

FOR IMMEDIATE RELEASE:

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AG Balderas Sues Massive Solar Company for Defrauding New Mexicans & Jeopardizing Their Home Ownership

*There are hundreds of clouded home titles and thousands of affected
customers in New Mexico*

Albuquerque, NM – This morning, Attorney General Hector Balderas announced he filed a lawsuit against Vivint Solar, Inc. and related companies (“Vivint”). Attorney General Balderas’ lawsuit claims Vivint was engaging in unfair and unconscionable business practices including clouding titles to consumers’ homes, fraud and racketeering in connection with its residential solar power purchase agreements and solar equipment. Through its investigation, the Office of the Attorney General has learned there are hundreds of clouded titles and thousands of Vivint customers in New Mexico. Attorney General Hector Balderas is committed to expanding access to clean, affordable solar energy across New Mexico, and will not tolerate bad actors who prey on the good intentions of New Mexico families and small businesses.

“I will fight to protect the rights of all New Mexico consumers and hold giant, out-of-state corporations accountable who abuse, mislead and employ dishonest practices to defraud our hard working families,” said Attorney General Hector Balderas. “Every New Mexican deserves access to clean, affordable energy, and the development and expansion of rooftop solar should be encouraged by businesses that use the industry’s best practices to help consumers become more energy independent.”

The complaint alleges that Vivint binds New Mexico consumers into 20-year contracts that require consumers to purchase the electricity generated by a solar system placed on their homes at rates that increase by over 72% during the 20 years. The complaint further alleges that Vivint deploys door-to-door sales managers to engage in high pressure sales techniques and procedures designed to mislead consumers into believing that these 20-year contracts will save them substantial amounts of money. The complaint also charges Vivint with filing improper notices in consumer real estate records that operate to cloud titles, and in some cases making it difficult for New Mexico consumers to sell their homes.

The lawsuit was filed today in the Second Judicial District Court in Bernalillo County. Please see attached for a copy of the complaint.

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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.*,
HECTOR H. BALDERAS, Attorney General of
New Mexico,

Plaintiff/Petitioner,

v.

VIVINT SOLAR DEVELOPER, LLC, VIVINT
SOLAR, INC., VIVINT SOLAR HOLDINGS, INC.,
DAVID BYWATER, Individually and as an Officer
of Vivint Solar, Inc., DANA RUSSELL,
Individually and as an Officer of Vivint Solar, Inc.,
PAUL DICKSON, Individually and as an Officer of
Vivint Solar, Inc., L. CHANCE ALLRED,
Individually and as an Officer of Vivint Solar, Inc.,
XYZ CORPORATION 1-10, and JOHN/JANE
DOES 1-10,

Defendants.

**COMPLAINT FOR RESTITUTION AND CIVIL PENALTIES AND
PETITION FOR PERMANENT INJUNCTIVE AND DECLARATORY RELIEF**

DEMAND FOR TRIAL BY JURY OF 12 PERSONS

COMES NOW, the State of New Mexico *ex rel.* Hector H. Balderas, its Attorney General,
by and through his undersigned counsel, Assistant Attorney General, Joshua A. Spencer and brings
this Complaint for Restitution and Civil Penalties and Petition for Injunctive and Declaratory
Relief against Defendant Vivint Solar, Inc., Vivint Solar Developer, LLC, Vivint Solar Holdings,
Inc., David Bywater, individually and an as officer of Vivint Solar, Inc., Dana Russell, individually
and as an officer of Vivint Solar, Inc., Paul Dickson, individually and as an officer of Vivint Solar,
Inc., L. Chance Allred, individually and as an officer of Vivint Solar, Inc. (collectively “Vivint,”

“Vivint Defendants” or “Defendant”), XYZ CORPORATION 1 through 10; and JOHN/JANE DOES 1 through 10. In support of its Complaint, Plaintiff/Petitioner states:

I. INTRODUCTION

New Mexico is situated within the “sunbelt” of the United States. Given its advantageous geographic location and its semiarid climate, New Mexicans enjoy 300 days of sunshine each year. Because of this abundance of sunny days and the decreasing cost of solar power equipment, solar energy has become a viable option for New Mexican consumers (hereinafter “consumers”) to meet their energy needs. Because of the increasing viability of solar energy, the solar power industry has correspondingly increased its presence in New Mexico. Vivint is one of many solar companies that have recently begun operation in New Mexico.¹

Unlike most solar companies, Vivint does not sell or lease any photovoltaic cells (hereinafter “Solar Panels”) or the accompanying equipment (collectively, “Solar System”). In fact, Vivint goes to great lengths to advertise that it will design, install and maintain a Solar System for a consumer’s home for “free.” In exchange for the “free” Solar System, consumers agree to purchase all of the power produced by the “free” Solar System. To the consumer, a “free” Solar System is alluring. However, Vivint has skillfully crafted, baited and set a “free” trap. Vivint’s “free” trap, in truth, is not free at all; rather, it hooks consumers into paying more for energy, entangles consumers’ property rights, and ensnares consumers with a twenty-year contract called a “Residential Solar Power Purchase Agreement” (hereinafter “PPA”).

The Vivint Defendants use multiple ploys to lure consumers into its “free” trap. Vivint, by and through its employees, engages in unfair trade practices including: high pressure and illegal door-to-door sales; making false, misleading and fraudulent statements; willfully omitting

¹ According to the Solar Energy Industries Association, as of September 9, 2016, there are 99 companies “at work in the value chain of New Mexico, employing 1,899 people.” Available online at: <http://www.seia.org/state-solar-policy/new-mexico>

material facts; falsely assuring that consumers will save 10%-30%, 20%-40%, or even more, on their utility bills compared to their prior utility rates when, in fact, they will likely pay more; failing to properly inform consumers of their right to cancel the PPA; failing to provide consumers with a copy of the PPA; and attempting to contractually force consumers to waive rights guaranteed by New Mexico law. Once caught in its “free” PPA trap, Vivint further ensures that consumers will remain obligated for the full 20-year term by filing erroneous UCC financing statements on their homes. Vivint utilizes UCC-1 Financing Statements for these filings, which falsely describe the consumer as a “Debtor.” As a result, reasonable consumers are led to believe that this erroneous UCC filing is in fact a lien on their home, and potential home buyers of those homes are misled about any encumbrances on the real property. Vivint’s fixture filings operate to encumber consumers’ homes, negatively impacting the value of their property and complicating real estate transactions. These filings are made despite Vivint’s contractual promise to consumers that it will not file property liens.

Beyond the above misrepresentations, Vivint engages in a host of business practices that violate New Mexico law, including failing to provide consumers with a paper copy of their PPA contracts, instead utilizing electronic devices that do not provide consumers with an adequate opportunity to review the lengthy, complex and detailed contracts. Vivint also fails to provide consumers with two separate paper copies of the notice of their right to cancel the PPA contract. Here, again, Vivint utilizes electronic devices that do not provide consumers with an adequate opportunity to review the notice of consumers’ right to cancel the contract. Vivint’s continued reprehensible business actions demonstrate a pattern of unfair and unconscionable business practices, fraud and racketeering. Plaintiff/Petitioner seeks monetary damages and injunctive relief, as well as costs and reasonable attorneys’ fees.

II. PARTIES, JURISDICTION, VENUE AND JURY DEMAND

1. Plaintiff/Petitioner Hector H. Balderas is the duly elected Attorney General of the State of New Mexico.

2. The Attorney General shall prosecute and defend all actions and proceedings in which the State may be an interested party. *See* NMSA 1978, § 8-5-2(B) (1933, amended 1975).

3. The Attorney General has the statutory authority to enforce laws for the protection of the public, including the New Mexico Unfair Practices Act, NMSA 1978, Sections 57-12-1 to -26 (1953, as amended through 2009) (hereinafter “UPA”), False Advertising Act, NMSA 1978, Sections 57-15-1 to -10 (1953, as amended through 1967), the Racketeering Act, NMSA 1978, Sections 30-42-1 to -6 (1978, as amended through 2015) and Civil Fraud. *See* UJI 13–1633 NMRA.

4. Defendant Vivint Solar, Inc., is a Foreign Limited Liability Corporation formed under the laws of Delaware in 2011. Vivint Solar Inc.’s principal office is located at 3301 North Thanksgiving Way, Suite 500, Lehi, Utah 84043. As set forth in its SEC filings, Vivint Solar, Inc. operates through its subsidiaries, including Vivint Solar Holdings, Inc., which in turn owns “subsidiaries and other entities related to various solar energy system financing vehicles.” In its filings with the SEC, Vivint Solar, Inc. refers to itself and these subsidiaries collectively as the “Company.” The “Company” conducts business throughout New Mexico and is engaged in the business of leasing, servicing and maintaining photovoltaic systems (“Solar Systems”) or the power created by the Solar Systems. In addition to maintaining permits to conduct business through its subsidiaries, Vivint Solar, Inc., maintains a business permit in the Village of Las Lunas. Vivint Solar, Inc.’s officers are:

- a. David Bywater, Chief Executive Officer;

- b. Dana Russell, Chief Financial Officer;
- c. Paul Dickson, Chief Revenue Officer; and
- d. Chance Allred, Chief Sales Officer.

Upon information and belief, Defendants Bywater, Russell, Dickson, and Allred (collectively “Vivint Officers”), are residents of the State of Utah.

5. Vivint Solar Holdings, Inc. (“Vivint Holdings”) is a wholly-owned subsidiary of Vivint Solar, Inc. According to Vivint Solar, Inc.’s SEC filings, “Vivint Solar Holdings, Inc., our wholly owned subsidiary, wholly owns or partially owns a number of subsidiaries and other entities related to various solar energy system financing vehicles.” Through these various subsidiaries, including Vivint Solar Developer, LLC, Vivint Holdings conducts business throughout New Mexico. Vivint Holdings has, at various points, held permits to conduct business in many parts of New Mexico, including, but not limited to, the City of Albuquerque, Valencia County, and the City of Belen.

6. Defendant Vivint Solar Developer, LLC (hereinafter “Vivint Developer”), is a Foreign Limited Liability Corporation formed under the laws of Delaware in 2011 and is managed wholly by Vivint Solar, Inc. Vivint Developer’s principal office is located at 1800 West Ashton Blvd., Lehi, Utah 84043. Vivint Developer conducts business throughout New Mexico. Vivint Developer is engaged in the business of selling, servicing and maintaining Solar Systems or the power created by the Solar Systems. Vivint Developer has, at various times, maintained permits to conduct business in multiple municipalities of New Mexico, including, but not limited to, the City of Albuquerque, Valencia County, the City of Belen, the City of Santa Fe, the City of Rio Communities, the Village of Corrales, the City of Rio Rancho, and Bernalillo County.

7. Upon information and belief, Defendants XYZ CORPORATIONS 1-10 are various corporations and/or entities which have participated in the unlawful acts alleged herein and whose names are not known at the present time. Plaintiff/Petitioner will seek leave of the Court to amend this complaint to reflect their true names when they have been ascertained.

8. Upon information and belief, Defendants JOHN/JANE DOES 1-10 are any officers, principals, trustees, employees, managers, agents, members, or representatives who have participated in the unlawful acts alleged herein and whose names are not known at the present time. Plaintiff/Petitioner will seek leave of the Court to amend this complaint to reflect their true names when they have been ascertained.

9. Whenever in this complaint reference is made to any act of any individual defendant, such reference shall be deemed to mean the personal act of said defendant or the act of said defendant's employees, members, agents or other representatives acting within their scope of employment or authority.

10. Whenever in this complaint reference is made to any act of any corporate defendant, said reference shall be deemed to mean the act of said Officers of Vivint, directors, members, employees, and agents or other representatives or within their scope of employment or authority.

11. As a court of general jurisdiction, this court has subject matter jurisdiction over this matter. *See* N.M. Const. art. XII, § 13.

12. The court has personal jurisdiction over Vivint because it has continuous and systematic contact with New Mexico, it maintains a place of business in Bernalillo County located at 5600 Venice Ave NE, Albuquerque, New Mexico, 87113 and some of the alleged violations occurred or continue to occur in Bernalillo County, New Mexico. *See* § 57-12-8(A); *see also* § 57-15-4; §30-42-6; N.M. Const. art. XII, § 13; U.S. Const. Amend. 14.

13. Venue is proper in this County pursuant to NMSA 1978, Section 38-3-1 (1988) because all or some of the alleged conduct took place in Bernalillo County.

14. Pursuant to Rule 1-038(B)(1) NMRA, Plaintiff/Petitioner hereby demands trial by jury of twelve persons. Concurrently with this demand, Plaintiff/Petitioner is depositing with the clerk of the court the jury fee of three hundred dollars (\$300.00).

III. FACTS COMMON TO ALL COUNTS

Vivint's Door-to-Door Sales Model

15. Defendant's business consists of the design, installation, maintenance, repair, monitoring, and supplying of Solar Systems to be placed on consumers' homes. In turn, consumers agree to purchase all of the energy produced by the system installed on their home.

16. During the relevant period of August 1, 2015 to the present, Defendant's business relied, and continues to rely, on door-to-door sales by employees, and/or independent contractors, called "Sales Managers." These Sales Managers work on a commission bases, encouraging an "anything goes" approach to sales.

17. According to Vivint's "Residential Customer Operations Manual" (hereinafter "Operations Manual"), Sales Managers are directed to knock on doors of "qualifying homes," give a "Solar Renewable Energy Presentation," explain the "Customer Agreement" and relate examples of "successes in the area."

18. Also according to the Operations Manual, the Sales Manager is required to introduce himself and the company first by presenting his Vivint Employee Badge and license to engage in door-to-door sales.

19. Vivint's Sales Managers engaged in high pressure sales tactics, including making false and misleading statements designed to induce the consumer to enter to a contract entitled "Residential Solar Power Purchase Agreement."

20. Vivint's sales model allows and encourages Sales Managers to overstate the cost savings to consumers, representing that consumers will save 10% - 30% off their current utility bill.

21. Vivint's sales model allows and encourages Sales Managers to tell consumers that Vivint's rates are 30% - 40% less than PNM Resources Inc. ("PNM"), a competitor company.

22. Vivint's sales model allows and encourages Sales Managers to tell consumers that they may save 50% or even save 60% to 80% on their power rates compared to PNM.

23. Vivint's sales model allows and encourages Sales Managers to tell consumers they can "lock in [an] energy rate," "we'll lock in a rate for the next 20 years" by "simply paying a low, predetermined price for every kilowatt-hour your solar panels generate."

24. Vivint's sales model requires Sales Managers, and even the terms of Vivint's PPA, to inform consumers that Vivint's energy rate will *not increase by more* than 2.9% each year, implicitly suggesting that consumers may see smaller increases, or no increases at all.

25. Vivint's sales model allows and encourages Sales Managers to conceal or omit the fact that the price consumers pay for power from the solar system *will* increase by 2.9% each year.

26. Vivint's sales model requires Sales Managers to falsely tell consumers that in the event consumers sell their home, they will remove the Solar System for no charge and cancel the contract.

27. Vivint’s sales model allows and encourages Sales Managers to falsely tell consumers that adding a Solar System is a significant upgrade to their home, will increase the value of the home and will make the home easier to sell.

28. Vivint’s sales model allows Sales Managers to falsely tell consumers that Vivint is a “solar utility company.”

29. Vivint’s sales model allows Sales Managers to falsely tell consumers that the Solar System is free because the cost of the Solar System has been paid for by state and federal taxes. In fact, customers pay more for power produced by these “free” solar systems than they do for electricity purchased from PNM.

30. Vivint’s sales model allows Sales Managers to conceal or omit the fact that, soon after entering into the contract and installation of the Solar System, Vivint will file a UCC Statement or a fixture filing in their home’s real property records identifying the consumer as a “debtor,” thereby clouding the consumer’s real property title.

31. Vivint’s sales model allows Sales Managers to conceal or omit the fact that, upon entry into a PPA, Vivint, and not the consumer, will receive all credits, rebates, incentives, allowances, tax benefits or certificates attributable, allocated or related to the Solar System.

32. Vivint’s sales model allows Sales Managers to conceal or omit the fact that, upon entry into a PPA, any credit, rebate, incentive, allowance, tax benefit or certificate Vivint receives will never be apportioned, credited or accounted against the price of the Solar System.

Vivint’s Residential Solar Power Purchase Agreement

33. A PPA is a financial agreement through which Vivint offers to arrange for the design, permitting, and installation of a Solar System on a consumer’s property.

34. The PPA is a standardized 20-year contract prepared solely by Defendant. Vivint alone sets the terms and conditions of the PPA, thereby enjoying a superior bargaining position to consumers. Consumers are offered the PPA on a take-it-or-leave-it basis and are unable to bargain for more favorable terms. The PPA is a contract of adhesion.

35. After installation, Vivint then sells all of the power generated by the Solar System to the consumer at a contractual rate.

36. Vivint receives income from the sale of electricity and any tax credits and other incentives generated from the Solar System.

37. Since Vivint began operations in New Mexico in August of 2015, it has amended its PPA four times.

38. Each version of the PPA has grown in page length and word count, increased the use of specialized, scientific or other technical language, terms and formulas.²

39. The PPA contains contradictory information. For instance, Page 1 of the PPA states “Your Energy Price will not increase by more than 2.9% per year”; or “The energy rate will never increase by more than 2.9% per year.” However, buried later at Paragraph 3, on a different page and in smaller font, the PPA contains the following statement: “On each anniversary of the In-Service-Date, the Energy Price *shall* increase by two and nine-tenths percent (2.9%).” (*emphasis added*).

40. In each iteration of the PPA, only one paragraph mentions any credits, rebates, incentives, allowances, tax benefits, or certificates. That paragraph simply details that the consumer has disclaimed any credits, rebates, incentives, allowances, tax benefits, or certificates to Vivint.

² Vivint’s PPA has grown from 14 pages (PPA (6/2015), v3.1) to 20 pages (PPA (12/2016), v3.2.3).

41. One version of the PPA will allow the transfer of the Solar System only if the “Transferee meets [Vivint’s] credit qualifications[.]”³

42. Vivint even controls the act of signing the PPA, utilizing an “e-signature” on an electronic tablet, substantially impacting the consumers’ ability to understand the terms of the 20 year PPA contract that they are entering into.

43. The consumer is not given a physical copy of the PPA at the time of its execution, nor is the consumer given two physical copies of the Notice of Cancellation.

Vivint Charges More for Electricity than Competitors

44. Vivint represents to consumers that a PPA agreement will save them money over purchasing electricity from a utility. Indeed, on its website and in its marketing materials, Vivint asserts that consumers will “save 10-30%” on utility rates.⁴ In an interview on KOAT Action News, Vivint boasted there is a good chance that savings could jump into the 60-80% range.⁵ This assertion is demonstrably false. In fact, and contrary to Vivint’s persistent marketing, Vivint’s rates for electricity are higher than those currently charged by PNM. Vivint repeats these false claims in email advertisements, again claiming that consumers will “save 10-30% on your power bill every month.” This figure is repeated throughout Vivint’s marketing materials, “save 10-30% on your utility rate with a Power Purchase Agreement. No Fine print.”⁶ But consumers do not learn that Vivint’s representations are falsehoods until after they’ve entered into a 20 year contract with Vivint. And then, consumers learn that, not only do they pay more for electricity from Vivint

³ See PPA (6/2015 v3.1), pg. 8, ¶ 5(n), “Transfer of Property.” At present, the credit worthiness clause is believed to affect 500 – 600 consumers.

⁴ <https://www.vivintsolar.com/state/new-mexico/albuquerque-solar>, last visited on December 19, 2017.

⁵ *KOAT Action News 7: Company Offer Solar Power At No Cost* (ABC television broadcast January 29, 2016) available online at: <https://youtu.be/Lv7bhE7sHig>

⁶ <https://www.vivintsolar.com/solar-plans/solar-ppa>, produced by Vivint as Power Purchase Agreement _ Solar PPA _ Vivint Solar.pdf

than they would from, for example, PNM, they are often obligated to purchase more electricity than they actually consume.

45. Vivint employees know these representations are false. For example, one former Vivint Sales Manager acknowledged to investigators that Vivint PPAs would not save consumers even 10% over their current electric bills. In fact, consumers pay higher per kilowatt hour (“kWh”) rates from the outset and, because of the cost escalator built into the Vivint PPA contract, consumers are guaranteed to see their electric rates rise by more than 72% over the life of the contract.

46. As with other utility companies throughout the country, PNM’s rates are tiered and have different seasonal rates. PNM’s tier one rates, which cover the first 450 kWh hours of electricity consumed every month, are *more than 26% lower than Vivint’s rates*. As a result, the average consumer pays substantially less for electricity purchased from PNM than for electricity purchased from Vivint. Moreover, in contrast to the built-in 2.9% escalator in the PPA, PNM’s rates have been relatively stable for approximately a decade. This is significant because, pursuant to the PPA, consumers will see more than a 72% increase over the twenty year term of their contract, with rates steadily rising to more than \$0.18 per kWh.

47. Thus, PNM’s rate history directly contradicts Vivint’s representations that New Mexico consumers can save between 10%-30% through a PPA agreement.

48. Vivint’s false and misleading statements cost consumers a substantial amount of money over the life of the PPA contract. Even ignoring the long-term impact of Vivint’s rate escalator, the higher prices charged by Vivint at current rates may cost the average consumer thousands of dollars over the course of the contract.

49. Consumer complaints highlight the cumulative impact of Vivint's multiple false statements and unfair business practices from the initial door-to-door sales pitch through design of solar systems to the billing for their production. One consumer noted that the Vivint Sales Manager who pitched the system promised a "free" system that would result in electricity costs that were \$0.04 per kWh cheaper than PNM, resulting in savings of 20% or more. This soon proved to be untrue.

50. Vivint Sales Managers are aware of the fact that instead of saving money, consumers who enter into PPA contracts with Vivint see their electricity rates increase as compared to their prior rates with PNM. Indeed, within two months of the installation of the Vivint system, one consumer saw his bill rise from \$149 the same month of the prior year to \$172.83, an increase of approximately 16%. And, while this consumer was told that Vivint's rates would "never go up more than 2.9% per year," he wasn't told that, in fact, his electric rate was *absolutely going to increase at 2.9% per year*. Vivint's failure to provide consumers with hard copies of their contract made discovering this fact nearly impossible. One consumer noted that when agreeing to the Vivint contract, he was "never shown the full document." Instead, the Vivint Sales Manager showed the consumer the first two pages of the contract on a tablet, then flipped to the last page to get the consumer's signature agreeing to the contract. The consumer had no idea that the contract he signed consisted of more than those three pages and he was never provided with a physical copy of the contract or physical copies of the cancellation notice.

51. One consumer was told by Vivint Sales Managers that he would only need to pay for the solar electricity that he consumed, and that any excess production would be purchased by PNM at market rates. The consumer was told that he would receive credits on his bill for any such excess production. But this was untrue. Indeed, in many instances, Vivint appears to design Solar

Systems to produce more electricity than the consumer needed. Pursuant to the PPA Contract, consumers are required to purchase “all” of the electricity produced by their system, regardless of their actual electricity consumption.

52. As a result of Vivint’s misrepresentations, consumers were, and continue to be, harmed, and Vivint has been substantially enriched.

Vivint’s Erroneous Fixture Filings

53. On page 1 of the PPA, under the headings “Our Promises” and “Our Promises to You,” the PPA states: “We will **not** place a lien on Your Property” (emphasis added).

54. The PPA also contains the following statements:

We will not place a lien on Your Property. You authorize Us to make filings and recordings with relevant governmental authorities as may be necessary to provide notice of and to take security interest in Our ownership in the System and the System Interests, and Our right to access Your Property, including (without limitation) financing statements, UCC-1 financing statements and fixture filings.

Notwithstanding the manner in which the System is attached to Your Property, **nor any fixture filing by Us**, You and We hereby agree that the System and the System Interests shall remain Our sole personal property and shall not be deemed or characterized as a “fixture” or any part of the “realty”, as those terms may be defined by applicable law. It is further agreed that the installation of the System shall not be a repair, remodel, alteration, conversion, modernization of, or addition to, Your Property.

(emphasis added).

55. A fixture filing is the filing of a financial statement covering goods that are or will become fixtures to the real property. *See* NMSA 1978, § 55-9-102(40).

56. Fixtures are goods that have become so related to particular real property that an interest in them arises under real property law. *See* § 55-9-102(41).

57. Contrary to its representations to consumers, the fixture filings filed by Vivint are effectively liens, as they identify the consumer as a “debtor” and Vivint as a “secured party.” The

operative effect of these filings is to cloud title, creating substantial delays and difficulties in the sale or refinancing of real property. Consumers have been harmed by Vivint's filings. The Defendant has filed hundreds of such filings against the real properties of consumers in multiple counties throughout New Mexico.

58. The impact of the filings is significant, but consumers typically aren't aware of this significance until they attempt to sell their home or until they seek to refinance their mortgages. When consumers attempt to sell their homes, potential buyers, financing banks, and title companies take note of the fact that the homeowner is identified as a "debtor" on the UCC filings filed by Vivint with County Recorders. The false "debtor" and "secured party" designations are made despite the fact that consumers owe no debt to Vivint, and they imply the existence of a lien. By making these two false statements in each of its many filings, Vivint has harmed consumers and violated New Mexico law.

**The Vivint Officers Direct, Control Approve, Ratify, and
Actively Participate in Vivint's Fraud**

59. A person is responsible for conduct that the person performs or causes to be performed on behalf of a corporation just as though the conduct were performed on the person's own behalf. *See* UJI 14-4420; *see also Stinson v. Berry*, 1997-NMCA-076, ¶ 17, 123 N.M. 482, 943 P.2d 129 ("[I]f the officer or director directed, controlled, approved or ratified the activity that led to the injury, he or she can be held personally liable.").

60. "A director of a corporation has a duty to act to prevent injuries to third parties where he has knowledge, amounting to acquiescence, of the corporation wrongful acts." *C & H Const. & Paving Co., Inc. v. Citizens Bank*, 1979-NMCA-077, ¶12, 93 N.M. 150, 597 P.2d 1190.

61. Officers or agents are individually liable for violations of law committed by the corporation if the *officers or agents participated in or directed the acts* or practices, had

knowledge and authority to control the acts or practices, or acquiesced or sanctioned the acts or practices.

62. The Officers of Vivint have, as alleged in detail below, participated in and directed the acts of Vivint and its agents, representatives, and employees. They had the knowledge and authority to control the acts and practices of the company and sanctioned such acts or practices that resulted in violations of the UPA, False Advertising Act, and Racketeering Act.

63. The Vivint Officers, including CEO David Bywater and CFO Dana Russell, as well as Chief Revenue Officer Paul Dickson and Chief Sales Officer L. Chance Allred, are intensely focused on the sale of PPAs, closely monitoring and fostering the marketing and pricing of PPA contracts.

64. On May 9, 2017, during an earnings conference call, Vivint CEO David Bywater acknowledged the fact that Vivint's management was deeply invested in, and knowledgeable of, sales practices in each of Vivint's markets, explain that "we have invested heavily in the management, oversight, compensation incentives, and processes" Bywater noted that management's "integrated process allows us to carefully control the customers' experience from the beginning to the end." Bywater said that management had "been able to standardize best practices across all the markets we service, while maintaining the capability to meet the unique needs of each local market." Bywater also spoke directly of his knowledge of Vivint's sales managers, stating that the company's organic growth was improving as sales managers "become more productive and proficient in selling..." Bywater further acknowledged his focus on PPA contracts, noting that "we've also migrated to, more and more of our sales force, in markets that have higher PPA pricing." While discussing selling financed Solar Systems, Bywater continued

to focus on PPAs, noting that “we love PPAs,” and stating that “as long as you continue to sell PPAs in the right markets, they're both a good thing.” Bywater essentially admitted that PPAs have a special appeal because of the price escalator built into them when he admitted that Vivint had “done a nice price increase in those markets” where Vivint focused on PPA sales.

65. CFO Dana Russell agreed with Bywater on the May 9, 2017 call, stating that Vivint “doubled down in our key markets.” Russell echoed Bywater’s statements, acknowledging Vivint’s focus on markets with high PPA pricing:

I completely agree with what David said there. The key markets that we're in, we've actually seen some price increases and price increases in several utilities that we felt were marginal. And we've been able to hold volumes in those price, in those markets, as we've raised some prices.

Russell also indicated his critical awareness of the rates that Vivint charged for PPA contracts, noting that “[o]ur average PPA rate in the first quarter of 2017 was approximately \$0.139 compared to the average PPA rate in the first quarter of 2016 of \$0.127, a 9% year-over-year increase.”

66. During a conference call on March 16, 2017, CFO Russell highlighted the revenue growth from PPAs, “[d]uring the second half of the year our average PPA rates increased by approximately 7%. This was a combination of emphasizing markets with more favorable rates as well as price increases in select markets”

67. Paul Dickson, Vivint’s chief revenue officer is, according to Vivint, responsible for providing “financial operations advice” to Vivint.⁷ Previously, as Vivint’s Vice President of Operations, Dickson was

responsible for developing and overseeing Vivint Solar's integrated approach to providing distributed solar energy where we fully control the lifecycle of our customers' experience, including the initial professional consultation design and

⁷ <https://www.vivint.com/company/newsroom/press/new-executive-team-members>, last visited on January 10, 2018.

engineering process, installation and ongoing monitoring and service.”⁸ Vivint describes Dickson as having a “major influence on the success of the company since its infancy.” As Chief Revenue Officer, Dickson “oversee[s] the team focused on the sales process and will continue to build out Vivint Solar’s world-class sales operations group.

68. L. Chance Allred, Vivint’s chief sales officer, leads Vivint’s sales force and is responsible for the recruitment, development, and leadership of Vivint’s sales force, including its sales managers. As such, Allred oversees the practices undertaken by sales managers as well as the representations made to consumers by sales managers. Prior to being named chief sales officer, Allred was Vivint’s vice president in charge of sales. In both roles, Allred reported directly to CEO David Bywater.

IV. VIOLATIONS OF THE UPA

69. The UPA prohibits unfair or deceptive trade and unconscionable trade practices in the conduct of any trade or commerce. *See* § 57-12-3.

70. The UPA defines an "unfair or deceptive trade practice" as an act specifically declared unlawful pursuant to the UPA, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit ... that may, tends to or does deceive or mislead any person.

§ 57-12-2(D).

71. The UPA further defines an "unfair or deceptive trade practice" as:

- a. "[R]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have;" § 57-12-2(D)(5);
- b. “[D]isparaging the goods, services or business of another by false or misleading representations;” § 57-12-2(D)(8);

⁸ <https://www.prnewswire.com/news-releases/vivint-solars-paul-dickson-named-a-recharge-news-4040-new-energy-leader-260917781.html>, Last visited on January 10, 2018.

- c. “[M]aking false or misleading statements of fact concerning the price of goods or services, the prices of competitors or one's own price at a past or future’; § 57-12-2(D)(11);
- d. “[U]sing exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive.” § 57-12-2(D)(14); and
- e. “[S]tating that a transaction involves rights, remedies or obligations that it does not involve”§ 57-12-2(D)(15).

72. The UPA defines an "unconscionable trade practice" as

an act or practice in connection with ... the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment: (1) takes advantage of a lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid.

§ 57-12-2(E).

COUNT ONE

VIVINT REPRESENTS THAT GOODS OR SERVICES HAVE CHARACTERISTICS, USES, OR BENEFITS THAT THEY DO NOT HAVE. See, § 57-12-2(D)(5).

73. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

74. Vivint’s advertising makes both unsupported and inaccurate assertions regarding cost savings provided by its product as well as unqualified assertions that its product offers a general environmental benefit.

75. It is an unfair or deceptive trade practice to misrepresent directly or by implication that a product or package offers a general environmental benefit. 12.2.5.15 NMAC.

76. Vivint willfully represents that goods or services have characteristics, uses, or benefits that they do not have in violation of UPA.

COUNT TWO

VIVINT DISPARAGES THE GOODS, SERVICES OR BUSINESS OF ANOTHER BY FALSE OR MISLEADING REPRESENTATIONS. *See*, § 57-12-2(D)(8).

77. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

78. Vivint makes false or misleading representations that disparages the goods, services or business of another such as:

- a. “We only increase your rate at 2.9% per year. Compare that to how much utility companies have raised their rates.”; and
- b. “The way most electricity is currently produced is expensive, dirty and unsustainable.”

79. Vivint willfully disparages the goods, services or business of another by false or misleading representations in violation of UPA.

COUNT THREE

VIVINT MAKES FALSE OR MISLEADING STATEMENTS OF FACT CONCERNING THE PRICE OF GOODS OR SERVICES, THE PRICES OF COMPETITORS OR ITS OWN PRICE AT A PAST OR FUTURE TIME OR THE REASONS FOR, EXISTENCE OF OR AMOUNTS OF PRICE REDUCTION. *See*, § 57-12-2(D)(11).

80. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

81. As set forth in Counts I and II, *supra*, Vivint makes numerous representations regarding cost savings that consumers will realize by entering into a PPA with Vivint as well as representations regarding the prices charged by its competitors.

82. On page one of the PPA, under the headings “Our Promises” and “Our Promises to You,” the PPA states:

- a. “Your Energy Price will not increase by more than 2.9% per year”; or
- b. “The energy rate will never increase by more than 2.9% per year”.

83. Despite these representations, which imply that Vivint’s rates may go up by less than 2.9%, Vivint imposes a full 2.9% price increase during every year of the PPA contract.

84. Buried in the PPA, on a different page than the above representations, Vivint departs from its sales pitch, acknowledging that the price it charges “shall” increase by 2.9% per year. However, as set forth above, many consumers do not see this statement because they are never provided with a paper copy of the PPA contract and because the sales managers, who utilize tablets during their sales presentation and the execution of the contract, do not review the substantive portions of the contract with consumers prior to signing.

85. Vivint willfully makes false or misleading statements of fact concerning the price of goods or services, the prices of competitors or its own price at a past or future time in violation of UPA.

COUNT FOUR

VIVINT USES EXAGGERATION, INNUENDO OR AMBIGUITY ABOUT A MATERIAL FACT OR AN OMISSION OF A MATERIAL FACT. *See*, § 57-12-2(D)(14).

86. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

87. Vivint’s advertising and marketing demonstrates a willful pattern of using exaggeration, innuendo or ambiguity about material facts or omissions of material fact in violation of UPA. In its marketing and advertising, Vivint makes, *inter alia*, the following statements:

- a. “We take all the risk you take all the reward.”;

- b. “When the electric utility company raises their rates, you don’t have to worry because your solar rate is locked in.”;
- c. Solar panels are a “major upgrade” for homes;
- d. “Did you know that Solar Panels increase home value?”;
- e. Solar panels “[a]dd a valuable asset to your home[.]”
- f. “We are a solar utility company, so instead of buying your power from coal you’re getting it all off your roof.”;
- g. “People say, “Hey, it’s too good to be true”. It’s not that it’s free, it’s that it’s at no cost to them. All of us have already paid for this through our state and federal taxes.”; and
- h. “There is a good chance that savings will dip into 60% to 80% range.”

88. Vivint willfully uses exaggeration, innuendo or ambiguity about a material fact or an omission of a material fact in violation of UPA.

COUNT FIVE

VIVINT STATES THAT A TRANSACTION INVOLVES RIGHTS, REMEDIES OR OBLIGATIONS THAT IT DOES NOT. *See*, § 57-12-2(D)(15).

88. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

89. On page one of the PPA, under the headings “Our Promises” and “Our Promises to You,” the PPA states: “We will not place a lien on Your Property.”

90. The PPA also contains the following statements:

We will not place a lien on Your Property. You authorize Us to make filings and recordings with relevant governmental authorities as may be necessary to provide notice of and to take security interest in Our ownership in the System and the System Interests, and Our right to access Your Property, including (without

limitation) financing statements, UCC-1 financing statements and fixture filings. [...]

Notwithstanding the manner in which the System is attached to Your Property, nor any fixture filing by Us, You and We hereby agree that the System and the System Interests shall remain Our sole personal property and shall not be deemed or characterized as a “fixture” or any part of the “realty”, as those terms may be defined by applicable law. It is further agreed that the installation of the System shall not be a repair, remodel, alteration, conversion, modernization of, or addition to, Your Property.

91. A fixture filing is the filing of a financial statement covering goods that are or will become fixtures. *See* NMSA 1978, § 55-9-102(40).

92. Fixtures are goods that have become so related to particular real property that an interest in them arises under real property law. *See* § 55-9-102(41).

93. The Defendant has filed thousands of filings against the real properties of consumers in multiple counties.

94. Each of these fixture filings identifies the consumer at issue as a “debtor” and Vivint as the “secured party,” indicating that Vivint is a lienholder when, in fact, it is not.

95. By defining the consumer as a “debtor” and Vivint as the “secured party” in a UCC filing associated with a consumer’s property, Vivint clouds title, creating confusion and expense when the consumer attempts to sell or refinance the property.

96. Vivint’s practice of fixture filings demonstrates a willful pattern of falsely stating that the transaction involves rights, remedies or obligations that it does not in violation of the UPA.

COUNT SIX

VIVINT ENGAGES IN UNCONSCIONABLE TRADE PRACTICES.

See, § 57-12-2(E).

97. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

98. Defendant's business activities reveal a pattern and practice of unfair, deceptive, and unconscionable trade practices in offering and providing solar power to consumers.

99. From the inception of the business relationship, there is an imbalance in bargaining power between Vivint and consumers.

100. Vivint engages in a misleading marketing campaign to induce consumers to enter into unconscionable contracts of adhesion.

101. Vivint presents consumers with a PPA, a standardized twenty-one (21) page document, in an electronic format readable only on a sales manager's device at the time of sale.

102. Vivint controls the action of signing the contract by making consumers sign on an electronic tablet while the sales manager "reviews the contract terms (e.g. 20-year term, 2.9% escalator, etc.)."

103. Vivint fails to give the consumer a copy of the PPA and give proper notice of the right to cancel the contract.

104. Vivint's contract contains provisions for a "2.9% escalator" clause, the filing of liens and waiving of all incentive payments consumers could receive.

105. In December of 2013, Vivint stated it was an "early adopter of the PPA model". As an early adopter of the PPA model, Vivint has perfected the PPA's language and the PPA model in order to maximize its profit to the detriment of consumers and their legal rights.

106. Vivint's unfair, deceptive, and unconscionable business practices in the course of offering solar power grossly takes advantage of consumers' lack of knowledge and experience with PPAs, to the detriment of consumers and in violation of the UPA. *See* § 57-12-3.

COUNT SEVEN

DEFENDANT DECEIVES AND MISLEADS CONSUMERS WHEN ITS SALESPERSONS FAIL TO ACQUIRE THE PROPER PERMITS REQUIRED TO SOLICIT AT PRIVATE RESIDENCES. *See* § 57-12-7, § 57-12-2(D).

107. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

108. According to the Operations Manual, “Sales Managers are not allowed to actively sell in areas where they are unlicensed.”

109. Although Vivint’s sales managers have current door-to-door sales permits for the cities of Rio Rancho, Albuquerque and Los Lunas, throughout the relevant period, Vivint’s sales managers engaged and continue to engage in door-to-door sales in multiple jurisdictions, including but not limited to the cities of Santa Fe, and Belen, the Town of Bernalillo and the villages of Bosque Farms and Tijeras, at various times without the required permits.

110. Many municipalities have made it unlawful for any person to conduct any business solicitation in any location, particularly solicitations at private residences in the city, without a valid door-to-door sales permit. *See e.g.*, Albuquerque, NM Rev. Ord. Chap. 3, Art. I, §§ 13-3-1-1 to -99 (1976, as amended 1991); *see also* Santa Fe City Code of 1987, Chapter XVIII, Article 18-3, §§ 18-3.1 to -18-3.14 (1987, as amended 2010)(requires an application, license and criminal background check); Belen Municipal Code, Ord. 5.04.030 (requiring solicitors to pay a fee of 25.00 per day and provide a bond of \$1,000.00).

111. The purpose of these ordinances are to protect the general public from unwanted or unsolicited intrusions into private residences

112. Upon information and belief, at various times Vivint’s sales managers have engaged in and continue to engage in unlicensed solicitations.

113. While the responsibility to acquire such a permit lies with each sales manager, Vivint fails to enforce such a requirement, thereby endorsing, condoning and ratifying such unlawful activity, and continues to accept and keep the benefits of the ultimate sales.

114. Pursuant to Section 57-12-7 of the UPA, a transaction forbidden by a municipality's ordinance is subject to the UPA. Vivint's conduct in soliciting at private residences, as defined by each ordinance, without a proper permit is an unfair or deceptive trade practice as defined by the UPA.

COUNT EIGHT

VIVINT FAILS TO FURNISH THE BUYER WITH A FULLY COMPLETED RECEIPT OR COPY OF ANY CONTRACT PERTAINING TO SUCH SALE AT THE TIME OF ITS EXECUTION. *See*, § 57-12-21(A)(1).

115. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

116. “In connection with any door-to-door sale, it constitutes an unfair or deceptive trade practice for any seller to[] fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution.” *Id.*; § 57-12-21(A)(1).

117. All of the Vivint's PPAs are executed on an electronic tablet. The resulting PPA is subsequently electronically mailed to the consumer.

118. Vivint does not provide consumers a fully completed copy of the PPA pertaining to the sale at the time of its execution.

119. Vivint's failure to provide the consumer with a fully executed copy of the PPA at the time of its execution is an unfair or deceptive trade practice as defined by the UPA. *Id.*

COUNT NINE

VIVINT FAILS TO PROPERLY INFORM CONSUMERS OF

THEIR RIGHT TO CANCEL. See § 57-12-21(A)(2).

120. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

121. Under New Mexico law,

In connection with any door-to-door sale, it constitutes an unfair or deceptive trade practice for any seller to[] fail to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION", that shall be attached to the contract or receipt and easily detachable.

Id.; § 57-12-21(A)(2).

122. Vivint does not provide consumers with a completed "NOTICE OF CANCELLATION" in duplicate that is easily detachable from the contract. *Id.*

123. Vivint's failure to properly inform consumers of their right to cancel or provide two completed copies of "NOTICE OF CANCELLATION" is an unfair or deceptive trade practice as defined by the UPA. *Id.*

COUNT TEN

VIVINT'S PPA INCLUDES A WAIVER OF THE RIGHTS TO WHICH THE BUYER IS ENTITLED. See § 57-12-21(A)(4).

124. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

125. In connection with any door-to-door sale, it constitutes an unfair or deceptive trade practice for any seller to include in any door-to-door contract any waiver of any of the rights to which the buyer is entitled under the UPA, including specifically his right to cancel the sale in accordance with New Mexico law. *Id.*; § 57-12-21(A)(4).

126. Vivint's contracts states: "You consent and agree to receive electronically all communications, agreements, documents, notices, records, disclosures, and other information (collectively, " Electronic Records') that We provide in connection with the Services. Electronic Records include (without limitation): this Agreement, the Notice of Cancellation, and the Customer Packet."

127. Vivint's purported waiver of the rights to which the buyer is entitled, namely the right to receive a copy of the PPA at the time of its execution and receive two copies of the NOTICE OF CANCELLATION, " is an unfair or deceptive trade practice as defined by the UPA. *Id.*

COUNT ELEVEN

VIVINT IS WILLFULLY USING OR HAS WILLFULLY USED A METHOD, ACT OR PRACTICE IN VIOLATION OF UNFAIR PRACTICES ACT. *See* § 57-12-8.

128. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

129. In any action brought under Section 57-12-8, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Unfair Practices Act, the Attorney General, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty of not exceeding five thousand dollars (\$5,000) per violation. *See* § 57-12-11.

130. Vivint's pattern of unconscionable actions as alleged herein demonstrates it has willfully violated the UPA in its dealings with 3,566 consumers that entered into Vivint's PPA.

131. Plaintiff/Petitioner requests monetary damages and injunctive relief, as well as costs and reasonable attorneys' fees.

V. VIOLATION OF THE FALSE ADVERTISING ACT

COUNT TWELVE

VIVINT IS WILLFULLY OR HAS WILLFULLY VIOLATED THE FALSE ADVERTISING ACT. See NMSA 1978, §§ 57-15-1 TO -10.

132. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

133. The Attorney General brings a claim against Vivint for violation of NMSA § 57-15-1 for false advertising.

134. False advertising includes “advertising, including labeling, which is misleading in any material respect[.]” NMSA § 57-15-2. When determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. *Id.*

135. As set forth above, Vivint has engaged and continues to engage in false advertising by, *inter alia*:

- a. misrepresenting the savings that consumers will realize by entering into a PPA contract;
- b. misrepresents that goods or services have characteristics, uses, or benefits that they do not;
- c. misrepresenting the cost increases that consumers will face once they’ve entered into the PPA contract;
- d. misrepresenting the costs charged by competitors;
- e. misrepresenting Vivint’s notice filing procedures, and concealing its practice of filing erroneous UCC financing statements, which appear as liens on the

real property of consumers by identifying them as debtors and Vivint as the secured party in the filings; and

- f. misrepresenting that it is properly licensed to do business in each of the jurisdictions in which it operates.

136. Pursuant to NMSA § 57-15-8, the Attorney General is empowered to prosecute actions for violation of the False Advertising Act.

137. Notice of this action has been served on Vivint and Vivint has failed to establish why such an action should not be commenced.

VI. FRAUD
COUNT THIRTEEN
CIVIL FRAUD

138. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

139. The Attorney General brings a claim against Vivint based on common-law fraud pursuant to its *parens patriae* authority for the purpose of protecting its citizens for unfair, deceptive, and unconscionable trade practices.

140. Vivint is liable for damages proximately caused by its fraudulent misrepresentations. *See* UJI 13–1633.

141. The elements of fraud include (1) a misrepresentation of fact, (2) either knowledge of the falsity of the representation or recklessness on the part of the party making the misrepresentation, (3) intent to deceive and to induce reliance on the misrepresentation, and (4) detrimental reliance on the misrepresentation.

142. Vivint’s representatives made material and untrue representations of fact to each of the 3,566 consumers with whom they have contracted.

143. Vivint has made the following false or misleading misrepresentations:
- a. Consumers will save “10%-30%” off of their electricity rates;
 - b. “We will not place a lien on Your Property.”
 - c. “Your Energy Price will not increase by more than 2.9% per year[.]”;
 - d. “The energy rate will never increase by more than 2.9% per year[.]”;
 - e. “It’s not that it’s free, it’s that it’s at no cost to them.”;
 - f. “Solar Panels increase home values[.]”;
 - g. “Solar panels are a “major home upgrade.”;
 - h. We take all the risk you take all the reward.”;
 - i. “Instead of buying your power from coal you’re getting it all off your roof.”;
 - j. “We believe energy should do more, should power our homes while giving back to the planet, and that starts with you.”
 - k. “All of us have already paid for this through our state and federal taxes.”; and
 - l. “There is a good chance that the savings will dip into 60% to 80% range.”

144. Each representation was made with the intent to deceive and to induce consumers to rely on the representation.

145. Consumers did in fact rely on the representations by entering into the PPA with Vivint. Each of the PPA’s entered into by consumers has been secured by fraud in the inducement to enter into the contract and therefore is voidable at the option of the consumer.

146. New Mexico Law enables a party to recover damages proximately caused by fraud and that a plaintiff alleging fraud may recover such damages *as are the direct and natural consequences* of the reliance on a fraudulent representation. *See id.*; *see also Indus. Supply Co. v. Goen*, 1954-NMSC-107, ¶ 12, 58 N.M. 738, 276 P.2d 509.

VII. RACKETEERING

COUNT FOURTEEN

VIVINT IS WILLFULLY VIOLATING OR HAS WILLFULLY VIOLATED THE RACKETEERING ACT. *See* §§ 30-42-1 TO -6.

147. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

148. The State may file an action on behalf of those persons injured or to prevent, restrain or remedy racketeering as defined by the Racketeering Act. *Id.*

149. According to the Racketeering Act, “racketeering” means any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year[.]” § 30-42-3(A). The chargeable or indictable act must be one of twenty-five enumerated offenses. *Id.* One of the enumerated acts is criminal fraud. *See* § 30-42-3(A)(6).

150. According to the Racketeering Act, “person” means an individual or entity capable of holding a legal or beneficial interest in property[.]” § 30-42-3(B).

151. Vivint is a person as defined by the Racketeering Act. *Id.*

152. According to the Racketeering Act, “enterprise” means a sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or a group of individuals associated in fact although not a legal entity and includes illicit as well as licit entities[.]” § 30-42-3(C).

153. Vivint is an enterprise as defined by the Racketeering Act. *Id.*

154. According to the Racketeering Act, "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities”. § 30-42-3(D).

155. Vivint has received proceeds derived, directly or indirectly, from a pattern of racketeering activity, specifically criminal fraud, in which Vivint has participated, to establishment or operate an enterprise.

156. By and through its misrepresentations to consumers, Vivint has defrauded consumers, enticing them into long-term PPA contracts to the consumers' detriment.

157. This detriment includes the payment of electricity rates that are, in fact, higher than those charged by competitors, including PNM.

158. As a result of these misrepresentations, consumers are defrauded over the course of the twenty year PPA contracts, in amounts exceeding \$500.

159. Vivint has engaged in a pattern of racketeering activity, specifically criminal fraud as alleged herein, in order to acquire or maintain interest in or control of an enterprise. Here, Vivint was financially enriched as a result of its unlawful conduct.

160. Vivint representatives conducted or participated, directly or indirectly, in the conduct of the Vivint's affairs by engaging in a pattern of racketeering activity, specifically criminal fraud, as alleged herein.

161. The Vivint Officers, and each of the Vivint entities engaged in this pattern of racketeering activity by, *inter alia*:

- a. creating and adopting a sales structure that relies on false or misleading representations to consumers;
- b. setting rates for PPA contracts that are higher than those charged by PNM;
- c. approving marketing material that is false and misleading; and
- d. entering into PPA contracts with consumers that are marketed based on false and/or misleading representations.

162. Vivint is willfully violating or has willfully violated the racketeering act. *See* §§ 30-42-1 to -6.

VIII. REQUEST FOR DECLATORY RELIEF

COUNT FIFTEEN

REQUEST FOR DECLARATORY RELIEF

163. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

164. Plaintiff/Petitioner requests that this Court declare all transactions of the Defendant sharing the same or similar unlawful scheme in violation of the UPA, False Advertising Act, Racketeering Act and Fraud to be voidable as a matter of New Mexico law.

165. Plaintiff/Petitioner requests that this Court declare null and void all liens and fixture filings obtained in violation of the UPA, False Advertising Act, Racketeering Act and Fraud.

166. Plaintiff/Petitioner requests that this Court declare that all of Vivint's PPA's are voidable as a result of Vivint's fraud in the inducement or obtained in violation of the UPA, False Advertising Act, Racketeering Act and Fraud.

167. Plaintiff requests reimbursement of costs and an award of reasonable attorneys' fees.

IX. REQUEST FOR INJUNCTIVE, EQUITABLE AND ANCILLARY RELIEF

COUNT SIXTEEN

INJUNCTIVE, EQUITABLE AND ANCILLARY RELIEF, INCLUDING THE DISGORGEMENT OF ALL ILL-GOTTEN GAINS FOR UPA VIOLATIONS.

168. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

169. Vivint's business activities violate New Mexico law and reveal a pattern and practice of exploiting consumers through the use of deceptive acts and business practices.

170. On this basis, the New Mexico Attorney General petitions the Court for temporary or permanent injunctive relief pursuant to the UPA, False Advertising Act, Racketeering Act and Fraud.

171. In any action filed pursuant to the Unfair Practices Act, the attorney general may petition the district court for temporary or permanent injunctive relief and restitution. *See* § 57-12-8.

172. Defendant's form of contract purports to require that certain disputes be individually arbitrated. Defendants' arbitration clause is not enforceable because the contract is substantively and procedurally unconscionable and/or is against public policy. To the extent that Defendant asserts that claims asserted herein, on behalf of and/or by Vivint's New Mexico customers, are subject to an arbitration agreement(s), Plaintiff/Petitioner requests declaratory and/or injunctive relief in the form of a finding as void and unenforceable each such a purported arbitration agreement.

173. When seeking injunctive relief pursuant UPA, the Attorney General is not required to post bond. *See* §57-12-8(A).

174. Plaintiff/Petitioner requests reimbursement of costs and an award of reasonable attorneys' fees.

COUNT SEVENTEEN

EQUITABLE RECOVERY UNDER PRINCIPLES OF RESTITUTION AND UNJUST ENRICHMENT.

175. Plaintiff/Petitioner re-alleges and incorporates the factual allegations set forth above.

176. As a direct and proximate result of Vivint's sales of "solar power," including but not limited to, Vivint's receipt of incentive payments, Defendant has been unjustly enriched.

177. This Court should find that Vivint has been unjustifiably enriched and order Vivint to disgorge all monies received as a result of its unlawful business practices.

WHEREFORE, Plaintiff/Petitioner respectfully requests that:

A. The Court find that it has subject matter jurisdiction over the matter brought before it;

B. The Court find it has personal jurisdiction over the parties to this action;

C. The Court find that venue is proper;

D. Plaintiff/Petitioner is entitled to trial by jury of twelve persons;

E. The Court find the Defendant has violated and continue to violate the UPA;

F. The Court find the Defendant's trade practices are unconscionable;

G. The Court find the Defendant has willfully used a method, act or practice to violate the UPA;

H. The Court find the Defendant's PPA Contracts are voidable and unenforceable because they are substantively and procedurally unconscionable and/or against public policy;

I. The Court find the Defendant has engaged in fraud;

J. The Court find the Defendant has engaged in racketeering;

K. The Court find the Officers of Vivint are each personally liable for each of the its fraudulent acts;

L. The Court declare all transactions of the Defendant sharing the same or similar unlawful scheme in violation of the UPA, False Advertising Act, Racketeering Act and Fraud to be unenforceable as a matter of New Mexico law;

M. The Court issue a temporary injunction restraining the Vivint from engaging in the unlawful conduct alleged herein;

N. The Court issue a permanent injunction restraining the Vivint from engaging in conduct which is found to be unlawful pursuant to UPA, False Advertising Act, Racketeering Act and Fraud;

O. The Court find that all of Vivint's PPA's in New Mexico are voidable as a result of Vivint's fraud in the inducement;

P. The Court order Vivint to release liens and fixture filings associated with the same or similar unlawful business acts;

Q. The Court order the Defendant to pay restitution to all persons for any monies which were acquired through any practice found to be unlawful pursuant to UPA, False Advertising Act, Racketeering Act and Fraud;

R. The Court order Defendant to disgorge all monies collected from engaging in conduct which is found to be unlawful pursuant to UPA, False Advertising Act and Fraud;

S. The Court order the Vivint to pay to the State of New Mexico a civil penalty of up to FIVE THOUSAND DOLLARS (\$5,000.00) per willful violation of the UPA;

T. The Court order the Defendant to reimburse the New Mexico Office of the Attorney General for its attorney fees and costs incurred in the investigation and prosecution of this matter; and

U. For such other relief as the Court deems just and proper.

V. Plaintiff/Petitioner requests a trial by jury.

Respectfully Submitted,

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*Special Assistant Attorneys General by
Commission, on behalf of Plaintiff/Petitioner*

**Pro Hac Vice Applications to be Filed*