

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GERRIE DEKKER, et al.,
Plaintiffs,

No. C 19-07918 WHA

v.

VIVINT SOLAR, INC., et al.,
Defendants.

**ORDER RE ARBITRATION AND
MOTION TO DISMISS**

INTRODUCTION

In this unfair business practices suit, defendant solar panel installer moves to compel arbitration, or in the alternative, dismiss the complaint. Because the arbitration agreement clearly delegates the question of arbitrability to the arbitrator, for plaintiffs who agreed to, **ARBITRATION IS COMPELLED**. The motion to dismiss against the remaining two named plaintiffs is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

Defendants Vivint Solar, Inc., Vivint Solar Holdings, Inc., Vivint Solar Developer, LLC, and Vivint Solar Provider, LLC (all “Vivint”) install solar panels on customers’ roofs and, at least as advertised, sell them the low cost, clean energy produced (Compl., Dkt. No. 1, at ¶ 3). Vivint’s unit of sale is the residential “power purchase agreement,” under which Vivint agrees to install and maintain the solar system on a customer’s roof (*id.* at ¶ 4).

1 Plaintiffs' complaint, though, alleges a host of systematic misconduct. Instead of
2 agreeing to purchase only power *used*, customers apparently agreed to purchase all power
3 *generated* by the system — leading to higher bills. And, customers must still pay the average
4 expected energy generation rate even while the system is offline or broken (*id.* at ¶ 5).

5 Moreover, the agreement imposes a 20-year term which limits customers' ability to sell
6 their homes. The new buyer must either agree to assume the remainder of the power-purchase
7 agreement term, or the customer must purchase the entire solar system. Plaintiffs contend
8 these buy-out provisions, along with Vivint's other prepayment prices and default payments,
9 constitute unlawful liquidated damages provisions (*id.* at ¶¶ 4, 6–9).

10 To attract and bind customers to these power-purchase agreements, Vivint employs
11 aggressive door-to-door salespeople to proclaim the convenience and low cost of the solar
12 installation, and ease of transfer if a customer sells their home. But, Vivint's salesforce
13 deliberately targets vulnerable consumers, the elderly, active-duty military personnel, low-
14 income and at risk-borrowers, and non-native English speakers. Thus, Vivint allegedly
15 peddles its deceptively dangerous power-purchase agreement to those who don't really
16 understand and cannot actually afford its consequences (*id.* at ¶¶ 2–3).

17 Plaintiffs are California residents ensnared by Vivint. Gerrie Dekker signed a power-
18 purchase agreement in 2012 but discovered in 2017 that Vivint had been charging her for a
19 system offline for nearly two years (*id.* at ¶ 15). Karen Barajas's terminally ill father,
20 Thompson Bryson, signed up for Vivint's solar system. Following his death, Vivint threatened
21 to put a lien on her father's home unless she bought out the system (*id.* at ¶ 16). Marlene
22 Rogers has been unable to sell her home because of Vivint's restrictions (*id.* at ¶ 17). Vivint
23 demanded exorbitant early termination fees from Daniel Thompson, Jae Chong, Marci Hulsey,
24 Cindy Piini, and Genie Hilliard, each who had become dissatisfied with Vivint's solar service
25 (*id.* at ¶ 18–21, 23). Phyllis Runyon discovered Vivint had deliberately installed more solar
26 panels than she needed on her roof so they could make her buy more power (*id.* at ¶ 22). And,
27 Juan Bautista, a native Spanish speaker with virtually no English proficiency, was sold a
28 system by a Spanish speaking salesperson who made him sign an English contract but never

1 gave him a translated copy. In 2018, Vivint sent Mr. Bautista a \$2,000 bill that ballooned to
2 \$18,000 thirty days later (*id.* at ¶ 24).

3 Plaintiffs filed this putative class action in December 2019, seeking relief from Vivint’s
4 (alleged) unlawful liquidated damages provision and accompanying violations of California’s
5 Consumer Legal Remedies Act and Unfair Competition Law. Mr. Bautista also seeks relief
6 under the California Translation Act. But Vivint’s power-purchase agreement, for most
7 plaintiffs, included an arbitration agreement which governs:

8 [A]ll disputes, claims and controversies arising out of or relating to (i) any aspect
9 of this relationship between You and Us, whether based in contract, tort, statute or
10 any other legal theory; (ii) this Agreement or any other agreement concerning the
11 subject matter hereof; (iii) any breach, default, or termination of this Agreement;
and (iv) the interpretation, validity, or enforceability of this Agreement, including
the determination of the scope or applicability of this [arbitration agreement].

12 (Dkt. Nos. 22-1 at ¶ 4; 22-5 at ¶ 6(e) (similar)). Additionally, the agreement prohibits class or
13 representative relief in one of two manners:

14 The arbitrator shall not have any authority to (i) entertain a claim, or to award any
15 relief, on behalf of or against anyone other than a named party to the arbitration;
or (ii) join any other party to the arbitration.

16 (Dkt. No. 22-5 at ¶ 6(e)),

17 You may bring claims against us only in your individual capacity, and not as
18 plaintiff or class member in any purported class or representative proceeding.

19 (Dkt. No. 22-1 at ¶ 4). Vivint now moves to compel plaintiffs Hilliard (Dkt. No. 22, Exh. A),
20 Hulse (Exh. B), Bautista (Exh. C), Thompson (Exh. D), Barajas (Bryson) (Exh. E), Chong
21 (Exh. F), Piini (Exh. G), Rogers (Exh. H), and Runyon (Exh. I) to arbitrate, or in the
22 alternative, to dismiss their claims. Vivint also moves separately to dismiss Ms. Dekker’s
23 claims as untimely. This order follows full briefing and oral argument.

24 **ANALYSIS**

25 **1. VIVINT’S MOTION TO COMPEL ARBITRATION.**

26 Under the Federal Arbitration Act, a district court determines “whether a valid arbitration
27 agreement exists and, if so, whether the agreement encompasses the dispute at issue.”
28

1 *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). Here,
2 plaintiffs do not dispute the arbitration agreement covers the consumer protection claims in suit
3 (Dkt. Nos. 22-5 at ¶ 6(e); 22-1 at ¶ 4). Thus, the only issue is whether the arbitration
4 agreement is valid and enforceable.

5 In California, “a law established for a public reason cannot be contravened by a private
6 agreement.” This is no less true where the underlying agreement compels arbitration. “[A]
7 provision in *any* contract . . . that purports to waive, in all fora, the statutory right to seek
8 public injunctive relief . . . is invalid and unenforceable under California law.” *McGill v.*
9 *Citibank, N.A.*, 393 P.3d 85, 93–94 (Cal. 2017).

10 Plaintiffs contend that Vivint’s arbitration agreements prevent public injunctive relief and
11 are unenforceable under *McGill*. For this to be true: (1) plaintiffs’ claims must offer the public
12 injunctive relief contemplated in *McGill*; and (2) plaintiffs must actually seek such relief.
13 They do.

14 *First*, in *McGill*, the California Supreme Court held that “the public injunctive relief
15 available under the UCL [and] the CLRA . . . is primarily for the benefit of the general public.”
16 *Id.* at 94 (quotation omitted). So, the question here is whether plaintiffs’ claims for unlawful
17 liquidated damages under California Civil Code § 1671(d) and for violation of the California
18 Translation Act are also directed to the public benefit. They are.

19 Public injunctive relief “has the primary purpose and effect of prohibiting unlawful acts
20 that threaten future injury to the general public.” *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819,
21 824 (9th Cir. 2019). The difference is that “private injunctive relief . . . primarily resolve[s] a
22 private dispute between the parties and . . . benefits the public, if at all, only incidentally”
23 where “public injunctive relief . . . by and large benefits the general public and . . . benefits the
24 plaintiff, if at all, only incidental[ly] and/or as a member of the general public.” *McGill*, 393
25 P.3d at 89 (citations and quotations omitted).

26 California generally prohibits liquidated damages in consumer contracts. In “contract[s]
27 for the retail purchase, or rental . . . of personal property or services, primarily for . . . personal,
28 family, or household purchases” “a provision in a contract limiting liquidated damages for the

1 breach of the contract is void” in most cases. *See* Cal. Civ. Code § 1671(c)–(d). And,
 2 California’s Translation Act requires “[a]ny person engaged in a trade or business who
 3 negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in
 4 writing” to deliver “a translation of the contract or agreement in the language in which the
 5 contract or agreement was negotiated.” The California Legislature originally passed this law
 6 “to increase consumer information and protections for the state’s sizeable and growing
 7 Spanish-speaking population.” Cal. Civ. Code § 1632. Both these laws set the *public*
 8 boundaries of consumer contract which apply whether or not the parties agree to them.

9 *Second*, plaintiffs do invoke each of these statutes “by and large” for the public benefit.
 10 The question is not how many times the complaint uses the term “public,” it is the *form* of the
 11 relief sought. *See McGill*, 393 P.3d at 89. As noted, plaintiffs seek to stop: (1) Vivint’s
 12 imposition of unlawful liquidated damages provisions; and (2) Vivint’s imposition of English
 13 agreements on non-English speaking customers. *These are California’s express goals* — not
 14 merely terms the parties agreed to. If the termination provisions are declared unlawful
 15 liquidated damages provisions, then plaintiffs’ relief from further enforcement of these
 16 provisions follows incidentally from prohibiting Vivint’s imposition and enforcement of the
 17 provisions against *anyone*. And if Vivint’s practice of imposing English agreements on non-
 18 English speaking customers is declared unlawful, then Mr. Bautista and similarly-situated
 19 plaintiffs’ relief from enforcement of the power-purchase agreements also follows incidentally
 20 from the prohibition of that practice against *anyone*. Vivint peddles its (allegedly) unlawful
 21 contracts to the public at large. Prohibition of that misbehavior reaches the same.

22 In sum, plaintiffs seek public injunctive relief. Yet, Vivint’s agreements prohibit “any
 23 relief, on behalf of or against anyone other than a named party to the arbitration” (Dkt. No. 22-
 24 5 at ¶ 6(e)). Thus, the arbitration clauses are invalid insofar as they purport to waive plaintiffs’
 25 rights to seek such public injunctive relief. *McGill*, 393 P.3d at 93–94.

26 **A. ARBITRABILITY IS DELEGATED TO THE ARBITRATOR.**

27 It appears, however, that the law has moved to the point where the above analysis is
 28 committed to the arbitrator. Though the gateway issues of “(1) whether there is an agreement

1 to arbitrate” and “(2) whether the agreement covers the dispute” are generally for the court,
 2 they “can be expressly delegated to the arbitrator where the parties *clearly and*
 3 *unmistakably* provide otherwise.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)
 4 (quotation omitted). But “a party can be forced to arbitrate *only those issues* it specifically has
 5 agreed to submit to arbitration.” *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 945
 6 (1995) (emphasis added). So, the questions here become: (1) may parties delegate a public-
 7 policy matter of enforceability of an arbitration agreement to the arbitrator; and (2) does the
 8 provision here so delegate?

9 *First*, the United States Supreme Court recognized in *Rent-A-Center, West, Inc. v.*
 10 *Jackson* that public-policy unconscionability challenges to an arbitration agreement may be
 11 delegated to the arbitrator. 561 U.S. 63, 68–69 (2010). Faced with an undisputedly “clear and
 12 unmistakable” delegation of arbitrability, Mr. Jackson had instead argued the entire agreement
 13 was unconscionable. The Supreme Court distinguished between the delegation provision and
 14 the arbitration agreement as a whole. An unconscionability challenge specifically to the
 15 delegation provision would have been for the court. But because Jackson had not “challenged
 16 the delegation provision specifically,” it was accepted as valid under § 2 of the FAA, and “the
 17 validity of the Agreement as a whole [was] for the arbitrator.” Thus, an unconscionability
 18 challenge could be delegated to the arbitrator. *Id.* at 69, fn. 1, 72–74.

19 *Second*, our court of appeals, applying *Rent-A-Center* in *Brennan*, provided an example
 20 of clear delegation in the American Arbitration Association rules, which stated that the
 21 “arbitrator shall have the power to rule on his or her own jurisdiction, including any objections
 22 with respect to the . . . validity of the arbitration agreement.” *Brennan* challenged the entire
 23 arbitration clause as procedurally and substantively unconscionable. But our court of appeals
 24 held “that incorporation of the AAA rules constitutes clear and unmistakable evidence that
 25 contracting parties agreed to arbitrate arbitrability.” 796 F.3d at 1128, 1130.

26 Here, just as clearly, Vivint’s arbitration agreements delegate the arbitrability — “the
 27 interpretation, validity, or enforceability . . . including the determination of the scope or
 28 applicability” — of the agreements to the arbitrator (Dkt. Nos. 22-5 at ¶ 6(e); 22-1 at ¶ 4).

1 Indeed, plaintiffs' challenge under *McGill* is explicitly one of "invalid[ity] and
2 unenforceab[ility] under California law," categories enumerated in the delegation provision.
3 *See* 393 P.3d at 94.

4 Plaintiffs contend *Brennan* left the door ajar, that where one contracting party is
5 unsophisticated, the agreement's incorporation of the AAA rules might not clearly delegate
6 arbitrability. Plaintiffs cite several decisions from this circuit holding such incorporation
7 insufficient against such an unsophisticated party. But the delegation here is not a reference to
8 the arbitrator's own rules, rather it is plain on the face of the arbitration agreement and must be
9 observed. 796 F.3d at 1130.

10 *Third*, even though it appears clear from the above discussion that Vivint may not compel
11 plaintiffs to waive public injunctive relief via an arbitration clause, the final decision on this
12 matter remains for the arbitrator. In *Schein v. Archer & White Sales*, the Court of Appeals for
13 the Fifth Circuit declined to compel arbitration, even if the question of arbitrability was clearly
14 delegated, because the asserted grounds for arbitrability were "wholly groundless." But the
15 Supreme Court unanimously reversed, holding that "[w]hen the parties' contract delegates the
16 arbitrability question to an arbitrator, a court may not override the contract. In those
17 circumstances, a court possesses no power to decide the arbitrability issue." 586 U.S. ___, 139
18 S. Ct. 524, 529 (2019).

19 Plaintiffs' argument that the arbitration agreements are invalid under *McGill* — however
20 meritorious — is for the arbitrator. Where the question of arbitrability is clearly delegated,
21 *Rent-A-Center*, *Brennan*, and *Schein* leave no discretion to evaluate whether the general
22 contract principles of a state prevent enforcement of the agreement. How the laws of the
23 several states will further develop the application of general contract principles to arbitration
24 clauses if the question is almost always delegated to the arbitrator remains unclear.

25 **B. CONTRACT DEFENSES ARE DELEGATED TO THE ARBITRATOR; FORMATION**
26 **DEFECTS ARE NOT.**

27 Plaintiffs also contend, more broadly, that formation and validity defenses to the power-
28 purchase agreements remain for the court — not the arbitrator. As above, parties may delegate

1 these gateway questions to the arbitrator. *Brennan*, 796 F.3d at 1130. But, again, “[a] federal
 2 court’s duty to enforce an arbitration provision . . . operates on the *specific written*
 3 *provision* . . . that the party seeks to enforce.” So, the question here is *which specific issues* the
 4 agreement “clearly and unmistakably” delegates to the arbitrator. *Brennan*, 796 F.3d at 1130,
 5 1133 (citing *Rent-A-Center*, 561 U.S. at 72) (emphasis added).

6 The delegation provision expressly delegates “interpretation,
 7 validity, . . . enforceability, . . . scope[,] or applicability” issues to the arbitrator (Dkt. Nos. 22-1
 8 at ¶ 4; 22-5 at ¶ 6(e)). The United States Supreme Court has recognized that “[g]enerally
 9 applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to
 10 *invalidate* arbitration agreements” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681,
 11 687 (1996) (emphasis added). And, a “contractual clause is *unenforceable* if it
 12 is . . . unconscionable.” *See Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir.
 13 2007) (overruled on other grounds) (emphasis added). Thus, plaintiffs’ contentions that Vivint
 14 misrepresented or obfuscated power-purchase agreement terms or that the agreements
 15 themselves are unconscionable are delegated. Even the question (which plaintiffs do not raise)
 16 whether Vivint may enforce an arbitration agreement that appears to be signed by plaintiff
 17 Gennie Hilliard’s *husband* Christopher remains a matter of enforceability for the arbitrator
 18 (Compl. at ¶ 23; Dkt. No. 22-1).¹

19 But, Vivint’s agreements do not clearly delegate the question of *formation* to the
 20 arbitrator. Vivint only needed to use that term used in *Rent-A-Center*’s indisputably “clear and
 21 unmistakable” delegation: “formation.” *See* 581 F.3d at 914 (“interpretation, applicability,
 22 enforceability or formation of this Agreement”); 561 U.S. at 66. It did not and must live with
 23 that choice. Absent such clear delegation, formation defects — such as a language barrier —
 24 remain for the Court.

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 28 ¹ As a final note, plaintiffs do not challenge whether Vivint’s affiliates may invoke the arbitration
 agreement together. This argument is waived.

C. MR. BAUTISTA’S ARBITRATION AGREEMENT IS DEFECTIVE.

The “mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). The manifestation of assent is judged objectively. *See Cal Fire Local 2881 v. Cal. Pub. Empls. Ret. Sys.*, 435 P.3d 433, 455 (Cal. 2019) (Kruger, J., concurring); WITKIN, SUMMARY OF CAL. L., CONTRACTS, § 767 (11th ed. 2017). And, where a party’s conduct could not reasonably be taken as assent to contract, for example where the terms are hidden, no contract is formed. *See Barnes & Noble*, 763 F.3d at 1177–78 (citing *Specht v. Netscape*, 306 F.3d 17 (2d Cir. 2002)).

Plaintiff Juan Bautista spoke Spanish, not English. A sales representative walked up to his door to pitch a Vivint solar system. The entire discussion was conducted *in Spanish*. The sales representative then had Mr. Bautista sign a document in *English*. Vivint never sent Mr. Bautista a Spanish translation (Dkt. Nos. 1, 46). Now, without even attempting to assert that the terms of the arbitration provision were communicated to Mr. Bautista in Spanish, Vivint seeks to force him to arbitrate. Mr. Bautista had no reason to comprehend the document presented in English, so his signature is not an objective manifestation of assent to its terms. The reasonable observer is not naïve.

Vivint cites only non-binding authority to place the burden on Mr. Bautista to raise the language barrier or to ask for more time, as though the sales representative was not aware the negotiations took place in Spanish. Regardless, the California Legislature has placed that burden on Vivint:

Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, that includes a translation of every term and condition in that contract or agreement.

Cal. Civ. Code § 1632(b). If Vivint wanted to send sales representatives to Mr. Bautista’s door and bind him to an arbitration provision, it should have provided a Spanish version of its

1 contract. *See Lopez v. Asbury Fresno Imports, LLC*, 234 Cal. App. 4th 71, 77 (2015); *Reyes v.*
2 *Superior Court*, 118 Cal. App. 3d 159, 161 (1981).

3 Mr. Bautista entered no agreement to arbitrate and will not be compelled to do so. On
4 the complaint and limited record presented, it is not even clear that he entered *any* agreement
5 with Vivint.

6 **2. VIVINT’S MOTIONS TO DISMISS.**

7 This order does not reach the merits of plaintiffs Barajas, Rogers, Thompson, Chong,
8 Hulse, Piini, Runyon, and Hilliard’s complaints as they are compelled to arbitrate. But Ms.
9 Dekker did not sign an arbitration agreement and Mr. Bautista never made one. So Vivint
10 moves, in the alternative, to dismiss these complaints.

11 **A. PLAINTIFF DEKKER.**

12 Vivint does not move to dismiss Ms. Dekker’s claims on the merits but instead argues her
13 claims are untimely under both a one-year contractual limitations period and California’s
14 standard statutes of limitations for her claims (Dkt. No. 21 at 1, fn. 1; 24). This order
15 disagrees.

16 “A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the
17 applicable statute of limitations only when the running of the statute is apparent on the face of
18 the complaint.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969
19 (9th Cir. 2010) (quotation omitted). Plaintiffs’ unlawful liquidated damages, Consumer Legal
20 Remedies Act, and Unfair Competition Law claims must be brought within either three or four
21 years. Cal. Code Civ. P. § 337; Cal. Bus. Prof. Code § 17208; Cal. Civ. Code § 1783; *Beasley*
22 *v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1401 (1991).

23 California generally observes last-element accrual, that is, the “cause of action accrues
24 when [it] is complete with all of its elements — those elements being wrongdoing, harm, and
25 causation.” The California Supreme Court has explicitly held, in the § 17200 context, that
26 legislative “silence triggers a presumption in favor of permitting settled common law accrual
27 rules to apply.” *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 875–76 (Cal. 2013) (quotation
28 omitted).

1 In 2017, Ms. Dekker discovered she had been improperly billed for an offline solar
 2 system for nearly two years. She requested removal of the system, but ultimately sued on
 3 December 3, 2019 (Compl. at ¶ 15). Vivint characterizes Ms. Dekker’s complaint as purely
 4 about the propriety of the alleged liquidated damages provisions, which were part of Ms.
 5 Dekker’s power purchase agreement from the beginning. It is generally true that “whether a
 6 contract is fair or works an unconscionable hardship is determined with reference to the time
 7 when the contract was made” *See Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d
 8 866, 875 (1979). But just because Vivint drafted a potentially unlawful agreement in 2012 did
 9 not irrevocably mandate that it enforce the unlawful provisions in 2017. That action is within
 10 the applicable three or four-year statutes of limitations.

11 Vivint also contends Ms. Dekker’s claims are barred by a one-year limitations period
 12 included in the power-purchase agreement, which reads “both parties agree that no lawsuit or
 13 any other legal proceeding connected with this agreement shall be brought or filed more than
 14 one (1) year after the incident giving rise to the claim occurred” (Dkt. No. 25-1 at 3).

15 Vivint essentially asserts Ms. Dekker should have filed suit within one year of
 16 discovering the incorrect billing, meaning the discovery of the incorrect billing *itself* was “the
 17 incident giving rise to the claim.” But no reasonable person discovers an improper bill and
 18 immediately sues. Instead, they investigate. The complaint alleges Vivint billed Ms. Dekker
 19 for an offline system for two years and, when she complained, demanded \$40,000 (Compl. at ¶
 20 15). It is not clear whether Vivint immediately rebuffed Ms. Dekker and demanded \$40,000,
 21 whether a period of negotiation continued into the one-year limitations period, or whether
 22 Vivint’s own delayed response tolled the limitations period. Absent these facts, and regardless
 23 of the propriety of the shortened contractual limitations period, Ms. Dekker’s complaint is not
 24 facially untimely. *See Von Saher*, 592 F.3d at 969.²

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 26
 27 ² Vivint’s motion to dismiss on the merits does mention Ms. Dekker, but expressly disclaims her
 28 from the scope of its motion to compel and motion to dismiss on the merits (Dkt. No. 21 at 1).
 Regardless, Vivint does not get two bites of the apple against Ms. Dekker. Its motion against her
 raises only the statute of limitations and this order will not exceed that scope.

B. PLAINTIFF BAUTISTA.

Vivint does not challenge Mr. Bautista’s claim for violation of the California Translation Act. But plaintiffs’ liquidated damages, and derivative unconscionability claims — each predicated upon an unlawful contract — appear inapplicable to Mr. Bautista given this order’s observation that, on this record, he likely lacks an agreement with Vivint. Thus, this order dismisses Mr. Bautista’s first four claims for relief and invites him to move for leave to amend his complaint.

CONCLUSION

Plaintiffs Barajas, Bryson, Rogers, Thompson, Chong, Hulsey, Piini, Runyon, and Hilliard are **COMPELLED TO ARBITRATE** their claims against Vivint and its motion to dismiss as to those plaintiffs is **DENIED AS MOOT**. But the Court retains jurisdiction over these claims, should the arbitrator decide any of their claims are not arbitrable.

Vivint’s motion to dismiss plaintiff Dekker is **DENIED**.

Finally, Vivint’s motion to dismiss plaintiff Bautista is **GRANTED**. His claim under the California Translation Act was not challenged and may proceed, but Mr. Bautista is invited to move for leave to amend his complaint by **APRIL 6 AT NOON**. Any such motion must include as an exhibit a redlined version of the proposed amendment that clearly identifies all changes from the current complaint. This order highlighted certain deficiencies in the complaint, but it will not necessarily be enough to add sentences parroting each missing item identified herein. If Mr. Bautista moves for leave to file yet another amended complaint, he should be sure to plead his best case, taking into account all criticisms made by defendants, including those not reached by this order.

IT IS SO ORDERED.

Dated: March 24, 2020.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California