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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

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GERTRUDE I. HEWAPATHIRANA;) Case No. 37-2018-00016438-CU-MC-CTL
)
Plaintiff,) Assigned to the Honorable Eddie C. Sturgeon
)
v.) **DEFENDANT’S NOTICE OF MOTION AND**
) **MOTION TO COMPEL ARBITRATION;**
) **MEMORANDUM OF POINTS AND**
14 VIVINT SOLAR, INC. and DOES 1 through) **AUTHORITIES**
20, inclusive,)
)
Defendants.) [Filed concurrently herewith: Declaration of
) Mark Valdez; Declaration of Chet A.
) Kronenberg; [Proposed] Order]
)
) Date: August 24, 2018
) Time: 9:00 a.m.
) Dept.: C-67
)
) Date Action Filed: April 3, 2018
)
)
)

1 **TO PLAINTIFF GERTRUDE HEWAPATHIRANA AND TO HER ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE THAT** on August 24, 2018 at 9:00 a.m. before the
4 Honorable Eddie C. Sturgeon in Department C-67 of the above-entitled Court located at 330 W.
5 Broadway, San Diego, California 92101, Defendant Vivint Solar, Inc. ("Vivint Solar") will and
6 hereby does move, pursuant to 9 U.S.C. § 2 and/or California Code of Civil Procedure § 1281.2,
7 for an order to compel arbitration. Pursuant to California Rule of Court 3.1330, a copy of the
8 agreement to arbitrate on which this motion is based is attached to the accompanying Declaration
9 of Mark Valdez and is incorporated by reference.

10 Vivint Solar further requests that, pursuant to 9 U.S.C. § 3 and/or California Code
11 of Civil Procedure § 1281.4, the Court stay this litigation pending arbitration.

12 Vivint Solar's Motion is based on this Notice of Motion, the Motion, the
13 accompanying Memorandum of Points and Authorities, the Declarations of Mark Valdez and Chet
14 A. Kronenberg, all pleadings and papers on file herein and upon such other evidence as may be
15 presented prior to or at the hearing on the Motion.

16
17 Dated: May 18, 2018

18 SIMPSON THACHER & BARTLETT LLP

19
20 By


Chet A. Kronenberg
Tyler Z. Bernstein

21
22 *Attorneys for Defendant Vivint Solar, Inc.*

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

INTRODUCTION 1

STATEMENT OF FACTS 2

 I. In January 2017, Plaintiff Signs The PPA, Which Contains An Arbitration
 Provision 2

 II. By Email Dated September 6, 2017, Plaintiff Admits That She Signed The
 PPA 3

 III. Notwithstanding Plaintiff’s September 6, 2017 Admissions, Plaintiff Files An
 Identity Theft Victim’s Complaint and Affidavit Accusing Vivint Solar Of
 Forging Her Signature..... 3

 IV. Plaintiff Commences This Action..... 4

ARGUMENT 4

 I. The Federal Arbitration Act Governs This Arbitration Agreement And
 Embodies A Strong Public Policy Favoring Arbitration 4

 II. This Court Must Compel Plaintiff To Arbitrate 4

 A. The Parties Entered Into A Valid Arbitration Agreement 5

 B. The Arbitration Agreement Encompasses The Dispute At Issue 6

 III. This Litigation Must Be Stayed Pending Arbitration 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

1		
2		
3		
4	<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	4, 6
5		
6	<i>Aviation Data, Inc. v. Am. Express Travel Related Servs. Co.</i> , 152 Cal. App. 4th 1522 (2007)	4
7	<i>Cronus Invs., Inc. v. Concierge Servs.</i> , 35 Cal. 4th 376 (2005)	4
8		
9	<i>DirecTV, Inc. v. Imburgia</i> , 136 S. Ct. 463 (2015).....	4
10	<i>Engalla v. Permanente Med. Grp., Inc.</i> , 15 Cal. 4th 951 (1997)	5
11	<i>Fed. Ins. Co. v. Superior Court (Mackey)</i> , 60 Cal. App. 4th 1370 (2d Dist. 1998).....	7
12		
13	<i>GIB, LLC v. Salon Ware, Inc.</i> , 634 F. App'x 610 (9th Cir. 2016)	5
14	<i>Greear v. Comcast Corp.</i> , No. C 14-05333 JSW, 2015 WL 926576 (N.D. Cal. Mar. 3, 2015)	7
15		
16	<i>Malone v. Superior Court</i> , 226 Cal. App. 4th 1551 (2d Dist. 2014).....	6
17	<i>Momot v. Mastro</i> , 652 F.3d 982 (9th Cir. 2011)	5
18		
19	<i>Nunez v. R'bibo</i> , 211 Cal. App. 3d 559 (2d Dist. 1989).....	5
20		
21	<i>Omar v. Ralphs Grocery Co.</i> , 118 Cal. App. 4th 955 (2d Dist. 2004).....	5
22	<i>Preach v. Monter Rainbow</i> , 12 Cal. App. 4th 1441 (2d Dist. 1993).....	5
23		
24	<i>Scott v. Harris</i> , 550 U.S. 372 (2007).....	5
25	<i>Tiri v. Lucky Chances, Inc.</i> , 226 Cal. App. 4th 231 (1st Dist. 2014).....	6
26	<i>Twentieth Century Fox Film Corp. v. Superior Court</i> , 79 Cal. App. 4th 188 (2d Dist. 2000).....	7
27		
28		

1
2
3
4
5
6
7
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10
11
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STATUTES

9 U.S.C. § 2 4
9 U.S.C. § 3 6
9 U.S.C. § 4 5
Cal. Civ. Proc. Code § 1281.4 7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Vivint Solar, Inc. (“Vivint Solar”) respectfully submits this
3 Memorandum of Points and Authorities in support of its motion to compel arbitration of Plaintiff
4 Gertrude Hewapathirana’s claims.

5 **INTRODUCTION**

6 Plaintiff had solar panels installed on her roof by Vivint Solar pursuant to a January
7 2017 Residential Solar Power Purchase Agreement (the “PPA”). The PPA signed by Plaintiff
8 contains an arbitration provision covering any disputes between the parties. To try to avoid her
9 obligations under the PPA, including payment for solar power and binding arbitration, Plaintiff
10 alleges that “she never signed the [PPA]” and that Vivint Solar “forged” her signature. Plaintiff
11 even went so far as to file a “Identity Theft Victim’s Complaint and Affidavit” in January 2018,
12 certifying that a “Vivint Solar person forged [her] signature.”

13 Plaintiff’s allegations of forgery are insufficient as a matter of law to avoid
14 arbitration. *In a September 6, 2017 email to Vivint Solar, which Plaintiff references in her*
15 *Complaint, Plaintiff admitted four different times that she signed the PPA.* Plaintiff’s entire
16 lawsuit—and her Identify Theft Victim’s Complaint and Affidavit—are based on a lie. Because
17 Plaintiff admitted in writing that she signed the PPA, there are no genuine issues of fact
18 necessitating a trial on whether Plaintiff’s signature on the PPA was forged. In addition, the
19 arbitration provision expressly provides that it encompasses any disputes between the parties
20 concerning “the interpretation, validity, or enforceability of [the PPA], including the determination
21 of the scope or applicability of [the arbitration clause.]” Accordingly, any challenge to the
22 enforceability of the arbitration clause must be made to the arbitrator—not this Court.

23 The false allegations in Plaintiff’s Complaint are particularly reprehensible because
24 this is not the first time that Plaintiff’s counsel—the Mashiri Law Firm and The Jami Law Firm
25 P.C.—has accused Vivint Solar of forgery and had a client perjure himself or herself in an
26 “Identity Theft Victim’s Complaint and Affidavit.” On February 1, 2018, Judge Battaglia
27 dismissed a lawsuit brought by a different consumer who also filed an Identity Theft Victim’s
28 Complaint and Affidavit. In denying the plaintiff leave to amend his complaint, Judge Battaglia

1 held that the plaintiff's theory that Vivint Solar stole his signature from some public source and
2 put it on the form was an "impossibility." Kronenberg Decl., Ex. A (*Del Llano v. Vivint Solar,*
3 *Inc., et al.*, Case No. 3:17-cv-01429-AJB-MDD (S.D. Cal.), Dkt. 25) at 13-15.¹ Plaintiff's
4 allegations in this case are even worse than the plaintiff's allegations in the prior case given
5 Plaintiff's multiple admissions in writing that she signed the PPA.

6 STATEMENT OF FACTS

7 **I. In January 2017, Plaintiff Signs The PPA, Which Contains An Arbitration Provision**

8 On January 26, 2017, Vivint Solar's salesperson Mark Valdez met with Plaintiff at
9 her residence. Valdez Decl., ¶ 2.² Mr. Valdez provided Plaintiff with the PPA on an electronic
10 tablet. *Id.*, ¶ 3. According to Mr. Valdez, Plaintiff viewed the form on the electronic tablet and
11 signed the PPA on that tablet. *Id.*

12 The PPA includes an arbitration clause stating that "any dispute" between the
13 parties "shall be resolved by binding arbitration." *Id.*, Ex. A (PPA) at 11. Under the heading
14 "Scope of this Arbitration Provision," the arbitration clause provides, in relevant part, as follows:

15 Either You or We may, without the other's consent, elect mandatory,
16 binding arbitration for any claim, dispute, or controversy arising out of or
17 relating to (i) any aspect of the relationship between You and Us, whether
18 based in contract, tort, statute, or any other legal theory; (ii) this Agreement
19 or any other agreement concerning the subject matter hereof; (iii) any
20 breach, default, or termination of this Agreement; and (iv) the interpretation,
21 validity, or enforceability of this Agreement, including the determination of
22 the scope or applicability of this Section 6(e) (each, a "Dispute"). Any
questions about whether any Dispute is subject to arbitration shall be
resolved by interpreting this arbitration provision in the broadest way the
law will allow it to be enforced. . . . This arbitration agreement is made
pursuant to a transaction involving interstate commerce, and shall be
governed by the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1-16).

23 *Id.*, Ex. A (PPA) at 12.

24 Under the heading "Arbitration Procedures," the arbitration clause states,
25 among other things, that the arbitration "shall be administered by JAMS pursuant to its

26 ¹ Citations to "Kronenberg Decl." refer to the Declaration of Chet A. Kronenberg, dated
27 May 18, 2018.

28 ² Citations to "Valdez Decl." refer to the Declaration of Mark Valdez, dated May 17, 2018.

1 Streamlined Arbitration Rules and Procedures and in accordance with JAMS Policy on
2 Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural
3 Fairness (available at: <http://www.jamsadr.com> . . . and under the rules set forth in th[e]
4 Agreement.” *Id.*

5 **II. By Email Dated September 6, 2017, Plaintiff Admits That She Signed The PPA**

6 In a September 6, 2017 email to Vivint Solar Executive Resolution Specialist
7 Jordan Hill, Plaintiff accused Vivint Solar of purported “fraudulent activity.” Valdez Decl., ¶ 5 &
8 Ex. B (9/6/17 email). In this email, which Plaintiff references in Paragraph 20 of her Complaint,
9 Plaintiff admitted *four separate times that she signed the PPA*. Specifically, Plaintiff stated that:

- 10 • Vivint Solar’s agent “fraudulently *got my signature*”;
- 11 • She “was not given a paper agreement to read *before getting my signature*”;
- 12 • Vivint Solar’s agent “*fraudulently got my signature in a tablet*”; and
- 13 • She did not have “the opportunity to read and understand *before signing*.”

14 *Id.*, Ex. B at 2 (emphases added).

15 **III. Notwithstanding Plaintiff’s September 6, 2017 Admissions, Plaintiff Files An Identity
16 Theft Victim’s Complaint and Affidavit Accusing Vivint Solar Of Forging Her
Signature**

17 According to Plaintiff, on November 8, 2017, she notified Vivint Solar that she
18 “never signed the [PPA] and that the signature on the [PPA] appeared to be forged.” Compl. ¶ 23.
19 On January 10, 2018, Plaintiff completed an “Identity Theft Victim’s Complaint and Affidavit”
20 (“Affidavit”) and filed a police report. *Id.* ¶ 28. In her Affidavit, Plaintiff certified—
21 “understand[ing] that knowingly making any false or fraudulent statement or representation to the
22 government may violate federal, state, or local criminal statutes, and may result in a fine,
23 imprisonment, or both”—as follows:

24 Either Mark Valdez or Vivint Solar person forged my signature on a
25 document entitled “Residential Solar Power Purchase Agreement.”
The signature is not mine. It is a forged signature.

26 Kronenberg Decl., Ex. B (Affidavit) at 3, 6.

1 **IV. Plaintiff Commences This Action**

2 Plaintiff filed this action on April 3, 2018 and served her Complaint on Vivint Solar
3 on April 18, 2018. Plaintiff alleges that Vivint Solar violated the California Identity Theft Act and
4 the Rosenthal Fair Debt Collection Practices Act by attempting to collect on Plaintiff’s account
5 knowing that she is a “victim of identity theft.” Compl. ¶¶ 38, 49.

6 **ARGUMENT**

7 **I. The Federal Arbitration Act Governs This Arbitration Agreement And Embodies A
8 Strong Public Policy Favoring Arbitration**

9 The PPA’s arbitration provision states that it is “governed by the Federal
10 Arbitration Act.” See Valdez Decl., Ex. A (PAA) at 12. When an arbitration provision expressly
11 references the Federal Arbitration Act (the “FAA”), the agreement’s interpretation and application
12 are governed by the FAA. See *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (confirming
13 parties can contractually agree to designate FAA as governing law); *Cronus Invs., Inc. v.*
14 *Concierge Servs.*, 35 Cal. 4th 376, 394 (2005) (holding that parties may “expressly designate that
15 any arbitration proceeding should move forward under the FAA’s procedural provisions rather
16 than under state procedural law”) (emphasis in original); *Aviation Data, Inc. v. Am. Express Travel*
17 *Related Servs. Co.*, 152 Cal. App. 4th 1522, 1534–35 (1st Dist. 2007) (holding that because the
18 agreement stated that it would be governed by the FAA, the FAA applied to the question of
19 arbitrability).

20 The FAA mandates that arbitration agreements like the one at issue here “shall be
21 valid, irrevocable, and enforceable.” 9 U.S.C. § 2. There is a strong public policy favoring
22 arbitration of disputes. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The
23 FAA applies in California state courts, and preempts any inconsistent state law. See *DirectTV*, 136
24 S. Ct. at 468 (holding that the Supremacy Clause forbids state courts from dissociating themselves
25 from federal law, and “the judges of every State must follow” the FAA).

26 **II. This Court Must Compel Plaintiff To Arbitrate**

27 A Court’s role in enforcing an arbitration agreement under the FAA is limited to
28 two questions: (i) whether a valid agreement to arbitrate exists and, if it does, (ii) whether the

1 agreement encompasses the dispute at issue. *Omar v. Ralphs Grocery Co.*, 118 Cal. App. 4th 955,
2 960-61 (2d Dist. 2004); *Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011) (same). Both criteria
3 are satisfied here.

4 **A. The Parties Entered Into A Valid Arbitration Agreement**

5 A court may “decide as a matter of law that the parties did or did not enter into an
6 arbitration agreement only when there is no genuine issue of fact concerning the formation of the
7 agreement.” *GIB, LLC v. Salon Ware, Inc.*, 634 F. App’x 610, 611 (9th Cir. 2016) (citation
8 omitted). Thus, a “quasi-summary-judgment” standard applies. *Engalla v. Permanente Med.
9 Grp., Inc.*, 15 Cal. 4th 951, 973 n.7 (1997). Here, there is no genuine dispute that Plaintiff signed
10 the PPA. Valdez Decl., Ex. A (PPA) at 19. Mr. Valdez personally witnessed Plaintiff sign the
11 PPA on the electronic tablet. *Id.* ¶ 3. And, by email dated September 6, 2017, Plaintiff admitted
12 multiple times that she signed the PPA. *Id.*, Ex. B at 2 (9/6/17 email).

13 Plaintiff’s after-the-fact, self-serving statements of forgery in her Complaint and
14 Affidavit are insufficient to create an issue of fact requiring a trial on whether Plaintiff signed the
15 PPA. It is well settled that “[i]n determining whether any triable issue of material facts exists, the
16 trial court may, in its discretion, give great weight to admissions . . . and disregard contradictory
17 and self-serving affidavits of the party.” *Preach v. Monter Rainbow*, 12 Cal. App. 4th 1441, 1451
18 (2d Dist. 1993). *See also Nunez v. R’bibo*, 211 Cal. App. 3d 559, 563 (2d Dist. 1989) (“When a
19 defendant can establish a part of his defense with the admissions offered by plaintiff, the
20 admissions are considered so valuable that contradictory affidavits may be disregarded.”); *Scott v.
21 Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which
22 is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should
23 not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).³

24
25 ³ If this Court were to find a genuine issue of material fact as to whether Plaintiff signed the
26 PPA (it should not), the next step in this litigation would be an immediate trial limited to
27 the issue of whether Plaintiff signed the PPA. In this regard, the FAA states that “[i]f the
28 making of the arbitration agreement . . . be in issue, the court shall proceed summarily to
the trial thereof.” 9 U.S.C. § 4.

1 **B. The Arbitration Agreement Encompasses The Dispute At Issue**

2 The arbitration clause encompasses Plaintiff’s claims that Vivint Solar purportedly
3 is violating the law by attempting to collect on Plaintiff’s account knowing that Plaintiff was a
4 “victim of identity theft.” Compl. ¶¶ 38, 49. Indeed, the arbitration clause states that “any
5 dispute” between the parties “shall be resolved by binding arbitration,” including “any claim,
6 dispute, or controversy arising out of or relating to . . . any aspect of the relationship between [the
7 parties], whether based in contract, tort, statute, or any other legal theory.” Valdez Decl., Ex. A
8 (PPA) at 11-12.

9 In addition to her bogus forgery theory, Plaintiff’s allegations suggest that she may
10 seek to have the arbitration clause declared unenforceable because she purportedly was “deceived”
11 by Vivint Solar’s “fraudulent activities.” Compl. ¶ 20. However, the PPA explicitly delegates to
12 the arbitrator any disputes concerning “interpretation, validity, or enforceability” of the arbitration
13 provision. Valdez Decl., Ex. A (PPA) at 12. After the U.S. Supreme Court’s decision in *AT&T*
14 *Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), California courts have held that delegation
15 clauses like the one here are enforceable. *See Malone v. Superior Court*, 226 Cal. App. 4th 1551,
16 1568–70 (2d Dist. 2014) (enforcing delegation clause); *Tiri v. Lucky Chances, Inc.*, 226 Cal. App.
17 4th 231, 250 (1st Dist. 2014) (enforcing delegation clause).

18 **III. This Litigation Must Be Stayed Pending Arbitration**

19 Pursuant to Section 3 of the FAA, the Court must stay the litigation upon referring
20 a dispute to arbitration:

21 If any suit or proceeding be brought in any of the courts of the United States
22 upon any issue referable to arbitration under an agreement in writing for
23 such arbitration, the court in which such suit is pending, upon being satisfied
24 that the issue involved in such suit or proceeding is referable to arbitration
25 under such an agreement, shall on application of one of the parties stay the
 trial of the action until such arbitration has been had in accordance with the
 terms of the agreement, providing the applicant for the stay is not in default
 in proceeding with such arbitration.

26 9 U.S.C. § 3. Likewise, under California Code of Civil Procedure Section 1281.4, the Court must
27 stay the litigation pending arbitration:
28

1 If an application has been made to a court of competent jurisdiction, whether
2 in this State or not, for an order to arbitrate a controversy which is an issue
3 involved in an action or proceeding pending before a court of this State and
4 such application is undetermined, the court in which such action or
5 proceeding is pending shall, upon motion of a party to such action or
6 proceeding, stay the action or proceeding until the application for an order to
7 arbitrate is determined and, if arbitration of such controversy is ordered,
8 until an arbitration is had in accordance with the order to arbitrate or until
9 such earlier time as the court specifies.

7 CAL. CIV. PROC. CODE § 1281.4; *see also Twentieth Century Fox Film Corp. v. Superior Court*, 79
8 Cal. App. 4th 188, 192 (2d Dist. 2000) (“This statute is clear and unambiguous: it requires that the
9 trial court stay an action pending before it while an application to arbitrate the subject matter of
10 the action is pending.”).


11 Because Plaintiff agreed to arbitrate her claims, including any dispute about the
12 interpretation, validity, or enforceability of the arbitration provision, a stay is required. *See Gear*
13 *v. Comcast Corp.*, No. C 14-05333, 2015 WL 926576, at *2 (N.D. Cal. Mar. 3, 2015) (staying
14 litigation under FAA § 3 upon referring dispute to arbitration); *Fed. Ins. Co. v. Superior Court*
15 *(Mackey)*, 60 Cal. App. 4th 1370, 1375-76 (2d Dist. 1998) (ordering trial court to issue a stay
16 pending arbitration pursuant to Cal. Civ. Proc. Code § 1281.4).

17 **CONCLUSION**

18 For the foregoing reasons, Vivint Solar respectfully request that the Court
19 (i) compel Plaintiff to arbitrate her claims against Vivint Solar; and (ii) stay the litigation pending
20 arbitration.

21 Dated: May 18, 2018

SIMPSON THACHER & BARTLETT LLP

22
23 By 
Chet A. Kronenberg
Tyler Z. Bernstein

24
25 *Attorneys for Defendant Vivint Solar, Inc.*