

1 **BEFORE THE TRIBUNALS OF**
2 **THE AMERICAN ARBITRATION ASSOCIATION**

3 *In the Matter of the Arbitration between*
4 T3 Enterprises, Inc., an Idaho corporation,
5
6 Claimant,
7
8 and
9 Safeguard Business Systems, Inc., a
10 Delaware corporation,
11
12 Respondent.

AAA No. 01 15 0002 6860

INTERIM AWARD

Maureen Beyers, Chair
Hon. Kenneth Kato (Ret.), Arbitrator
Van Elmore, Arbitrator

Lance Tanaka, Case Manager

13 Claimant T3 Enterprises, Inc. (“T3”) brings this arbitration for breach of contract,
14 breach of covenant of good faith and fair dealing, intentional interference with economic
15 advantage, and violations of the Texas Deceptive Trade Practices Act based on actions of the
16 Respondent Safeguard Business Systems, Inc. (“SBS”) in connection with the parties’ July 28,
17 2006 Distributor Agreement. (Ex. 10.) Respondent denies the allegations and asserts the
18 following affirmative defenses: lack of material breach, estoppel, justification, proximate
19 cause, release, waiver and bad faith. Pursuant to the agreement between the parties, this
20 arbitration is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the American
21 Arbitration Association’s Rules of Commercial Arbitration.

22 **PRELIMINARY ISSUES**

23 The evidentiary hearing in this matter was conducted in Boise Idaho on August 2-5 and
24 August 8, 2016, before Maureen Beyers (Chair), Honorable Kenneth Kato (Ret.) and Van
25 Elmore. T3 appeared through counsel James Mulcahy and Doug Luther of Mulcahy LLP and
26 was represented by Dawn Teply, its president. SBS appeared through counsel Steven
27 Schossberger and Dane Bolinger of Hawley Troxell, and was represented by Michael Dunlap,
28 its General Counsel.

1 At the commencement of the evidentiary hearing, the parties, through Ms. Teply and
2 Mr. Dunlap affirmed that they accepted the Panel's composition.

3 During the course of the proceedings, the Panel heard testimony from the following live
4 witnesses: Michael Dunlap, Larry Berliner, Dawn Teply, Tressa McLaughlin, Jamie
5 McCormick, Robert Taylor, Ron Gambassi, and George Gersema. The Panel also heard
6 excerpts of the deposition testimony of SBS's President J.J. Sorrenti.

7 The parties stipulated to the admission of all exhibits except the following: Exhibits
8 276, 282, 573, 574, 575, 576 and 577. As to those exhibits, the parties' relevancy objections
9 were overruled. No exhibits offered were excluded.

10 The evidentiary hearing was stenographically recorded by Tucker & Associates, and
11 transcripts were made available to the Panel and to both parties.

12 At the conclusion of the evidentiary hearing, the parties, through Ms. Teply and Mr.
13 Dunlap affirmed that they each had received a full and fair hearing.

14 Following the evidentiary hearing, the Panel kept the record open to receive post-
15 hearing briefs, first on liability and damages and, subsequently, if necessary, on an award of
16 attorneys' fees and costs.

17 The undersigned arbitrators, having been duly appointed in accordance with the
18 agreement of the parties dated August 28, 2006, having heard the proofs and arguments of the
19 parties, hereby make the following Preliminary Award on liability and damages.

20 **FINDINGS OF FACT**

21 **A. Background and Relevant Sections of the Distributor Agreement.**

22 1. SBS is engaged in the distribution of Safeguard brand products and business
23 services through a nationwide network of distributors. SBS distributors solicit orders from
24 SBS's customers for SBS products and services including W2 and other tax processing and
25 products ("Safeguard Systems") provided by Deluxe Corporation (SBS's parent) ("Deluxe"),
26 and other suppliers approved by SBS. Orders for Safeguard Systems are billed through SBS.
27 Where the distributor purchased the products directly from approved vendors, SBS administers
28 the customer billing and accounts receivable and pays commissions to the distributor. SBS also

1 provides new products and services to the SBS distributors, monitors and administers exclusive
2 account protections and the associated rotation of commission payments, and provides a
3 website for ordering and for product and services information. SBS also provides regular
4 training programs and meetings, manuals, promotional materials, newsletters, policy
5 documents, national and local referral sources and provides communication to distributors
6 regarding existing and potential customer inquiries. In exchange for these core services, the
7 distributor pays SBS a fee out of each customer order on an ongoing basis. (Ex. 10.)

8 2. On June 1, 1987, pursuant to an agreement with SBS, Roger Thurston
9 (“Thurston”) became an SBS distributor. On November 13, 1995, Thurston assigned his SBS
10 distributor business to his corporate entity, Thurston Enterprises.

11 3. In 1995, Thurston hired Teply to serve as a sales representative for Thurston
12 Enterprises. During the summer of 2006, after working for Thurston Enterprises for
13 approximately 11 years, Teply purchased Thurston Enterprises’ exclusive rights to
14 commissions on all sales to almost 2,000 of his customers. Teply formed T3 and purchased
15 these exclusive commission rights, including commissions for the sale of data processing
16 services. The purchase was approved by SBS, which transferred the Protected Customers
17 (defined below) to T3. (Ex. 7.)

18 4. Pursuant to their agreement, T3 agreed to pay Thurston Enterprises \$598,118.32,
19 in 120 monthly installments of \$4,984.32 in return for T3’s “rights to solicit, and receive
20 commissions on” more than 1,863 of Thurston Enterprises’ customers, the office furniture and
21 the rights to a list of referral sources from whom Thurston had obtained leads and assistance.
22 Teply also provided Thurston Enterprises with a “Personal Continuing Guarantee” in which she
23 “unconditionally” guaranteed payment of the \$598,118.32. (Ex. 8.)

24 5. Contemporaneously, T3 entered into an agreement with SBS on July 28, 2006.
25 (“T3 Agreement” or the “Distributor Agreement”). T3 entered into the Distributor Agreement
26 to obtain the rights, services and SBS support that is given to SBS distributors. Foremost
27 among these services were the online ordering and product information website, account or
28

1 customer protection contractual rights and SBS's enforcement of commission protection and
2 associated commission rotation.

3 6. The Distributor Agreement contains the following relevant provisions:

4 **DISTRIBUTOR AGREEMENT BETWEEN SAFEGUARD BUSINESS**
5 **SYSTEMS, INC. ("WE" or "SAFEGUARD") AND T3 ENTERPRISES,**
6 **INC. ("YOU" or "DISTRIBUTOR")**

7 You are appointed our sales agent ("Distributor") for those Safeguard
8 products and services defined in the attached Addenda, under the terms
9 set forth in such Addenda, plus any new Safeguard Systems (pursuant to
10 Paragraph 3 below) which are designed for sale to business and
11 professional markets which you accept by signing the applicable product
12 addendum and complying with its terms (collectively, "Safeguard
13 Systems"), on the following terms:

14 1. PRODUCTS:

15 You shall have the right, in the territory described in Exhibit A
16 (the "Territory"), to solicit orders of Safeguard Systems, as an
17 independent agent, in accordance with the price schedules
18 published by Safeguard from time to time, and in accordance
19 with other terms and conditions including, for example, with
20 respect to submitted orders electronically and filling out design
21 forms, as Safeguard may specify from time to time.

22 2. TERRITORY:

23 You are not authorized to represent Safeguard or solicit orders of
24 Safeguard Systems outside the Territory except pursuant to our
25 written policies or guidelines to the contrary that are in effect
26 from time to time such as, for example, those pertaining to out-
27 of-territory sales from referral sources. Your Territory is non-
28 exclusive and this Agreement does not prevent Safeguard from
selling Safeguard Systems inside the Territory through other
persons or means.

3. FUTURE PRODUCTS

From time to time Safeguard may offer to you the right to offer
and sell new Safeguard Systems within the Territory of any
future office supplies and accessories, or data processing
products or services which are either: (a) manufactured by
Safeguard; or (b) made available by Safeguard through strategic
alliances with selected vendors. Products manufactured by
Safeguard or made available through strategic alliances
established by Safeguard as well as Safeguard-approved sourced
products, which are identified as of the date of this Agreement

1 and/or added from time to time are collectively referred to as the
2 "Safeguard Systems". You may accept Safeguard's offer by
3 signing the applicable addendum, which will contain the terms
4 and conditions, such as quotas, commission rates, upon which
5 Safeguard is willing to permit you to represent it with respect to
6 such new Safeguard System, when it is offered to you. You shall
7 only have the right to represent Safeguard with respect to such
8 new Safeguard Systems on a non-exclusive basis.

6 4. ACCOUNT PROTECTION RIGHTS:

7 You shall have the exclusive right to the commissions generated
8 on sales of Safeguard Systems to any customer listed on Exhibit
9 B. This exclusive right to commissions applies to Safeguard
10 Systems sales to each such customer for so long as is specified on
11 Exhibit B or until this Agreement is terminated; however, your
12 exclusive right to commissions on sales of Safeguard Systems to
13 any customer shall expire if that customer has not purchased any
14 Safeguard System within thirty-six (36) months after the invoice
15 date of such customer's last prior purchase of any Safeguard
16 System.

13 5. RELATIONSHIP BETWEEN SAFEGUARD AND YOU AS
14 AN INDIVIDUAL OR CORPORATION.

15 (A) The relationship between Safeguard and you shall be that
16 of principal and independent sales agent, and not employer and
17 employee or buyer and seller. . . .

17 * * * *

18 6. OPERATION AND PAYMENT OF COMMISSIONS

19 (A) All orders which you solicit and send to us pursuant to
20 this Agreement shall be processed by us in our normal and
21 customary manner. Except pursuant to written administrative
22 policies then in effect, or with our prior written consent, you shall
23 not submit orders (and Safeguard shall not accept them) where
24 the Safeguard Systems are or appear to be intended to be resold
25 by the customer.

24 (B) We shall bill and ship to customers directly for orders
25 credited to you and the customer shall pay us directly. You are
26 expressly prohibited from converting to your own account any
27 customer payments issued to Safeguard. For your services
28 hereunder you shall receive commission payments pursuant to the
commission rate specified in the applicable product Addendum
on the net sales of Safeguard Systems credited to you; however,
commission rates may be changed, upon ninety (90) days written

1 notice, at our sole discretion due to a change in economic or
2 competitive conditions; but such changes can only be made in
3 connection with a broad policy change affecting all distributors
4 (except those, if any, whose contracts provide otherwise) and
5 provided further that any such change in commission rates shall
6 only affect sales made after an announcement by Safeguard. **For
7 the purpose of calculating the commission payable to you, net
8 sales of Safeguard Systems means the amount actually
9 received by us with respect to sales credited to you, less:**

10 **(i) all taxes applicable thereto;**

11 **(ii) all transportation and freight costs applicable
12 thereto;**

13 **(iii) all handling costs applicable thereto;**

14 **(iv) all returns and allowances.**

15 * * * *

16 7. **SAFEGUARD'S DUTIES AND OBLIGATIONS**

17 In addition to those duties and obligations described elsewhere in
18 this Agreement, Safeguard shall:

19 (A) Use its best efforts, consistent with your status as an
20 independent sales agent, our obligations to other distributors,
21 and our financial and personnel limitations, to assist you in
22 the solicitation of orders of Safeguard Systems within the
23 Territory by furnishing to you, upon terms not less favorable
24 to you than are generally offered to other comparable
25 distributors, such samples, technical and descriptive
26 information as you may, at your discretion, reasonably
27 request from time to time.

28 (B) Forward to you, with reasonable promptness, copies of all inquiries
and other correspondence relating to Safeguard Systems received by
Safeguard from customers identified on Exhibit B, together with
copies of Safeguard's reply to such inquiries or correspondence.

* * * *

17. **MISCELLANEOUS**

(C) Limitation of Damages. THE DAMAGES RECOVER-
ABLE BY EITHER PARTY HERETO FOR ANY
CONTROVERSY OR CLAIM, WHETHER FOR BREACH
OF CONTRACT, TORT, VIOLATION OF STATUTE, OR
OTHERWISE, BASED UPON, ARISING OUT OF, OR
RELATED TO THIS AGREEMENT, A BREACH

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THEREOF, OR THE COMMERCIAL OR ECONOMIC RELATION BETWEEN THE PARTIES, SHALL BE LIMITED TO ACTUAL DAMAGES FOR COMMERCIAL LOSS. NEITHER PARTY HERETO SHALL BE LIABLE TO THE OTHER FOR PUNITIVE DAMAGES, OR FOR COMPENSATORY DAMAGES FOR EMOTIONAL DISTRESS.

(D) Limitation of Actions. THE PARTIES MUTUALLY AGREE THAT ANY CLAIM OF ANY KIND BASED UPON, ARISING OUT OF, OR RELATED TO THIS AGREEMENT, A BREACH THEREOF, OR THE COMMERCIAL OR ECONOMIC RELATION BETWEEN THE PARTIES, SHALL BE BARRED UNLESS ASSERTED BY THE COMPLAINING PARTY BY THE COMMENCEMENT OF AN ACTION WITHIN ONE YEAR AFTER THE FIRST INACTION OR ACTION TO WHICH THE CLAIM RELATES.

* * * *

18. GOVERNING LAW.

...this Agreement, the distributorship and the relationship between you and Safeguard will be governed and construed under and in accordance with the laws of Texas, except that the provisions of the Texas Deceptive Trade Practices Act (and the regulations thereunder) will not apply unless its jurisdictional requirements are met independently without reference to this subsection.

21. DISPUTES/ARBITRATION/WAIVER OF JURY TRIAL

* * * *

(B) . . . THE ARBITRATORS SHALL HAVE THE RIGHT TO AWARD OR INCLUDE IN THEIR AWARD ANY RELIEF WHICH THEY DEEM PROPER IN THE CIRCUMSTANCES, INCLUDING WITHOUT LIMITATION, MONEY DAMAGES (WITH INTEREST ON UNPAID AMOUNTS FROM DATE DUE), SPECIFIC PERFORMANCE, INJUNCTIVE RELIEF. PROVIDED THAT THE ARBITRATOR DOES NOT HAVE THE RIGHT TO AWARD EXEMPLARY OR PUNITIVE DAMAGES.

* * * *

1 **EXHIBIT B**
2 **TO THAT CERTAIN DISTRIBUTOR AGREEMENT BETWEEN**
3 **SAFEGUARD BUSINESS SYSTEMS, INC. AND T3**
4 **ENTERPRISES, INC.**

5 You shall have the exclusive right to the applicable commissions on
6 sales of Safeguard Systems to:

7 (i) each customer in the Territory whose first order of Safeguard
8 Systems is directly the result of your efforts and is credited to
9 you, except National Accounts, Banks (and Bank referrals) and
10 other referral sources with respect to which you have failed to
11 comply with Paragraph 8(C); and

12 (ii) the Safeguard customers listed in Safeguard computer under
13 Distributor #04F7-XX[.]

14 In addition, your exclusive right to commission on sales of Safeguard
15 Systems to any customer shall expire if that customer has not purchased
16 any Safeguard System within thirty-six (36) months after the invoice
17 date of such customer's last prior purchase of any Safeguard System.

18 (Ex. 10.)

19 **B. The Account Protection Rights.**

20 7. The language of the Distributor Agreement is unambiguous. SBS agreed that, if
21 T3 solicited an order with a customer for any Safeguard Systems, then T3 was entitled to the
22 exclusive rights to all commissions generated from *any and all* sales of Safeguard Systems to
23 that customer for the next 36 months ("Protected Customer") (Ex. 10 ¶ 4.)

24 8. The exclusive right to commissions expired "only if that customer has not
25 purchased any Safeguard System and paid in full for such purchase, within thirty-six (36)
26 months after the invoice date of such customer's last prior purchase of any Safeguard System."
27 (Ex. 10 at ¶ 4 and Ex. B thereto.) Further, anytime a new sale is made to a Protected Customer,
28 the 36 months of exclusive rights to commissions for that Protected Customer starts over. (Ex.
10 at ¶ 4 and Ex. B thereto.)

9. Finally, the T3 Distributor Agreement also provided if any other SBS distributor
or Safeguard itself sells to one of T3's Protected Customers, the commissions on the sales must

1 be paid to T3. (Ex. 10 at ¶ 4 and Ex. B thereto.) The rights described above are collectively
2 referred to herein as “Account Protection Rights.”

3 10. The Account Protection Rights operate as an exclusive right to commissions on
4 sales of Safeguard Systems to these Protected Customers. Consequently, if SBS distributors or
5 SBS itself, solicit sales of Safeguard Systems to the Protected Customers of another SBS
6 distributor, the commission is “rotated” (*i.e.* paid) to the distributor with the Account Protection
7 Rights. If the Protected Customer is only purchasing one product from T3, T3’s Account
8 Protection Rights allow T3 to collect commissions on sales of any other SBS product or service
9 to the Protected Customers by other SBS distributors, provided T3 secured that customer’s
10 “first order of Safeguard Systems.” (Ex. 10, at Ex. B.)

11 11. As a result of the Account Protection Rights, T3 has no obligation to share its’
12 Protected Customers with SBS or any other SBS distributor. Indeed, according to Section 7 of
13 the Distributor Agreement, SBS is required to forward all inquiries and correspondence related
14 to T3’s Protected Customers. It also must notify the distributor “with reasonable promptness”
15 of any “event that may be reasonably expected to have a material adverse effect upon the sale
16 of Safeguard Systems to [the Protected Customers].”

17 12. Account Protection Rights are provided for in every SBS distributor agreement
18 and SBS oversees and enforces those rights. These account protection and commission rotation
19 services are essential and significant services that SBS provided pursuant to the Distributor
20 Agreement.

21 13. Evidence at the evidentiary hearing showed that SBS has implemented and
22 utilizes its databases, including CMS software to track and to manage the activity of its
23 distributors. SBS distributors call or send an email to SBS’s Distributor Services department at
24 its Dallas headquarters to clear prospective customers. Evidence showed that SBS was able to
25 determine whether a customer was the Protected Customer of another distributor routinely
26 within a day and in some circumstances within a few minutes. In the event that an SBS
27 distributor receives a “not clear” with regard to a customer, that distributor must refrain from
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1 making sales to that Protected Customer, or risk having the commissions on that sale “rotated”
2 to the distributor associated with that Protected Customer.

3 14. SBS has developed and distributed to all SBS distributors a “Deceptive Business
4 Practices Policy” (“SBS’s DBPP”), which expressly addresses the importance of Account
5 Protection Rights. Pursuant to SBS’s DBPP, any solicitation of orders for Safeguard Systems
6 from the Protected Customers of another SBS distributor is explicitly deemed to be a
7 “deceptive business practice.” Also, according to SBS’s DBPP, and under the Distributor
8 Agreement, any SBS distributor that engages in these deceptive business practices is subject to
9 both the assessment of fines by SBS, and the potential termination of its distributor agreement.

10 15. Account Protection Rights are also reinforced in SBS’s Open Territory Policy,
11 which states that “[distributors] are not allowed to solicit orders from the protected account of
12 another Distributor, whether the customer is located within or outside of your Territory.”
13 Account Protection Rights are discussed at length in SBS literature. (Ex. 6.) (“if a Safeguard
14 distributor solicits an order for a business that is invoiced and paid for, that distributor receives
15 the exclusive rights to the commissions generated from all sales to that customer for the next 36
16 months.”)

17 **C. The BAM Program and the IBF and DocuSource Acquisitions.**

18 16. In 2008, SBS started its Business Acquisitions and Mergers (“BAM”) program
19 (“BAM Program”) wherein Safeguard Acquisitions, Inc. (a holding company) was funded by
20 Deluxe to acquire independent non-SBS distributor businesses in the small business forms,
21 supplies and services product market. Following the acquisition, SBS operated the acquired
22 businesses until terms were reached with a qualified buyer to become a new SBS distributor
23 and purchase the commission rights on those accounts from SBS.

24 17. In 2013, as part of its BAM Program, Safeguard Acquisitions purchased Form
25 Systems Inc. doing business as DocuSource (“DocuSource”) and also purchased Idaho
26 Business Forms (“IBF”), two distributors in the Pacific Northwest.

27 18. DocuSource and IBF were direct competitors of T3 in the same relevant
28 geographic market in Idaho, and DocuSource and IBF historically sold a full line of products

1 (i.e., not Safeguard Systems) that competed directly with T3's sales of Safeguard Systems. As
2 a result, T3 had a high volume of cross-over customers with DocuSource and IBF.

3 19. As part of the BAM pre-sale due diligence process, SBS obtained and reviewed
4 DocuSource's and IBF's customer lists, and analyzed the potential for conflict with the
5 Customer Protection rights of all Safeguard distributors, including T3. Through this
6 reconciliation or "scrub" process, SBS learned that many of DocuSource and IBF's customers
7 were T3's Protected Customers. (Exs. 40 & 41.) SBS prepared multiple worksheets detailing
8 estimates of the IBF sales to these Protected Customers.

9 20. SBS knew well before buying IBF that IBF had no intention of voluntarily
10 relinquishing its rights to commissions on sales to overlapping customers. (Ex. 36.)

11 21. SBS created a final scrub sheet for IBF prior to the acquisition showing the sales
12 made by IBF to SBS distributor's Protected Customers. The final scrub list showed that at least
13 \$1 million of IBF's revenue over a 12 month period, and almost \$3 million over the prior 36
14 month period, came from the Protected Customers of T3 and 35 other SBS distributors. The
15 list also identified which distributor had greater sales to the Protected Customer, the affected
16 SBS Distributor or IBF. To the extent that IBF had greater sales, the document noted that
17 Deluxe would force the SBS distributor to either sell or share the account. A similar list was
18 prepared for DocuSource. (Exs. 39 and 31, 34.)

19 22. SBS knew that the IBF and DocuSource acquisitions would interfere with and
20 violate T3 Customer Protection rights. SBS's DocuSource Due Diligence Summary noted
21 there was "account protection overlap, \$200,000+ in existing Safeguard distributor sales" and
22 the DocuSource Executive Summary stated "account protection - \$183,328." The IBF Due
23 Diligence Summary noted "an above normal number of account protection issues" and the IBF
24 Executive Summary stated that the "resolution of account protection matches will be key as
25 some accounts do business with area Safeguard offices." (Exs. 40 and 41.) SBS
26 unquestionably was aware before purchasing IBF, that IBF competed with T3 for business, and
27 that many of IBF's customers, including Meridian High School, were T3's Protected
28 Customers. (Ex. 43.)

1 23. On August 5, 2013 Safeguard Acquisitions Inc. purchased IBF and on April 30
2 2013, Safeguard Acquisitions Inc. purchased DocuSource. (Exs. 24 & 42.)

3 24. After acquiring DocuSource and IBF, SBS positioned both IBF and DocuSource
4 as company-owned distributors that solicited orders on behalf of SBS and in competition with
5 T3 and other SBS distributors.

6 25. In August 2013, former IBF principals Tressa McLaughlin and Jamie
7 McCormick created KMMR, LLC to act as the staffing agency to provide the then SBS-owned
8 IBF, with company sales representatives. SBS paid McLaughlin and McCormick to run IBF on
9 its behalf.¹

10 26. Prior to their acquisitions in 2013, IBF and DocuSource had never sold
11 Safeguard Systems. After being acquired, IBF sold only Safeguard Systems. These Safeguard
12 Systems include Deluxe-manufactured products and Safeguard Systems sourced from other
13 third party vendors.

14 27. Deluxe and SBS ran both IBF and DocuSource as company owned distributors
15 from 2013 through April 2015. During this entire time, SBS encouraged, facilitated and
16 allowed DocuSource and IBF sales agents to solicit and obtain orders for SBS's sale of
17 Safeguard Systems to T3' s Protected Customers. Commissions on these sales however, were
18 not rotated to T3.

19 28. This arrangement continued until KMMR re-acquired the IBF assets from SBS
20 on May 1, 2015 and simultaneously entered into a distributor agreement with SBS. (Exs. 216 –
21 229.)

22 29. KMMR's distributor agreement has the same Account Protection rights as
23 contained in the T3 Agreement. Indeed, SBS granted to KMMR Account Protection Rights to
24 some of the same Protected Customers that it had given to T3 years earlier. (Exs. 10 & 216.)
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28 ¹ Although SBS owned IBF from August 2013 through April 2015, and KMMR owned IBF
thereafter, for ease of reference, we refer to IBF as one entity throughout.

1 **D. Consequences of SBS’s Encroachment.**

2 **1. Customer Confusion.**

3 30. Because IBF and T3 shared the same Protected Customers, customer confusion
4 ensued. Many of T3’s Protected Customers no longer knew from whom they were supposed to
5 order and to whom they were supposed to pay.

6 31. This confusion was exacerbated in early October 2013 (well before KMMR
7 entered into its own distributor agreement) when McLaughlin, with SBS’s approval, circulated
8 a solicitation letter to all of IBF’s former customers including T3’s Protected Customers. The
9 letter stated that IBF was now a part of SBS, that IBF executives McLaughlin and McCormick
10 were on the SBS team and that the customers should place orders with them. (Exs. 62, 69 and
11 74.)

12 **2. SBS’s Attempts to Reconcile Protected Customers.**

13 32. SBS dispatched its general counsel, Michael Dunlap to deal with the predictable
14 fallout from SBS’s decision to grant Account Protection Rights for the same Protected
15 Customers to two different distributors (T3 being one). Dunlap knew, however, that T3’s
16 Distributor Agreement had enforceable Account Protection Rights. In a September 25, 2013
17 email from Dunlap to another SBS employee, Amy Tiller-Shumway, regarding IBF cross over
18 accounts, Dunlap wrote, “[W]e have to honor [T3’s] account protection.” (Ex. 58.) Again in
19 an email dated May 29, 2014 regarding IBF cross over accounts with T3, Dunlap wrote to
20 Sorrenti: “The risk is still that Ms. Teply may claim or request all commissions paid to IBF
21 since they became a Safeguard entity, sort of like what the Strongs are claiming. We have
22 some better evidence to offset than [*sic*] than we do in the Strong matter, but still, the risk is
23 there.” (Ex. 169.)

24 33. SBS’s reconciliation efforts, however, consisted of concealing the violations of
25 T3’s Account Protection Rights. SBS failed to notify T3 that SBS was selling *Safeguard*
26 *Systems* to T3’s Protected Customers after IBF and DocuSource were purchased and further
27 failed to rotate commissions to T3 on SBS’s own sales of Safeguard Systems that were made to
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1 T3's Protected Customers through IBF and DocuSource (both of whom became company-
2 owned entities).

3 34. In addition, throughout 2013 and into 2014, SBS employees misrepresented to
4 Teply that they did not have information about the cross over accounts and gave Teply partial
5 lists of affected accounts.

6 35. In response to Teply's efforts to find out about the scope of the encroachment
7 problem, Dunlap set up a meeting with her for October 3, 2013. In a September 26, 2013 email
8 Teply asked Dunlap whether her attorneys should be present. Dunlap responded "No, just a
9 casual meeting, all good, nothing to do with your contract, all about IBF." (Ex. 56.) However,
10 the meeting had everything to do with her Distributor Agreement and her Account Protection
11 Rights.

12 36. On October 3, 2013, Dunlap met with Teply to discuss the customer overlap
13 caused by the acquisition of IBF and DocuSource, but he did not reveal the Protected Customer
14 final scrub list that he had in his possession. During the meeting, Dunlap physically covered
15 the information on his spreadsheet regarding IBF's previous sales to T3's Protected Customers.
16 Without giving customer names, Dunlap asked Teply to give up or sell to SBS her Protected
17 Customers that Dunlap claimed had historically generated more business through IBF.

18 37. On October 7, 2013, Dunlap emailed Teply a list of 108 "potential conflicts."
19 He claimed to have "no idea of what IBF was selling and to whom and how much the sales
20 were." Dunlap and SBS continued to characterize the issue as "potential" despite the fact that
21 SBS was well aware of actual sales occurring to T3's Protected Customers without T3's
22 knowledge.

23 38. Following their October 3, 2013 meeting Teply made several inquiries about the
24 scope of the customer overlap both in terms of number of Protected Customers and amount of
25 sales. SBS continued to deflect these questions. (*i.e.*, Exs. 100, 119, 135, 145, 151.)

26 39. On February 6, 2014, Dunlap emailed Teply a new list of "56 Common
27 Customers" that, according to Dunlap, represented the sum total of "what we show got orders
28 fulfilled through [IBF] since late August, that appear to be matches with some accounts in your

1 base.” He then asked Teply to “examine these [common customers] and then you and I can
2 have a conversation about possible resolutions.” This list did not identify the full scope of the
3 cross over. (Ex. 103.)

4 40. SBS then negotiated with T3 for the “repurchase” of certain of T3’s Protected
5 Customers. In a February 20, 2014 email, Dunlap proposed for T3 to keep certain listed
6 accounts, and sell the commission rights to certain other accounts. In addition, T3 and SBS
7 (through McLaughlin/IBF) would exchange the corresponding customer files. Dunlap stated
8 that SBS through its company-owned IBF would no longer make sales to the remaining
9 Protected Customers that were not sold by T3, and T3 would keep those customers. (Ex. 113.)

10 41. On or about March 7, 2014 T3 signed an agreement reflecting its sale of some of
11 its Protected Customers in exchange for \$7,340 from SBS (“Partial Sale Agreement”).
12 (Ex. 514.)

13 42. IBF and McLaughlin, however, refused to go along with this arrangement even
14 though at this time, IBF was owned by SBS. On February 24, 2014, Dunlap emailed
15 McLaughlin with the list of T3 Protected Customers IBF had been selling to and told her that
16 IBF could continue selling to certain of those Protected Customers (the Protected Customers
17 that T3 would sell in the Partial Sale Agreement) but that IBF had to give up certain customers
18 to T3. Notwithstanding that McLaughlin was at this time an SBS contractor, she refused to
19 relinquish any of her Protected Customers to T3. (Ex. 125.) During the ensuing months, Teply
20 and Dunlap made several unsuccessful efforts to implement what they thought was the deal T3
21 had struck with SBS with respect to IBF sales. But despite relinquishing certain Protected
22 Customers and giving McLaughlin the files for those customers, SBS (through McLaughlin)
23 never relinquished the files for the Protected Customers that Dunlap told Teply T3 would keep,
24 nor were commissions on sales made to those Protected Customers by SBS (through IBF)
25 rotated to T3.

26 43. On March 7, 2014, Teply contacted Dunlap to express her concern that SBS
27 (through IBF) had been placing SBS orders for Safeguard Systems with T3’s Protected
28

1 Customers for more than seven months, and was harming T3's relationships with, and sales to,
2 her bank customers and referral providers. (Ex. 119.)

3 44. On March 26, 2014, after Dunlap instructed her to hand over the customer files,
4 McLaughlin refused to do so and appealed to Sorrenti. Sorrenti overruled Dunlap and allowed
5 McLaughlin to keep the customer files and continue selling to T3's Protected Customers
6 irrespective of the Distributor Agreement's Account Protection Rights. (Exs. 127 & 128.)

7 45. Efforts by Teply to obtain the information (and commissions) to which T3 was
8 entitled continued, as did SBS's obstruction. (*i.e.*, Exs. 135, 145, 156, 196.)

9 46. Exasperated that he could not get the support of management for the deal he
10 made with Teply on February 20, 2014, Dunlap told McLaughlin and Teply to "work it out."
11 On April 14, 2014, Dunlap sent an email to Teply stating, "I thought and still do think that it is
12 a far better, [*sic*] for the three of you [*i.e.*, Teply, McLaughlin and McCormick] to talk about
13 the handling of specific accounts, than for me to make decisions from a spreadsheet. What we
14 are trying to promote is a way of growing sales, all sales yours, IBF, all." (Ex. 151.) But
15 McLaughlin never handed over the customer files and continued to sell to T3's Protected
16 Customers.

17 47. On May 1, 2014, Dunlap emailed Teply suggesting that they "start fresh" in
18 their communications relating to sales to the Protected Customers. Instead of providing the
19 requested sales numbers and product information for these accounts, Dunlap included in his
20 email a new list of "36 Common Customers" between Teply and IBF that Dunlap identified as
21 needing "resolution." Dunlap's email contained five new Protected Customers not previously
22 identified. (Ex. 531.)

23 48. On May 15, 2014, Teply learned that SBS was selling to another one of her
24 Protected Customers, Meridian High School. This customer, however, was never identified by
25 SBS as a common customer between T3 and IBF. Teply sent an email to Dunlap asking him to
26 "check into this and let me know the status." Dunlap responded that he would check into it, but
27 he was never able to explain to Teply how that Protected Customer had been missed in prior
28 lists. (Ex. 535.)

1 49. On May 19, 2014, Teply once again emailed McLaughlin for information about
2 sales to T3's Protected Customers. On May 28, 2014, McLaughlin wrote back, telling Teply
3 that "[Dunlap] has all of the information."

4 50. On May 27, 2014, after rejecting an offer to sell her account, Teply insisted that
5 Dunlap provide her with "a complete report identifying all Common Customers between
6 [Teply] and IBF at the time SAI purchased IBF." Despite the passage of many months since
7 the IBF and DocuSource transactions, and the data available to it, SBS professed not to have
8 the information Teply was seeking.

9 51. On May 28, 2014, McLaughlin gave Dunlap a full scrub list showing up to date
10 sales from SBS (through IBF) to T3's Protected Customers. McLaughlin stated that IBF (at
11 this point still an SBS-owned entity) will continue to "share" the customer, or in others words
12 continue its sales to the Protected Customers regardless of T3's contractual rights.
13 Notwithstanding his earlier efforts to force McLaughlin to comply with the agreement he made
14 with Teply in February, Dunlap responded back "Understood."

15 52. On June 5, 2014, Dunlap sent Teply another email, this time containing a new
16 list of 17 of T3's Protected Customers that he described as a "list of possible common accounts
17 from May 27." Fourteen (14) of these Protected Customers had been omitted from Dunlap's
18 original February 6, 2014 list that was supposed to contain all of the impacted Protected
19 Customers. (Ex. 537.)

20 53. On December 9, 2014, Teply called Amanda Cammarota, a Commission
21 Analyst with SBS to discuss a potential conflict list with IBF. When Teply asked for
22 commissions related to an order IBF had obtained from one of her Protected Customers,
23 Pioneer Family Medicine, Cammarota stated that she would "pull some files and would get
24 back to her." When Cammarota reported this conversation to her superiors, they all
25 congratulated her on the continued prevarication. Sorrenti, the President of Safeguard and Vice
26 President of Deluxe, told her "Well done Amanda!" and Dunlap chimed in "Expertly handled
27 by Amanda, many thanks." (Ex. 210.)

28

1 54. At all times, SBS knew that SBS (through IBF and DocuSource’s sales agents)
2 was selling to T3’s Protected Customers. SBS closely monitored the sales its company-owned
3 distributors were making in regularly updated scrub sheets. It singled out the sales to the
4 Protected Customers of other SBS distributors based upon name, address and other identifying
5 information. Commissions on these sales were never paid to T3.

6 55. McLaughlin and McCormick gave SBS spreadsheets on a monthly basis
7 showing sales made to T3’s and other distributors’ Protected Customers. Furthermore, SBS
8 had remote access to IBF’s E-Quantum software and could access IBF’s sales data at any time.

9 56. Despite this history, the Distributor Agreement and T3’s repeated refusals to
10 compromise its Account Protection Rights (beyond the Partial Sale Agreement (Ex. 514)), SBS
11 and its parent company Deluxe sold some of T3’s Protected Customers to KMMR, LLC in
12 April 2015.

13 57. At no point in time did SBS ever reveal to T3 the final customer scrub and full
14 list of Protected Customers SBS was selling to through or by IBF and DocuSource. Nor did
15 SBS ever identify the value or scope of the sales involved.

16 **E. The Overlap Between T3 and IBF’s Products and Services.**

17 58. While T3 and IBF sold largely the same products and services, there are some
18 differences.

19 59. IBF’s historical products and services sometimes included product and services
20 not offered by SBS, including, for instance, credit card and cash register “ribbons” and also W-
21 2 processing.

22 60. Prior to SBS’s acquiring IBF, SBS did not offer W-2 processing.

23 61. T3’s Distributor Agreement authorizes T3 to serve as a sales agent for those
24 Safeguard Systems identified in Addenda 1 through 10. T3’s authorized Safeguard Systems do
25 not include services. T3’s Addenda also do not expressly include W-2 processing.

26 62. However, the Distributor Agreement states that T3 may sell “those Safeguard
27 products and services defined in the attached Addenda, under the terms set forth in such
28

1 Addenda, *plus any new Safeguard Systems* (pursuant to Paragraph 3 below) which are designed
2 for sale to business and professional markets.” (emphasis added.)

3 63. Referring to Paragraph 3, “Future Products,” the Distributor Agreement then
4 goes on to state that “[f]rom time to time Safeguard may offer to you the right to offer and sell
5 new Safeguard Systems within the Territory of any future office supplies and accessories, or
6 data processing products or services which are either: (a) manufactured by Safeguard; or (b)
7 made available by Safeguard through strategic alliances with selected vendors.” In addition,
8 SBS had added W-2 and tax document processing to its list of services on its intranet. (Ex. 18.)

9 64. The Panel finds that this language is broad enough to authorize T3 to sell W-2
10 and related tax form processing.

11 65. Even if the Panel was to conclude that the language of the Distributor
12 Agreement required a written addendum before T3 was allowed to sell these services, Dunlap
13 testified that the addendum requirement could be satisfied if a distributor took training for the
14 new product or service. Ms. Teply testified that she had taken W-2 processing training through
15 an SBS-approved supplier, Apex. Apex was supplying W-2 processing and associated software.

16 66. In any event, there is no evidence that SBS provides an addendum to distributor
17 agreements for W-2 processing. In fact, KKMR received only a side letter, not an addendum to
18 its distributor agreement. (Ex. 28.)

19 67. Similarly, T3 had not provided warehouse services, although Teply testified that
20 T3 could provide such services if a customer needed it. The Panel concludes that T3 could
21 have provided warehousing services and is owed commissions on sales of warehouse services
22 sold to her Protected Customers by any other SBS distributor, including IBF.

23 **F. T3’s Damages.**

24 68. In 2010, T3’s annual commissions were \$168,786.53. In 2011, T3’s annual
25 commissions increased to \$171,786.53. In 2012, T3’s annual commission increased to
26 \$181,300.37. In 2013, T3’s annual commissions increased to \$191,059.10. In 2014, T3’s
27 annual commissions increased to \$199,458.03. In 2015, T3’s annual commissions increased to

28

1 \$219,354. T3 is on schedule to make more than \$220,000 in commissions for 2016. (Exs. 500,
2 550, 551.)

3 69. T3 seeks \$321,657.77 in lost past commissions; \$373,473.76 in future lost
4 commissions based on the last full year of IBF's sales to the Protected Customers; \$214,432.39
5 in damages stemming from SBS giving IBF more favorable pricing terms compared to those
6 given to T3; and \$566,143.61 in damages to the value of T3's Distributor Agreement.

7 70. T3 retained Robert Taylor as an expert witness to opine regarding its alleged
8 damages. With some minor adjustments set forth below, the Panel accepts Taylor's
9 calculation.

10 71. Taylor agreed there should be a reduction of \$7,832.45 to his damages
11 calculations because DocuSource no longer makes sales in Idaho as of May 1, 2015. The Panel
12 accepts that reduction.

13 72. As to the identified damages for the customers that required warehousing
14 services, Taylor had relied upon both IBF's purchase orders (its internal accounting for the
15 purchase of the goods) and also IBF's warehousing release (the internal accounting that is
16 actually billed to the customers) which erroneously doubled the amount of IBF's sales margin
17 in Taylor's report. This caused an inaccuracy in Taylor's calculations of \$30,019.08. (Ex.
18 565.) The Panel reduces the amount of damages by this amount.

19 CONCLUSIONS OF LAW

20 21 A. Breach of Contract²

22 73. In Texas, "[t]he elements for breach of contract are (1) the existence of a valid
23 contract, (2) the plaintiff's performance or tendered performance, (3) the defendant's breach of
24

25
26 ² T3's Demand for Arbitration includes a claim for Breach of the Covenant of Good Faith and
27 Fair Dealing. None of the prehearing or post-hearing briefs addressed this claim, nor was there
28 evidence presented upon which the Panel could conclude whether the necessary "special
relationship" exists between T3 and SBS sufficient to support such a claim. *See Mailing and
Shipping Sys. Inc. v. NeoPost USA, Inc.*, 937 F. Supp. 2d 879 (W.D. Tex. 2013). The Panel
thus deems this claim abandoned and denies any relief thereunder.

1 the contract, and (4) damages as a result of the breach.” *Paragon General Contractors, Inc. v.*
2 *Larco Constr., Inc.*, 227 S.W.3d 876, 882 (Tex. App. 2007).

3 74. The issues in dispute in this Arbitration are breach and damages. For the
4 reasons set forth below, the Panel concludes that SBS breached the Distributor Agreement and
5 that T3 suffered damages as a direct result thereof.

6 75. T3 had a valid Distributor Agreement with SBS that unambiguously gave it
7 Account Protection Rights. SBS breached (and continues to breach) the Distributor Agreement
8 by failing to pay T3 commissions on sales made by SBS, IBF and DocuSource to T3’s
9 Protected Customers. The Panel rejects SBS’s argument that parol evidence suggests a
10 different outcome because the Distributor Agreement was signed before the BAM Program
11 began.

12 76. The Panel rejects SBS’s argument that sales of Safeguard Systems by
13 DocuSource and IBF after they were acquired by SBS in 2013 did not and do not generate
14 commissions in favor of T3. The Account Protection Rights section of the Distributor
15 Agreement clearly gives T3 the right to all commissions on all sales of Safeguard Systems to its
16 Protected Customers. This interpretation is supported not only by Section 4 of the Distributor
17 Agreement, but also Section 7(B) of the Distributor Agreement, which obligates SBS to inform
18 T3 of “inquiries and other correspondence” from its Protected Customers. Further support is
19 found in the course of dealing between the parties as evidenced by, among other things, the
20 rotation notices whereby commissions on orders to Protected Customers made by other
21 distributors were rotated to T3. (*See Exs. 19-22.*)

22 77. Moreover, SBS’s own literature following the commencement of the BAM
23 Program explains that the new SBS distributors (*i.e.*, DocuSource and IBF) could not capture
24 the commissions for Safeguard Systems sales to the protected customers of “legacy”
25 distributors unless the “legacy” distributors, like T3, agreed to share commissions with the new
26 distributor. (Ex. 6.) As SBS knew well, except for the Partial Sale Agreement, T3 never
27 agreed to waive its Account Protection Rights by sharing commissions with DocuSource or
28 with IBF.

1 78. SBS made much of the fact that IBF has loyal customers who will not purchase
2 Safeguard Systems from another SBS distributor. T3, however, is not seeking an order
3 compelling IBF to stop selling to T3’s Protected Customers, much less an order compelling
4 IBF’s customers to buy from T3. SBS sold the “exclusive rights” to the same Protected
5 Customers at least twice, and unfairly asked the impacted distributors to fight it out. The
6 competing distributors have no obligation to reach a resolution between themselves. Instead,
7 each of the competing distributors has a right to the commissions on sales of Safeguard
8 Systems to their respective protected customers. SBS has deliberately put itself in the position
9 of being contractually obligated to pay duplicative commissions to each competing distributor
10 on sales to those common customers.

11 79. The Panel similarly rejects SBS’s argument that it is not obligated to pay
12 commissions to T3 because the Protected Customers were long-time IBF customers. There is
13 no dispute that prior to SBS’s acquisition of IBF in 2013, IBF sold *competing products, not*
14 *Safeguard Systems*. Thus, while the Protected Customers may have had an ongoing
15 relationship with IBF, SBS was still required to pay T3 commissions on sales to the Protected
16 Customers if the “first order of *Safeguard Systems* is directly the result of [T3’s] efforts.”
17 Distributor Agreement at Ex. B (emphasis added). There is no evidence that the first order of
18 *Safeguard Systems* to the Protected Customers was a result of anyone’s efforts other than those
19 of T3.

20 80. The Panel further rejects SBS’s argument that commissions on sales to Protected
21 Customers were not due to T3 during the period of time between 2013 and 2015 when IBF and
22 DocuSource were company-owned entities because the Distributor Agreements contemplates
23 sales by SBS directly in T3’s territory. Distributor Agreement at ¶ 2. But T3 does not argue
24 that it has exclusive territory rights, and the Distributor Agreement does not confer them.
25 Instead, T3 has the exclusive right to commissions on sales to its Protected Customers. SBS
26 itself, IBF, DocuSource or any other SBS distributor, sold to T3’s Protected Customers at its
27 peril. Assuming the other requirements were met (sale made within 36 months, initial sale of
28 Safeguard System by T3), SBS was not only obligated to rotate the commissions on those sales

1 to T3 (or pay the commissions to more than one distributor), it was also obligated to follow
2 SBS's DBPP with respect to the offending distributor.

3 81. The Panel further concludes that T3 proved that SBS breached the Distributor
4 Agreement by giving IBF more favorable pricing on Safeguard Systems.

5 82. Paragraph 1 of the T3 Distributor Agreement provides that T3 has "the right
6 [...] to solicit orders of Safeguard Systems, as an independent agent, in accordance with the
7 price schedules published by Safeguard from time to time [...]" This clause requires SBS to
8 provide to T3 the same pricing it provided to IBF and DocuSource on Safeguard Systems.

9 83. SBS breached Paragraph 1 of the T3 Distributor Agreement by providing IBF
10 lower price schedules than T3. Based on data contained in SBS's CMS and e-Quantum
11 databases, the base price charged to IBF for the envelope and laser check product lines was
12 approximately 40% less than the base price charged to T3. The higher base prices directly
13 affected T3's commissions and consequently its profits.

14 84. The Panel also rejects SBS's argument that T3's damages should not include
15 commissions on IBF's sales of warehousing services to T3's Protected Customers. The
16 evidence amply established that while T3 did not own a warehouse, it could have nevertheless
17 provided warehousing services. And, in any event, the Distributor Agreement does not in any
18 way restrict T3's receipt of commissions on sales by others to its Protected Customers. The
19 plain terms of the Distributor Agreement entitles T3 to commissions on sales to its Protected
20 Customers without reference to whether T3 itself was providing such services.

21 85. For the same reasons, the Panel rejects SBS's argument that T3 is not entitled to
22 commissions to T3's Protected Customers on IBF's sales of W-2 processing services. There
23 was ample evidence that while T3 did not offer these services, Teply was trained and could
24 provide them. Additionally, as noted above, the language of the Distributor Agreement does
25 not restrict T3's right to collect commissions to only those Safeguard Systems T3 then offered.

26 86. Finally, the Panel rejects SBS's argument that T3 is not entitled to commissions
27 on sales to certain of its Protected Customers because of the size of the account, or the fact that
28 a Protected Customer might have multiple locations or billing accounts. These customers were

1 unquestionably Protected Customers of T3 regardless of which product or service was
2 purchased or where the bill was sent.

3 **B. Contract Damages.**

4 87. In a breach of contract action, the prevailing party is entitled to damages that
5 flow naturally and necessarily from the wrongful conduct. *See Mead v. Johnson Group, Inc.*,
6 615 S.W.2d 685, 687 (Tex.1981) (“In an action for breach of contract, actual damages may be
7 recovered when loss is the natural, probable, and foreseeable consequence of the defendant’s
8 conduct.”).

9 88. T3’s actual damages fall under four categories: (1) past lost commissions; (2)
10 future lost commissions; (3) damages from the pricing advantage given to IBF versus T3; and
11 (4) damages for the value of the distributorship.

12 89. The Distributor Agreement limits damages recoverable in any action between
13 the parties to “ACTUAL DAMAGES FOR COMMERCIAL LOSS,” and precludes recovery of
14 punitive damages or compensatory damages for emotional distress. (Ex. 10 at ¶ 18(D).) The
15 Arbitration Clause in the Distributor Agreement further precludes “EXEMPLARY OR
16 PUNITIVE DAMAGES.” (Ex. 10 at ¶ 21(B).)

17 90. Each of T3’s damage categories are recoverable under Texas law because they
18 are actual damages for commercial loss that naturally flow from and were reasonably
19 foreseeable consequences of SBS’s breach.

20 91. Past commissions not paid to T3 on sales by others to its Protected Customers
21 are recoverable damages. The total amount of the past commissions that SBS failed to pay for
22 sales by SBS, IBF and DocuSource to T3’s Protected Customers amounts to \$321,657.77, an
23 amount that includes a \$30,019.08 reduction for an error in Taylor’s initial expert report. (Exs.
24 263, 264, 565.)

25 92. T3’s lost commissions for future sales made to T3’s Protected Customers are
26 also recoverable. Even if these future lost commissions could be deemed consequential
27 damages, they are nevertheless recoverable because they were reasonably contemplated by the
28 parties.

1 93. SBS uses a metric of approximately “one times annual revenue” when it
2 acquires distributors and when SBS distributors acquire other distributors. This was the same
3 metric used when Teply purchased part of Thurston’s business. Thus, SBS itself considers the
4 present value of future commissions to be equated to approximately one times the annual
5 revenue of the company.

6 94. The Panel finds that T3 and Taylor’s use of a “one times annual revenue” metric
7 fairly represents the present value of future commission rights. *See AZZ, Inc. v. Morgan*, 462
8 S.W.3d 284, 289-90 (Tex. App. 2015). The present value of the future commissions for IBF’s
9 sales to T3’s Protected Customers is \$373,473.76. This amount is based on the last full year of
10 IBF’s sales to T3’s Protected Customers. The Panel concludes that T3 is entitled to
11 \$373,473.76 in lost future commissions, an amount that includes a reduction of \$7,832.45 to
12 account for the fact that DocuSource did not sell in Idaho after May 1, 2015.

13 95. The Panel rejects T3’s request for damages in connection with the accounts it re-
14 sold to SBS in March 2014 pursuant to the Partial Sale Agreement, which it claims were
15 undervalued by SBS. While the circumstances surrounding the resale were less than ideal, the
16 Panel concludes that T3 knowingly engaged in an arm’s length transaction that should not be
17 disturbed. Damages in the amount of \$92,660 on this ground, therefore is denied and is
18 deducted from the amount sought as future damages in Taylor’s report.

19 96. T3’s preferential pricing damages are \$214,432.39. This represents the
20 additional source fees (\$5,749.29) and base price that T3 paid on the envelopes (\$30,921.46)
21 and laser check (\$177,761.64) product lines as compared to IBF. These damages directly flow
22 from SBS’s breach of paragraph 1 of the Distributor Agreement by giving preferential pricing
23 to IBF. The Panel rejects SBS’s argument that there was no evidence to support these figures.
24 Taylor’s report (*i.e.*, Ex. 263 at 5A, 6 and 7) and testimony (*i.e.*, Day 6 at 1627) provide ample
25 evidence to support this finding and no contrary evidence was adduced at the evidentiary
26 hearing.

27 97. T3 also seeks to recover in damages the full value of the Distributor Agreement
28 pursuant to a revocation of acceptance theory. Although the Panel concludes that SBS’s breach

1 entitles T3 to recover the value of the Distributor Agreement, the Panel finds that
2 \$1,475,707.53 is recoverable under a theory of constructive termination damages.

3 98. As noted above, T3 unquestionably had exclusive rights to commissions on sales
4 to the Protected Customers. By giving the same “exclusive” rights to DocuSource and IBF,
5 SBS diluted the value of the Distributor Agreement Account Protection Rights. Such
6 encroachment on a distributor’s rights can give rise to constructive termination of a distribution
7 agreement. *See Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1182-83 (2d Cir. 1997) (contract
8 theory); *Carvel Corp. v. Baker*, 79 F. Supp. 2d 53, 61-64 (D. Conn. 1995) (good faith and fair
9 dealing theory); *Gossard v. Adia Services Inc.*, 723 So. 2d 182 (Fla. 1998) (same); *Maintainco,*
10 *Inc. v. Mitsubishi Caterpillar Forklift America Inc.*, 408 N.J. Super. 461, 477-481 (App. 2009)
11 (state franchise act).

12 99. The Panel concludes that SBS’ breach damaged T3’s business to such an extent
13 that the Distributor Agreement now fails of its essential purpose entitling T3 to constructive
14 termination damages.

15 100. T3 offered expert testimony that the current value of the Distributor Agreement
16 is \$566, 143.61. No controverting evidence was adduced at the evidentiary hearing.
17 Accordingly, we conclude that T3 is entitled to recover its undisputed \$566, 143.61 value.

18 101. In summary, T3 is awarded \$1,475,707.53 as actual damages for its breach of
19 contract claim as follows: past commissions that SBS failed to pay for sales by IBF and
20 DocuSource (\$321,657.77), the present value of the future commissions for IBF’s sales to T3’s
21 Protected Customers (\$373,473.76), preferential pricing damages (\$214,432.39) and the value
22 of the distributorship (\$566,143.61).

23 **C. Tortious Interference.**

24 102. Texas law protects business relations from tortious interference. *Wal-Mart*
25 *Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001).

26 103. To prevail on a claim for tortious interference with prospective business
27 relations, the plaintiff must establish that “(1) there was a reasonable probability that the
28 plaintiff would have entered into a business relationship with a third party; (2) the defendant

1 either acted with a conscious desire to prevent the relationship from occurring or knew the
2 interference was certain or substantially certain to occur as a result of the conduct; (3) the
3 defendant's conduct was independently tortious or unlawful; (4) the interference proximately
4 caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.”

5 *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 923 (Tex. 2013).

6 104. T3 had a business relationship with each of its Protected Customers.

7 105. From 2013 to the present, SBS encouraged and facilitated SBS employees,
8 DocuSource and IBF to solicit and obtain orders for the sale of Safeguard Systems to T3’s
9 Protected Customers without paying T3 commissions to which it was entitled pursuant to the
10 Account Protection Rights.

11 106. SBS intentionally interfered with T3’s business relations with its Protected
12 Customers when it purchased the assets of T3 competitors DocuSource and IBF and then
13 directly sold Safeguard Systems to T3’s Protected Customers. SBS further intentionally
14 interfered with T3’s business relations with its Protected Customers when SBS entered into
15 distributor agreements with DocuSource and IBF and by doing so, gave to DocuSource and
16 IBF the “exclusive rights” to commissions on sales to the same customers it had earlier given to
17 T3 in the Distributor Agreement. The purchase of a market competitor (and here the payment
18 of commissions to the competitors) states a claim for tortious interference where, as here, the
19 purchaser has conflicting commitments to its existing distributors (in this case exclusive rights
20 to commissions on sales to specific customers).

21 107. T3, who already was selling to and had ongoing relationships with these
22 Protected Customers, could have sold these same Safeguard Systems. It is clear from these
23 orders that T3’s Protected Customers sought out Safeguard Systems. But for this interference,
24 T3, who also offered Safeguard Systems, would have been able to make these sales to its
25 Protected Customers.

26 108. The Panel concludes that SBS’s conduct adequately demonstrates one or more
27 independent torts – including fraudulent concealment and misrepresentations – to support a
28

1 claim under Texas law for intentional interference. *Bright v. Addison*, 171 S.W.3d 588 (Tex.
2 App. 2009); *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 636 (Tex. App. 1993).

3 109. Pursuant to T3's Account Protection Rights, SBS had a duty to disclose the sales
4 made to T3's Protected Customers based on T3's Account Protection Rights, (Distributor
5 Agreement at ¶ 7(B)), and it had a duty to rotate the commissions on those sales to T3.
6 (Distributor Agreement at ¶ 4 & Ex. B.) Not only did SBS breach these provisions of the
7 Distributor Agreement, but it fraudulently concealed known communications from Protected
8 Customers (such as orders) and commissions paid to IBF and DocuSource.

9 110. SBS monitored the sales to Protected Customers and had the power to comply
10 with its obligation to rotate commissions where one distributor sold to another's Protected
11 Customers. SBS further maintained monthly logs detailing the amount of sales it made to T3's
12 Protected Customers based upon orders solicited by IBF and DocuSource.

13 111. Notwithstanding its knowledge and obligation to disclose, SBS employees
14 repeatedly concealed the value and identity of sales to T3's Protected Customers by others.
15 There was ample evidence at the hearing that SBS well understood its obligations under the
16 Distributor Agreement, but actively concealed information that T3 was entitled to know and
17 commissions T3 was entitled to have. For example, in email correspondence in September
18 2013 (shortly after the IBF acquisition), before he met with Teply to discuss the Account
19 Protection overlap, Dunlap reminded SBS management that SBS has to "honor account
20 protection" and that because SBS "own[s] [IBF]" SBS does "not have to beg [IBF]" to give up
21 commissions on overlapping account," because SBS, not IBF "make[s] the decisions." Dunlap
22 proposed that if IBF does not cooperate, "the rule applies and [the commissions] rotate to the
23 legacy distributor [T3]." (Ex. 58.) Months later, in May 2014, Dunlap advised Sorrenti that he
24 has the list of overlapping accounts from IBF and wondered if Sorrenti has a "swinging gate"
25 or "Hail Mary" plan to prevent the commissions on sales to those accounts from going to T3.
26 (Ex. 169.) Then, over a year after the IBF acquisition, in December 2014, following months of
27 Teply's efforts to obtain information on sales to T3's Protected Customers, Sorrenti and Dunlap
28

1 congratulated an SBS employee (“Well done Amanda!” “Expertly handled by Amanda, many
2 thanks.”) for continuing to keep Teply in the dark. (Ex. 210.)

3 112. T3’s actual damages for tortious interference are identical to those recoverable
4 under its breach of contract claim and are also recoverable under a tortious interference theory.

5 113. T3 also seeks punitive damages on the ground that (a) SBS’s tortious behavior is
6 more egregious in light of the franchisor-franchisee relationship with the SBS distributors; (b)
7 SBS, with the express knowledge that T3 is a financially vulnerable distributor, intentionally
8 sought to harm the distributorship business Teply spent a lifetime building; and (c) actual
9 damages will not deter SBS from continuing its behavior; and (d) SBS’s conduct is not
10 confined to harming T3.

11 114. Consistent with the language of the Distributor Agreement, however, the Panel
12 declines to award punitive damages. Paragraph 21 of the Distributor Agreement precludes an
13 award of punitive or exemplary damages. The Panel concludes that it has no authority to award
14 punitive damages on T3’s tort claims.

15 **D. The Texas Deceptive Trade Practices Act.**

16 115. T3 further seeks relief under the Texas DTPA. The Distributor Agreement
17 attempts to waive T3’s rights under the DTPA, Ex. 10 at ¶ 18, but, SBS conceded at the
18 evidentiary hearing that the waiver was ineffective and unenforceable. (Transcript Day 6 at
19 1785.)

20 116. Under Section 17.50 of the DTPA, a consumer has a private right of action for
21 “the use or employment by any person of a false, misleading, or deceptive act or practice that is
22 ...specifically enumerated in Subsection (b) of Section 17.46...and relied on by a consumer to
23 the consumer’s detriment.” DTPA§17.50(A)(1). Additionally, a consumer has a private right
24 of action for “any unconscionable action or course of action by any person.” *Id.* at
25 § 17.50(a)(3).

26 117. As a threshold matter, the parties disagree whether T3 is a “consumer” under the
27 DTPA, and the law is murky where the complaining party is a distributor. The Panel
28 concludes, however, that T3 is a “consumer” under the Texas DTPA.

1 118. A “consumer” under the DTPA must have “sought or acquired goods or services
2 by purchase or lease, and must show that these same goods or services formed the basis for the
3 DTPA complaint.” *Fisher Controls Int’l, Inc. v. Gibbons*, 911 S.W.2d 135, 138 (Tex. App.
4 1995); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex. 1987).

5 119. Where only intangible rights are conveyed, the DPTA does not apply. *See*
6 *Fisher Controls Int’l, Inc.*, 911 S.W.2d at 138-39. Notwithstanding its argument to the
7 contrary, the Distributor Agreement clearly gave T3 the intangible right to use SBS’s name and
8 logo. (Ex. 10 ¶9.)

9 120. To qualify as a “consumer” under the DTPA, the intangible right must be
10 accompanied by “collateral goods or services” that are “an objective of the transaction and not
11 merely incidental to the performance of the transaction.” *Mary Kay, Inc. v. Dunlap*, No. 3:12-
12 CV-0029-D, 2012 WL 2358082, at *2 (N.D. Tex. June 21, 2012).

13 121. The Distributor Agreement was accompanied by collateral services. Among
14 other things, the Distributor Agreement gave T3 solicitation assistance (Ex. 10 ¶ 7(A)),
15 indemnification rights (Ex. 10 ¶ 7(B)), a promise to forward inquiries SBS receives from T3’s
16 Protected Customers (Ex. 10 ¶ 7(D)), and most important, Account Protection. (Ex. 10 ¶ 4.)
17 SBS created systems and performed services to its distributors that made Account Protection
18 more than mere words on paper. SBS maintained a central sale tracking system (CMS) where
19 distributors could pre-clear sales to new prospective customers to be sure they were not selling
20 to another distributor’s protected customer. (Exs. 23 & 78.) Further, SBS monitored its
21 distributors to ensure compliance. According to SBS’s DBPP, SBS deemed it a deceptive
22 business practice to solicit sales from a protected customer of another SBS distributor. (Ex. 2.)
23 Indeed, sales to another distributor’s Protected customer was not only prohibited, but was
24 subject to escalating penalties, including the possibility of termination. (Ex. 2 at 2.) SBS
25 enforced Account Protection Rights by rotating commissions on sales to protected customers to
26 the distributors with Account Protection Rights to those protected customers. (Exs. 19-22.) In
27 furtherance of the Account Protection Rights, these “rotation notices” stated in bold all caps:
28 **“MASTER FILE HAS BEEN CHANGED. PLEASE FORWARD ALL NECESSARY**

1 **CUSTOMER FILES TO THE ASSIGNED DISTRIBUTOR.”** (Ex. 19, 21, 22.)(emphasis in
2 original).

3 122. The Panel concludes that the above-mentioned services provided by SBS to its
4 distributors that gave meaning to the Account Protection Right were objectives of and “central
5 to” the Distributor Agreement. *Mary Kay*, 2012 WL 2358082, at *3. *See Clary Corp. v. Smith*,
6 949 S.W. 2d 452, 465 (Tex. App. 1997) (“A Clary distributorship was more than the right to
7 sell Clary products; it included many services central to the transaction [including sales
8 support]”); *Wheeler v. Box*, 671 S.W.2d 75, 78 (Tex. App. 1984) (purchase of business
9 including services satisfies DTPA “consumer” definition).

10 123. The DTPA definition of “consumer” also requires that the “the goods or
11 services” acquired form the basis of the complaint. *Mary Kay*, 2012 WL 2358082, at *4;
12 *Meineke Disc. Muffler v. Jaynes*, 999 F.2d 120, 125 (5th Cir. 1993). Here, T3 complains that
13 SBS failed to provide the Account Protection services that were required. The Panel concludes
14 that T3 satisfied this nexus between the services SBS provided and the Demand for Arbitration.

15 124. While T3 seeks relief under §§ 17.46(b)(5) and (b)(12) of the Texas DTPA, the
16 Panel finds that T3 failed to demonstrate that SBS represented that its services had
17 “characteristics,” “benefits, or quantities,” which the Distributor Agreement did not have. Nor
18 was there any evidence that SBS made representations that the Distributor Agreement “confers
19 or involves rights, remedies, or obligations which it does not have or involve, or which are
20 prohibited by law[.]” Indeed, T3 proved just the opposite: the Distributor Agreement had
21 characteristics, benefits and qualities that SBS breached. Accordingly, T3 may not recover
22 damages under DTPA §§ 17.46(b)(5) and (b)(12).

23 125. The Panel does conclude, however, that the requirements of DTPA
24 § 17.50(A)(3) have been met because SBS committed “an unconscionable action or course of
25 action.”

26 126. The statute defines “unconscionable” as an “act or practice which, to a
27 consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or
28 capacity of the consumer to a grossly unfair degree.” DPTA § 17.45. A plaintiff “can show

1 unconscionable course of conduct by showing that it was taken advantage of to a grossly unfair
2 degree.” *Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 127
3 (Tex. App. 1994).

4 127. SBS took advantage of T3 to a grossly unfair degree by refusing to enforce T3’s
5 Account Protection Rights, and actively participating in the violation of those rights.

6 128. SBS employees concealed and misrepresented that sales were being made to
7 T3’s Protected Customers. SBS took advantage of its sole possession of the information T3
8 needed and to which T3 was entitled. T3 was left in the dark about sales SBS, IBF and
9 DocuSource made (and continued to make) to T3’s Protected Clients. T3 was powerless –
10 short of a lawsuit – to identify the offending sales and compel SBS to perform its obligations
11 under the Distributor Agreement. One communication in particular speaks volumes about
12 SBS’s willful disregard of its duties: In one August 6, 2014 email between Dunlap and
13 Sorrenti, Dunlap noted there was nothing Teply could do to make SBS comply with her
14 Account Protection Rights: “Notice she doesn’t say or else. She has never used that reference,
15 because she doesn’t have an or else.” (Ex. 196.)

16 129. The Panel further finds evidence supporting unconscionable conduct in the
17 manner in which SBS negotiated its purchase from T3 of certain Account Protection Rights
18 with T3. SBS knew early on that it was not going to get IBF to cooperate on account protection
19 issues. (Exs. 36, 105.) After running the proposal past IBF (Ex. 105), on February 20, 2014
20 SBS (through Dunlap) offered T3 an agreement whereby T3 would relinquish 19 Protected
21 Customers and keep 28 other Protected Customers (Ex. 113.) IBF was advised of this
22 arrangement on February 24, 2014. (Ex. 115.) Shortly thereafter, on or about March 3, 2014,
23 T3 did in fact relinquish the 19 Protected Customers for \$7,340. (Ex. 118.) McLaughlin on
24 behalf of IBF appealed this already-consummated agreement between SBS and T3 to Sorrenti
25 on March 26, 2014 (Exs. 123 and 127.) Thereafter, SBS made no meaningful effort to force
26 McLaughlin or IBF (an SBS contractor at this point) to turn over IBF’s records for the 28
27 Protected Customers that T3 was to keep or otherwise implement the plan. Throughout this
28 period of time, SBS acknowledged that it had the power to compel IBF to comply. (Ex. 58

1 “we own the business, we make the decisions ... we don’t have to beg [IBF] we have to honor
2 account protection”); (Ex. 172.) (“[McLaughlin] made the decision not to comply with our
3 account protection resolutions”) (Ex. 186.) (“I am happy to remind leadership at IBF of their
4 responsibilities around account protection (not that it is already crystal clear)... our reps from
5 the company-owned location should be instructed to refrain from soliciting from that protected
6 account.”)

7 130. Despite the acknowledged power to compel IBF to turn over the files for the 28
8 Protected Customers and rotate the commissions on these sales to T3, SBS let IBF call the
9 shots. Sorrenti “reversed” the decision (Exs. 113 & 115) Dunlap made with T3 about how to
10 handle overlapping accounts. (Ex. 127.) Then, to make matters worse, SBS sold the Account
11 Protection Rights to these same 28 Protected Accounts to IBF (even though they were already
12 owned by T3) when KMMR re-purchased IBF’s assets from SBS. (Exs. 216, 218 & 219.)
13 Throughout this period of time, Tepy made repeated requests to IBF and SBS about the 28
14 Protected Accounts to no avail. The Panel concludes that SBS’s willful failure to follow
15 through with its agreement with T3 with respect to these 28 Protected Accounts constitutes an
16 unconscionable act.

17 131. For all these reasons, the Panel concludes that SBS engaged in unconscionable
18 courses of action *vis-à-vis* T3 and is liable for damages under the Texas DTPA.

19 132. Damages under the Texas DPTA include “compensatory damages for pecuniary
20 loss,” DTPA § 17.45(11), including (1) the “out of pocket” measure, which is the “difference
21 between the value of that which was parted with and the value of that which was received;” and
22 (2) the “benefit of the bargain” measure, which is the difference between the value as
23 represented and the value actually received. *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945
24 S.W.2d 812, 816 (Tex. 1997); *see also Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162
25 (Tex. 1992) (DTPA damages include recovery for “the total loss sustained [by the consumer] as
26 a result of the deceptive trade practice”).

27 133. T3 seeks the same categories of damages for this statutory violation as it seeks
28 in contract damages: (1) past lost commissions (\$321,657.77); (2) future lost commissions

1 (\$373,473.76); (3) damages from the pricing advantage given to IBF versus T3 (\$214,432.39);
2 and (4) the value of the distributorship (\$566,143.61). The Panel concludes that SBS is liable
3 to T3 in the total amount of \$1,475,707.53 by virtue of its breach of Texas DTPA.

4 134. T3 also seeks treble damages under the DTPA. A consumer may obtain treble
5 damages “[i]f the trier of fact finds that the conduct of the defendant was committed knowingly
6 [...] the trier of fact may award not more than three times the amount of economic damage.”
7 DTPA § 17.50(b)(1).

8 135. As noted above, however, Paragraph 21 of the Distributor Agreement precludes
9 an arbitration award of punitive or exemplary damages. The Panel concludes that it has no
10 authority to award treble damages under the Texas DTPA.

11 **CONCLUSION**

12 For all the foregoing reasons, the Panel concludes that SBS is liable to T3 for breach of
13 contract, intentional interference with business relations and for violation of the Texas DTPA in
14 the amount of \$1,475,707.53.

15 Based on the foregoing Findings of Fact and Conclusions of Law, the Panel finds that
16 T3 is the prevailing party in this matter and may apply for a determination on an award of
17 attorneys’ fees pursuant to applicable law, including but not limited to Texas law and/or the
18 Commercial Rules of the American Arbitration Association. Such application must be
19 supported by evidence (*i.e.* invoices), and must be accompanied by a sworn declaration of
20 counsel attesting to the accuracy and reasonableness of the fees and costs sought and attesting
21 that the fees and costs were actually expended. Any challenge by SBS to the reasonableness of
22 the fees and costs sought by T3 must similarly be supported by evidence (*i.e.* invoices) and
23 must be accompanied by a sworn declaration of counsel attesting to the accuracy and
24 reasonableness of the fees and costs expended on SBS’s behalf and attesting that the fees and
25 costs were actually expended.

26 Any motion for an award of attorneys’ fees and costs shall be filed on or before
27 October 31, 2016. Any response thereto shall be filed on or before November 14, 2016.
28 Absent an order from the Panel, no reply shall be filed.

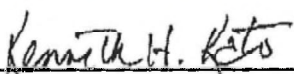
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This preliminary award is in full settlement of all claims submitted to the Panel in this Arbitration. Except for an award of attorneys' fees and costs (as to which the Panel retains jurisdiction to decide), all claims not expressly granted herein are hereby denied.

DATED: October 5, 2016.



Maureen Beyers



Honorable Kenneth Kato (ret.)



Van Elmore