

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IN RE:

Ch. 7

POWER HOME SOLAR, LLC,

Debtor

Case No. 22-50228

**CLAUDE MUMPOWER et al.,
for themselves and on behalf of
others similarly situated,**

Plaintiffs,

Adv. Pro. No. 23-03005

v.

POWER HOME SOLAR, LLC et al.,

Defendants.

**PLAINTIFFS' OPPOSITION MEMORANDUM TO
DEFENDANT SOLAR MOSAIC, LLC'S
MOTION TO COMPEL ARBITRATION**

The Plaintiffs, Herman Bland, Sylvia Bland, Brian Baumgardner, Jason Schieber, Denise Henderson, Paul Campbell, and Philip Joiner, on behalf of themselves and all others similarly situated, oppose the Motion to Compel Arbitration (ECF No. 80) filed by Defendant Solar Mosaic, LLC ("Mosaic"). This Court should deny the Motion because arbitration of these issues would substantially interfere with the core bankruptcy functions of this Court. To the extent this Court

finds any of the claims to not be constitutionally core, Mosaic has asked this Court to enter a final order on its Motion to Compel and thus consented to this Court deciding it in the first instance.

INTRODUCTION

This case concerns a fraudulent scheme orchestrated by Defendants that induced consumers to purchase underperforming solar power systems at secretly inflated prices. Virginia residents, Herman Bland, Sylvia Bland, Brian Baumgardner, Jason Schieber, Denise Henderson, and Philip Joiner, were some of those consumers. These Plaintiffs all received loans from Mosaic which were arranged by Power Home Solar, LLC (“Power Home”), for the purchase of a solar power system. As alleged in the Amended Complaint, all of the loans that Mosaic arranged for these Plaintiffs included a hidden fee not disclosed on the loan document. As for Paul Campbell, Mosaic arranged a loan for him from Digital Federal Credit Union, and he did not sign an arbitration agreement with Mosaic.

This class action seeks to remedy that wrong and others. These Plaintiffs allege that Power Home, its CEO Jayson Waller, Mosaic, and others violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the Virginia Consumer Protection Act (VCPA), and that they committed common law fraud. Additionally, these Plaintiffs, except for Mr. Campbell, assert a Truth in Lending

Act (TILA) claim against Mosaic, and Mr. Campbell's TILA claim is asserted against his direct lenders. All of Plaintiffs' claims are inextricably intertwined with and will necessarily be resolved by the Court in connection with the Court's adjudication of Plaintiffs' claims against the Debtor. Indeed, even Plaintiffs' TILA claim will necessarily be resolved by the Court's adjudication of their other claims against the Debtor, as all claims are based on the same fraudulent loan transactions.

Mosaic's motion to compel arbitration seeks to needlessly multiply this litigation by severing Plaintiffs' inextricably intertwined claims against it from this unified class action adversary proceeding and sending them to a separate arbitration.

The Court should deny Mosaic's motion because compelling a separate arbitration of Plaintiffs' claims against Mosaic in this case is incompatible with the efficiency and collective resolution policies that are fundamental to bankruptcy administration.

I.

FACTUAL BACKGROUND

These Plaintiffs have filed individual proofs of claim against the Debtor based on the claims asserted in this adversary proceeding; they are also among the named plaintiffs in this adversary proceeding, and they have, together with the other named plaintiffs, filed a class proof of claim in the Power Home bankruptcy, to which no party in interest has objected.

The operative Amended Complaint details the misrepresentations and fraud that were systematically carried out by Power Home in coordination with the financial-entity defendants, including Mosaic. (*See* Am. Compl. ¶¶ 2–7, 28–92, ECF No. 34.) The named Plaintiffs in this action are residents of Virginia or North Carolina who signed separate contracts with Power Home for the installation of a home solar panel system with financing to be arranged with the financial-entity defendants, but only Virginia residents have asserted claims against Mosaic.

These Plaintiffs do not dispute the signed contracts that Mosaic has provided the Court. (Ex. 1 to 6 to Declaration of Jeff Rothernberg attached to Mosaic’s Memorandum in Support of Motion at ECF No. 81-2 through 81-7.) Except for Paul Campbell’s, the documentation with each loan contract explains that for Mosaic to make the loan, each consumer was required to allow Power Home’s employees to assist in completing and submitting the loan application, and that each consumer had to agree to receive documents electronically. (See Authorization and Consent to Share Application Information, second and third paragraph, pg. 5, ECF No. 81-2, 81-3, 81-4, 81-5, and 81-6). These are the loan contracts that were arranged for them by a Power Home sales representative. (Am. Compl. ¶ 72.)

As for Paul Campbell, as alleged in the Complaint, Mosaic helped arrange a loan for him. (Am. Compl. ¶ 78.) That loan (ECF No. 81-7) though is not from Mosaic but as stated on its face is a loan from Digital Federal Credit Union. Mosaic

presumably had it in its files because of it arranged the financing for that loan. Furthermore, given that Mr. Campbell's actual lender is represented by the same counsel as Mosaic and has filed its own Motion to Compel Arbitration, his inclusion here appears to merely be an oversight of no real consequence. His situation will not be further addressed.

The Amended Complaint alleges that the face amount of each loan “was not the true amount of the loan.” (Am. Compl. ¶ 7.) “Instead, based on separate contracts between Power Home and the various financial entity defendants, the cash price for each financed installation was inflated to include an undisclosed fee charged by the financial entity defendants, who actually paid less to Power Home for the design, installation, and equipment than the amount of the loan proceeds.” (*Id.*) “[T]he same Power Home employee who negotiated the sale of the solar power system also arranged the credit contract.” (*Id.* ¶ 6.). “By wearing these two hats, that representative was an agent for Power Home and an agent for the financial entity.” (*Id.*) “The dual nature of the agency role of that Power Home employee inextricably ties the valuation of each Plaintiff's claim against Power Home to the determination of the value of their claim against financial-entity Defendants involved in their transaction.” (*Id.*)

As alleged, these solar power systems were sold under a standard sales pitch in conjunction with the related financing.” (*Id.* ¶ 40.) This “pitch misled consumers

about the efficiency and effectiveness of the system being sold to them, misrepresented the federal solar tax credit as a guaranteed rebate that would come back to the consumer in one lump sum, and misrepresented the amount of the dollar benefit to the consumer.” (*Id.* ¶ 41.) The sales agents were not trained to even determine how much of a credit a consumer might receive. (*Id.* ¶¶ 42–46.) Instead, they were trained to misrepresent “the full potentially available tax credit as a rebate that the customer would necessarily receive all at one time, as a cash payment rather than a reduction in tax owed.” (*Id.* ¶ 48.) The agents were trained to “discuss the monthly payment that would be required to pay the loan as if the full amount of the tax credit would be available to the consumer the following year.” (*Id.* ¶ 50.)

“Power Home established contracts with the financial-entity defendants for those entities to work with Power Home to sell and finance residential solar power systems that produced electricity.” (*Id.* ¶ 29.) Power Home had “hidden fee agreements with the financial entity defendants” which, in this instance, refers to Mosaic. (*Id.* ¶ 37). The sales process “ensured that the agents who sold the system and arranged the financing did not disclose the hidden fee.” (*Id.* ¶ 38.)

Plaintiffs’ Amended Complaint explains how Power Home increased the cost of the system far higher than if the consumer were to pay cash. (*Id.* ¶ 53.) It details how this was to cover the hidden fee. (*Id.* ¶ 55.) Specifically, “the purported cash price of the system was determined in part by the credit granting protocols of the

financial-entity defendants and their secret agreement with Power Home (through Waller) regarding the hidden fee that the financial-entity defendants retained from the principal amount of the loan to the consumer purportedly for the cost of the solar installation contract.” (*Id.* ¶ 56.) “None of the Plaintiffs were told that the price of the system had been increased because of the hidden fee being retained by the financial-entity defendant that was working with Power Home.” (*Id.* ¶ 60.)

“No Plaintiffs were aware of the hidden fee in their contract because the Defendants took affirmative steps to conceal its existence from them.” (*Id.* ¶ 81.) Those steps are set forth in Paragraphs 82 through 85 of the Amended Complaint.

All the claims against the Debtor and Mosaic in the Amended Complaint have at their core the unlawful nature of the hidden fee. These Plaintiffs recognize that they may recover only actual damages one time on these inter-related claims. As for the direct liability of Mosaic, “recovery of damages for that direct liability, which cover the same damages as a claim against Power Home, may also reduce the amount of the Plaintiffs’ claims against Power Home, potentially leaving more resources available for the bankruptcy estate, which may improve the potential recovery available to Power Home’s non-consumer creditors.” (*Id.* ¶ 8.)

Furthermore, as set forth in paragraph 15 of Mosaic’s loan contracts, Mosaic contractually agreed to be liable for all claims and defenses that these Plaintiffs have against Power Home, up to the amount owed under the loan. (See pg. 18, ECF No.

81-2, 81-3, 81-4, 81-5, and 81-6.) This clause is also common to the other Plaintiffs “such that any claim the consumer has against Power Home is also a claim that can be raised against the finance entity Defendants, which themselves are creditors of Power Home in its (above captioned) bankruptcy case.” (Am. Compl. ¶ 3.) Plaintiffs have alleged that Mosaic, as one of the financial entity defendants, can assert claims against Power Home through indemnity agreements or other legal theories. (*Id.* ¶ 4.)

Plaintiffs assert that Defendants’ unlawful conduct allows them, and all other victims, to choose to cancel their contracts and have their system removed and have their property replaced to its previous condition. (*Id.* ¶ 94.) All these victims should also be able to choose to keep a functioning system and recover their actual damages based on the value of the electricity being produced. (*Id.* ¶ 95.)

These Plaintiffs do not yet have a copy of the agreement between Mosaic and Power Home that was in place at the time of their transactions, but know that by 2020 the standard installer agreement used by Mosaic included indemnity agreements and insurance requirements. (See Exhibit 1, Para. 2.4 and 10.1). Furthermore, as shown in Exhibit 3 to the Amended Complaint, Mosaic’s standard practice was to assess a dealer fee that increased as the purported annual percentage rate of the loan contract decreased. This rate card also identifies that the “payment factor” assumes each loan will necessarily have “a 26% Federal Solar Investment Tax Credit.” (Am. Compl. Exhibit 3, under **, ECF 34-3.)

II.

TO ACCOMPLISH THE PURPOSE OF THE BANKRUPTCY CODE, THE ARBITRATION CLAUSE SHOULD NOT BE ENFORCED REGARDING PLAINTIFFS' CORE BANKRUPTCY CLAIMS AGAINST BOTH THE DEBTOR AND MOSAIC.

These Plaintiffs are not contesting the basic validity of the arbitration clause in their Mosaic contracts. Instead, Plaintiffs oppose Defendant's motion because arbitration of Plaintiffs' claims against Mosaic would present an irreconcilable conflict between the Federal Arbitration Act ("FAA") and the provisions and purposes of the Bankruptcy Code, which therefore precludes enforcement of the FAA on the facts of this case. Because arbitration of Plaintiffs' claims against Defendant in this case is incompatible with the efficient administration of bankruptcy, the bankruptcy court should deny Defendant's motion to compel arbitration.

In the context of the claims adjudication process in the Power Home bankruptcy, the FAA cannot be reconciled with the provisions of the later-enacted Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) with respect to Mosaic's rights to enforce the arbitration clause in Plaintiffs' financing agreements for Power Home's solar power systems. *See Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456–457 (1945) (repeal by implication occurs when earlier and later Federal statutes are irreconcilable); *Morton v. Mancari*, 417 U.S. 535, 550(1974) (same). Although courts ordinarily strongly disfavor the implied repeal

of one federal statute by another, *see Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (“repeal by implication is a rare bird indeed”), bankruptcy is a unique area of law that has been specifically carved out by Congress, *see In re Bauer*, No. AP 20-80012-DD, 2020 WL 3637902, at *3 (Bankr. D.S.C. June 8, 2020) (discussing *Allen v. Cooper*, 140 S. Ct. 994 (2020) (comparing copyright law with bankruptcy law because both are mentioned in Article I of the United States Constitution, recognizing the “singular nature” of a bankruptcy court's jurisdiction and acknowledging “bankruptcy exceptionalism”)).

Other than these Plaintiffs’ TILA claim, which they assert solely against Mosaic, this adversary proceeding asserts inseparable core bankruptcy claims against both Mosaic and the Debtor, which will necessarily be resolved in the claims allowance process established under the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. Plaintiffs acknowledge that their separate TILA claims against Mosaic are not core bankruptcy claims for purposes of 28 U.S.C. §157, because Plaintiffs’ TILA count seeks relief solely from Mosaic and the other non-debtor finance entity defendants, and does not seek relief from the Debtor. Nevertheless, the central issue at the heart of Plaintiffs’ TILA claim against Mosaic—whether the Debtor and Mosaic included an unlawful secret finance charge in Mosaic’s loan to Plaintiffs for the Power Home solar power system—will nevertheless be decided in connection with the resolution of Plaintiffs’ non-TILA

core bankruptcy claims against the Debtor and the other Defendants in this case. Additionally, the resolution of the proof of claim will also necessarily determine the amount of Plaintiffs' actual damages from the hidden fee, and that the Mosaic loan is part of a consumer transaction. Because Mosaic will not be able to deny that it is a "creditor" subject to TILA's requirements (as that term is defined in TILA), the only other issue that would need to be adjudicated with respect to Plaintiffs' TILA claim against Mosaic would be the statutory damages remedy, which is a purely mathematical computation under 15 U.S.C. § 1640(a).

The question of whether a bankruptcy court may enter a final judgment in a case depends on whether the cause of action stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. *Stern v. Marshall*, 564 U.S. 462 (2011). Because Plaintiffs' inextricably intertwined non-TILA claims against the Debtor and Mosaic will necessarily be resolved in the claims allowance process, Plaintiffs' claims against the Debtor and Mosaic are constitutionally core such that this Court may enter final judgment on them. As for the non-constitutionally core TILA claim, Mosaic has not objected to the Court exercising jurisdiction in the first instance over this matter. Therefore, this Court can decide all the matters raised by Mosaic.

Conducting contemporaneous separate arbitrations of Plaintiffs' claims against Mosaic and the other non-debtor finance entities while this Court adjudicates

those same core claims against the Debtor and other Defendants would produce an unworkable administrative nightmare that further confirms the irreconcilable conflict between the FAA and the Bankruptcy Code with respect to the facts of this case. The Fourth Circuit recognizes that inherent conflicts exist between the FAA and the Bankruptcy Code, and the facts of this case likewise present an irreconcilable conflict between these overlapping federal laws. In *Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015), the Fourth Circuit affirmed the district court's holding that the appellant was not required to arbitrate a “constitutionally core” claim, which was necessarily resolved in connection with the claims allowance process. *Id.* (denying creditor’s motion to dismiss or compel arbitration of adversary proceeding by Chapter 13 debtor seeking declaratory judgment that creditor’s consumer loan was “void *ab initio*” under North Carolina law and seeking damages under the North Carolina Debt Collection Act, finding that the adversary proceeding was a core bankruptcy proceeding because it involved the allowance or disallowance of claims, but finding that Mrs. Moses’ second cause of action was non-core and it could therefore not enter a final judgment. *Id.* at 68–69).

Just as requiring arbitration of the Plaintiff’s constitutionally core declaratory judgment claim in *CashCall* posed an inherent conflict with the Bankruptcy Code, so too would requiring separate arbitrations for each Plaintiff’s non-core TILA claims against Mosaic. The same facts and legal issues will necessarily be resolved

in the Court's determination of Plaintiffs' claims against Power Home, as will be resolved with respect to their interrelated claims against Mosaic.

Mosaic's attempt to compel arbitration of Plaintiffs claims against it in this case is an attempt to protect its own interests without regard to the detrimental effect that doing so would cause to the efficiency and fairness of the administration of the Power Home bankruptcy. While Mosaic's motivation is understandable, the effect of its proposal on the administration of this case is untenable.

Compelling separate arbitrations of every Plaintiff's claims against Mosaic would result in separate determinations by each arbitrator in each arbitration of precisely the same issues that this Court will already be deciding with respect to each of the Plaintiffs' identical claims against the debtor. Compelling arbitration in this case thus guarantees inconsistent results, both from one arbitral award to the next, and as between the amount of each of these arbitral awards versus the Court's own determination of the amount of consumers' identical claims against the Debtor. Moreover, compelling arbitration places an unnecessary economic burden on Plaintiffs and the Debtor's other consumer creditors, as they would be obligated to pay Bankruptcy Court filing fees to file motions to lift the automatic stay to pursue arbitrations of their claims against the non-debtor Defendants, as well as fees for initiating the arbitration proceeding, even though this Court will already be

determining Plaintiffs' identical claims against the Debtor in the ordinary course of administering this Chapter 7 case.

The FAA and the Bankruptcy Code both are grounded in important policy considerations concerning efficiency and fairness. *See In re McPherson*, 630 B.R. 160, 166–67 (Bankr. D. Md. 2021). However, unlike the FAA, the Bankruptcy Code is not party- or contract-specific, which is what Mosaic's motion fails to address. Bankruptcy administration determines and balances the rights of many parties that hold a variety of legal rights and interests involving the debtor. It is this collective balancing that is critical to the Bankruptcy Court's ability to administer the bankruptcy process efficiently and expeditiously:

Bankruptcy cases are different in purpose and scope from most other debtor-creditor matters and two-party disputes in general. Bankruptcy law is collectivist in nature, impacting a debtor and potentially many of her creditors. Its purpose protects the debtor's fresh start while equitably adjusting and enforcing creditor payment rights. [...] Uniform application of the law [...] should not depend upon whether the issue is before a judicial officer or an arbitrator and should not vary depending upon whether a creditor has contracted for arbitration or not. To the extent that the bankruptcy clause in the United States Constitution was intended to ensure uniformity in application of the law to sovereign states, likewise it requires uniformity of the law [...] to all debtors and creditors.

In re Bauer, 2020 WL 3637902, at *8.

“Although the objectives of the FAA and the Code may not always conflict, they frequently do diverge, presenting the bankruptcy court with competing considerations.” *In re McPherson*, 630 B.R. 160, 167 (Bankr. D. Md. 2021) (citing

In re White Mountain Mining Co., L.L.C., 403 F.3d 164, 169 (4th Cir. 2005) (“Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights ‘contingent upon an arbitrator's ruling’ rather than the ruling of the bankruptcy judge assigned to hear the debtor's case.”)). This is why “‘Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.’” *Moses v. CashCall, Inc.*, 781 F.3d 63, 71 (4th Cir. 2015) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995)).

Determining the “allowance or disallowance of claims against the estate,” 28 U.S.C. § 157(b)(2)(B), is both constitutionally and statutorily core, *see CashCall*, 781 F.3d at 70. Thus, ruling on the amount of a claim is central to the operation of the Bankruptcy Court. To effectively carry out its statutory duty, the Bankruptcy Court must necessarily be able to decide the validity of claims before it. In light of the purposes underlying the Bankruptcy Code of “centraliz[ing] disputes over the debtor’s assets and obligations in one forum,” *id.* at 72, the Bankruptcy Court should not relinquish its control over determining whether to allow or disallow a claim; doing so necessarily interferes with its basic function to determine such claims. Thus, as set forth in *Cashcall*, the determination of the validity of a claim is not something any bankruptcy court must send to arbitration. *Id.*

Thus, determining the amount of these Plaintiffs' Proofs of Claim is a necessary part of the statutory bankruptcy process that Congress has created the Bankruptcy Court to oversee; it is not something an arbitrator decides. Jayson Waller, another co-defendant, has also filed a Proof of Claim in the Power Home bankruptcy, which is claim no. 5607 on the Court's claims register for the Power Home bankruptcy. Waller's proof of claim asserts an unliquidated claim of indemnity rights against Power Home to the extent that any person asserts any claims against him in his role as an officer, manager, or employee of Power Home. Waller's proof of claim will necessarily be decided by this Court, and its determination is also directly controlled by and intertwined with the outcome of Plaintiffs' claims against Mosaic for its role in Defendants' fraudulent scheme.

Significantly, this Court's determination of the amount of these Plaintiffs' Proofs of Claim against the Debtor will be a function of whether they are required to pay all, some, or none of the Mosaic loans. That determination necessarily has three parts: Mosaic's direct liability (i) for the misconduct of the Power Home agent it used to negotiate the loan and (ii) for its participation in the hidden fee scheme, as well as (iii) Mosaic's derivative liability under the terms of Plaintiffs' loans for Power Home's misconduct. Regardless of whether Mosaic's liability to Plaintiffs is direct or derivative, Plaintiffs' claims against Mosaic are based on the exact same conduct in a transaction by a sales agent who worked for both Power Home and

Mosaic. Mosaic is also a necessary party to determine the amount of liability to be assessed against Power Home under these Plaintiffs' Proof of Claim because, to the extent these Plaintiffs are relieved from paying any part of the Mosaic loan, their claim against Power Home is correspondingly reduced. If that determination is not made within the bankruptcy case, the liability claim against Power Home would be overstated to the detriment of other creditors.

Accordingly, because separate arbitration of Plaintiffs' claims against Mosaic is incompatible with the provisions and purposes of the Bankruptcy Code, the Court should find that enforcement of the FAA in this case is precluded by the provisions and purposes of the later enacted Bankruptcy Code.

III.

EVEN IF NOT CONSTITUTIONALLY CORE, SEPARATE ARBITRATION OF PLAINTIFFS' CLAIMS AGAINST MOSAIC WOULD SUBSTANTIALLY INTERFERE WITH THE FUNCTIONS OF THE BANKRUPTCY COURT.

When determining whether compelling arbitration would result in substantial interference with the Bankruptcy Code, the arbitral process is not to be given preference. Under the Federal Arbitration Act, "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, - U.S -, 142 S. Ct. 1708, 1713 (2022). "The Federal Arbitration Act eliminates hostility to private dispute resolution; it does not create a preference for that process." *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th

Cir. 2009). Sending these Plaintiffs' claims against Mosaic to a separate arbitration would substantially interfere with the Bankruptcy Court's efficient administration of this case.

As the Fourth Circuit determined in *In re Bestwall*, litigating the exact same claims in forums other than the bankruptcy court inevitably affects the bankruptcy estate. See *In re Bestwall LLC*, -- F. 4th. --, 2023 WL 4066848, at *6 (4th Cir. 2023) (affirming 2022 WL 67469 (W.D.N.C. Jan. 06, 2022), which affirmed 606 B.R. 243 (Bankr. W.D.N.C. 2019)).¹ For a similar reason, in *Allied Title Lending v. Taylor*, both the Bankruptcy Court and the District Court found that the plaintiff's state law claim should not be sent to arbitration. The Bankruptcy Court specifically found that the usury claim concerned whether money was owed, and that it "would necessarily be resolved by the Court in the claims allowance process when considering Allied's proofs of claim." *In re Taylor*, 594 B.R. 643, 654 (E.D. Va. Bankr. 2018). Similarly, the District Court found that "because resolution of Counts II and III would determine the very validity of Allied's Claims against Taylor's bankruptcy estate, referral of those Counts to arbitration would defeat the "animating purpose" of the

¹ In *Bestwall*, the Fourth Circuit held "[as] the bankruptcy court correctly determined, the asbestos-related claims against Bestwall are identical to the claims against New GP pending now or likely to be pending in the future in the various state courts." *Id.* One reason for such jurisdiction is because "the bankruptcy procedures promote the equitable, streamlined, and timely resolution of claims in one central place compared to the state tort system, which can and has caused delays in getting payment for legitimate claimants." *Id.* at *9.

Bankruptcy Code . . . By referring Counts II and III to arbitration, or by keeping one and referring the other, the Bankruptcy Court would risk inconsistent results — results that directly impact the reorganization of Taylor's bankruptcy estate.” *Allied Title Lending, LLC v. Taylor*, 420 F. Supp. 3d 436, 450 (E.D. Va. 2019).

Just like in the *Taylor* case, when this Court determines the causes of action against the Debtor as part of determining these Plaintiffs’ claims, it will necessarily determine the issues against Mosaic. As in *Bestwall*, having the same claims against Mosaic decided in another forum risks “issue preclusion, inconsistent liability, and evidentiary issues.” *See* 2023 WL 4066848, *6. Also as in *Bestwall*, any recovery by Plaintiffs against Mosaic resulting from these satellite arbitrations “could reduce the claimants' recovery on those claims in the bankruptcy proceeding, thereby reducing the amount of money that would be paid out of the bankruptcy estate and leaving more funds in the estate for other claimants.” *Id.*

Finally, if each Plaintiff’s claims against Mosaic are sent to separate arbitrations, the Debtor (via the Chapter 7 trustee) will need to respond to discovery in each individual arbitration, as well as in the adversary proceeding. Likewise, even if arbitration of Plaintiffs’ claims against Mosaic were required, Mosaic would still be required to participate in this adversary proceeding with respect to third-party discovery, and thus Mosaic’s litigation burden would only be multiplied by compelling separate arbitrations of each Plaintiff’s claims against it. Given the unity

of the issues and witnesses involved in both arbitrating the liability of Mosaic while also litigating the liability of Power Home in the adversary proceeding, arbitration will substantially interfere with an efficient resolution of the Debtor's bankruptcy.

“The bankruptcy courts are expressly invested by statute with original jurisdiction to conduct proceedings under the Bankruptcy Act.” *Katchen v. Landy*, 382 U.S. 323, 326–27 (1966). “The bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession.” *Id.* at 327 (quotations omitted). The bankruptcy court’s jurisdiction includes the resolution of claims against and by the estate. *See Cent. Virginia Community College v. Katz*, 546 U.S. 356, 369 (2006). “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. . . .” *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quotation omitted). “All matters” means just that, and in this case, that includes the Plaintiffs' inseparable claims against Mosaic, the resolution of which will impact Plaintiffs’ claims against the estate and impact other creditors’ recoveries from the estate. This case thus demonstrates precisely why this “comprehensive jurisdiction” of the Bankruptcy Court is so critical.

When deciding whether a claim goes to arbitration, the pertinent question is not whether this is a core claim but how to maintain the Bankruptcy Code’s efficient process for reorganizing debts.

The core/non-core distinction, however, is not mechanically dispositive in deciding whether a bankruptcy judge may refuse to send a claim to arbitration. Instead, what matters fundamentally is whether compelling arbitration for a claim would inherently undermine the Bankruptcy Code's animating purpose of facilitating the efficient reorganization of an estate through the “[c]entralization of disputes concerning a debtor's legal obligations”

Cashcall, 781 F.3d at 83–84 (Gregory, J., concurring regarding the non-core, debt collection practices claim) (citations removed).

Whether a core claim or not, “substantial interference” with the bankruptcy process is the test for when courts may exercise discretion to decline to enforce arbitration agreements. *Id.* at 84, 92. Regarding the declaratory judgment claim in *CashCall*, the majority (Judges Niemeyer and Gregory) agreed that arbitration was properly denied because determination of that claim by an arbitrator would pose an inherent conflict with the Bankruptcy Code because of the substantial interference with the reorganization. *Id.* at 72–73, 82. For the non-constitutionally core claim, the same substantial interference test was used. *Id.* at 84-85, 92-93 (in the concurring opinions by Judge Gregory and Judge Davis); *see also Id.* at 75-77 (Judge Niemeyer in dissent explaining his reasons for why the non-core claim should not be sent to arbitration).

Therefore, Mosaic incorrectly claims that non-core claims must be sent to arbitration. The constitutionally core issue does not determine the result or the test but, under *Cashcall* only this Court’s initial jurisdiction to enter a final judgment. Because *Cashcall* states that an arbitration decision even though interlocutory in nature is required to meet the *Stern* test which applies to final judgments, *id.* at 72, Plaintiffs understand that under ordinary principles of precedence, this Court is to follow *Cashcall* for any claim that is not constitutionally core. This holding in *Cashcall* is contrary to the ordinary principle that in non-constitutionally core cases this Court retains jurisdiction to enter interlocutory orders without the need to issue proposed findings of fact and conclusions of law. “[I]t is now very well established that bankruptcy courts consistent with *Stern v. Marshall* may handle all pretrial proceedings short of a final ruling—including entry of interlocutory orders dismissing fewer than all of the claims in an adversary complaint, granting partial summary judgment, or making discovery and evidentiary rulings—without the need to issue proposed findings of fact and conclusions of law and invocation of Fed. R. Bankr. P. 9033.” *Windstream Holdings, Inc. v. Charter Comms., Inc. (In re Windstream Holdings, Inc.)*, Case No. 19-22312 (RDD), 2020 Bankr. Lexis 468, 2020 WL 833809 *2 (Bankr. S.D.N.Y. Feb. 19, 2020); *see also First-Citizens Bank & Trust Co. v. Parker Med. Holding, (In re Parker Med. Holding Co.)*, Case No. 22-50369 (JWC), 2023 Bankr Lexis 850, 2023 WL 2749715 *15, (Bankr. N.D. Ga.

March 13, 2023). The holding in *Cashcall*, which appears without analysis or explanation for why an interlocutory decision is subject to treatment under *Stern* as if it is a final order, is not pertinent here because Mosaic has asked this Court to issue a final ruling on its Motion. It has not in this adversary proceeding informed the Court that it wants the District Court to decide these matters. Therefore, this Court has jurisdiction to decide the arbitration motion as an interlocutory decision without issuing proposed findings of fact and conclusions of law even as to a claim that is not constitutionally core. To the extent the Court disagrees and follows *Cashcall*, the test is still the same, and the proposed findings of fact and conclusions of law should be that any non-constitutionally core claim should not be sent to arbitration.

In its motion in favor of arbitration, Mosaic relies heavily on Judge Beyer's inapposite pre-*CashCall* decision in *In re Barker*, a case involving a single Chapter 13 debtor's adversary proceeding against a single creditor, in which the creditor invoked an arbitration clause in its agreement with the debtor to compel arbitration of the claims the debtor asserted against it in the adversary proceeding. *See Barker v. Fox Den Acres, Inc. (In re Barker)*, 510 B.R. 771 (Bankr. W.D.N.C. 2014). However, *Barker* can be reconciled with the Fourth Circuit's later *CashCall* opinion on the basis that the Chapter 13 debtor's claims against his creditors in *Barker* were not "necessarily resolved" in connection with the administration of the debtor's Chapter 13 bankruptcy, which is a very different process from this Chapter 7 case.

Id. at 777. Here, the inclusion of Mosaic as a Defendant in the litigation potentially has a direct impact on the Chapter 7 estate, as Mosaic is (presumably) solvent and, as Plaintiffs have alleged, jointly liable with the Debtor for the fraudulent scheme described in Plaintiffs' Amended Complaint. As a consequence, Plaintiffs' recovery from Mosaic, if any, would reduce their claim against the estate dollar-for-dollar (excluding any recovery on their separate TILA claim against Mosaic), which would consequently leave more estate resources available for Power Home's other creditors.

Consequently, even if any of the claims against Mosaic are non-constitutionally core, and even under *Cashcall*, this Court should determine that arbitration of such claims would substantially interfere with its statutory bankruptcy functions.

IV.

THE ISSUE OF WHETHER A CLASS SHOULD BE CERTIFIED IS NOT RIPE.

Mosaic appears to ask this Court to both compel arbitration and also direct that the arbitrator may not engage in class arbitration. The terms of the arbitration clause are clear that the class action waiver is to apply in arbitration. If this Court compels arbitration, it is up to the arbitrator to enforce that provision. If this Court does not enforce the class, the waiver embedded in the arbitration agreement does not apply to this Court. If this Court does not compel arbitration, then it can decide

whether the class action remedy may be used after analyzing the factors of Rule 23. The basic presumption of arbitrability that is created by the FAA is not the proper analysis for whether any party has waived its right to proceed under Rule 23 in federal court.

CONCLUSION

This Court should deny Mosaic's motion to compel to arbitration of Plaintiffs' claims against it. In the alternative, for any claim found not to be constitutionally core and if the Court finds it has no authority to decide in the first instance such an interlocutory question, it should recommend to the District Court that the Motion similarly be denied.

Respectfully submitted,

/s/ Rashad Blossom

Rashad Blossom (NC State Bar No. 45621)

Blossom Law PLLC

301 S. McDowell St., Suite 1103

Charlotte, NC 28204

Telephone: (704) 256-7766

Facsimile: (704) 486-5952

rblossom@blossomlaw.com

Counsel for all Plaintiffs

Theodore ("Thad") O. Bartholow III

(Admitted Pro Hac Vice)

Texas State Bar No. 24062602

Karen L. Kellett

Texas State Bar No. 11199520

KELLETT & BARTHOLOW PLLC

11300 N. Central Expressway, Suite 301

Dallas, Texas 75243
Telephone: (214) 696-9000
Facsimile: (214) 696-9001
thad@kblawtx.com
Counsel for all Plaintiffs

Thomas Domonoske, VSB #35434
(Admitted Pro Hac Vice)
Leonard A. Bennett, VSB #37523*
Consumer Litigation Associates, P.C.
763 J. Clyde Morris Blvd., Ste. 1-A
Newport News, VA 23601
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com
Email: tom@clalegal.com
**Pro Hac Vice motion forthcoming*
Counsel for all Plaintiffs:

Kristi Cahoon Kelly, VSB #72791
J. Patrick McNichol, VSB# 92699
KELLY GUZZO, PLC
3925 Chain Bridge Rd, Suite 202
Fairfax, Virginia 22030
Telephone: (703) 424-7572
Facsimile: (703) 591-9285
E-mail: kkelly@kellyguzzo.com
E-mail: pat@kellyguzzo.com
Counsel for all Virginia Plaintiffs

Herman Bland, Sylvia Bland, Jacob Green, Emily Yeatts, Marc Vredenburg, Shon Jualin, Amber Jualin, Richard Monteria, Logan Schalk, Kim l. Larsen, Scott Larsen, Jason Schieber, Damien Sink, Heather Wilson Medlin, George w. Harris, III, Mohamed Abdalla, Reagan Atkins, Brian Baumgardner, Samantha Bowyer, Teresa Ciccone, Michael Craighead, James Crowder, Joshua Dickey, Robert Duncan, Michael Dunford, Dominic During, Glen Erwin, Anthony Fucci, Melissa Grube, Richard Harrell, Denise Henderson, Philip Joiner, Dumont Jones, Jeanette Jones, Kami Jordy, Marc Kennedy, Joshua Laplante, Stephanie Laplante, Carrie Lee, Howard Lohnes, Norma Lohnes, Elizabeth Mank, Wendy Minor, Joesil Moore, Debra Orr, Edwin Pinto - Castillo, Catherine Pistone, Rick Pistone, Jeffrey Preuss, Erin Ray, Wesley Richie, Tracey Richie, Kathy Roberson, Daniel Roberts, Pamela

Seifert, Ashley Shelley, Kelly Tenorio, Lashanda Theodore, Wilson Theodore, Anthony Ward, Jerry Watson, Jesse Weaver, Kristen White, Nina Briggs, Margaret Fleshman, Angela Morris, John Morris, Carl Steinhart, Christian Stratton, Ashley Sustek, Matt Sustek

Jeremy P. White, VSB #48917
Blue Ridge Consumer Law, PLLC
722 Commerce Street, Suite 215
Lynchburg, VA 24504
Telephone: (434) 201-6800
Email: jeremy@consumerlawva.com
Counsel for Plaintiffs Nina Briggs, Margaret Fleshman, Angela Morris, John Morris, Carl Steinhart, Christian Stratton, Ashley Sustek, and Matt Sustek

John T. O'Neal, NC State Bar # 23446
O'Neal Law Office
7 Battleground Court, Suite 101
Greensboro, NC 27408
P: 336.510.7904
F: 336.510.7965
E: john@oneallawoffice.com
Counsel for Plaintiffs Silberio Reyes, Steve Hollingshead, and Vicky Prasongphime

Dale W. Pittman, VSB#15673
THE LAW OFFICE OF DALE W. PITTMAN, P.C.
The Eliza Spotswood House
112-A West Tabb Street
Petersburg, VA 23803
(804) 861-6000
(804) 861-3368 (Fax)
dale@pittmanlawoffice.com
Counsel for Plaintiffs Herman Bland, Sylvia Bland, Dustin Fontenot, Jacob Green, Amber Jualin, Shon Jualin, Richard Monteria, Claude Mumpower, Nirmal Sakthi, Marc Vredenburg and Emily Yeatts

Michael C. Litman, VSB #92364

LITMAN PLLC
6802 Paragon Place, Suite 410
Richmond, VA 23230
(804) 723-6912
(804) 293-3973 (Fax)
mike@mlitman.com
*Counsel for Plaintiffs Heather Wilson Medlin
and Eric Medlin*

Emily Connor Kennedy, VSB# 83889
Mark C. Leffler, VSB# 40712
Boleman Law Firm, P.C.
2104 W. Laburnum Ave, Suite 201
Richmond, VA 23227
(804) 358-9900 – Telephone
(804) 358-8704 – Facsimile
Email: eckennedy@bolemanlaw.com
Email: mcleffler@bolemanlaw.com
Counsel for Plaintiff George W. Harris, III

James J. O’Keeffe (VSB no. 48620)
MichieHamlett PLLC
109 Norfolk Avenue, S.W., 2nd Floor
P.O. Box 2826 (24001)
Roanoke, VA 24011
540-491-0634
Fax: 434-951-7271
jokeeffe@michiehamlett.com
Counsel for Kim and Scott Larsen, Damien Sink, Logan Schalk, and Jason Schieber

EXHIBIT 1



**MOSAIC LOAN PROGRAM
PARTICIPATION AGREEMENT**

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**MOSAIC LOAN PROGRAM
PARTICIPATION AGREEMENT**

Last updated August 17, 2020

This Mosaic Loan Program Participation Agreement (this “**Agreement**”) is entered into between Solar Mosaic, Inc., a Delaware corporation, as the administrator (“**Program Administrator**”) of the Mosaic® Loan Program (the “**Program**”), and the Person named as Participant in the Participant Application (“**Participant**”). Capitalized terms used herein shall have the meanings given to such terms in Exhibit A and the rules of construction set forth therein shall apply hereto. Participation in the Program constitutes Participant’s agreement to the terms and conditions of this Agreement, as may be modified, revised, amended, or amended and restated from time to time by Program Administrator in accordance with Section 1.4.

1. PROGRAM ADMINISTRATION AND PARTICIPATION

- 1.1. Program Administration.** Program Administrator manages a network of merchants, distributors, equipment manufacturers, installers and contractors that participate in the Program and provides administrative, technical and ministerial services to Funding Providers participating in the Program. Program Administrator enters into this Agreement under delegated authority in its role as Program Administrator for Funding Providers participating in the Program, and all references to actions of Program Administrator herein shall be construed as actions by Program Administrator acting on behalf of and under the direction and control of the Funding Providers.
- 1.2. Participant Authorization.** Participant desires to participate in the Program to allow its Customers to obtain Loans from a Funding Provider to finance the purchase of an Eligible Product from Participant. By participating in the Program, Participant shall be authorized to (a) promote the Program in the Territory and (b) facilitate the submission of Credit Applications, in each case subject to the terms and conditions of the Program Documents.
- 1.3. Program Terms; Ownership.** Program Administrator has the sole discretion to (a) determine the terms and conditions of any Credit Application, Loan Agreement and Loan and (b) establish policies and procedures related to the promotion, application or funding of Loans. This Agreement gives neither Participant nor its Affiliates any ownership rights in any aspect of the Program. Participant acknowledges and agrees that each Funding Provider shall own (i) its respective Loans, (ii) the corresponding Credit Application and (iii) all Customer Information that such Funding Provider receives in connection with the Credit Application and/or Loan.
- 1.4. Modifications.** Program Administrator may add new Program Documents or modify the terms of this Agreement or any other Program Document by posting such new Program Document or updated version thereof on its website, www.joinmosaic.com, or by notifying Participant of such change in accordance with Section 13.2. Participant agrees that it has an ongoing obligation to check the website for any updates or changes to the Program Documents. Without limiting the generality of the foregoing, Program Administrator may, at any time and as directed by the Funding Providers, make changes to (a) the Loan documentation, including the Credit Application and Loan Agreement, (b) the terms and conditions of a Loan, including the interest rate, maximum amount and term, (c) the credit standards used to evaluate Credit Applications and (iv) Loan-related procedures in the Program that Participant must comply with. Unless otherwise required by Applicable Law, any modifications to the interest rate or Seller’s Points applicable to a Loan shall be applicable with respect to Credit Applications approved on or after the effective date of such modification and shall not apply to Credit Applications approved prior to such effective date. Participant’s continued participation in the Program after the effective date of any such modification will constitute Participant’s acceptance of the modified terms and Participant’s agreement to be bound thereby.
- 1.5. Non-Exclusivity; Customer Communications.** Subject to Section 2.1, Participant may present its Customers with financing options from other companies or develop its own financing options in addition to the Program. Funding Providers may provide Loans to any Person without any restrictions on distribution channels or methods. In addition, nothing in this Agreement shall prohibit either Party from contacting or communicating with such Party’s customers regarding other goods or services, in each case in accordance with all Applicable Laws.

- 1.6. Funding Availability. Nothing in this Agreement requires a Funding Provider to take any action with respect to a Loan, including accepting a Credit Application or approving a Customer for a Loan. Notwithstanding the foregoing, subject to Section 3.3 or unless required by Applicable Law, a Funding Provider may only withdraw a previous Loan approval or cancel a Loan prior to making a disbursement under such Loan.

2. PARTICIPANT RESPONSIBILITIES

- 2.1. Credit Applications. Participant may invite a Customer to apply for financing through the Program (a) by submitting a Mosaic Credit Application or (b) via a custom credit application created by Participant to enable Customers to apply for financing products from one or more financing providers (a “**Custom Credit Application**”). Any Custom Credit Application and associated disclosures used by Participant must be approved by Program Administrator in advance in writing. Participant shall not knowingly permit any Customer to submit a Credit Application to Funding Providers (i) if such Customer has been previously rejected by any other third-party financing provider with regard to obtaining financing for such Eligible Product; or (ii) using any type of selection criteria that could reasonably be determined to be adverse to Funding Providers as determined in Program Administrator’s sole and absolute discretion. Participant will not use any nonrandom selection criteria in connection with the Program without Program Administrator’s prior written approval.
- 2.2. Eligible Products. Participant will be responsible for the design, delivery, engineering, construction, installation and completion, as applicable, of each Eligible Product for each Customer in the Program. Each Eligible Product will be designed, delivered, engineered, constructed, installed and completed, as applicable, in accordance with Prudent Industry Practices. Participant agrees that it will not offer Extended Warranties or Service Agreements in conjunction with purchases of Eligible Products without the Program Administrator’s prior approval. If so approved, Participant agrees that (a) all such Extended Warranties and Service Agreements will comply with Applicable Law, (b) Participant will comply with all obligations under any such Extended Warranty or Service Agreement, whether underwritten by Participant, an Affiliate of Participant or a Third Party, and (c) in the event a manufacturer or Third Party breaches a Standard Warranty, Participant will cure, or cause to be cured, such breach within thirty (30) calendar days’ notice thereof. Participant will not permit any lien, charge or encumbrance to exist on any Eligible Product or the applicable Customer’s home, and in the event a lien is filed by a Subcontractor, Participant shall cause such lien to be released and shall provide evidence thereof in form and substance reasonably satisfactory to Program Administrator.
- 2.3. Subcontractors. Participant may use Subcontractors to perform some or all of Participant’s obligations under this Agreement, provided that (a) Participant agrees to provide Program Administrator information regarding its Subcontractors within two (2) business days of Program Administrator’s request therefor, and (b) Participant shall be solely responsible for the performance of its obligations hereunder and for paying each Subcontractor amounts due to such Subcontractor upon the rates and terms as determined between Participant and such Subcontractor. Participant shall cause all Subcontractors to comply with the terms of this Agreement and Applicable Law, including training requirements, the Marketing Requirements, and all license, bonding and insurance requirements. Participant shall be solely responsible for the employment, control, actions, liability and conduct of Subcontractors. No Subcontractor shall be deemed to be a third-party beneficiary of this Agreement or an agent, employee, contractor, joint venturer or partner of Program Administrator or the Funding Providers.
- 2.4. Insurance Requirements. Participant shall, at its own cost and expense, procure from an insurance company or companies rated “A VIII” or higher by A.M. Best or otherwise acceptable to Program Administrator, and maintain in full force and effect for the entire term of this Agreement and thereafter for so long as Participant has any obligations with respect to the Program, general liability insurance and workers’ compensation insurance in such amounts and in such forms as required by Applicable Law. If requested by Program Administrator, (a) Program Administrator and/or the applicable Funding Provider shall be named as additional insureds under each insurance policy maintained by Participant, and (b) Participant shall furnish to Program Administrator certificates of insurance, and the endorsements thereto, evidencing the insurance coverage required pursuant to this Section 2.4. If any required insurance policy is not renewed, Participant shall notify Program Administrator in writing within five (5) business days of such non-renewal.

- 2.5. Compliance with Program Documents and Applicable Laws. Participant will continuously comply, and will cause its Subcontractors to comply, with its obligations under the Program Documents and with Applicable Law, including with respect to consumer protection, licensing, data privacy, and data security, during the term of this Agreement. Without limiting the generality of the foregoing, (a) Participant shall not require, through a price increase, additional fee, surcharge, or otherwise, any Customer to pay any fees in connection with obtaining financing through the Program (including Seller's Points, administrative fees or any other fees imposed by Funding Providers or Program Administrator on Participant under this Agreement), provided, that Participant may (i) treat such fees as overhead to be distributed across Customers regardless of whether such Customer uses a Loan to pay for an Eligible Product or (ii) offer price discounts to Customers electing to pay the entirety of the applicable Contract Price in cash; (b) Participant shall not knowingly encourage, assist or permit any Customer to (i) use Loan proceeds for any purpose other than to purchase an Eligible Product, or (ii) receive cash or other payments from Participant or any other party in connection with the Loan (except any applicable rebates from the manufacturer of the related Eligible Product or local utility, as applicable); and (c) Participant shall not, directly or indirectly, make or agree to make any payment on a Loan on behalf of a Customer without the prior written approval of Program Administrator.
- 2.6. Required Notifications. Participant will notify Program Administrator in writing (a) promptly and in no event later than five (5) calendar days following Participant's receipt of notice of (i) any litigation or investigation, demand, inquiry or action by any regulatory body against Participant in connection with a Credit Application, a Loan or the Program; (ii) any Customer inquiry or complaint (whether directly or through a regulatory body or other Third Party) regarding the Program; (iii) any litigation or investigation, demand, inquiry or action by any regulatory body against Participant which, if adversely determined, could reasonably be expected to materially impair Participant's financial solvency or its continued ability to carry out its responsibilities under this Agreement; and (b) immediately if a Customer or Participant has canceled or communicated an intent to cancel a Closed Loan or the related Purchase Agreement. In the case of each of clause (a)(i) and clause (a)(ii) above, Participant will cooperate with Program Administrator and the Funding Providers in investigating and resolving such matter in a timely manner.

3. FEES AND PAYMENTS

3.1. Funding Schedule; Seller's Points.

- 3.1.1. Program Administrator, on behalf of the applicable Funding Provider, will define funding stages for each Eligible Product (each, a "**Funding Stage**"). Upon completion of the applicable Funding Stage ("**Stage Completion**"), Program Administrator will direct Participant and/or the Customer to provide confirmation and/or evidence of such Stage Completion, in each case in such form and substance as required by Program Administrator or the applicable Funding Provider, and Participant shall deliver or cause the related Customer to deliver such confirmation and/or evidence promptly upon Program Administrator's request.
- 3.1.2. Program Administrator may require Participant to pay a fee equal to a percentage of the Loan Amount for each Closed Loan (the "**Seller's Points**"). The Seller's Points are "seller's points" for purposes of the Truth in Lending Act and Regulation Z promulgated thereunder. Participant agrees to accept the Loan Amount, minus the applicable Seller's Points and any outstanding amounts owed by Participant to Program Administrator or any Funding Provider under this Agreement (the "**Net Loan Amount**") in full satisfaction of the amount owed by the applicable Customer for an Eligible Product under the Purchase Agreement. Subject to Section 3.3, Program Administrator, on behalf of the applicable Funding Provider, will pay Participant the Net Loan Amount in installments within ten (10) business days following the achievement of certain Funding Stages as notified by Program Administrator to Participant (the "**Funding Schedule**"). Program Administrator reserves the right, in its sole discretion, to change Seller's Points, the Funding Schedule and any other payment terms upon written notice to Participant in accordance with Section 1.4.
- 3.1.3. Program Administrator may, in its sole discretion, disburse all or a portion of the Net Loan Amount to Participant prior to expiration of the applicable Customer's statutory right to cancel the Loan Agreement if the Customer wishes to waive such statutory right due to emergency circumstances. In such an event, Participant must obtain from the Customer a waiver in the Customer's own handwriting that (a) details the nature of the emergency, (b) states that the Customer is waiving his or her right to cancel the Purchase Agreement and the Loan Agreement with the applicable Funding Provider within the statutory period, (c) is signed and dated by the Customer, and (d) is otherwise in the form required by Applicable

Law (a “**Cancellation Waiver**”). Participant will promptly provide a copy of any Cancellation Waiver within three (3) business days of Program Administrator’s request therefor. In the event that Participant fails to provide a copy of the Cancellation Waiver within such timeframe, or the Cancellation Waiver is not in the form required by this Section 3.1.3, then Program Administrator reserves the right to cancel the applicable Loan Agreement and exercise the remedies set forth in Section 3.3. Copies of all Cancellation Waivers shall be retained by Participant for three (3) years.

3.2. Payment Method.

- 3.2.1. All payments referenced in this Agreement shall be made electronically via wire transfer, ACH (Automated Clearing House) payment or similar means. Participant authorizes Program Administrator, on behalf of the applicable Funding Provider, to initiate credit entries for amounts that may be due Participant under this Agreement. Participant authorizes Program Administrator to initiate debit entries for (a) any credit entries in error; or (b) the amount which Participant owes Program Administrator or any Funding Provider under this Agreement, including Seller’s Points, which is more than the amount owed to Participant. Such credit and debit entries will be to the bank account identified by Participant. The authorizations set forth in this Section 3.2.1 will remain in effect until the date on which no Loans remain outstanding. Participant must notify Program Administrator within three (3) business days of any change to the bank account for such ACH credits and ACH debits. Program Administrator agrees to comply with written notifications from Participant that alter Participant’s bank account information (i.e. name and address of the bank or financial institution, transit/routing number or account number), provided, that Program Administrator receives such notification in sufficient time and manner to give Program Administrator and the bank or financial institution reasonable opportunity to act on it. Any payment disputes shall be resolved pursuant to Section 11.
- 3.2.2. Any disbursement by Program Administrator on behalf of Participant to any equipment manufacturer, distributor or other specified designee(s) shall constitute a payment by Program Administrator to Participant for amounts owed by Program Administrator to Participant pursuant to this Agreement. To the extent a disbursement made on behalf of Participant to any equipment manufacturer, distributor or other specified designee(s) is less than the total purchase price of the related equipment owed by Participant to such manufacturer, distributor or other designee, Participant shall be solely responsible for the payment to such manufacturer, distributor or designee of any such deficiency.

3.3. Program Administrator’s Remedies.

- 3.3.1. If Participant (a) fails to perform its contractual obligations to Customers under any Purchase Agreement in any material respect, or (b) is not in compliance with any of the terms or conditions of the Program Documents in any material respect, Program Administrator, on behalf of the Funding Providers, reserves the right in its sole discretion to take any or all of the following actions, in addition to any remedies available to Program Administrator or the applicable Funding Provider at law or in equity: (i) withhold all or part of any amount owed to Participant under this Agreement until such deficiencies are remedied; (ii) at any time, as a continuous right, without notice or demand, set off any amounts owed by Participant to Program Administrator or any Funding Provider under this Agreement against any outstanding amounts owed by Program Administrator or any Funding Provider to Participant until Participant’s liability for such amounts owed is fully satisfied and discharged; (iii) immediately suspend Participant’s participation in the Program and assess Participant such additional charges (such as late payment, returned payment or administrative charges) as implemented by Program Administrator in its reasonable discretion; (iv) require Participant to refund, or charge back Participant through offset or otherwise, up to 100% of the Loan Amount for the related Loan and/or any losses incurred by the applicable Funding Provider in connection with Customer disputes related to Participant’s non-compliance (“**Customer Dispute Amounts**”); (v) initiate a debit entry on Participant’s bank account for the Loan Amount and/or Customer Dispute Amounts; (vi) terminate and/or cancel the applicable Loan Agreement(s); and/or (viii) charge interest on any delinquent payment amounts at a rate of 12% per annum prorated for each day such payment is past the due date.
- 3.3.2. Participant’s obligations under this Agreement are not affected by any settlement, extension, forbearance or variation in terms that Program Administrator or a Funding Provider may grant in connection with any Loan or by the release of the obligations of any Customer by a court or by operation of law. Each right, power,

and remedy of Program Administrator or any Funding Provider provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power, or remedy provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Program Administrator or any Funding Provider of any one or more of such rights, powers, or remedies shall not preclude the simultaneous or later exercise by Program Administrator or any Funding Provider of any or all such other rights, powers, or remedies.

4. **MARKETING AND PROMOTION**

4.1. **Marketing and Promotion of the Program.** Participant will market and promote the Program during the term of this Agreement in strict accordance with the requirements of this Section 4 (the “**Marketing Requirements**”).

- 4.1.1. Any marketing, promotional and advertising materials and communications referencing the Program, Loans, Program Administrator or a Funding Provider (whether used in Credit Applications or otherwise, and whether in electronic, hard copy format, or oral communications, “**Marketing Materials**”) must be approved in writing by Program Administrator in advance of use by Participant. Program Administrator’s review shall be limited to Program-specific representations and statements and shall not be construed as a review or approval of any advertising or solicitation materials for any other purpose or for compliance with any other provisions of any local, state or federal laws not related to the Program. Copies of all Marketing Materials must be retained by Participant for three (3) years from the last date of usage.
- 4.1.2. All marketing, advertising, promotion, electronic mail and other digital communication, and telephonic communication by Participant or its agents, employees, affiliates and/or Resellers (as applicable, and collectively, the “**Participant Agents**”) relating to the Program shall be in compliance with all Applicable Laws (including fair lending and trade practices laws, the Telephone Consumer Protection Act, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act), the Training Program and the Marketing Requirements. Participant shall be responsible for ensuring that no Participant Agent makes any statement or representation, or omission of material information, regarding the Program that is false, misleading or deceptive. No unfair, deceptive, or abusive conduct in relation to Marketing is permissible.
- 4.1.3. Participant is prohibited from making any statement regarding the likelihood that a Customer will be approved for a Loan.
- 4.1.4. Participant may not reference the name of any Funding Provider, except in Marketing Materials approved by the Program Administrator.
- 4.1.5. All marketing relating to the Program shall be in English (except as set forth in the Solar Energy Systems Addendum, if applicable). If a Customer does not speak English well, or at all, such Customer may still apply for a Loan. However, Participant may not use a language other than English and must recommend that such Customer involve someone who will be able to translate the Loan terms and documents for him or her, including a family member, a friend or any third person whose assistance the Customer is confident will enable him or her to fully understand such Participant communications and Loan features and terms.
- 4.1.6. Participant shall comply with any other requirements related to marketing and promotion of the Program communicated by Program Administrator from time to time in accordance with Section 1.4.

4.2. **Publicity.** The Parties shall jointly agree upon the necessity and content of any press release in connection with the matters contemplated by this Agreement. Any publication, news release or other public announcement by a Party relating to this Agreement shall first be reviewed and consented to in writing by the other Party.

5. **TRAINING**

5.1. **Participant Agents.** Participant will train all Participant Agents on the terms and conditions of the Program, the Marketing Requirements, Applicable Laws and other standards (the “**Training Program**”) and will cause all

Participant Agents to complete the Training Program prior to participating in the Program. In addition, Participant will implement, update, revise and disseminate its policies, procedures, systems, internal controls, and training materials as reasonably necessary to ensure that its Training Program includes appropriate training and oversight of Participant Agents that have consumer contact or compliance responsibilities. Participant will ensure that all Participant Agents (a) engage in further training when changes are made to the Program or Applicable Law or as deemed necessary by Program Administrator, and (b) obtain a passing score on the Program training quiz in order to gain access to the Portal and participate in the Program. Participant will provide Program Administrator with reasonable access to Participant's sales meetings, marketing events, and other business development meetings for the purpose of evaluating Participant's implementation of the Training Program. Program Administrator will provide support to Participant in connection with Participant's Training Program as reasonably requested by Participant.

- 5.2. Resellers. Resellers may only be provided with access to the Portal with written consent of Program Administrator and following participation in the Training Program. Participant shall submit to Program Administrator for review and approval a list of proposed Resellers, including full corporate names and addresses. Participant shall be responsible for any failure by its Resellers to comply with the terms of this Agreement.

6. PARTICIPANT REPRESENTATIONS AND WARRANTIES

Participant hereby represents and warrants to Program Administrator, as of the date hereof and as of the date of each executed Loan Agreement, that:

- 6.1. Corporate Matters. (a) It is duly organized, validly existing and in good standing under the laws of the state of its formation, and has the power and authority to enter into this Agreement and to perform its obligations hereunder; (b) the execution and delivery of this Agreement and the performance of and compliance with the provisions of this Agreement will not conflict with or constitute a breach of or a default under (i) its organizational documents; (ii) any agreement or other obligation by which it is bound; or (iii) any Applicable Law; (c)(i) all actions required to be taken by Participant to make this Agreement effective have been duly and validly taken; (ii) this Agreement has been duly and validly authorized, executed and delivered; and (iii) this Agreement constitutes a legal, valid and binding obligation of Participant, enforceable in accordance with its terms, subject to laws of bankruptcy, insolvency, reorganization, moratorium or other similar laws; and (d) it has the financial capability to carry out and satisfy all of its obligations under this Agreement.
- 6.2. Program Matters. With respect to each Loan Agreement, the related Credit Application, and the related Purchase Agreement, (a) each of Participant and any applicable Participant Agent(s) (i) is in compliance with the Program Documents, the Purchase Agreement and all Applicable Laws governing the same, (ii) possesses all registrations, licenses, permits or authorizations and all bonds and insurance required by any Governmental Authority to carry out its business and to perform its obligations under this Agreement and the applicable Purchase Agreement, (iii) is fully experienced and properly qualified and equipped to perform its obligations under this Agreement and the applicable Purchase Agreement, (b) to Participant's and its applicable Participant Agent's best knowledge, (i) each Loan Agreement will arise out of a bona fide sale of Eligible Products by Participant and the express consent of the applicable Customer and will not involve the use of the Loan for any purpose other than to finance the Eligible Products that are the subject of the Loan Agreement, and (ii) such Customer satisfies the Qualification Requirements, (c) the applicable Customer has no claim or defense to payment of any amount based upon materials or workmanship or any act or omission of Participant or any Participant Agent, (d) there are no present or future rights related to the transaction that could give rise to a mechanic's, materialman's or laborer's lien, except to the extent those rights are in favor of Participant, in which event Participant agrees not to assert those rights to the detriment of any Funding Provider, and (e) Participant has not taken any adverse action against a Customer because such Customer is a member of a protected class, as defined by Applicable Law, or because such Customer has chosen to use credit to finance the purchase, nor has Participant engaged in any practice that has or could have an impermissible negative or disparate impact on members of any protected class, including steering Customers to more expensive or less favorable financing options because of the Customers' membership in a protected class.

7. RECORDS; AUDIT RIGHTS

- 7.1. Maintenance of and Access to Records. Participant shall retain accurate and complete written or electronic records relating to its Eligible Product transactions with Customers, including a copy of all Purchase Agreements and Marketing Materials provided to the Customers, and a description of products purchased and/or services completed in connection with an Eligible Product. Upon reasonable request, Participant shall provide Program Administrator or any Funding Provider with access to all such records and information for the purpose of determining whether Participant and Participant Agents have complied with this Agreement, to resolve a Customer dispute or respond to an investigation, demand, inquiry or action.
- 7.2. Audits. Participant will permit Program Administrator to conduct such audits, inspections and examinations (collectively, “**Audits**”), from time to time as are reasonably necessary for Program Administrator, on behalf of the Funding Providers, to ensure compliance with the Program Documents and Applicable Laws, which Audits include the right of Program Administrator to directly or indirectly Audit any Eligible Product or corresponding Customer data and documentation. Unless otherwise warranted by specific information received by Program Administrator, Audits shall occur at reasonable intervals during regular business hours and will be subject to as much advance notice as is practicable. Audits may include a review of Customer communications and documents, complaints activity, internal audits, summaries of test results or other equivalent evaluations. Participant authorizes Program Administrator to obtain business credit reports and engage in credit checks from time to time. Subject to reasonable notice by Program Administrator, Participant shall respond to additional information requests and to interviews with Program Administrator, Funding Providers, and their respective Representatives.
- 7.3. Financial Statements. Participant will provide Program Administrator such financial statements requested by Program Administrator to evaluate and audit the financial condition, operations, or performance of Participant, including, but not limited to, (a) Participant’s books and records, (b) federal and state tax returns, and (c) balance sheets and income statements for any annual or quarterly period. Participant covenants that all financial statements delivered to Program Administrator in accordance with the foregoing shall be true and correct.
- 7.4. Eligible Product Data. To the extent applicable, Participant shall provide to Program Administrator the Eligible Product Data for each Purchase Agreement upon Program Administrator’s request.

8. INTELLECTUAL PROPERTY

- 8.1. Intellectual Property Rights. As between the Parties, Program Administrator retains and reserves all rights, title and interest in and to all inventions, works of authorship, patents, copyrights, trade secrets, trademarks, service marks, trade names, know-how, ideas, techniques, concepts, algorithms, data, formats, code, platforms, functionality, interfaces, documents, technology and other intellectual property (collectively, “**Intellectual Property**”) related to the Portal and the Program. No rights are granted to Participant hereunder other than as expressly set forth herein.
- 8.2. Portal Usage. During the term of this Agreement, Program Administrator will allow Participant to access the Portal for the exclusive purposes of (a) facilitating the logging and tracking of Customer Information in accordance with the terms and conditions of this Agreement, (b) executing actions strictly necessary for Customers to apply for, process and execute Loans, (c) sending or receiving notifications or other information related to the Loan to or from Customers and (d) uploading or downloading, as the case may be, evidence or confirmation of Stage Completion, Eligible Product Data and other documentation (all of the aforementioned, “**Permitted Portal Usage**”), in each case conducted in accordance with the Program Documents. Participant shall (i) send Program Administrator a written list of individual Participant Agents requiring access to the Portal (“**Participant Authorized Users**”), including name, title, sales territory and any other information that Program Administrator deems necessary prior to providing such Participant Agents with access to the Portal and (ii) regularly update such list. Program Administrator grants to Participant and Participant Authorized Users solely during the term of this Agreement a limited, non-exclusive license to use the Portal exclusively for the Permitted Portal Usage. Participant will use strict procedures to ensure that Participant Authorized Users do not share login credentials or passwords and use the Portal in compliance with Permitted Portal Usage. Without limiting the generality of the foregoing, Participant will not directly, or indirectly through any Affiliate, agent or other Third Party: (a) sell, lease, license or sublicense the Portal to any Third Party; (b) decompile, disassemble or reverse engineer the Portal, in whole or in part; (c) write or develop any derivative software or any other software program based upon the Portal or any Confidential Information of Program Administrator; (d) use the Portal to provide lending services to third parties, or otherwise use the Portal on a “service bureau” basis; or (e) provide, disclose, divulge or make available to, or permit use of the Portal by, any Third Party.

Participant shall only use all data resulting from the use of the Portal and all other Program materials solely to perform its obligations under this Agreement.

- 8.3. Limited Scope Trademark License. Subject to the Parties' compliance with the terms and conditions of this Agreement, each Party grants to the other a non-exclusive, non-transferable, non-sublicensable right and license during the term of this Agreement to display the grantor's trademarks, servicemarks, trade names and trade dress (collectively for either Party, the "**Marks**") in connection with the Program. All uses of the Marks shall inure solely to the benefit of the grantor. Neither Party shall acquire any right, title or interest in the other Party's Marks or any goodwill associated therewith. All rights and title in the Marks are and shall be exclusively owned by the grantor, and any rights not expressly granted therein and thereto are reserved to the grantor. Approval of use of the Marks of either Party shall follow the approval process for Marketing Materials set forth in Section 4.2 of this Agreement. The Parties shall not directly or indirectly contest the validity of the Marks of the other Party or the right and title of grantor therein and thereto anywhere in the world.

9. TERM AND TERMINATION

- 9.1. Term. The term of this Agreement commences as of the Effective Date and terminates upon written notice of termination by either Party as set forth in this Section 9.
- 9.2. Termination; Effect of Termination. Either Party may terminate this Agreement at any time by providing written notice to the other Party. Following the termination of this Agreement pursuant to this Section 9.2, Participant's authorization to promote the Program under Section 1.2 and other relevant portions of this Agreement shall immediately terminate, and the Parties shall mutually cooperate to engage in orderly resolution of obligations to Customers under the terms and conditions of any Loan Agreement outstanding upon such termination.
- 9.3. Suspension of Agreement. Program Administrator may at any time suspend Participant's authorization under Section 1.2, including submissions and/or approvals of Credit Applications and execution of Loan Agreements, in its sole discretion, effective upon Program Administrator's delivery of written notice to Participant.

10. INDEMNIFICATION

- 10.1. Indemnification by Participant. Participant shall fully indemnify and hold harmless Program Administrator, the Funding Providers and their respective Representatives from and against any and all claims, actions, suits, proceedings, losses, liabilities, penalties, damages and related fees and expenses (including attorneys' fees) of any kind whatsoever (collectively, "**Losses**") incurred by Program Administrator, a Funding Provider or their respective Representatives that are caused by or result from (a) gross negligence, bad faith or willful misconduct of Participant or any of its Representatives in connection with the Program, (b) a breach by Participant of its obligations, covenants, representations or warranties contained herein, (c) the failure of Participant or its Representatives to perform their respective obligations or duties owed to a Customer pursuant to any agreement, warranty, guaranty, Applicable Law or otherwise, or (d) infringement or misappropriation by Participant or its Representatives of any Intellectual Property of Program Administrator, a Funding Provider or their respective Representatives or of any Third Party in connection with this Agreement; provided, however, that none of Program Administrator, the Funding Providers or their respective Representatives shall be entitled to indemnification for any losses hereunder to the extent resulting from such party's own gross negligence, bad faith or willful misconduct.
- 10.2. Indemnification by Program Administrator. Program Administrator shall fully indemnify and hold harmless Participant and its Representatives against any and all Losses incurred by Participant or its Representatives that are caused by or result from (a) the failure of Program Administrator or its Representatives to comply with Applicable Law, (b) breach of the confidentiality restrictions of this Agreement, or (c) infringement or misappropriation by Program Administrator of Intellectual Property of Participant or of any Third Party in connection with this Agreement; provided, however, that neither Participant nor its Representatives shall be entitled to indemnification for any Losses hereunder to the extent resulting from Participant's or such Representative's own gross negligence, bad faith or willful misconduct.
- 10.3. Indemnity Procedure.

- 10.3.1. If a Third Party initiates a claim, demand, dispute, lawsuit or arbitration (“**Third-Party Claim**”) against a Party, the Funding Providers or their respective Representatives (the “**Indemnified Party**”) with respect to any matter for which the Indemnified Party may make a claim for indemnification against another Party under this Section 10 (the “**Indemnifying Party**”), then the Indemnified Party must promptly notify the Indemnifying Party in writing of the existence of such Third-Party Claim and deliver copies of any documents served on the Indemnified Party with respect to the Third-Party Claim; provided, however, that any failure on the part of an Indemnified Party to so notify an Indemnifying Party shall not limit any of the obligations of the Indemnifying Party under this Section 10 (except to the extent such failure materially prejudices the defense of such proceeding). Such notice of claim shall specify all facts known to the Indemnified Party giving rise to the indemnification right.
- 10.3.2. Upon receipt of the notice described in Section 10.3.1, the Indemnifying Party shall be entitled to participate in and assume the defense of the Indemnified Party with respect to such claim, with counsel that is selected by and at the expense of the Indemnifying Party and that is reasonably acceptable to the Indemnified Party, provided that: (i) a conflict of interest does not exist or arise between the Indemnifying Party and the Indemnified Party with respect to such Third-Party Claim; (ii) the Indemnifying Party notifies the Indemnified Party in writing within thirty (30) days after the Indemnified Party from and against the entirety of any Losses the Indemnified Party may suffer resulting from, arising out of, relating to, in the nature of , or caused by the Third-Party Claim; (iii) the Third-Party Claim involves only money damages and does not seek an injunction or other equitable relief; (iv) settlement of, or an adverse judgment with respect to, the Third-Party Claim is not, in the good-faith judgment of the Indemnified Party, likely to establish a precedential custom or practice adverse to the continuing business interests or the reputation of the Indemnified Party; and (v) the Indemnifying Party conducts the defense of the Third-Party Claim actively and diligently; provided, however, that if Program Administrator is the Indemnified Party, Program Administrator may, at its sole option, defend itself from such claim independently of Participant. If the Indemnifying Party does not assume the defense of the Indemnified Party, or if the Indemnified Party elects to defend itself independently in accordance with the preceding sentence, then the Indemnifying Party shall reimburse the reasonable fees and expenses (including attorneys’ fees) incurred by the Indemnified Party on a monthly basis for the Indemnified Party’s defense by separate counsel selected by the Indemnified Party and reasonably acceptable to the Indemnifying Party; provided, that Indemnifying Party’s failure to provide a reasonable objection to the Indemnified Party’s choice of counsel within five (5) business days of notice thereof shall be deemed approval of such counsel. The Indemnifying Party shall control the settlement of all claims for which it has assumed the defense; provided, however, that the Indemnifying Party shall not conclude any settlement which requires any action or forbearance from action by an Indemnified Party without the prior approval of the Indemnified Party.

11. GOVERNING LAW; DISPUTE RESOLUTION

- 11.1. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to its conflicts of laws principles.
- 11.2. Arbitration. Any question, dispute, difference or claim arises out of or relates to this Agreement (a “**Dispute**”) that is not resolved within the applicable notice or cure periods provided in this Agreement must be submitted to binding arbitration. The arbitration hearing(s) and all related proceedings shall be conducted in San Francisco County, California and shall be administered by either AAA or JAMS, at the option of the Party (including, for purposes of this provision, any Funding Provider) demanding submission to arbitration. All proceedings by arbitration shall be pursuant to the rules and procedures of the arbitration administrator selected. The submitting Party shall submit such Dispute to arbitration by providing a written demand for arbitration to the other Party. The Parties agree that any arbitrated matter will be handled by a single arbitrator with significant commercial contract resolution experience to be selected mutually by the Parties, or, if the Parties are unable to mutually select an arbitrator, pursuant to Section R-12 of the AAA Commercial Arbitration Rules and Mediation Procedures or Rule 15 of the JAMS Comprehensive Arbitration Rules & Procedures, as applicable. The decision of the arbitrator shall be in writing, final, and binding on the Parties. Any award may be enforced by any Party, as applicable, in a court of competent jurisdiction. The award shall include interest from the date of any damages incurred, and from the date of the award until paid in full, at the rate of the lesser of (a) the rate per annum equal to the rate published by the *Wall Street Journal* as the “prime rate” on the date on which such interest begins to accrue plus one percent (1%) and (b) the maximum rate allowed

by Applicable Law. The Parties specifically agree that the Party prevailing in arbitration of any such Dispute shall be awarded its reasonable and documented out-of-pocket attorneys' fees, expert fees, expenses and costs, as incurred in connection with the Dispute, including all reasonable and documented out-of-pocket fees and costs incurred prior to the written demand for arbitration, as arising from the Dispute. Nothing in this Agreement shall preclude any Party from seeking provisional or equitable remedies from a court of appropriate jurisdiction.

- 11.3. LIMITATION OF LIABILITY. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL PROGRAM ADMINISTRATOR, THE FUNDING PROVIDERS OR THEIR RESPECTIVE REPRESENTATIVES BE LIABLE TO PARTICIPANT OR ANY OTHER PERSON FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, CONTINGENT OR PUNITIVE DAMAGES, INCLUDING LOSS OF PROFIT OR ANY OTHER SIMILAR DAMAGE OR LOSS.

12. **CONFIDENTIALITY; INFORMATION SECURITY**

- 12.1. Protection of Confidential Information. No Receiving Party shall divulge, disclose, produce, publish, or permit access to any Confidential Information of the Disclosing Party except (a) to its Representatives who are engaged in the implementation and execution of the Program; (b) subject to Section 12.2, as required or requested by a court or other Governmental Authority; (c) as required by Applicable Law; (d) as required in connection with any government or regulatory filings, including filings with any regulating authorities covering the relevant financial markets or to the securities exchange on which the shares of any Party are listed; (e) to banks, investors and other financing sources and their advisors; (f) to any equipment manufacturer, software provider or other Person providing services to Program Administrator in connection with Dealer's activities hereunder; (g) in connection with an actual or prospective merger or acquisition or similar transaction; (h) to obtain appropriate legal, tax or financial advice from a Party's own professionals; (i) to report income or expense to appropriate tax authorities; or (j) in connection with any litigation to enforce the terms of this Agreement (each, a "**Permitted Purpose**"); provided, however, that any disclosure under subsections (a) and (e)-(j) shall be subject to confidentiality obligations substantially similar to those set forth herein. The Receiving Party shall use the standard of care that the Receiving Party uses to preserve its own Confidential Information, but in no case less than a reasonable standard of care to prevent unauthorized use or disclosure of such Confidential Information.
- 12.2. Disclosure of Confidential Information to Governmental Authorities. In the event that a Receiving Party is requested or required by a court or other Governmental Authority (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any Confidential Information of the Disclosing Party, the Receiving Party will, to the extent legal and practicable, provide the Disclosing Party with prompt notice of such request(s) so that the Disclosing Party may seek an appropriate protective order or other appropriate remedy and/or waive the Receiving Party's compliance with the provisions of this Agreement. In the event that the Disclosing Party does not seek such a protective order or other remedy, or such protective order or other remedy is not obtained, or the Disclosing Party grants a waiver hereunder, the Receiving Party may furnish that portion (and only that portion) of the Confidential Information of the Disclosing Party which the Receiving Party is legally compelled to disclose and will exercise such efforts to obtain reasonable assurance that confidential treatment will be accorded any Confidential Information of the Disclosing Party so furnished as the Receiving Party would exercise in assuring the confidentiality of any of its own Confidential Information. Notwithstanding the foregoing, each Party shall be permitted to disclose any Confidential Information to a Governmental Authority without consent by, and, if prohibited by such Governmental Authority, notice to, the other Party.
- 12.3. Customer Information Privacy Policy. It is expressly understood that any and all Customer Information disclosed in connection with the Permitted Purpose will be held by the Receiving Party as Confidential Information and, to the extent that such information may be considered Customer Information, the Receiving Party will not gather, store, log, use or otherwise retain any Customer Information in any manner and will not disclose, distribute, sell, share, rent or otherwise transfer any Customer Information to any Third Party. Without by implication limiting the foregoing, each Party shall adopt and maintain a comprehensive privacy policy with respect to its handling of Customer Information and such Party's privacy policy shall be available on such Party's website and shall at all times comply with Applicable Laws. For the avoidance of doubt, Customer Information may be the Confidential Information of both Parties if such Customer Information was received by both Parties directly from the applicable Party, and in such case each Party will be entitled to use such Customer Information for any purpose permitted by Applicable Law and its privacy policy.

- 12.4. Information Security Policies and Procedures. Each of Participant and Program Administrator, on behalf of the Funding Providers, agrees that it has developed, implemented and will maintain at all relevant times contemplated by this Agreement effective information security policies and procedures that include administrative, technical and physical safeguards designed to (a) ensure the security and confidentiality of Customer Information, (b) protect against anticipated threats or hazards to the security or integrity of Customer Information, (c) protect against unauthorized access or use of Customer Information, (d) ensure the proper disposal of Customer Information, and (e) honor requests to delete or not share such information if required to do so by Applicable Law. All personnel handling Customer Information shall be appropriately trained in the implementation of such information security policies and procedures. Each Party shall regularly audit and review its information security policies and procedures and systems to ensure their continued effectiveness and determine whether adjustments are necessary in light of circumstances including changes in technology, customer information systems or threats or hazards to Customer Information.
- 12.5. Security Incidents. In the event that either Party learns or has reason to believe that (a) Customer Information has been disclosed or accessed by an unauthorized party, (b) such Party's facilities associated with any Customer Information has been accessed by an unauthorized party, or (c) such Customer Information has been lost or misplaced, such Party shall, as soon as reasonably practicable, (i) provide notice of the security incident to the appropriate law enforcement or state agencies and government regulatory authorities in conformity with the notification requirements found in applicable Privacy Laws and (ii) provide written notice thereof to the other Party and shall specify the corrective action that was or will be taken unless a Governmental Authority instructs such Party to refrain from doing so. Each Party shall cooperate with the other Party, and shall pay all related expenses, to provide any notices regarding such unauthorized access to affected applicants and Customers, as the other Party (in the case of Program Administrator, at the direction and control of the Funding Providers), in its sole discretion, deems appropriate.
- 12.6. Destruction of Confidential Information. Upon the expiration or termination of this Agreement or upon the Disclosing Party's request, the Receiving Party shall destroy all Confidential Information of the Disclosing Party and provide, within ten (10) calendar days of the Disclosing Party's request, a written certification signed by an officer of the Receiving Party certifying such destruction. The provisions of this Section 12.6 will not apply to Confidential Information or copies thereof which are required to be made, retained and stored by the Receiving Party or its Representatives according to provisions of Applicable Law or its internal document retention policies; provided, that any such retained Confidential Information or copies thereof shall remain subject to the confidentiality obligations set forth herein.
- 12.7. Audits of Information Security Policies and Procedures. Upon not less than ten (10) business days' prior notice, Participant will permit Program Administrator (in its own discretion or at the direction and control of the Funding Providers) to review and audit Participant's information security policies, procedures and systems during regular business hours to verify their adequacy for protection of Customer Information.
13. **MISCELLANEOUS**
- 13.1. Assignment. Participant shall not assign this Agreement without the prior written consent of Program Administrator, except to a successor in interest who purchases all or substantially all of the assets of Participant or in connection with any merger of Participant with another Person, whether or not Participant is the surviving entity from such merger, or any other change in control of Participant; provided, that (a) any such surviving entity assumes all obligations of Participant under this Agreement, and (b) Participant provides prior written notice of such assignment to Program Administrator. Nothing in this Section 13.1 shall limit a Funding Provider's right to assign, in whole or in part, a Loan or related documentation. Subject to the foregoing, this Agreement shall be binding on the Parties and on their respective successors, heirs and permitted assigns.
- 13.2. Notices. Any notice, request, demand or other communication required or permitted under this Agreement shall be in writing and shall be deemed to be properly given by the sender and received by the addressee (a) if personally delivered, on the date of such delivery; (b) if mailed by certified or registered air mail, post prepaid, with a return receipt requested, three (3) calendar days after deposit in the mail; (c) if sent electronically by email, on the date of such delivery; or (d) with respect to any written notice required to be given by Program Administrator to Participant, if posted to the Portal or to Program Administrator's website in accordance with Section 1.4, on the date of such

posting. Except as set forth in clause (d) of the preceding sentence, all notices from Program Administrator to Participant shall be sent to the address in the Participant Application or such other address as Participant may advise Program Administrator in writing. All notices from Participant to the Program Administrator shall be sent to the address set forth below or to such other address as Program Administrator may advise Participant in writing.

Solar Mosaic, Inc.
300 Lakeside Drive, 24th Floor
Oakland, CA 94612
Attention: Legal Department
E-mail: legalnotices@joinmosaic.com

- 13.3. Consent to Electronic Communications. Participant authorizes Program Administrator to communicate with Participant Agents by email and text messaging for support and marketing purposes. Standard carrier rates will apply for all text message communications. If Participant Agents no longer wish to receive emails and text messages for marketing purposes, Participant Agents may opt out by following the opt-out instructions for text messages provided in such text messages, or by unsubscribing to email messages using the appropriate link in the email message.
- 13.4. Third-Party Beneficiaries. Participant acknowledges that Program Administrator has and will enter into agreements with Funding Providers to provide financing under the Program and that such Funding Providers will originate and own the Loans contemplated hereunder. Each Funding Provider shall be a third-party beneficiary of the obligations of Participant hereunder and shall have the benefit of such obligations and the right to enforce (but not to the exclusion of Program Administrator for its own account) such obligations with respect to any Loan owned by such Funding Provider. Except as expressly provided herein, this Agreement shall not create any rights on the part of any Person not a party hereto, whether as a third-party beneficiary or otherwise.
- 13.5. Survival. Sections 2.5, 3.3, 6, 7, 8.1 and 9-13 shall survive termination of this Agreement for any reason.
- 13.6. Headings. The headings in this Agreement are for convenience and reference only and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.
- 13.7. No Agency. The Parties are independent contractors under this Agreement. Neither Party is an agent, representative or partner of the other Party, and neither Party nor its Representatives shall represent that it is an agent, representative, partner or employee of the other Party. Neither Party shall have any right, power or authority to enter into any agreement of any kind for or on behalf of, incur any obligation or liability of, or otherwise bind, the other Party. This Agreement shall not be interpreted or construed to create an association, joint venture, agency, partnership, franchise, sales representative or employment relationship between the Parties or to impose any partnership obligation or liability upon either Party. Each Party shall bear its own costs and expenses in performing this Agreement.
- 13.8. Complete Agreement. This Agreement, together with any other applicable Program Document (in each case, as may be modified from time to time in accordance with Section 1.4), constitutes the complete and entire agreement between the Parties and supersedes any previous communications, representations or agreements, whether oral or written, with respect to the subject matter hereof. Any agreement previously entered into between the Parties is hereby terminated and shall have no further force and effect, and any Credit Applications submitted, Loans originated or other matters arising under or in connection with any such prior agreement shall be governed by the terms of this Agreement. Any agreement subsequently entered into between the Parties will supersede the Program Documents only if such agreement specifically states therein that it supersedes the Program Agreements and is signed by both Parties.
- 13.9. Electronic Signatures. Any signature (including any electronic symbol or process attached to, or associated with, a contract or other record and adopted by a Person with the intent to sign, authenticate or accept such contract or record) hereto or any other certificate, agreement or document related to this transaction, and any contract formation or record-keeping through electronic means shall have the same legal validity and enforceability as a manually executed signature or use of a paper-based recordkeeping system to the fullest extent permitted by Applicable Law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, the California Uniform Electronic Transactions Act, or any similar state law based on the Uniform

Electronic Transactions Act, or any similar state law based on the Uniform Electronic Transactions Act, and the Parties hereby waive any objection to the contrary.

- 13.10.** Severability. Whenever possible, each provision of this Agreement will 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 in any jurisdiction, such invalidity, illegality, or unenforceability will not affect any other provision or any other jurisdiction, but this Agreement will be reformed, construed, and enforced in such jurisdiction as if such invalid, illegal, or unenforceable provisions had never been contained herein.
- 13.11.** Ambiguities; Consultation with Counsel. The Parties waive the application of any law, regulation, holding, or rule of construction providing that ambiguities in an agreement or other document will be construed against the Party drafting such agreement or document. The Parties agree that the language of all parts of this Agreement shall in all cases be construed as a whole, according to their fair meaning, and not strictly for or against any Party as the drafter. The Parties have each consulted with, or had the opportunity to consult with, counsel regarding this Agreement.

EXHIBIT A

RULES OF CONSTRUCTION; DEFINITIONS

1. **Rules of Construction.** As used in this Agreement: (a) unless the context requires otherwise, all references to singular nouns shall apply equally to the plural form and any pronoun shall include the corresponding masculine, feminine and neuter forms; (b) (i) the words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation” and (ii) the word “or” is not exclusive; (c) any definition of or reference to any agreement, instrument, other document, law, or regulation herein shall be construed as referring to such agreement, instrument, other document, law, or regulation as from time to time amended, supplemented or otherwise modified; (d) any reference herein to any Person shall be construed to include such Person’s successors and assigns; and (e) the words “herein,” “hereof” and “hereunder,” and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof, and all references herein to Sections, Exhibits and Schedules shall be construed to refer to Sections of, and Exhibits and Schedules to, this Agreement.

2. As used in this Agreement, the following capitalized terms have the following meanings:

“**Affiliate**” means, for a specified Person, any Person directly or indirectly controlling, controlled by or under common control with such specified Person. For this definition, “control” with respect to any specified Person means the possession, directly or indirectly, of the power to direct the management and policies of such Person, whether through ownership of at least fifty percent (50%) of the voting securities, by contract, or otherwise.

“**Agreement**” has the meaning set forth in the introductory paragraph.

“**Applicable Laws**” means any applicable statute, law, ordinance, rule, code, regulation, judgment, order, or award of any Governmental Authority, including any term, condition or requirement of any permit, license, certificate, approval, bond, qualification or similar requirement from a Governmental Authority, including the Privacy Laws.

“**Audits**” is defined in Section 7.2.

“**Background Technology**” means all firmware, source code, object code, applications, algorithms, operation instructions, interfaces, documentation, program images and text viewable on the internet, any HTML or XML code relating thereto, and any similar or related technology.

“**Cancellation Waiver**” is defined in Section 3.1.3.

“**Closed Loan**” means any Loan that a Funding Provider has funded as evidenced by making an initial payment to Participant and/or on behalf of Participant to any equipment manufacturer, distributor or other specified designee(s).

“**Confidential Information**” means all information, including records, technology, software, trade secrets, and financial and business information, or data related to a Party’s products (including the discovery, invention, research, improvement, development, manufacture, or sale thereof), processes, or general business operations (including sales, costs, profits, pricing methods, organization, employee or customer lists, marketing techniques and materials, development or marketing timetables, strategies and development plans, and process), whether oral or written or communicated via electronic media, disclosed or made available by a Disclosing Party to the other Party or to which such other Party is given access pursuant to this Agreement by the Disclosing Party, any other trade secrets, and any information obtained through access to any information assets or information systems (including computers, networks, voice mails, etc.) that if not otherwise described above is of such a nature that a reasonable person would believe it to be confidential. In addition to the foregoing, Customer Information shall also be deemed to be Confidential Information. Confidential Information shall not include information that (a) is generally available to the public, (b) was known to the Receiving Party prior to obtaining the same from the Disclosing Party under no confidentiality obligation; (c) has become publicly known not due to the fault of the Receiving Party subsequent to the Receiving Party acquiring the information; or (d) is obtained by the Receiving Party from a Third Party who is under no confidentiality obligation to the Disclosing Party.

“**Contract Price**” means the price of an Eligible Product pursuant to a Purchase Agreement.

“Credit Application” means an application for a Loan, in the form of a Mosaic Program Credit Application or Custom Credit Application submitted directly by a Customer or, if permitted by Program Administrator with respect to a Custom Credit Application, by Participant following the Customer’s submission of such Custom Credit Application.

“Custom Credit Application” is defined in Section 2.1.

“Customer” means a customer of Participant that is considering engaging or has engaged Participant to sell or provide an Eligible Product.

“Customer Dispute Amounts” is defined in Section 3.3.1.

“Customer Information” means (a) any information that identifies or can be used to identify an individual either alone or in combination with other readily available data; (b) any other sensitive or personally identifiable information or records in any form (oral, written, graphic, electronic, machine-readable, or otherwise) relating to a Customer, including the name, home address, email address, date of birth, social security number and biometric information of a Customer; and (c) any other data of or regarding a Customer, the use, access or protection of which is regulated under Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et. seq.* and implementing regulations, Interagency Guidelines Establishing Standards For Safeguarding Customer Information and codified at 12 C.F.R. Parts 30, 208, 211, 225, 263, 308, 364, 568, and 570, and 16 C.F.R. Part 314, and other applicable federal, state and local laws, rules, regulations, and orders relating to the privacy and security of personal information of consumers including the California Consumer Privacy Act.

“Disclosing Party” means the Party disclosing Confidential Information to the other Party.

“Dispute” is defined in Section 11.2.

“Eligible Product” means the goods, services (including design, delivery, engineering, permitting, installation, maintenance, building, and monitoring) and/or merchandise that a Customer may purchase from Participant (or a Reseller acting on behalf of Participant) with a Loan made by a Funding Provider in connection with the Program.

“Eligible Product Data” is defined in the Eligible Product Data Requirements.

“Eligible Product Data Requirements” means the agreements, obligations, and terms set forth in the Eligible Product Data Requirements available on Program Administrator’s website, www.joinmosaic.com.

“Extended Warranty” means any agreement, written or oral, by Participant or a Third Party to provide to the Customer a production and/or workmanship warranty of the Eligible Product that is above and beyond the Standard Warranty.

“Funding Provider” means each of the banks, credit unions and non-bank lenders, including Program Administrator and its Affiliates, that makes Loans individually in the Program and jointly market and offer the Program to consumers to finance the purchase of Eligible Products.

“Funding Schedule” is defined in Section 3.1.2.

“Funding Stage” is defined in Section 3.1.1.

“Governmental Authority” means any court, tribunal, arbitrator, agency, legislative body, commission, official or other instrumentality of any government of any country, or a federal, state, province, county, city or other political subdivision thereof.

“Indemnified Party” is defined in Section 10.3.1.

“Indemnifying Party” is defined in Section 10.3.1.

“Intellectual Property” is defined in Section 8.1.

“Loan” means either a secured or unsecured closed-end loan extended by a Funding Provider to a Customer under

the related Loan Agreement to purchase an Eligible Product through the Program.

“Loan Agreement” means the agreement entered into between a Funding Provider and a Customer to extend a Loan to such Customer for the purchase of an Eligible Product.

“Loan Amount” means the amount of credit extended by a Funding Provider to a Customer under a Loan Agreement, which is equal to the Contract Price in the Purchase Agreement minus any credits or payments made by Customer in advance of the Loan, and after making adjustments for change orders or amendments agreed to by the Customer and Participant in writing.

“Losses” is defined in Section 10.1.

“Marketing Materials” is defined in Section 4.1.1.

“Marketing Requirements” is defined in Section 4.1.

“Marks” is defined in Section 8.3.

“Mosaic Program Credit Application” means a credit application in the form provided by the applicable Funding Provider.

“Net Loan Amount” is defined in Section 3.1.2.

“Participant” has the meaning set forth in the preamble.

“Participant Agents” is defined in Section 4.1.2.

“Participant Application” means the application submitted by Participant to Program Administrator to participate in the Program.

“Participant Authorized Users” is defined in Section 8.2.

“Party” means each of Program Administrator and Participant individually, and collectively, Program Administrator and Participant are the **“Parties.”**

“Permitted Portal Usage” is defined in Section 8.2.

“Permitted Purpose” is defined in Section 12.1.

“Person” means any individual, corporation, partnership, trust, limited liability company, association or other entity.

“Portal” means (a) the web application and application programming interface that Program Administrator, on behalf of the Funding Providers, provides to Participant, as modified from time to time, to enable Funding Providers to monitor the Program and enable Participant to conduct the activities included under Permitted Portal Usage, and (b) the web or mobile site or smartphone or tablet widget or application, as modified from time to time, that Program Administrator, on behalf of the Funding Providers, makes available to each Customer to enable such Customer to submit a Credit Application and conduct and monitor activities in connection with his or her Loan, including, in each case, the Credit Application, documentation, business logic, administrative tools, user interface and any related Background Technology.

“Privacy Laws” means all applicable privacy and data security laws in all relevant jurisdictions and the regulations promulgated thereunder, including the following, in each case, as amended or supplemented: Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et. seq*/Regulation P; Fair Credit Reporting Act/Regulation V; California Financial Information Privacy Act; California Consumer Privacy Act and related regulations; Federal Trade Commission Act; the Telephone Consumer Protection Act; the CAN-SPAM Act of 2003; state data breach and data security Laws (including the New York State Department of Financial Services Cybersecurity Requirements for Financial Services Companies, 23 NYCRR 500); international data protection and security laws, including Directive 95/46/EC of the European Parliament and of the Council

and, when effective, the General Data Protection Regulation; and analogous local, state, federal, and international laws relating to the processing, privacy, usage, protection and security of Customer Information.

“Program” has the meaning set forth in the preamble.

“Program Administrator” has the meaning set forth in the preamble.

“Program Documents” means this Agreement, the Eligible Product Data Requirements, the Solar Energy Systems Addendum (if applicable), and any other policies, procedures, or instructions communicated by Program Administrator to Participant in accordance with Section 1.4.

“Prudent Industry Practices” means those standards of care and diligence normally practiced by equipment manufacturers, distributors, engineers, contractors, and installers, as applicable, in providing goods and/or performing services of a similar nature in the geographic region in which the Eligible Product will be provided and/or performed, and in accordance with good engineering, building and design practices, Applicable Laws (including local codes and standards), any requirements of the Utility, if applicable, and other applicable industry standards.

“Purchase Agreement” means the agreement, purchase order, invoice or similar document evidencing the purchase by Customer of an Eligible Product from Participant.

“Qualification Requirements” means (a) with respect to any Loan, the following requirements for Loan eligibility: the applicable Customer must (i) own a house in the Territory, (ii) have a valid social security number and (iii) have a valid existing email address or have personally created a valid email address; and (b) with respect to a Loan, the proceeds of which will be used to finance a Solar Energy System, the requirements set forth in clause (a) above and the Solar Energy Qualification Requirements (as defined in the Solar Energy Systems Addendum).

“Receiving Party” means the Party receiving Confidential Information from the Disclosing Party; provided, that where Program Administrator is the Receiving Party, such term will also include the Funding Providers.

“Representatives” means any Affiliates, shareholders, members, managers, directors, officers, employees, agents or representatives of a Person, including Participant Agents, Subcontractors, attorneys, accountants, consultants and financial advisors.

“Reseller” means a Subcontractor that performs marketing and sales services in connection with selling Eligible Products and has a contractual agreement with Participant to perform such activities.

“Seller’s Points” is defined in Section 3.1.2.

“Service Agreement” means an agreement, written or oral, by Participant or a Third Party to provide services to the Customer beyond the Standard Warranty, including but not limited to Performance Guarantees, Extended Warranties, warranty services, and production guarantees.

“Solar Energy Systems” means (i) any residential solar power generation systems, including solar panels or modules, inverters, electricity storage, charging and monitoring equipment (including batteries and automobile charging equipment; provided, that any batteries must be properly wired and installed for charging by the Solar Energy System and not charging by the applicable utility grid), prepaid operations and maintenance agreements and related landscaping, roofing or re-roofing, wiring, electrical system upgrades and any other additional equipment or services related to the installation thereof; and/or (ii) any electricity storage unit on a standalone basis, including wiring, electrical system upgrades and any additional equipment or services related to the installation thereof.

“Solar Energy Systems Addendum” means the agreements, obligations, and terms set forth in the Solar Energy Systems Addendum available on Program Administrator’s website, www.joinmosaic.com.

“Stage Completion” is defined in Section 3.1.1.

“Standard Warranty” means, with respect to an Eligible Product, the standard manufacturer’s warranty and/or

state-mandated minimum workmanship warranties provided to all purchasers of such Eligible Product.

“**Subcontractor**” means any Third Party directly or indirectly engaged by Participant in connection with the performance or provision of any Eligible Product or the fulfillment, in whole or in part, of any obligation of Participant under the Program or a Purchase Agreement.

“**Territory**” means the states where the Program is offered by Program Administrator on behalf of the Funding Providers, as identified by Program Administrator in its sole discretion from time to time.

“**Third Party**” means any Person who is not a Party.

“**Third-Party Claim**” is defined in Section 10.3.1.

“**Training Program**” is defined in Section 5.1.

“**Utility**” means the operator of the transmission or distribution system to which a Solar Energy System is being interconnected, or another utility providing standard net metering service to such Solar Energy System.