



1 However, once negotiations were complete, “Defendant required Plaintiff to sign an English-language  
2 contract.” (*Id.*, ¶ 19) Plaintiff reports he “protested signing such a contract since Plaintiff only spoke  
3 Spanish.” (*Id.*, ¶ 20) According to Plaintiff, “Defendant neither provided Plaintiff a Spanish  
4 translation of the contract nor did Defendant mail a Spanish translation of the contract to Plaintiff at  
5 any time thereafter.” (*Id.*, ¶ 21) Plaintiff contends Vivint is liable for a violation of California Civil  
6 Code § 1632(b) for the failure to provide a Spanish translation. (*Id.*, ¶ 24)

7 Plaintiff contends that after his solar panels were installed, he “did not experience any energy  
8 savings as promised by Defendant.” (Doc. 1 at 4, ¶ 22) He asserts his electricity bill has “increased  
9 each month with the solar panels installed.” (*Id.*, ¶ 23) As a result, Plaintiff contends Vivint is liable  
10 for fraudulent business practices in violation of California Business & Professions Code § 17200. (*See*  
11 *id.* at 10, ¶¶ 62-64)

12 On October 19, 2017, Defendant responded to the complaint by filing the motion to dismiss or  
13 to compel arbitration and stay the proceedings by asserting “Plaintiff entered into a valid and  
14 enforceable arbitration agreement requiring his claims to be submitted to arbitration.” (Doc. 8 at 2) In  
15 January 2018, the parties requested the hearing on the matter be continued because they were  
16 “exploring resolution of the matter,” and the Court continued the hearing to March 2018. (Doc. 17 at  
17 2; Doc. 18) Plaintiff did not oppose the motion and the Court found the moving papers were sufficient  
18 for a decision without oral arguments. Accordingly, the matter was taken under submission pursuant  
19 to Local Rule 230(g).

## 20 **II. Arbitration Terms**

21 The Residential Power Purchase Agreement (“PPA”) signed by Plaintiff includes an arbitration  
22 provision informing the customer that it affects legal rights. (Doc. 8-1 at 3; *see also* Doc. 8-4 at 2-3)

23 The arbitration provision indicates in relevant part:

24 BY SIGNING BELOW, YOU ACKNOWLEDGE AND AGREE THAT (I) YOU  
25 ARE HEREBY WAIVING THE RIGHT TO A TRIAL BY JURY; AND (II) YOU  
26 MAY BRING CLAIMS AGAINST US ONLY IN YOUR INDIVIDUAL  
27 CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY  
28 PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. You and We agree  
to arbitrate all disputes, claims and controversies arising out of or relating to (i) any  
aspect of the relationship between You and Us, whether based in contract, tort, statute  
or any other legal theory; (ii) this Agreement or any other agreement concerning the  
subject matter hereof; (iii) any breach, default, or termination of this Agreement; and

1 (iv) the interpretation, validity, or enforceability of this Agreement, including the  
2 determination of the scope or applicability of this Section [].

3 (Doc. 8-1 at 3; *see also* Doc. 8-4 at 2-3) (emphasis in original) The agreement indicates that by  
4 initialing the arbitration provision, they “are giving up any rights [they] might possess” to have a trial  
5 by jury, “judicial rights to discovery and appeal.” (Doc. 8-1 at 6, emphasis omitted) Plaintiff signed  
6 the PPA and initialed the arbitration provision. (*See* Doc. 8-4 at 3)

7 **III. The Federal Arbitration Act (“FAA”)**

8 The FAA applies to arbitration agreements in any contract affecting interstate commerce. *See*  
9 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); 9 U.S.C. § 2. It is undisputed that Vivint  
10 Solar operates nationwide and its activities affect interstate commerce. (*See* Doc. 8-1 at 4) Thus, the  
11 FAA governs the arbitration policy.

12 Under the FAA, written arbitration agreements “shall be valid, irrevocable, and enforceable,  
13 save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. A  
14 party seeking to enforce arbitration agreement may petition the Court for “an order directing the parties  
15 to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4.

16 The court’s role in applying the FAA is “limited to determining (1) whether a valid agreement  
17 to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron*  
18 *Corp. v. Ortho Diagnostic Systems*, 207 F.3d 1126, 1130 (9th Cir. 2000), citing 9 U.S.C. § 4. “If the  
19 response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration  
20 agreement in accordance with its terms.” *Id.*; *see also* 9 U.S.C. § 4 (“The court shall hear the parties,  
21 and upon being satisfied that the making of the agreement for arbitration or the failure to comply  
22 therewith is not in issue, the court *shall* make an order directing the parties to proceed to arbitration in  
23 accordance with the terms of the agreement” (emphasis added)). Importantly, because the FAA “is  
24 phrased in mandatory terms,” “the standard for demonstrating arbitrability is not a high one [and] a  
25 district court has little discretion to deny an arbitration motion.” *Republic of Nicaragua v. Standard*  
26 *Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991).

27 A party opposing arbitration has the burden to demonstrate the claims at issue should not be  
28 sent to arbitration. *Green Tree Fin. Corp.- Alabama v. Randolph*, 531 U.S. 79, 81 (2000); *see also*

1 *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) (“the parties  
2 challenging the enforceability of an arbitration agreement bear the burden of proving that the provision  
3 is unenforceable”). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor  
4 of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

5 **IV. Discussion and Analysis**

6 **A. Validity of the arbitration agreement**

7 When determining whether a valid and enforceable agreement to arbitrate has been established  
8 for the purposes of the FAA, the Court should apply “ordinary state-law principles that govern the  
9 formation of contracts to decide whether the parties agreed to arbitrate a certain matter.” *First Options*  
10 *of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Circuit City Stores v. Adams*, 279 F.3d 889, 892  
11 (2002). Because Plaintiff is a resident of California and Defendant seeks to compel arbitration in this  
12 state, the Court looks to California law to determine whether there is a valid arbitration agreement  
13 between the parties.

14 Pursuant to California law, the elements for a viable contract are “(1) parties capable of  
15 contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration.” *United*  
16 *States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999) (citing Cal. Civ. Code § 1550;  
17 *Marshall & Co. v. Weisel*, 242 Cal. App. 2d 191, 196 (1966)). An arbitration agreement may be  
18 “invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but  
19 not by defenses that apply only to arbitration or that derive their meaning from the fact that an  
20 agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011); *see*  
21 *also* Cal. Code Civ. Proc. § 1281 (explaining an arbitration agreement may only be invalidated upon  
22 the same “grounds as exist for the revocation of any contract”). Under California law, an arbitration  
23 agreement may be invalidated for the same reasons as other contracts. Cal. Code Civ. Proc. § 1281.

24 **1. Consent**

25 Generally “a party cannot be required to submit to arbitration any dispute which he has not  
26 agreed so to submit.” *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648  
27 (1986). However, it does not appear that the parties were not capable of consent or did not consent to  
28 the terms of the PPA.

1 To the extent that Plaintiff may have raised his inability to speak or read English to indicate he  
 2 was unable to do so, this does not mandate a finding that he did not consent to the terms of the contract.  
 3 *See, e.g., Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3rd Cir. 2008) (holding a Spanish-speaking  
 4 employee was bound by the arbitration agreement that he signed, even though he was unable to read it);  
 5 *Mohebbi v. Khazen*, 2014 WL 6845477 (N.D. Cal. 2014) (“party cannot avoid the terms of an  
 6 agreement he signs on the ground that he did not understand the language in which the contract was  
 7 written”). Contracting parties manifest mutual assent when a “specific offer is communicated to the  
 8 offeree, and an acceptance is subsequently communicated to the offeror.” *Netbula, LLC v. BindView*  
 9 *Dev. Corp.*, 516 F. Supp. 2d 1137, 1155 (N.D. Cal. 2007), citing *Russell v. Union Oil Co.*, 7 Cal. App.  
 10 3d 110, 114 (Ct. Cal. App. 1970). The allegations of the complaint support a conclusion that a Vivint  
 11 sales representative explained the PPA to Plaintiff who not only signed the PPA but initialed the  
 12 arbitration provision. Thus, Plaintiff indicated his consent to the PPA.

## 13 2. Unconscionability

14 A contract “is unenforceable if it is both procedurally and substantively unconscionable.”  
 15 *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007)). Procedural unconscionability  
 16 focuses on “oppression and surprise,” while substantive unconscionability focuses upon “overly harsh  
 17 or one-sided results.” *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1532 (1997) (citations omitted).  
 18 Both forms of unconscionability must be present in order for a court to find a contract unenforceable,  
 19 but it is not necessary that they be present in the same degree. *Davis*, 485 F.3d at 1072; *Stirlen*, 51 Cal.  
 20 App. 4th at 1532. Consequently, “[c]ourts apply a sliding scale: ‘the more substantively oppressive  
 21 the contract term, the less evidence of procedural unconscionability is required to come to the  
 22 conclusion that the term is unenforceable, and vice versa.’” *Id.* (quoting *Armendariz v. Foundation*  
 23 *Health Psychcare Services, Inc.*, 24 Cal.4th 83, 99 (2000)).

### 24 a. Procedural unconscionability

25 Procedural unconscionability focuses on the “manner in which the contract was negotiated and  
 26 the circumstances of the party at the time.” *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th  
 27 1322, 1329 (1999). The Court must consider both oppression and surprise “due to unequal bargaining  
 28 power.” *Armendariz*, 24 Cal. 4th at 114. Oppression derives from a lack of “real negotiation and an

1 absence of meaningful choice,” while surprise arises from the terms of the bargain being “hidden in a  
2 prolix printed form,” or drafted in “fine-print terms.” *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1288  
3 (2008); *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015).

4 *i. Oppression*

5 The threshold issue for oppression with procedural unconscionability “is whether the subject  
6 arbitration clause is part of a contract of adhesion.” *Stirlen*, 51 Cal. App. 4th at 1532; *see also Soltani*  
7 *v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001). A contract of adhesion “is a  
8 standardized contract, which, imposed and drafted by the party of superior bargaining strength,  
9 relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Graham*  
10 *v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 817 (1981). An arbitration clause on a “take it or leave it” basis  
11 demonstrates “quintessential procedural unconscionability.” *Aral v. Earthlink, Inc.*, 134 Cal.App.4th  
12 544, 557 (2005). Accordingly, the Court must examine “the manner in which the contract was  
13 negotiated and the circumstances of the parties at that time.” *Kinney v. United Healthcare Services*,  
14 70 Cal. App. 4th 1322, 1327 (1999).

15 It is undisputed that Vivint’s PPA terms were offered on a “take it or leave it” basis—giving  
16 users the option to either accept the terms or find another solar service. Accordingly, the “oppression”  
17 element is satisfied.

18 *ii. Surprise*

19 Under California law, Plaintiff cannot avoid the terms of a contract by asserting he did not—or  
20 was unable to—read the terms of the PPA by prior to signing it. *See Madden v. Kaiser Found.*  
21 *Hospitals*, 17 Cal. 3d 699, 710 (1976) (the “general rule [is] that one who assents to a contract is bound  
22 by its provisions and cannot complain of unfamiliarity with the language of the instrument”); *Marin*  
23 *Storage & Trucking, Inc.*, 89 Cal.App.4th 1042, 1049 (2001) (“A party cannot avoid the terms of a  
24 contract on the ground that he or she failed to read it before signing”). Plaintiff is unable to show  
25 “surprise” because the terms were not hidden from view or drafted in “fine-print terms.” *See Bruni*,  
26 160 Cal. App. 4th at 1288; *Sanchez*, 61 Cal. 4th at 911.

27 Because the agreement to submit to the dispute resolution program was offered on a “take it or  
28 leave it” basis, the agreement was procedurally unconscionable. *Circuit City Stores, Inc. v. Adams*,

1 279 F.3d 889, 893 (9th Cir. 2002). However, the lack of surprise supports a conclusion that the level  
2 of procedural unconscionability is lessened. *See Stirlen*, 51 Cal.App.4th at 1532 (directing the court to  
3 consider both “oppression and surprise”).

4 b. Substantive unconscionability

5 “Substantive unconscionability addresses the fairness of the term in dispute.” *Szetela v.*  
6 *Discover Bank*, 97 Cal. App. 4th 1094, 1100 (Ct. App. 2002). While “parties are free to contract for  
7 asymmetrical remedies and arbitration clauses of varying scope,” substantive unconscionability “limits  
8 the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum  
9 on the weaker party without accepting the forum for itself.” *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th  
10 Cir. 2003) (quoting *Armendariz*, 24 Cal. 4th at 118). Thus, the focus of the Court’s inquiry is whether  
11 an agreement is one-sided and will have an overly harsh effect on the party not given an opportunity to  
12 negotiate its terms. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 854 (2001).

13 The Ninth Circuit instructs courts applying California law to arbitration agreements “look  
14 beyond facial neutrality and examine the actual effects of the challenged provision.” *Ting*, 319 F.3d at  
15 1149; *see, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d at 1165, 1180 (2003) (finding an arbitration  
16 agreement substantively unconscionable upon review of the agreement’s provisions, such as claims  
17 subject to arbitration, fee and cost-splitting arrangements, remedies available, and termination/  
18 modification of the agreement).

19 i. Claims subject to arbitration

20 An arbitration agreement that compels arbitration for claims of the individual but exempts from  
21 arbitration those claims of the corporation is substantively unconscionable. *See Ferguson v.*  
22 *Countrywide Credit Indus.*, 298 F.3d 778, 785 (2002) (citing *Mercuro v. Superior Court*, 96 Cal. App.  
23 4th 167, 175-76 (Ct. App. 2002)). In this case, the PPA informs customers that Vivint agrees to  
24 arbitrate “all disputes, claims and controversies arising out of or relating to (i) any aspect of the  
25 relationship between You and Us . . . (ii) this Agreement or any other agreement concerning the subject  
26 matter hereof; (iii) any breach, default, or termination of this Agreement.” (Doc. 8-1 at 5) Thus, it does  
27 not appear that Defendant excluded claims it may bring against Plaintiff or other customers from the  
28 arbitration agreement. Accordingly, the claims subject to arbitration are not unconscionable. *See*



1 *Ferguson*, 298 F.3d at 784, n.6 (explaining substantive unconscionability may be demonstrated when a  
2 defendant seeks to enforce “what is essentially a unilateral arbitration agreement”).

3 *ii. Filing fees and cost arrangement*

4 An arbitration agreement containing a cost-splitting provision is substantively unconscionable.  
5 For example, the Ninth Circuit found a provision substantively unconscionable when the agreement  
6 forced the plaintiffs to pay the filing fee up to a maximum of \$125.00 and share costs equally after the  
7 first day of arbitration. *Ferguson*, 298 F.3d at 781; *see also Ingle*, 328 F.3d at 1177-78 (finding a  
8 provision substantively unconscionable that stated “each party shall pay one-half of the costs of  
9 arbitration following the issuance of the arbitration award”). Similarly, a party cannot be required “to  
10 bear any *type* of expense that [he or she] would not be required to bear . . . in court.” *Armendariz*, 24  
11 Cal. 4th at 110 (emphasis in original)

12 The PPA indicates: “If You initiate the arbitration, You shall be responsible to pay \$250.”  
13 (Doc. 8-4 at 3) In addition, the PPA indicates “fees, travel expenses, and other costs of the arbitration  
14 shall be borne by [the customer] and [Vivint] in accordance with the JAMS Rules and applicable law.”  
15 (*Id.*) This fee is similar to a filing fee and is a fraction of what it costs to file a complaint. Thus, there  
16 is no indication that Plaintiff would be require to incur any *type* of expense other than similarly  
17 expenses that are required to proceed in court. Further, there is no indication that Plaintiff could be  
18 held responsible for half the cost of arbitration. Accordingly, the fees and cost provision is not  
19 substantively unconscionable.

20 *iii. Limitations on discovery*

21 California law requires that an arbitration agreement “provide for adequate discovery.”  
22 *Armendariz*, 24 Cal. 4th 83 at 122. In *Armendariz*, the court observed that parties are “permitted to  
23 agree to something less than the full panoply of discovery provided in Code of Civil Procedure section  
24 1283.05.” *Id.* at 106.

25 As noted above, the PPA incorporates JAMS Rules, which are publically available and permit  
26 discovery, including “at least one deposition” and additional discovery upon request to the arbitrator.  
27 *See, e.g., Toho-Towa Co. v. Morgan Creek Prod., Inc.*, 217 Cal. App. 4th 1096, 1110 (2013) (referring  
28 to discovery in a JAMS arbitration). Because the PPA incorporates JAMS Rules, it provides adequate



1 discovery during the arbitration proceedings, and is not substantively unconscionable. *See Sanchez v.*  
2 *Homebridge Fin. Servs.*, 2018 U.S. Dist. LEXIS 45786 at \*16 (E.D. Cal. Mar. 20, 2018) (finding a  
3 provision incorporating JAMS Rules did not include “a substantively unconscionable limitation on  
4 discovery”).

5 *iv. Agreement as a whole*

6 Although Plaintiff has not opposed the motion, the Court has reviewed the arbitration provision  
7 as a whole. Refusing to enforce an arbitration agreement is appropriate “only when an agreement is  
8 permeated by unconscionability.” *Armendariz*, 24 Cal.4th 83 at 122 (internal quotation marks  
9 omitted). For example, the Ninth Circuit found an arbitration agreement was “permeated by  
10 unconscionable clauses” where there was a “lack of mutuality regarding the type of claims that must  
11 be arbitrated, the fee provision, and the discovery provision.” *Ferguson*, 298 F.3d at 788. Here, the  
12 terms, taken as a whole, do not appear substantively unconscionable.

13 3. Conclusion

14 The parties were capable of consent, did in fact consent, and there was a lawful object to the  
15 contract. Further, the terms of the agreement are not permeated with unconscionability. Accordingly,  
16 there is no evidence that the arbitration provision in the PPA is not a valid contract.

17 **B. Whether the Agreement encompasses the Disputed Issues**

18 To determine whether an arbitration agreement encompasses particular claims, the Court looks  
19 to the plain language of the agreement. “In the absence of any express provision excluding a particular  
20 grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from  
21 arbitration can prevail.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574,  
22 584-86 (1960).

23 The arbitration provision in this case confers power upon the arbitrator to address “any aspect of  
24 the relationship between [the customer] and [Vivint Solar],” as well as “the interpretation, validity, or  
25 enforceability of [the] Agreement, including the determination of the scope or applicability” of the  
26 arbitration provision. (Doc. 8-1 at 5-6; *see also* Doc. 8-4 at 3) With this broad definition, the  
27 agreement clearly encompasses Plaintiff’s claims against Vivint. *See Rent-A-Center, W., Inc. v.*  
28 *Jackson*, 561 U.S. 63 (2010) (“parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such

1 as whether the parties have agreed to arbitrate or whether their agreement covers a particular  
2 controversy”).

3 **C. Entry of a Stay**

4 The FAA provides, “If any suit or proceeding be brought in any of the courts of the United  
5 States upon any issue referable to arbitration under an agreement in writing for such arbitration, the  
6 court in which such suit is pending, upon being satisfied that the issue involved in such suit or  
7 proceeding is referable to arbitration under such an agreement, shall on application of one of the  
8 parties stay the trial of the action until such arbitration has been had in accordance with the terms of  
9 the agreement . . .” 9 U.S.C § 3.

10 Indeed, the Seventh and Tenth Circuits have adopted the view that a stay is the most  
11 reasonable approach rather than a dismissal, explaining: “[I]t would be ‘wasteful’ and inconsistent  
12 ‘with principles of judicial economy’ for a court which has jurisdiction of the parties to be required to  
13 dismiss the parties, and to compel one of them to sue in another forum to enforce its award under § 9.”  
14 *Denver & Rio Grande W. R. Co. v. Union Pac. R. Co.*, 868 F. Supp. 1244, 1250 (D. Kan. 1994) *aff’d*,  
15 119 F.3d 847 (10th Cir. 1997), quoting *In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994).  
16 Therefore, the Court the matter will be stayed pending the completion of arbitration.

17 **V. Conclusion and Order**

18 Defendant met its burden to demonstrate there is a valid arbitration agreement that encompasses  
19 the issues in dispute. As a result, “there is a presumption of arbitrability” and the motion to compel  
20 arbitration should not be denied. *See AT&T Tech., Inc.*, 475 U.S. at 650.

21 Accordingly, the Court **ORDERS**:

- 22 1. Defendant’s motion to compel arbitration is **GRANTED**;
- 23 2. The matter is **STAYED** to allow the completion of the arbitration;
- 24 3. Within 120 days and every 120 days thereafter, counsel **SHALL** file a joint status  
25 report.
- 26 4. Within 10 days of the determination by the arbitrator, counsel **SHALL** file a joint status  
27 report; and

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5. The Court retains jurisdiction to confirm the arbitration award and enter judgment for the purpose of enforcement.

IT IS SO ORDERED.

Dated: April 9, 2018

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE