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ARBITRATION - JAMS

LIVERMORE SENIOR LIVING ASSOCIATES, L.P., a California limited partnership, and MURRIETA SENIOR ASSOCIATES, L.P., a California limited partnership, Plaintiffs, vs. MENLO ENERGY EFFICIENCY TECHNOLOGIES, LLC, an unknown entity or fictitious business name of an unknown individual or entity; MENLO CAPITAL GROUP LLC, an unknown entity or fictitious business name of an unknown individual or entity; SUNIL SURI, an individual; AKHIL SURI, an individual; VISTA SOLAR, INC., DBA V S I, a California corporation; and Does 1-300, inclusive, Defendants.	ARBITRATION BEFORE: Arbitrator: Hon. William J. Cahill JAMS Ref. No. 1100107416 ALAMEDA SC CASE NO.: HG190327 Complaint Files: August 27, 2019 [Assigned for all purposes to Hon. Patrick R. McKinney II- Dept. 15] **PLAINTIFFS AND COUNTER-DEFENDANTS LIVERMORE SENIOR LIVING ASSOCIATES, L.P.'S AND MURRIETA SENIOR ASSOCIATES, L.P.'S** **CLOSING BRIEF**

TO ALL COUNSEL AND JUDGE CAHILL:

Plaintiffs, LIVERMORE SENIOR LIVING ASSOCIATES, L.P. ("Livermore"), and MURRIETA SENIOR ASSOCIATES, L.P. ("Murrieta") [hereinafter collectively "Plaintiffs" or "Heritage Estates" or "Heritage"] hereby submit the following Closing Brief:

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I. **SUMMARY** - The testimony and documentary evidence submitted by Plaintiffs establishes (1) misrepresentation/inducement; (2) the failed promise of Minimum Guaranteed Savings of annual energy costs, (3) that the installation of the solar power systems has damaged the roof, lighting, and other components of the buildings, and (4) that security deposits submitted by Plaintiffs to MEET are due and owing.

II. **MISREPRESENTATION/INDUCEMENT** - The elements of the cause of action for negligent misrepresentation are (1) Defendant made a representation to the Plaintiff that a fact was true, (2) that representation was not true, (3) although Defendant may have honestly believed that the representation was true, Defendant had no reasonable grounds for believing the representation was true when made, (4) Defendant intended that the representation be relied on, (5) Plaintiff relied on the representation, (6) Plaintiff was harmed, and (7) Plaintiff's reliance on Defendant's representation was a substantial factor in causing harm to Plaintiff. [*CACI* 1903; *Civil Code* §1710(2).] The submitted evidence proves that Plaintiffs have met their burden proving this cause of action. A party does not have to have **knowledge** of the falsity of the representation. [*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239.]

The Power Purchase Agreements ("PPAs") establish unequivocally that MEET guaranteed Plaintiffs would save ***no less than*** $100,000 per year escalated by 2.9% every year (the "Minimum Guaranteed Savings"), based on installation of solar power systems that were promised to generate a total of 1,619,263 kWh of energy. [Arbitration Exhibit Nos. ("AE") 2-3]. The evidence establishes that as early as the PowerPoint presentation [AE 5] on August 15, 2015, MEET negligently misrepresented such guarantee, and had NO reasonable grounds to believe that the solar systems *as designed and installed* could generate the promised energy required to achieve the Minimum Guaranteed Savings in the 1st contract year or over 25 years of the PPAs.

MEET had no reasonable grounds for believing its misrepresentations were true prior to signing the PPAs. As shown below, MEET's subcontractor's (Vista) modeling was **off by 780,737 kWh** (2.4 million kWh actually used minus 1,619,263 kWh modeled and promised by MEET). Despite an entire team of experts, accountants, lawyers, etc. assisting MEET's modeling pre-signing of the PPAs, MEET also failed to include degradation of the solar modules known to its experts, which Vista specified (before the PPAs were signed) to be .79% per year. [AE 10-11(Contract Ex. 1 ¶ 2.c.i)]. Despite MEET holding itself out to be a solar expert, it failed to provide truthful and accurate information relied upon by Plaintiffs.

Plaintiffs established they had little knowledge regarding solar system installations. Robert Klein ("Klein"), one of the managing partners of Plaintiffs, testified that he had minimal knowledge of solar

systems. Although Klein had been involved with Sunil Suri in connection with an affordable housing project in Richmond, CA, Klein testified that Suri was the managing partner and Suri had exclusive control and management of all aspects of the solar installation at the Richmond project. [Reporter's Transcript of Proceedings ("RT") 148:11-22].

Sunil Suri approached Klein for a proposal for the installation of solar energy at the Plaintiffs' two senior facilities. [RT 148:23-150:25]. In order to make it worthwhile to install the solar energy systems at the two facilities, Klein told Suri that they needed a cumulative Minimum Guaranteed Savings of $100,000 each year trended up over time at 2.9% annually.

On August 15, 2015, Plaintiffs received an e-mail from Sunil Suri of MEET with a PowerPoint presentation prepared by MEET and Vista confirming unequivocally that the proposed solar systems would provide an annual Minimum Guaranteed Savings of at least $100,000 per year:

> ***"Here is the ES [Energy Study]. Please see that we have figured out how to deliver a $100k annual savings! This is way over the top for us and so a super good deal."***
> (Italics added for emphasis) [AE 4].

According to the PowerPoint attached to Sunil's email, after receipt of the Permission to Operate "(PTO") from Pacific Gas & Electric ("PG&E"), Plaintiffs would see a reduction of utility bills from an average of $374,223.00 per year to only $19,311.00 per year. Plaintiffs would then pay MEET $254,386.00 for the first year, resulting in an annual net energy cost savings for the first year to Plaintiffs of $100,526.00 and escalating at 2.9% per year with MEET's estimated Minimum Guaranteed Savings over 25 years of $2,836,464.00. [AE 4-5]. [This number was incorrect and low due to a math error. **Plaintiffs' energy cost savings, properly calculated at the promised $100,000 per year, with the contractual escalation of 2.9% annually for 25 years, is $3,598,434.00 (not $2,836,464.00).]**

On September 14, 2015, Sunil Suri sent an e-mail to Robert Klein confirming the Minimum Guaranteed Savings and acknowledging that Plaintiffs would not proceed without the Minimum Guaranteed Savings:

> "...**You said without a 'guarantee' you were not interested.**
> We ran the insolation (sic) math and compared your bills to **feel comfortable in saying that you will realize $100k**...." (Emphasis added). [AE 37]

On September 18, 2015, Dan Holloway of Sustainable Capital Finance, wrote to Sunil Suri reiterating yet again that the MEET team would deliver the $100,000 guaranteed savings without any energy conservation retrofit:

> "For what it is worth, we were planning on **saving Heritage $100,000, just based on solar alone**. The only reason we included in the 15% reduction in usage based on energy efficiency was so that we didn't overbuild the system. After the solar is installed, **there will be electric bills but we will assume that those will go away once the energy efficiency measures are completed.**" (Emphasis added). [AE 89]

[*See also* AE 151 – September 4, 2015 email that "savings we provided are based on the solar by itself"]. Plaintiffs have completed energy conservation retrofit measures, and yet the excess make-up power from PG&E costs $163,000 annually. [AE 186]. **Both before and after the PPAs were signed, MEET reaffirmed the $100,000 Minimum Savings Guarantee repeatedly**. [AE 4, 36 (regarding proration of $100,000 between two buildings), 37 ("We ran the insolation [sic] math and compared your bills to feel comfortable in saying that you will realize $100k"), 40 (Sunil Suri objecting to $200,000 Minimum Guaranteed Savings and arguing $100,000 should be aggregated between buildings), 68 ("We need to expand on an exhibit that detail how the $100k savings is calculated"), 89 ("we are planning on saving Heritage $100K just based on the solar alone")].

On September 24, 2015, Plaintiffs executed the PPAs for the purchase and sale of solar generated electric energy from the solar power systems. [AE 2 -3; Stipulation Fact No. 4.] Sunil Suri signed the Livermore PPA on September 9, 2015 and the Murrieta PPA on September 30, 2015, but held onto his signature pages until October 2015. [RT 199:12-200:11, 956:14-20; Klein Depo V2 181:21-182:6, 187:10-188:1]. **The PPAs incorporate the Minimum Guaranteed Savings of $100,000 into Sections 4.e and 7.j, among other sections.** [AE 2-3, ¶¶ 2 "Minimum Solar Savings", 4.c "Guaranteed Savings, 4.e "Minimum Solar Savings" 7.j "Guaranteed Savings", Pg. 1 referencing "Guaranteed Energy Savings.]

While an issue of Department of Toxic Substances Control ("DTSC") approval prompted Sunil Suri to email Joe Callahan on September 29, 2015 to say, "the power purchased will be lower so your savings lower," **the Minimum Guaranteed Savings was never modified**, as confirmed by Klein on September 29, 2015. [AE 41]. Plaintiffs were induced, over and over, into believing they could save money in energy with a *Minimum* Guaranteed Savings, which MEET knew or should have known it could never fulfill.

A. <u>The MEET August 15, 2015 Email and PowerPoint Presentation Contain the Minimum Guaranteed Savings Promise [AE 5]</u>.

Again, actionable deceit only requires an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." [*Civil Code* §1710(2).] The evidence establishes that MEET's promise of energy savings was made with the intent to induce Plaintiffs to enter into the PPAs.

[*Civil Code* §1709. (See also section 552(2) of the Restatement (Second) of Torts.)]

In 2015, MEET's presentation promised an annual net energy cost savings for the first year to Plaintiffs of $100,526.00 with MEET's estimated Minimum Guaranteed Savings over 25 years of $2,836.464.00. This promise was false.

MEET and Vista's misrepresentation induced Plaintiffs to enter into the PPAs. [RT 153:13-164:13, 1394:3-9]. Had Plaintiffs known that the solar power systems installed by Vista on behalf of MEET would *never* have the ability to provide the Minimum Guaranteed Savings promised, Plaintiffs would have declined the PPAs. [RT 395:15-19] **MEET's Sunil Suri's testimony that the PowerPoint presentation's promises were merely a "vision" is contradicted by the PowerPoint Presentation and the Minimum Guaranteed Savings affirmed ¶¶ 7.j and 4.e of the PPAs.**

Plaintiffs Justifiably and Reasonably Relied on Meet's Misrepresentations: According to the testimony of Plaintiffs' expert, Tarek Khoury ("Khoury"), MEET's PowerPoint presentation was deeply flawed. As shown on page 7 of the PowerPoint Presentation [AE 5], the energy study assumed that the solar array would almost completely offset the power that the facilities would have to purchase from PG&E:

MEET'S PowerPoint Presentation [AE 5 Page 7]

Current and Post Savings

	Pre-Solar	Post-Solar
Electricity Bill	$374,223	$19,311
PPA Payment	$0.00	$254,386
Year 1 Savings	$0.00	$100,526
Blended Electricity Rate	$0.2191	$0.1571
Inflation Rate/PPA Escalator	4% (40 year average)	2.9% (PPA Escalator)

According to the testimony of Khoury, "The PowerPoint was the promise for the system that was going to be built" [RT 1280:1-23]. Furthermore, "…when this promise of savings was established, it was under the assumption that the solar array was going to almost **completely offset** the power that the facility uses such that the facility buys power at the cheaper rate from PPA." (Emphasis added). [RT Page 1281 Lines 2-10]. "What is omitted in the PowerPoint is the makeup power that the facility ultimately had to purchase." [RT Page 1281 Lines 11-14]. Even though MEET knew 2.4 million kWh per year would be consumed, the forecast by MEET "indicated there's only going to be 1.6 [million] produced from the solar array." [RT 1281:15-19]. The make-up power that had to be purchased from PG&E turned out to be charged at a premium A-6 rate that "was not included in the analysis from MEET, so that's why their

analysis was initially flawed from the start." [RT 1281:19-23].

MEET has objected and will argue that the parol evidence rule and the integration clause in the PPAs bar any introduction of pre-contract negotiations. **California law recognizes that pre-contract negotiations are admissible to prove a claim of negligent misrepresentation.**

The court in *Thrifty Payless*, *supra,* 218 Cal.App.4th at 1239 held that neither the parol evidence rule nor the integration clause barred introduction of pre-contract negotiations to establish a claim for either negligent or intentional misrepresentation. *Thrifty Payless* alleged that defendant knew estimated taxes, insurance, and CAM charges were material to *Thrifty Payless* as part of a lease agreement, and that *Thrifty Payless* was relying on these estimates to evaluate the suitability of the project. *Thrifty Payless* also alleged defendant made representations with ***no reasonable basis to believe they were true***. *Thrifty Payless* asserted its reliance was reasonable based on defendant's **superior knowledge and experience building and operating shopping centers of similar size and scope**. [*Id.* at p. 1236].

The defendant in the *Thrifty Payless* case argued that implied terms of the contract could not contradict the express terms, and thus the lease permitted defendant to collect certain charges in the manner it did; and the lease contained an integration clause such that prior negotiations and discussions, which were no more than **"estimates,"** were merged into the lease. **The Court held that the integration clause in the lease did not bar Thrifty's claims.** [*Id.* at pp. 1241–1242].

In *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 400, Continental Airlines relied on brochures and briefings containing misleading statements about characteristics of a DC-10 aircraft and the disputed Purchase Agreement (which contrasted and conflicted with the guarantees of the brochures) contained an integration clause. [*Id.* at 400]. As with AE 5 in the instant case, the Continental Airlines Court concluded that the brochures and briefings were **admissible and were substantial evidence of negligent misrepresentation**:

> "'[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." [*Id.* at p. 428 (Citations omitted).]

As set out above, MEET's PowerPoint presentation during its energy cost savings presentation to Plaintiffs promised that by installing solar systems, Plaintiffs would be able to reduce the cost of energy through at least the Minimum Guaranteed Savings. The PowerPoint presentation also promised that the solar system would almost completely offset the power that the Plaintiffs would have to purchase from PG&E

($19,311) for the two facilities.

AE 5, the PowerPoint presentation, is therefore admissible and appropriate evidence in this Arbitration despite the PPAs' supposed integration clause. While Plaintiffs received multiple versions of AE 5 [see AE 6-10], Plaintiffs never received the version attached to MEET's exhibits as AE 32. [RT 1503:23-1504:12, 1585:17-1586:10]. Specifically, Plaintiffs were never provided the "Disclaimer" purportedly made part of AE 32. [RT 1503:23-1504:12, 1585:17-1586:10]. Tellingly, AE 32 comes from Vista Solar's production Bates Stamped VS_00000860, **which was NOT part of MEET's production**, and neither MEET nor Vista ever provided this Vista document to Plaintiffs prior to Arbitration. The omission of such a disclaimer from the versions of the PowerPoints MEET ultimately sent to Plaintiffs demonstrates that MEET intended AE 5 to induce Plaintiffs' reliance on the information contained therein. If MEET did not so intend, it should have refrained from removing the draft disclaimer from the edited PowerPoints MEET ultimately communicated to Plaintiffs.

Additionally, MEET's AE 32 shows: (1) "Annual Savings: **$282,522**" [AE 32 Page 12]; and (2) "20 Year Savings Projections: **$7,560,659** [AE 32 Page 13]. If Plaintiffs had seen AE 32 at any time prior to the PPAs, and not for the first time during Arbitration, Plaintiffs would have demanded a higher Minimum Guaranteed Savings of **$282,522 per year**.

Plaintiffs Justifiably Relied on the Misrepresentations of Minimum Guaranteed Savings: Actual reliance occurs when a misrepresentation is an immediate cause of plaintiff's conduct and plaintiff would not, in all reasonable probability, have entered into the contract; but it need not be the sole factor or even the predominant or decisive factor in inducing plaintiff's decision. [*Engalla v. Permanente Med. Grp., Inc.* (1997) 15 Cal.4th 951, 976–977.]

Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question". [*Id.* at p. 977; *Linden Partners v. Sup. Ct.* (1998) 62 Cal.App.4th 508, 527].

The evidence shows that MEET knew or should have known the risk that solar arrays installed would not provide the energy output or savings promised in the PowerPoint presentation. [RT 1263:22-1266:25; AE 185-186 (modeling of the system was faulty);]. In an e-mail dated September 29, 2015, Sunil Suri wrote to Klein stating, "unless we can build the car ports, we cannot deliver the targeted savings." [AE 41]. Then,

Sunil Suri wrote: "From my side no issue - the power produced will be lower so your savings lower..." [*Id*]. In reply to that e-mail, Klein reasserted that Plaintiffs still have "to reach the 90,000 floor with the modifications." [*Id.*] After this email, Sunil released his signature on the PPAs without any change to the $100,000 Minimum Guaranteed Savings provision and executed NO amendments to the PPAs.

No evidence was presented by MEET (and none exists) showing that the PPAs were modified in a writing signed by both parties, pursuant to ¶ 22.1 of the PPAs. The Minimum Savings Guarantee applies.

The PPAs Were Formed in a Commercial Setting for Business Purpose: California courts have recognized a cause of action for "negligent misrepresentation," that is, a **duty to communicate accurate information** where information is conveyed in a commercial setting for a business purpose. [*Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc.*, (2004) 115 Cal. App. 4th 1145, 1154-1155.] Negligent misrepresentation in commercial dealings has been treated as a distinct cause of action in tort as an invasion of financial or commercial interests. [*Id.* at p. 1155.]

The rule that imposes liability on those who supply information for business purposes in the course of a business or profession is based on the principle that, in financial matters, a plaintiff cannot expect the defendant to exercise the same degree of care in social meetings as he or she would when acting in a business or professional capacity. [*Friedman v. Merck & Co.*, (2003) 107 Cal. App. 4th 454, 481-482.]

The California courts recognize the distinction between an opinion of a future event and a representation of fact. When a statement is in the form of a deliberate affirmation of the matters stated, **it is deemed to be a positive assertion of a fact**. [*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769; *Jolley v. Chase Home Finance*, LLC (2013) 213 Cal.App.4th 872, 892].

MEET Held Itself Out As Specially Qualified And Knowledgeable: When a party, such as MEET, holds itself out as possessing superior knowledge, special information or expertise regarding the subject matter and plaintiff is so situated that it may reasonably rely on such supposed knowledge, information or expertise, the defendant's representation may be treated as a material fact. [*Gagne v. Bertran* (1954) 43 Cal.2d 481, 489;; *California Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 663-664].

Equally well recognized is liability for an opinion "expressed in a manner implying a factual basis which does not exist." In other words, the opinion infers knowledge of facts that make the predictions probable. If the defendant does not know of these facts, the statement is an actionable misrepresentation. [*Id.*

Jolley, supra, 213 Cal.App.4th at pp. 892–893; *Apollo Capital Fund LLC v. Roth Capital Partners*, LLC (2007) 158 Cal.App.4th 226, 241]

Plaintiffs had no prior experience with solar power systems or the leasing of solar power systems. Plaintiffs had no participation in the design of the systems, the placement of the solar arrays and modules, or the subsequent reduction in size and capacity that contributed to the failure to deliver the promised energy savings. Under the PPAs, Plaintiffs have no right to maintain or repair the systems. [AE 2-3 ¶¶ 16.a]

Based on the profound imbalance of solar system experience, MEET's promises were deliberate misrepresentations of the Minimum Guaranteed Savings intended to induce Plaintiffs to rely on MEET and its multiple experts. [See RT 1539:1-17, 1553:20-22, 1583:2-15].

B. <u>MEET Performed a Classic "Bait-and-Switch" - Unlawful in California</u>: Despite any "integration clause" in a contract for goods or services, it is unlawful in California for a company to conduct a "bait-and-switch" by misleading customers in any pre-contract representation that the company should have known to be misleading. [*Cal. Bus. and Prof. Code* ("*BPC*") § 17500; *Civil Code* §§ 1770(a)(7), (5), (9)-(10), (14), (16), (19)]. In the instant case, the evidence has shown that prior to the PPAs being signed, MEET promised Plaintiffs **(1)** a minimum of $100,000 per year in energy savings escalated at 2.9% every year for 25 years; **(2)** complete offset of the PG&E energy bills with the exception of $19,311; **(3) energy output from the solar power in the amount of 1,619,263 kwh per year [AE 5, Page 2], (4)** a carport system size of 325.08 kW AC [AE 5, Page 2]; **(5)** a rooftop system size of 763.56 kW AC [AE 5, Page 2]; **(6)** a total system size of 1060 kW DC [AE 5, Page 2]; **(7)** yearly system testing and review [AE 5, Page 4]; **(8)** a PG&E escalating rate pre-solar of 4% [AE 5, Page 7]; and **(9)** "Zero Upfront Cost" [AE 5, Page 13].

None of these promised representations turned out to be true. Instead, MEET switched the described characteristics of the system in violation of California law. [*Id.*] In actuality, **according to MEET's own expert, the systems never delivered $100,000 per year Minimum Guaranteed Savings, even without escalation.** [RT 1833:2-5; 1871:19-1872:2 ($291,196 Bride Calc.)]. In fact, based upon existing facts – at the time the contract was signed – the known project energy demand, the solar system sized design, and the known degradation rates, MEET's solar system could never have generated the Minimum Guaranteed Savings for 25 years. Furthermore, PG&E billing was not offset to the extent described (only $19,311 in PG&E bills), and instead Plaintiffs continue to incur $163,000/yr average [AE 186 (Khoury's report)] in PG&E bills in contradiction to MEET's misleading pre-contract statements.

First, the system failed to produce 1,619,263 kWh, averaging only 1,272,000 kWh. [AE 186]. The *carport* system size turned out to be only 190 kW AC instead of the 325.08 kW AC described by MEET pre-contract. [AE 186]. The *rooftop* system size turned out to be 735.13 kW AC, instead of the 763.56 kW AC described by MEET pre-contract. [AE 2-3, 5 (Pg. 2), 10-11, 186, 305]. The total solar system as-built size is only 770 kW AC, instead of the 940 kW AC described by MEET pre-contract. [AE 186].

Second, MEET failed to provide any yearly testing or review of the system as promised prior to entering into the contract, and indeed never even provided the 3-year true-up required by the Contract. [AE 2-3]. While Vista prepared a self-serving "true-up" of contract year 1 for the 800 Building *only*, that true-up was not deemed correct by either MEET or Plaintiffs' solar experts, and thus, Vista's "true-up" is unreliable on its face. [AE 97, 120, 185; *See* Vista's Arbitration Brief Page 7 addressing AE 97]. Vista conducted no additional "true-up" other than the faulty year 1 erroneous report for the 800 Building.

Third, instead of applying a 4% PG&E escalating rate as described pre-contract, MEET's expert attempts to apply a 7.9% rate to artificially inflate savings. [Khoury Decl. ¶¶ 8-12, 14, 16].

Lastly, MEET described and promised that Plaintiffs would have "Zero Upfront Cost," which turned out not to be true, as Plaintiffs were forced to pay $127,191.78 deposits before installation, which have not been refunded, and have been out-of-pocket in the cumulative repair costs of $425,485 just to date ($290,408 to bring carport lighting up to code, plus $135,077 in paid invoices for tree removal, DTSC reports, and repair of Vista's work), calculated to be $1,008,699.50 by the end of 25 years. [AE 268].

These bait-and-switch tactics by MEET are unlawful. MEET's attempted reliance on an integration clause to get around *Cal. BPC* § 17500 *and Civil Code* § 1770 is not supported by California law.

Bait-and-Switch - Change Order No. 3 - Physical Downsizing: In Change Order No. 3 dated February 15, 2017 [AE 12], **MEET and Vista reduced the physical system size** by removal of one section of the carport structures ***without a redesign*** (the actual work on Change Order No. 3 occurred well before 2/15/2017). Vista physically reduced the carport array by removing panels, inverters and other component parts, further reducing the size of the carport solar system's capacity to produce energy. [AE 19, 20, 21, 22, 23, 92, 123-127]. **Vista reduced the contract price with MEET by $67,148.25** (minus unrelated delay costs of $37,381.18 charged by Vista to MEET for a net reduction of $29,767.07.) [AE 23-24, 95].

Defendants argue that this downsizing was "authorized" by Joe Callahan. However, Callahan only prohibited the carport system from crossing the property boundary, to comply with a known business and

legal standard, between the 800 Building and the 850/900 Building (which was accommodated by Vista without any notice of penalty to Plaintiffs). Allowing the boundary crossing as negligently designed by Vista would violate title insurance requirements and various Municipal Codes adopted by the City of Livermore, which Vista should have known when initially designing the carports. **Defendants never provided any evidence that Callahan "authorized" the actual downsizing of the solar power system, as opposed to protecting the property boundary**. Indeed, Callahan never weighed in at all as to how MEET and Vista should fix the boundary issue.

It must be noted that Vista conflates the boundary dispute with a separate arsenic encapsulation issue, where Joe Callahan is alleged to have made an initial mistake as to the location of the arsenic encapsulation that ostensibly led to a 5 to 6 week delay while the DTSC approved the carport structures. [AE 38-39, 69-70]. No claim for this alleged 5 to 6 week delay was ever made to Plaintiffs, as the arsenic encapsulation was disclosed by Plaintiffs to MEET within the time required for resolution under the PPAs, and Sunil Suri accepted responsibility for any delay before releasing his signatures on the PPAs. [AE 41 (Sunil Suri 9/29/2015 email acknowledging DTSC approval requirement)]. At Arbitration, Vista's attorney misrepresented that DTSC approval somehow prompted a *redesign* of the carport structures, which is not accurate. **No redesign was required for the arsenic encapsulation.**

In MEET's Arbitration Brief, Page 8, MEET argues incorrectly that "Purchasers even demanded that the size of the solar systems be reduced." That statement by MEET is a flat-out falsehood not supported by any evidence, and to the contrary, the Arbitration evidence unambiguously establishes that **Plaintiffs never authorized this bait-and-switch downsize.**

Bait-and-Switch - Inverter Curtailment for Carport Hookup: After a physical downsizing of the carport *without a redesign* for the boundary issue, the carports were actually *redesigned* to comply with the City of Livermore Fire Code requirement to allow a 26-foot drive aisle. [AE 94, 548 (Page 6)]. Around the same time, Matt Gillett of PG&E informed Vista on January 25, 2017, that the carport solar panels, as designed, **could not be connected to the PG&E substation** unless a ground fault stabilizing bank with a minimum transformer size of 3 single phase 15kVA transformer or equivalent was installed at the PG&E substation and an approved PG&E switch was installed by Vista. [AE 19, 20, 21, 22, 23, 92, 123-127].

PG&E also provided an estimated cost for the upgrades required to interconnect the project to the PG&E distribution system. However, without the mitigations PG&E required, Vista would only be able to

operate the carport solar power system output below 190 kW-AC. PG&E provided Vista a cost estimate of $46,267.20 to install the Voltage Stabilizing Bank at the Interconnection, and $10,000 for inspection, review and testing. [AE 19-23, 92, 123-127]. Vista's Arbitration Brief, Page 3, erroneously argues that the curtailment of the inverters was allegedly due to "the owners' refusal to pay for upgrades to a PG&E substation," which is not true under the terms of the PPAs ("owners" /Plaintiffs are not responsible for any such upgrade costs) and is not true under the known facts (Vista never proved that Plaintiffs received any notice of the substation issue prior to curtailment). Vista then disingenuously argued at arbitration that the inverters were *never curtailed*, which is false. [RT 1913:17-25; AE 19-24, 92, 123-126, 127 (Vista states: "the results of the studies showed that [Vista] can interconnect a maximum of 190 kW-AC to the grid"), 584].

Even though Vista knew exactly what PG&E required to avoid having to operate the carport system at reduced capacity, Vista did not request PG&E to install the stabilization bank PG&E required. Instead, in March 2017, ***without Plaintiffs' knowledge***, Vista electronically reconfigured the carport solar power system, reducing the output from 310.23 kW to 190 kW. [AE 19-22, 24, 92, 125-126, 323, 584 (document 12), 729]. That change alone resulted in a loss of energy savings of **$42,000** per year, **($1,749,128.15 over 25 years, trended at the agreed 4.0% per year)** as admitted by Vista. [See AE 128]. PG&E eventually gave its permission to operate ("PTO") the carport solar system on March 27, 2017, **but only at reduced capacity below 190 kW-AC**. [AE 19-22, 24, 92, 125-126, 323, 584 (document 12), 729].

Bait-and-Switch - Defective Design and Installation: Outrageously, Vista argues in its Arbitration Brief that it was "never aware" of any inverter malfunctions at the subject properties. [Vista Brief Page 6]. MEET made a similar allegation in its Arbitration Brief at Page 28 Lines 13-15: "The Systems were and are functional, and have had no issues, and the regular service checks and monitoring did not reveal and have not revealed any unresolved defects or issues." The evidence shows this argument is false on the face of subpoenaed records from the inverters' supplier, SolarEdge, as well as testimony from Vista's own Persons Most Qualified. Plaintiffs have proven that numerous inverters malfunctioned and had to be replaced by Vista. [AE 123-127, 191, 564-572]

Vista also falsely stated in its Arbitration Brief at Page 3 lines 1-2 that "owners' **refus[ed]** to pay for upgrades to a PG&E substation." **Vista presented no evidence** in written form or by testimony of any witness that suggested in any way that (1) **Plaintiffs were made aware of the PG&E substation decreased capacity**,

or (2) that Plaintiffs somehow "refused" to pay for an upgrade that is the responsibility of MEET under the PPAs Paragraph 7.a that MEET "shall use commercially reasonable efforts to obtain, **at its sole cost and expense**: …ii. any agreements and approvals from the utility necessary in order to interconnect the System to the Facility electrical system and/or the Utility's electric distribution system." (Emphasis added) [AE 2-3].

The defective design and installation of numerous inverters installed by Vista's subcontractor, SolarEdge, Inc. (nonparty) resulted in the underperformance of the solar power systems and loss of the Minimum Guaranteed Savings promised by MEET and Vista. PG&E inspected the properties during installation and found the AC switchgear connection had to be limited to 190kw AC reducing the performance of the solar power systems. Plaintiffs must be compensated for their expected energy savings in years 1 through 25.

Bait-and-Switch - Production Guarantee in Vista Contracts: There is no controversy that the Vista Contracts with MEET contain production guarantees. MEET/Vista presented NO evidence that the output of the solar power systems met the explicit contractual Minimum Guaranteed Savings. Nevertheless, at the time of execution of the PPAs, MEET agreed to build a solar system with a total rating of 940 kW AC (1,060.21kW DC) that would provide a total of **1,619,263 kWh** of energy. MEET failed to provide a 940 kW AC system and instead delivered a smaller, 770 kW AC (1,004.76kW DC) system which produced an average of **1,272,000 kWh** per year of energy production during the first three full operational years after completion of the systems, resulting in a shortfall of 347,263 kWh annually (1,619,263 subtracted by 1,272,000). By MEET reducing the size of the solar systems, Plaintiffs did not achieve the Minimum Guaranteed Savings. [AE 186; RT 1266:2-1267:14].

Vista also provided MEET a predicted baseline production of 1,655,000 kWh for operational year 1. The system is **not meeting *Vista's forecasted production*,** with a **shortfall of approximately 23.1%** [100%-(1272/1655) MWh] **from Vista's predicted performance.** [AE 185-187]

Thus, the solar power systems are **smaller than what MEET agreed to build** and are **not providing *MEET's promised first year energy production* or even the forecasted output with a shortfall of approximately 21.4%** [100%-(1272/1619) MWh] **from predicted performance** from the 940kW AC (1,060.21kW DC) system design, as promised in the PPAs. [AE 185-187; RT 1266:2-1267:14].

MEET Made Actionable Post-PPAs Misrepresentations: MEET promised to reimburse $127,191.78 security deposits, **while knowing that it never intended to reimburse said deposits.** On October 21, 2021, Akhil Suri signed a declaration in this litigation, which for the first time acknowledged that the Security

Deposits were due and owing **from MEET to Plaintiffs** and should have been treated as offsets of 2018 PG&E bills. [AE 137, Page 7 Lines 1-4]. AE 137 was filed in opposition to Plaintiffs' Summary Adjudication of its 12th cause of action and is an admission of every element of Plaintiffs' 12th cause of action.

III. LOSS OF SAVINGS

A. PPAs Require Minimum Guaranteed Savings: Paragraph 7.j provides for the Minimum Guaranteed Savings to be calculated on a baseline of "**historical energy usage of [Plaintiffs]**." The installation of the solar systems was to result in "**substantial** savings" in the costs of energy over the 25-year term of the PPAs "as compared to the energy costs that would be incurred" if the parties did not enter into the PPAs. [Emphasis added].

To calculate the "historical energy usage," Plaintiffs provided access to MEET and Vista for the PG&E 15-minute interval data and billing data necessary to calculate demand charges and usage for the calendar year prior to the signing of the PPAs. [See, AE 90-91]. Despite MEET and Vista claiming otherwise, all parties had access to PG&E 15-minute interval data prior to and at the time of the PPAs.

The PPAs under the "Billing and Payment", Paragraph 4.e reaffirm the promised guarantee of the "Minimum Solar Savings" of at least $100,000.00 per year:

> "e. **Minimum Solar Savings.** Minimum Solar Savings, also referred to herein as Guaranteed Savings, shall after any and all additional costs, arising from and/or required by this solar energy system, be **at least one hundred thousand a year** derived **solely from the energy produced by this solar system.**" The Minimum Solar Savings is escalated by 2.9% per year under Section 7.j. [AE 2-3].

Paragraph 7.j, drafted by Sunil Suri, has three conditions precedent to any reduction in the Minimum Guaranteed Savings based on documented evidence of: a) weather, b) utility matters or c) absence of a utility baseline for power rates. Formally establishing any of these conditions in a given year ***may*** result in a reduction of savings "not to exceed a diminution of $10,000 per annum which are excused, (i.e., thus annual savings can range from $90,000 to $100,000) — with such payment made (30) days after the 3rd applicable Contract Year (with a savings floor payment of $80,000 for each year, paid on a current basis in each year)." However, MEET has submitted no documentation or evidence to support that any of the three variances, expressly specified, occurred in the first three years of operation, which are conditions precedent for failing to deliver the full annual $100,000 Minimum Guaranteed Savings. Instead, MEET has arbitrarily excused $10,000 annually without any cause, reducing the cost savings to $90,000 annually, in contravention of the PPA terms. [Khoury's Rebuttal Decl. ¶¶ 17, 19 21-22, 27]

B. **Paragraph 7.j – Energy Savings Calculation.** The evidence presented at Arbitration established that **Sunil Suri drafted Paragraph 7.j**, and Klein provided minimal redlined changes. [RT 182:10-183:5; 184:5-187:27, AE 300-301]. No party disputed that the PPAs themselves were initially drafted by MEET's team and submitted to Plaintiffs for redlining. Thus, the interpretation of Paragraph 7.j must be construed against MEET and in favor of Plaintiffs. [*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247–248]. MEET states incorrectly that "[t]he subject solar savings clause was drafted and inserted into the PPAs by Klein." [MEET Arb. Brief, Pg. 18 Ln. 1-2]. This was proven false at the Arbitration. [RT 182:10-183:5; 184:5-187:27, AE 300-301].

Further, multiple locations in the PPAs contain the Minimum Savings Guarantee, and MEET has not contested the interpretation of any clause containing the Minimum Savings Guarantee other than ¶ 7.j (initially drafted by Sunil Suri and minimally redlined by Klein). [AE 2-3, ¶¶ 2 "Minimum Solar Savings", 4.c "Guaranteed Savings, 4.e "Minimum Solar Savings" 7.j "Guaranteed Savings", Pg. 1 referencing "Guaranteed Energy Savings."]

Future Damages are Not Barred by the 3-Year True-Up Accounting Provision: MEET argues that Plaintiffs are not entitled to any future damages because of the three-year true-up provision in the PPAs.

As addressed in Plaintiffs' Opening Arbitration Brief, Pg. 25-26, *Civil Code* § 3300 governs general damages. California law holds that where there is **no uncertainty as to fact of damage**, that is, as to its nature, existence or cause, **the same certainty as to its amount is not required**. [*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.]

> "The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where ... it is the wrongful acts of the defendant ... that have caused the other party to not realize a profit to which that party is entitled." [*Id.* at pp. 873–874; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398.]

Plaintiffs' loss of savings damages in the future are not speculative, because the evidence has shown that the solar power systems have not and will never generate the energy output and Minimum Guaranteed Savings that MEET promised in the PPAs. [AE 185-186; RT 1266:2-1267:14].

Moreover, by MEET's own calculations, the 25-year future energy savings promised by MEET in the PowerPoint presentation was contemplated by the parties at the time of execution of the PPAs and is a direct and foreseeable damage to Plaintiffs. [AE 5 (Pg. 8)].

While MEET's wrongful omission of Exhibit 6 at the time of the execution of the PPAs may have

made it more difficult for the parties to calculate the future guaranteed annual energy savings, **it did not render them speculative**. Plaintiffs' **future damages of lost energy savings are calculable** because there is a **reasonable basis for the computation** of damages for the following five **(5)** reasons:

First, as stated above, **MEET *itself* calculated Plaintiffs' projected energy savings** over the 25-year term of the PPAs in its PowerPoint presentation. [AE 5 (Pg. 8)]

Second, Plaintiffs' Arbitration testimony and documentary evidence shows that the **solar power systems were downsized and will *never* generate the energy output and Minimum Guaranteed Savings specified in the PPAs.** [AE 185-186; RT 1266:2-1267:14].

Third, no party or expert disputes that the solar power system will **perform its best during the first 3-year true-up** and is **NOT expected to perform as well during the subsequent 22 years in the PPAs**. [AE 186 (Pg. 3 referencing 0.79 % degradation); RT 818:3-8, 1542:16-23, 1543:10-25, 1557:20-1558:5] Calculating the first year 3-year true-up can be done based on actual invoices, which both experts have cited to show that the solar systems **failed** to reach the Minimum Guaranteed Savings.

Fourth, the testimony and documentary evidence show that the **solar power systems will suffer an annual 0.79% degradation in power output** – as evidenced by Vista's specifications and industry standards; and therefore, **will *never* generate the energy output** and **Minimum Guaranteed Savings** that MEET **promised** in the PPAs. [AE 185-186; RT 1266:2-1267:14].

Fifth, Plaintiffs' expert, **Khoury has provided the Arbitrator with a reasonable basis to calculate the damages** analysis in Paragraph 7.j of the PPAs. [AE 184-187; RT 1256:3-11; 1256:22-1258:21]. [See, *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 775 (expert evidence is not speculative because the expert cannot state with absolute certainty future damages; only a reasonable certainty is required)].

Bride Does Not Address Future Lost Savings: Therefore, Plaintiffs' undisputed future calculations of lost savings should be accepted by the trier of fact. [RT 1876:4-1877:5; AE 262].

MEET Failed to Provide Exhibit 6 as Part of the PPAs: Plaintiffs demanded that MEET draft an acceptable Exhibit 6 to the PPAs to state a calculation formula for the Minimum Guaranteed Savings. [AE 2-3 (Page 1 referencing "Exhibit 6"; ¶ 7.j); AE 110 (Pg. 3); RT 216:21-219:15; 1277:16-1278:2; AE 104 (email submission of MEET's first version of Exhibit 6), AE 107 (submittal of Plaintiffs' redlines of MEET's Exhibit 6)]. MEET *failed* to comply.

More than one and a half years after the execution of the PPAs, MEET submitted a proposed Exhibit 6 which was not accepted by Plaintiffs. [AE 107, 104 (Plaintiffs' redline response); 110 (Pg. 3)]. Despite the lack of Plaintiffs' acceptance, Bride relied on PG&E escalation similar to that included in a draft Ex. 6 untimely proposed by MEET. [RT 1825:19-1826:11]. The lack of an Exhibit 6 does not prohibit the experts from calculating the 3-year true-up, and MEET cannot take advantage of MEET's failure to finalize Exhibit 6 as part of the PPAs to somehow avoid enforcement of the Minimum Guaranteed Savings.

No Evidence of *Facility Modification* to *Increase* Energy Consumption: MEET and Bride applied the wrong standard, in assessing whether any change in "usage" occurred at the facility, in violation of the PPAs. The language of Paragraph 7.j. does not address a mere change in "usage" as falsely argued by MEET [Arbitration Brief Pages 17-18]. Instead, Paragraph 7.j prohibits Plaintiffs from "**modify[ing] either of their respective Facilities** in a manner that materially *increases* its expected energy consumption" (Emphasis added). A simple variance in usage without ***modification of the facilities*** that *increases* energy consumption of the facilities themselves is not enough, despite how MEET intentionally misinterprets the PPAs. There were NO modifications to the facilities that would *increase* energy consumption. [RT 1261:5-8; 1267:15-21]. Rather, LED lighting retrofits *reduced* energy consumption. [RT 256:11-257:20].

C. Tarek Khoury Opinions and Conclusions.

Plaintiffs' Loss of Savings Calculation: Khoury calculated the initial 3-year true-up to be short of the Minimum Savings Guarantee by at least **$94,835**. [AE 186]. **Importantly, Khoury's initial 3-year true-up calculation does not take into account the lighting energy conservation retrofit program by Plaintiffs that saves at least $37,696 annually, as MEET documented and admitted, in AE 5 Pg. 6., and as MEET expected Plaintiff to implement in the future. [AE 151 (Dan Holloway states, "If Bob wants to install LEDs at some later date, the savings will increase, but the savings of $100K per year does not hinge on the installation of LEDs")].**

MEET induced Plaintiffs to enter into the PPAs by inaccurately promising that Plaintiffs' PG&E payments would be completely offset by solar, as represented by MEET, with the exception of $19,311. [AE 5, Page 7]. In addition to the PowerPoint presentation, MEET's representative, Dan Holloway, confirmed via email the complete offset of PG&E energy bills from the solar installation. [AE 89]. Thus, Plaintiffs have been damaged just in the first 3-year true-up an additional $431,067 ($163,000 minus $19,311 equals

$143,698, multiplied by 3 years) in approximate additional PG&E bills that had to be paid and were not offset by solar, as misrepresented by MEET. [AE 186 (Pg. 4)].

Khoury's 25-year calculation of future lost energy savings (without taking into account energy conservation retrofit programs purchased by Plaintiffs and additional PG&E bills) amounts to **$3,721,734**. [AE 5 (MEET promised the corrected $3.59 million over 25 years), 186-187 (Appendix 20)]. When accounting for energy conservation retrofit programs and additional PG&E bills, Plaintiffs have been damaged in the total amount of current and future lost energy savings in excess of $9 million.

Plaintiffs' Current A6 Rate is More Expensive than Non-Solar E19 Rate: As part of the interconnection agreement with PG&E, Vista requested approval from PG&E to switch Plaintiffs from an E19 PG&E rate to an A6 rate with solar panels. [AE 96]. The A6 rate has a higher per kWh rate for PG&E power than non-solar rates, but the cost would theoretically be less by avoiding "demand charges" because the amount of energy provided by PG&E should have been nearly, or completely eliminated (after Plaintiffs' conservation retrofit with PG&E) with solar. However, because Vista/MEET initially undersized and then further reduced the size of the solar system, which then generated less solar power and required more PG&E power purchased at the new, higher A6 rate, Plaintiffs' energy savings is substantially reduced and Plaintiffs now find themselves in a **materially worse position, than if they had never agreed to having a solar system installed**. [AE 186; RT 1286:24-1287:6].

D. Problems with Jim Bride's Opinions and Conclusions: Bride uses smoke-and-mirrors and every mathematical "trick-in-the-book" to come up with a three-year true-up calculation of approximately $291,196 in aggregate savings for the first three years.

However, **the Minimum Guaranteed Savings should total *at least* $308,784** over the first 3-year true-up [$100,000/yr. trended at 2.9% annually], given no Defense proof of the three categories of permitted reductions. Even by MEET's own calculation, by Bride's faulty math and unfair analysis, MEET breached the PPAs by failing to reach the Minimum Guaranteed Savings in the first 3-year true-up by **$17,588** (if Plaintiffs' expert's calculations were completely disregarded and only MEET's expert given evidentiary weight). No party or expert disputes that the solar power systems **will degrade and provide less savings during the subsequent 22 years in the PPAs**. Even if Bride's deceptive analysis and last-minute revisions to calculations, after his deposition, are believed, and Plaintiffs' expert disregarded, Plaintiffs' future damages over 22 years would be considerable **(Bride does not address future lost savings)**.

Bride Uses Incorrect Baseline – Pursuant to Khoury Declaration: "Baseline" is described in the PPAs at paragraph 7.j. to be "based on historical energy usage of [Purchaser]." Pursuant to this PPA description, Khoury used 12-month electricity costs ***before*** the PPAs were executed. [AE 186].

At Arbitration, Bride **corrected** the dollar amount he used for his initial baseline to be the year prior to solar being installed at the 900 Building (9/15/15-9/14/16), which he now states is $355,210. [Khoury Decl. ¶5].

However, for the 900 Building savings calculation for calendar year 2017, Bride uses a trending (escalated for current PG&E rate) baseline of $383,478 for the same amount of energy as the prior period (9/15/15-9/14/16). The $383,478 trending baseline **used by Bride to calculate 2017 savings, amounts to an escalation of ~7.9% ($28k) increase year-over-year for the same amount of energy**. A 7.9% escalation is **unsubstantiated in the known historical PG&E rates, the PowerPoint Presentation,** or the previous PG&E billings for the 900 Building. [Khoury Decl. ¶¶ 8-12, 14; AE 5].

For the 800 Building, **Bride's new post-deposition calculations changed his trending baseline by approximately 37%**, without support. [Khoury Decl. ¶ 7; AE 277].

Bride Uses Wrong PG&E Rate Escalator: PG&E rate schedule clearly states: "Average rates provided only for general reference, and individual customer's average rate will depend on its applicable kW, kWh, and TOU data." Bride **incorrectly assumes** that the *actual* rates charged to Plaintiffs by PG&E escalate the same as PG&E's "general reference" rates. [Khoury Decl. ¶¶ 11, 12, 16].

Contrary to Bride's incorrect assumptions, the subject facilities' rates are based on specific Time of Use ("TOU") usage, per historical data. **If Bride used the actual data MEET had access to, his energy savings calculation would be substantially lower.** [AE 277; Khoury Decl. ¶ 12].

The 7.9% increase is also inconsistent with the 5.8% PG&E escalation Bride uses for E-19 from 2016-2017. Similarly, the 7.9% increase is inconsistent with the 5% general reference average and contradicts the weighted E19 escalation from 2017-2019 in his analysis with an average annual increase of 4.4%. [Khoury Decl. ¶ 16].

Bride Takes Unauthorized $10,000/yr Reduction: Bride automatically reduces the Minimum Guaranteed Savings by $10,000 per year **without proof** of any agreed upon event. [See MEET's Arb. Brief Page 13].

The only adjustments that are authorized within a maximum credit range of $10,000 annually are for a) abnormal weather conditions, and b) utility matters or c) absence of a utility baseline for power rates [if

utility stops operating], **if documented for that year**. MEET submitted no documentation of abnormal weather variation to adjust the baseline cost. [AE 2-3 (¶ 7.j)].

By removing the $10,000 unilaterally and without cause from the $100,000, there is a **$30,000 decrease**, for the three study years, in Bride's new calculated true-up amount. After accounting for the incorrect Baseline Costs, corrections for the actual PPA permitted adjustments under 7.j and using the Minimum Guaranteed Savings, **the loss of savings for the initial 3-year true-up is *increased* by $93,604.** [Khoury Decl. ¶ 22].

In Addition to the $10,000/yr Unauthorized Reduction, Bride Also Uses Unauthorized Bandwidth Factor of 10%: Additionally, in his new calculations, Bride uses a 10% "Bandwidth" variation factor that is **not authorized anywhere in the PPAs**, to ostensibly eliminate variations in usage due to weather, high efficiency equipment or new equipment. [AE 277]. He never raised high efficiency equipment before and there is no authority for high efficiency equipment or new equipment in the PPAs for any documented and authorized adjustments for a) abnormal weather conditions, b) utility matters or c) absence of a utility baseline for power rates. [AE 2-3 (¶ 7.j)].

The concept of a "bandwidth" used in Bride's new calculations should only be used in the industry when the actual conditions are not known, such as future forecasting. Even in those cases such as future forecasting, the industry standard would be an adjustment for **documented weather variances** of +/- 2.5%, not +/-10%. [RT 1293:19-1296:9]. In the instant case, when the 3-year true-up occurs, **the actual weather is known, with no documented weather variations. No such "bandwidth" is appropriate in this case as actual usage and actual weather is known.** [AE 277; RT 1806:12-24, 1866:7-21, 1885:11-1887:18].

Bride's use of a bandwidth is also **"double-dipping."** [AE 277]. Paragraph 7j. of the PPAs already provides for a maximum of a $10,000 reduction in the aggregate, for documented variances under subpoint a. b. or c., in Minimum Guaranteed Savings, **in a given year for any proven abnormal weather cycle or other unavoidable variance factor expressly stated in Paragraph 7.j.** Bride attempts to take advantage of the $10,000 reduction for unproven variances in years 2017-2019, **ignoring the industry standard requirement for documentation, while at the same time artificially inflating savings by applying a 10% bandwidth**. [RT 1293:18-1294:12; 1295:5-12; 1295:14-1296:9; AE 277].

In Bride's post-deposition new calculations, he uses bandwidth to eliminate all usage variances +/- 10% (from -10% to 10% is a 20% deviation not authorized by the PPAs) instead of adjusting for them. In this manner, Bride's savings calculation was artificially inflated. [Khoury Decl. ¶ 20].

Bride Does Not Credit for Owner-Installed Energy Improvements: Under Paragraph 4.e of the PPAs, MEET cannot take credit for the extensive energy retrofit programs purchased by Plaintiffs through Bayren and PG&E. [RT 256:11-257:20; AE 2-3 (¶ 4.e)]. As admitted by MEET in their PowerPoint presentation [AE 5], a lighting energy conservation retrofit program would save at least $37,696 annually. [RT 253:21-257:19; Khoury Decl., ¶¶ 25-27; 277 (Khoury's Spreadsheet Summary)]. Plaintiffs' lighting energy conservation retrofit savings must be eliminated from Bride's three year true-up analysis.

With all of Bride's new calculations, there is no evidence presented by him, no correction, that he has complied with the PPA paragraph 4.e, to *eliminate the savings* resulting from energy conservation through Plaintiffs' cooperative program with PG&E, even though Defendants documented and admitted, in AE 5, that the lighting energy conservation retrofit program saves at least $37,696 annually, for a total of $113,088 over 3 years, which Defendants expected Plaintiff to install [AE 151], which actually occurred [Khoury Decl. ¶¶ 25, 27]. Extending this energy savings to 25 years, results in a total additional lost savings of $942,400 ($37,696 x 25 years).

Bride Does Not Address Overbilling From Misplacement of the 800 Building Rooftop Meter: Bride failed to address a further breach by MEET and Vista. Contrary to industry practice, Vista placed metering for the Murrieta building, **75 feet up on the rooftop,** as opposed to where power is being delivered at the first-floor electrical rooms shown on Exhibit 2 to the PPA as "Electrical Room" CAM 1 and CAM 2, resulting in a 2.38% overpayment, annually due to the loss of energy between the roof meter and the billing meter. [AE 186 (Pg. 3-4)]. This overbilling is **in addition to the lost solar energy savings** created by the underbuilt solar power system. Thus, even accepting MEET's expert's opinions and discounting Plaintiffs' expert's opinions, Plaintiffs' damages should include lost solar savings admitted by MEET and a **2.38% credit against the annual** solar energy bills received by Plaintiffs from MEET's affiliates to date on the 800 building. This overbilling due to the negligent placement of the meter alone totals over **$10,000** to date and will continue to damage Plaintiffs over the remainder of the effective dates of the PPAs in the total sum of $43,099.92 at the agreed upon trending rate. [See AE 187]

E. Plaintiffs Have Sustained Their Burden of Proof That MEET Breached the Minimum Guaranteed Savings Provisions of the PPAs.

If Bride's bandwidth and his doubling up of the $10,000 undocumented adjustments annually are removed from his new calculations, his ultimate dollar figure for lost energy savings is approximately the same as Plaintiffs' 3-year true-up calculation in terms of dollars and cents. [Khoury Decl. ¶ 27].

F. Non-Bypassable Charges Owed by MEET.

The PPAs at Paragraph 4.c state as follows:

> "All Personal property Taxes on the system, including without limitation all panels, inverters, controls supporting systems, distribution equipment and all other elements of the System **shall be paid by Seller**. Purchaser shall either pay or reimburse Seller for any and all Taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to the Utility's electric distribution system, **but only to the extent the payment of such Taxes in any Contract Year does not prevent Purchaser from realizing the Guaranteed Savings in such Contract Year**. For purposes of this Section 4(e), "Taxes" means any federal, state and local ad valorem, property, occupation, **generation**, privilege, **sales, use, consumption, excise, transaction**, and other taxes, **regulatory fees, surcharges or other similar charges**, and shall also include any income taxes or similar taxed imposed on Seller's revenues due to the sale of energy under this Agreement, which shall be Seller's responsibility." (Emphasis added).

After the installation of Solar Power, PG&E began charging Plaintiffs "Non-Bypassable Charges" in the total amount of $111,326.08 to date, $751,010.14 over the remaining portion of the 25-year contract term, which are owed to Plaintiffs by MEET.

G. Enertis Report Inaccurate: Shortly after the Enertis Report was complete, Karan Suri noted "some mistakes." [AE 98]. MEET argues in its Arbitration Brief at Page 27 Lines 20-28, that the Enertis Report somehow reflected "No Construction Defects." This is false on its face, as the Enertis Report identified installation defects. [AE 129 (Pg. 9-17). However, the Enertis Report did not specifically investigate roof damage, did not address temporary roof anchors in any way, and did not look for leaks or inspect any part of the lighting deficits or landscaping. [AE 129].

IV. PHYSICAL DAMAGES

MEET admitted that the physical damages alleged by Plaintiffs must be borne by either MEET or Vista. [RT 1682:2-1684:10; AE 152 – Sunil Suri's email of 4/27/18 to Brian Brogan of Vista: "Yes there are costs involved and some will come from you and some from us so we can achieve closure"; See also, AE 582].

A. PPAs *Guarantee* Integrity of Roof Following the Solar Installation: Under Paragraph 7.b, MEET represented that the Plaintiffs' roofs shall be as leak proof as they were prior to the solar system installation. [AE 2-3]. MEET was obligated under the PPAs and industry standards to conduct due-diligence

in inspecting the roofs at the subject facilities, to ensure the solar systems could be installed, without damage to the facilities, and would be suitable for a 25-year term pursuant to ¶ 6.a.i of the PPAs. [RT 2185:4-2189:17; AE 2-3;]

Prior to the installation of the solar power systems, Plaintiffs had a roofing specialist inspect the roofs of the Subject Properties. The roofing specialist notified MEET and Vista that the roofs were at around "half-life," meaning the roofs would have to be re-shingled in around 10 to 15 years, and extra precautions must be used by Vista due to inherent brittleness of the composite shingles. [AE 52; RT 415:10-418:11].

Vista's expert, Stephen Tsu, opined that "Seller [MEET] should have explained to Plaintiff that **it was unadvisable to install a 25-year solar system on roof that has <10 years** of remaining useful life." (Emphasis added) [AE 214 Page 3]. Additionally, as pointed out by Tsu, the Vista contracts with MEET "specifically state that 'Completion of any renovations, improvement or changes reasonably required on the property'" **must be completed prior to installation**. (Emphasis added) [AE 214 Page 4 ¶ 4]. Thus, MEET and Vista were negligent in installing a 25-year solar panel system on a roof that MEET and Vista knew or should have known would not last 25-years. [RT 2185:4-2189:17; AE 2-3]

MEET also failed to include in the PPAs any reference to the disruption of solar power due to completely foreseeable and required re-roofing and the predictable result in lost energy output or energy savings for which MEET has assumed all risks and responsibility.

B. MEET is Responsible For Vista's Installation and Workmanship: MEET is liable for all work to install the solar systems. Under ¶ 7.b of the PPAs: "Seller shall construct and install the System at the Facility." Under Section 7.f, the PPAs state:

> "...**Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors**. The Parties agree that unless otherwise agreed in writing by Purchaser, Seller's prime contractor for work related to installation of the System shall be [Vista Solar]." (Emphasis added)

Joint and Several Liability: MEET is contractually liable under ¶7.f of the PPAs which states that "Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors." Under California tort law and the PPAs, MEET is jointly and severally responsible for Vista's installation deficiencies. [*Expressions at Rancho Miguel Assoc. v. Ahmanson Developments, Inc.* (2001) 86 Cal.App. 4th 1135, 1179]

Plaintiffs are Third Party Beneficiaries of the Vista Contract: Under *Civil Code* §1559 and case law, Plaintiffs are plainly the intended beneficiaries of the solar power systems, and thus deemed third party

beneficiaries of the Vista Contracts between MEET and Vista. The third party need not be named or identified individually to be an express beneficiary. [*Kaiser Engineers, Inc. v. Grinnell Fire Protection Sys. Co.* (1985) 173 Cal.App.3d 1050, 1055; *accord, Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1774].

The beneficiary need not have consented to the underlying contract nor otherwise accepted beneficiary status. [*Skylawn v. Sup.Ct. (Alexander)* (1979) 88 Cal.App.3d 316, 319; 1 Witkin, Summary of California Law, Contracts § 708]. Both contracting parties need not have intended to benefit the third party. It is enough if the promisor understood the promisee had such an intent. It is clear from the fact that the installations are on Plaintiffs' properties, and other terms of the MEET/Vista agreements that Plaintiffs are third beneficiaries [AE 10-11].

C. MEET Warranted That All Work Would Be Performed In Accordance With Prudent Industry Practices and Standards [AE 2-3 ¶¶ 7.b, f and 14.b].

The Building Code Sets a Minimum Standard of Conduct; City Approval Does not Constitute Compliance with the Code: There is no merit to the argument that City approvals by building officials precludes a finding of negligence or absolves a contractor from complying with all building and fire codes. [*Beeks v. Joseph Magnin Company* (1961) 194 Cal.App.2d 73, 79-80]. Indeed, in the instant case, solar power systems were not installed up to code. Approval of construction by a public entity does not establish as a matter of law the duty or standard of care in tort actions. [AE 221-222, 587]

D. Plaintiffs Have Standing to Sue Despite Not Owning the System: Contrary to MEET's motion in limine arguments, MEET is expressly responsible for all design and construction deficiencies in the solar power systems. [AE 2-3, ¶ 7.f].

On the legal standing issue, MEET cites to *Stofer v. Shapell Industries* (2015) 233 Cal.App.4th 176, 189 and *Krusi v. S.J. Construction Co.* (2000) 81 Cal.App.4th 995, 1003-04, which are not on point. In both cases, no contractual relationship between the parties existed.

Further, the PPAs are expressly "service contract[s]" under ¶ 22.j of the PPAs. [AE 2-3]. California law recognizes that even a utility is liable for damages when a component of its system has caused damage to someone else's property interests. [See, *Mancuso v. Southern Cal. Edison Co.* (1991) 232 Cal.App.3d 88; *United Pacific Co. v. Southern Cal. Edison Co.* (1985) 163 Cal.App.3d 700; *Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68.] In addition, the statute for "standing to sue" is not limited to the ownership of the property causing injury. [*Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 147-148.]

E. **Livermore's Structural Attic Repairs did not Impair the Production of Solar Energy**: For unrelated structural repairs (referred to in the Arbitration as the "Sundt" case), the original repair plan was to get access from the rooftop, which was refused by MEET Defendants. MEET's unreasonable refusal to allow removal of the solar panels for structural repairs, forced Plaintiffs to find a solution for structural attic repairs without accessing the attic areas without opening up the rooftops. [RT 1016:17-1017:5; 1088:23-1090:7; 1091:2-11]. In Vista's Arbitration Brief at Page 2, Vista's counsel conflates the structural attic repairs with the damages alleged in this Arbitration, which are entirely separate with no overlap. [AE 46, 58, 73, 75, 84 (800 building only)]. Again, said attic structural repairs are not claimed as damages in this Arbitration.

F. **General Damages**

The Economic Loss Rule Does Not Bar Any of Plaintiffs' Installation Damages: The economic loss rule raised by MEET is not applicable in the instant case - MEET is **NOT** selling goods or products, but instead is providing *utility services*. [*North American Chemical Company v. Superior Court* (1997) 59 Cal.App.4th 764, 780-781 (economic loss rule has no application when the commercial relationship of the parties does not involve the **sale of goods or products**, nor under the Uniform Commercial Code, but rather relates only to the *performance of services*)]. Since the PPAs are expressly "service contracts," the economic loss rule does not bar Plaintiffs' negligence claim for damage arising out of the PPAs.

Even if the economic loss rule applied (it does not), the installation has caused physical damage to the roof and other components on the roof, water damage below the roof, as well as physical damage to the carport areas and landscaping. [AE 177-178, 268; See, *Aas v. Sup. Ct.* (2000) 24 Cal. 4th 627, 643]

Contract Damages Asserted by Plaintiffs are General Damages, NOT Consequential Damages: All of Plaintiffs' contract damages are general damages. MEET argues that that the following damages are consequential damages and are not recoverable under the terms of the PPAs: 1. temporary and permanent roof anchors; 2. bird abatement; 3. project/construction oversight; 4. lighting changes in the parking lot/on the property; and 5. landscaping and removal of trees. (*See* Motions in Limine).

First, these damages are direct damages arising out of the Vista contracts with MEET for the installation of the solar systems to which Plaintiffs are beneficiaries. These damages were within the contemplation of the parties, as they are specified in the Vista contracts and arise directly out of the performance of the installation of the solar systems. Second, under the terms of the PPAs, MEET is

responsible for the work performed by Vista. [AE 2-3, ¶ 7.f] Sunil Suri reviewed the property damages claimed by Plaintiffs in their punch list and testified at Arbitration that he "made a **reasonable review** of what was alleged, and they all appear to be **construction related issues**, and so in my mind **Vista was the responsible party**." (Emphasis added) [RT 1682:2-1684:10; See also, AE 582].

G. Out-of-Pocket Repair Costs of Physical Damages: Despite Vista agreeing to repair many of the deficiencies due to installation, most notably carport lighting and temporary anchors, MEET ***unreasonably refused*** to allow Vista to make needed repairs to the detriment of Plaintiffs. [Vista Response to Cross-Claim of MEET filed 10/8/2020, 3:21-25, 4:8-14].

Defective Carport Lighting: Vista's design of the carport structures required Vista to remove 11 light poles in the parking area at the 900 Building to accommodate carport support structures.

Because Vista removed light poles from the facility, Vista had a duty to reinstall lighting in the carports and drive aisle that complied with all state and local regulations and building codes. [See AE 62, 100 (Vista states: "[T]he new lighting plan with the carports will be equal-to, or greater than, what {Plaintiffs} have in place (and is to current Code)," 132 (Vista states: "We need to ensure that the lighting plan we propose 1) meets Code, and 2) is equal to, or greater than what you currently have on site," 152 (Vista states: "At the end of the day we need to solve the darkness issue in the driveway")]. Joe Callahan reminded Vista of that duty on July 20, 2016 via email. [AE 61]. Indeed, Plaintiffs placed Vista on written notice in August 2016 that Plaintiffs "consider this a Vista cost," with respect to repair of lighting. [AE 78]. Vista did not perform this work nor object to its responsibility for such costs until *after* Plaintiffs were forced to complete the work to protect the safety of their senior residents and staff.

Unfortunately, the defective carport lighting Vista installed caused "night-blindness" and "dark spots." [AE 100, 159, 160, 170, 172, 277] Vista negligently failed to prepare or arrange for a glare study, uplight analysis, or calculations by an electrical engineer to comply with Title 24 Section 6 (Building Energy Efficiency standards), which is required by the State of California. [RT 1302:24-1304:7; AE 586]

Moreover, Vista's lighting study was **not prepared by a California licensed engineer**, rendering the study in violation of code on its face. [RT 1303:8-11; AE 586]. Vista's lighting study was **never even submitted to the City of Livermore as part of permitting and it was never approved by the City**.

Vista's lighting study did not comply with California Title 24 requirements. [RT 1303:12-16]. To comply with State of California Title 24 requirements, **calculations are required as part of the submittal**

of construction documents to the City of Livermore for the Carport solar structure installations. [AE 586]. Vista's failure to conduct Title 24 calculations with submission to the City, and failure to obtain a CA licensed engineer approval of such calculations, including a glare and uplight analysis [RT 1303:17-1304:7; 1310:1-25], resulted in installation of inadequate and dangerous lighting in the carport areas.

To ostensibly show compliance with Title 24, Vista cited to a stamp from an engineer at McCalmont related to the overall installation of the solar power systems, which included a lighting *layout*. [See AE 25, depicting a one-page "Lighting Layout" dated August 11, 2015 ***prior to*** the issues with the dark spots and upglare]. **However, those layout plans are not the lighting system design and calculations required by Title 24.** Vista offered NO evidence of compliance with Title 24, despite promising to do so. [AE 66, 80].

When Plaintiffs reported and requested repair of the defective lighting to Vista representatives, Vista initially agreed to repair the "dark spots" and comply with the code at no cost to Plaintiffs. [AE 28, 29, 574]. However, Vista unreasonably refused to repair the inadequate and noncompliant lighting in the drive aisle (which it had created with removal of 11 pole lights). [AE 574].

Plaintiffs' consultant, Matt Donohue, responded to an inquiry from Joe Callahan that the "wall pack" lights (in the carport parking spaces) achieve a 1 Foot Candle "required by code" but noted that ***other deficits*** with the code remained. [AE 81-83]. Vista cited Mr. Donohue's email for the **incorrect proposition** that the **entire lighting** configuration installed by Vista was somehow "**up to code**," despite any proof of the same. Plaintiffs never argued that the 1 Foot-Candle offered by the wall pack lighting installed by Vista was insufficient in terms of Foot-Candles, but instead that the **wall pack lighting provided glare due to overbrightness and were improperly placed to light the drive aisle**.

MEET's own David Velasco admitted in a statement against interest that **"east and north drive aisles have areas where the minimum building code level of lighting isn't achieved due to the removal of the north and east pole lights."** [AE 99].

Unfortunately, Vista failed to make good on its promise to repair even the "dark spots" in the carport area and Plaintiffs were left with a drive aisle and parking spaces with noncompliant lighting that endangered its senior residents and staff. For the safety of its senior residents, Plaintiffs were forced to repair the defective lighting caused by Vista. **Plaintiffs performed a Title 24 lighting study, and installed 18 new light poles, incurring $290,408** to comply with Title 24 and repair the deficits caused by Vista in the parking spaces and drive aisle. [RT 1311:1-1312:22; AE 155, 537, 543-547]

Vista's own designated expert, Michael Villalba, conducted an independent evaluation of the cost to bring the parking lot area up to code with light poles, and **Mr. Villalba determined that $261,290 was a reasonable cost for this same work**. [AE 210].

Vista's Arbitration Brief at Page 2 alleges incorrectly and without support that prior car ports blocked lighting. However, Vista's attorney-made argument is unsupported by any evidence or expert.

Total Out-of-Pocket Costs: In addition to the carport lighting repair, Plaintiffs have incurred **$135,077** in non-carport-lighting repairs. [RT 1059:18-1060:2; AE 268]. Norris calculated total out-of-pocket repair costs incurred by the Plaintiffs, in part for the carport lighting repair noted above [AE 543 (Sprig Invoice 1 Page 1-5)], as well as additional invoices [AE 513 (CPC100985-986); 514 (Fields Invoice 2 Pg. 1-31, 35-61); 515 (Fields Invoice 5 Pg. 1-2); 516 (Fields Invoice 6 Pg. 1-2); 517 (Fields Invoice 12); 519 (Fields Invoice Pg. 1-2); 521 (Invoice 4 Pg. 35-36, 42-43, 49, 77); 530 (Killen Invoice 275); 537 (Metro Power Pg. 1-4); 538 (Northgate Invoice 1 Pg. 1-9)] for work Plaintiffs paid for during construction, as **$425,485.00** ($290,408 to bring carport lighting up to code, plus $135,077 in paid invoices for tree removal, DTSC reports, and repair of Vista's work) [See also, AE 177, 268]. Villalba calculated incomplete out-of-pocket costs for reasonableness in the total sums of **$261,290, which did not include an analysis of the non-carport-lighting repairs totaling $135,077** (which remain undisputed). [AE 210 (Page 2 of 8); 268]. Brown did not analyze any of the out-of-pocket invoices for reasonableness or necessity, leaving said invoices uncontroverted. [AE 228].

H. Future Repair Costs of Physical Damages: Plaintiffs' future damages can be separated into three categories: (1) **roof repair ($586,046)**; and (2) **removal and replacement of modules to get access to gutters and plumbing vents to get access and fire code requirements ($583,214.50)**. These **future repairs total $1,169,260.50.**

Roof Repair - Unprotected Foot Traffic (Deficient Use of Protective Mats): Plaintiffs established that the lack of protective mats to cover high foot traffic areas during work failed to prevent unreasonable wear and tear on the roof shingles by Vista's laborers, which damaged the roofs, particularly at the roof peaks. [AE 26. 245, 177, 207 (Pages 7, 9; 208 Pages 14, 16, 18); RT 1198:16-1199:25].

Jaymes Callinan testified for Vista *at deposition* that mats, blankets or protective barriers to protect the composite shingle roof from foot traffic **were *never* used** by Vista on a pitched roof due to safety concerns. [Callinan Dep. 204:8-19]. However, at Arbitration, he **impeached himself** by testifying that Vista

did use protective mats on this site. [RT 775:17-776:4].

In Vista's Arbitration Brief, at Page 3, Vista's attorney further confused the issue by arguing that **Vista never used protective mats**. However, Vista's attorney argued in opening statements that mats were used extensively. [RT 121:19-122:18]. In reality, Vista's general laborers were unskilled and not properly trained [RT 713:10-716:15] **and ended up <u>NOT</u> using what little protective matting Vista applied to the roof.** [See AE 26]. The result was excessive wear of the composite shingles from half-life, requiring a replacement of 50% of the roof. [RT 1198:16-1199:25; AE 26, 178 (Photos IMG_4088; IMG_4099)]

Joe Callahan personally observed that Vista's contractors refused to use any protective blankets demanded by Callahan and Dan Fields. [AE 74; 209 Page 1, LC019265 "issues with shingle wear"; 217 (Page 8 – shows extensive wear unique to areas close to the solar panels)].

Because of these installation deficiencies, independent roof consultant Tony de Kerf evaluated the projected useful life of the composite shingles to have gone down from 12-15 years to "5-7 years due the impacts of Vista Solar's install methods." [AE 74]. This estimate is in line with Steve Norris' opinion that the **Plaintiffs will need a half-roof replacement** on the solar-side to repair the damage done by Vista. [RT 1072:6-1074:14; AE 52; 60 (even wear on roofs prior to solar installation); 177, 207 (Pages 7, 9; 208 Pages 14, 16, 18)]

MEET's own David Velasco admitted in a statement against interest that the existence of "areas on both phases where the **roofing materials were damaged during [Vista's] install [of the Solar System], particularly at the roof peaks**." [AE 99]. Mr. Velasco estimated that about 10% of the composite shingles were affected by Vista's damages." [AE 99; 175]

Defendants cited the Killen report regarding the Critical Structural repairs in the Sundt case for the proposition that in March 2019, Killen estimated the total roof life to be 12-15 years. [AE 167]. However, AE 167 related to the entirety of the roof composite shingles, and Killen was not evaluating the shingles damaged by Vista's foot traffic around the solar panels.

As stated above, the totality of damages caused by Vista requires a half-roof replacement, with a reasonable and necessary cost totaling **$406,614.50** (excluding cost to remove and replace solar panels to do so). [AE 177]. Defendants' experts did not prepare a counter-proposal cost for a half-roof replacement and have not challenged the reasonableness of this number.

Defective Temporary Safety Anchors: It was not disputed by any evidence that the deficiencies in the temporary safety anchors are the direct result of Vista's installation. [AE 177; 229; 234; 244; 251;178 (Photos D-1472 D-1476, IMG 4880); 207 (Pages 6, 10, 12, 13, 20; 208 Pages 8-9, 11-12); 2-3 (MEET responsible for OSHA requirements regarding temporary roof anchors); 28-29; 53 (Debbie Clausen states, "It is my understanding that you are planning on installing temporary roof anchors into both sheet metal and shingles which will cause damage to both."); 54-55 (cited by Villalba – no proof that eyebolt anchors actually installed – rendering the evidence cited by Villalba irrelevant); 57 (cited by Villalba in his report, but relates to 800 building only – see AE 208 Page 7); 76 (permanent anchors not appropriate for the job); 77 ("Upon Completion and Removal of Temporary Anchors we will fix and waterproof anchor locations."); 152 ("Start immediately to fix all anchors")].

Plaintiffs' reasonable and necessary cost to repair the Temporary Anchors is $175 per location at 150 locations, for a total of **$26,250 (900 Building Only)**. [RT 1054:21-1056:1; AE 177]. Vista's expert's estimate of a "reasonable cost" of repairing the temporary anchors is $211 per anchor location at 149 locations for a total cost of **$31,570.11**. [AE 210]. Even MEET's own expert estimated that the "reasonable" cost of repairing the temporary anchors would be $130.15 per anchor location at 149 locations for a total cost of **$19,392.35** [AE 228]. Plaintiffs' estimate is a conservative, middle ground. The half-roof replacement recommended by Norris would subsume this cost. [AE 177]. The half-roof replacement would instead cost a total of **$406,614.50.** [RT 1072:6-1073:23; AE 177; 269].

Unused Mounting Holes: In Vista's Arbitration Brief at Page 3, Vista's counsel represents and argues that the hundreds of unused mounting holes were already repaired, which is contrary to their expert's testimony that none exist. Vista failed to present any evidence at Arbitration to support that the unused mounting holes were "already repaired." The only exhibit addressing alleged repairs is AE 59, which demonstrates that between February 10-16, 2015, Dan Fields inspected certain repairs of temporary anchors and penetrations and noted that Mr. Fields would "keep an eye on the balance of the project." These minor repairs predated the discovery of the unused mounting holes in March 2016 during the roof inspection personally conducted by Steve Norris. [AE 178 (Photo IMG 4877); 209 (LC019264); 229]. It appears from the dates that **unused mounting holes occurred AFTER Dan Fields' inspection**.

The reasonable and necessary cost to fix these hole locations from the unused mounting locations is $150-$250 per location, for a total of **$40,000**. [AE 177], which cost would be subsumed by a half-roof

replacement recommended by Norris, costing **$406,614.50**. [RT 1072:6-1073:23, 1074:5-1075:4; AE 177].

Damaged Bird Abatement: Vista damaged Plaintiffs bird shock track. [AE 178; 184; 209 (LC019255-258, LC019261, LC019265, LC019271 - Dan Fields states: "Bird Shock Track was damaged in several areas during installation of mounting tracks and solar panels," "shock track damage" by Vista's "crew", "Issues with shock track" "**All damaged shock track will be replaced at Vista Solar expense**" and on June 9, 2016 "[Dan Fields] showed Johnny [from Vista] the damage Vista's crew did to Shock Track, which **Johnny said Vista would pay to have it replaced**" (emphasis added); 208 (Pg. 9, 36-37)].

Vista admitted that it cut the bird shock track. [AE 28, 177]. Vista failed to prove at Arbitration, as argued by its attorneys, that Dan Fields allegedly provided *permission* to Vista to cut or damage the shock track, and no testimony or evidence supports that claim.

Repair of the shock track will cost **$15,233.80** [AE 268]; Villalba's estimate for the same work is **$11,686.25** [AE 210], and Brown's estimate is **$9,652** (not including equipment or "soft costs") [AE 228].

Similarly, as to bird abatement netting, Plaintiffs proved that Vista cut the netting in order to place solar modules and equipment. [AE 72 (800 Building Only); 178 (Photo DSC04766; 207 (Page 6); 208 (Page 32); 209 (LC019262 - "solar company cut out a section" of bird netting "near electrical panel", LC019271 - "Bird netting support poles knocked off wood supports"); 240] Replacing the bird netting will cost **$73,249.68** at the solar panels and **$53,116.52** at the roof wells. [AE 268]. Villalba's estimate for reasonableness of the same work is **$46,016.82** [AE 210], and Brown's estimate is **$21,365.56** (not including equipment or "soft costs") [AE 228].

Total Future Roof Repair Costs: Norris calculated Plaintiffs future damages for property repair including the above and $35,000 allocation for special equipment/operator as **$583,214.50** (including $406,614.50 for a half roof replacement plus $176,600 for landscaping repair, bird abatement repair, and specialty equipment/operator allowances [AE 268]) not including cost of solar panel removal and replacement for code compliance [AE 177, 268]. Villalba (for Vista) calculated future repair costs for reasonableness in the total sums of **$470,037.30**. [AE 210 (Page 2 of 8 – Total Estimated Project Cost)]. Even Brown (for MEET) estimated future repair costs for reasonableness in the total sum of **$175,242.28**. [AE 228 (Pg. 2)].

Removal and Replacement of Modules - Insufficient Distance from Eaves/Blocked Gutter Access: With respect to improper placement of solar panels, MEET's own David Velasco admitted in a statement against interest that "Industry standard solar panel installations are typically held back 3-5 feet from the

eaves to enable gutter maintenance to occur" [AE 99]. Mr. Velasco further opined that the "very critical item needs to be addressed immediately, most likely by ***permanently removing solar panels at the Eaves*** throughout both phases." (Emphasis added). [AE 27; 99; 207 (Pages 10, 15-17, 19); 208 (Page 15)].

The present layout of the solar panels "prevents reasonable access to the lower roof/eave area at the bottom side of the solar array, thereby blocking access to gutters..." [AE 177; see also AE 184, 200; 231-232; 254]. **Approximately 20 to 25% of the existing solar panels will require removal**. [AE 177]. Said removal and replacement costs for solar panels totals **$586,046**, which includes repair of fire code violations discussed below. [AE 201; RT 1247:14-1250:18]. Norris established that Vista's claim in its Arbitration Brief at Page 4 (that Plaintiffs may access gutters via lift) is incorrect. [RT 1038:15-1039:16].

Inadequate Plumbing Vents/Roof Penetrations Access: With respect to Solar panel layout, the panels also block access to plumbing vents on the roof for routine maintenance. [AE 177; 230; 233; 242]. In conjunction with other panel placement problems described above, **the inadequate plumbing vent access and roof penetration access would also be resolved by the removal of approximately 20 to 25% of the existing solar panels.** [AE 177; see also AE 184, 200]. This repair is included in the previously-stated amount of **$586,046** for removal and replacement of solar panels. [RT 1247:14-1250:18; AE 178 (Photo IMG_1046, IMG_1171201); 207 (Pages 9; 208 Page 19-20;) 268].

Fire Code Violations: Vista's Arbitration Brief (Page 4) incorrectly asserts that no panel separations are required by the Fire Code. Specifically, Fire Code ("FC") 605.11.3.1 requires residential panel sections to be no greater than 150 feet by 150 feet in either axis, to provide access paths, which are missing on the subject roofs. Vista's installation violates the following FC requirements:

> "**Perimeter pathways – There shall be a minimum 6-foot-wide (1829 mm) clear perimeter around the edges of the roof**... Interior pathways – Interior pathways shall be provided between array sections to meet the following requirements: (1) Pathways shall be provided at intervals **no greater than 150 feet** (45.7m) throughout the length and width of the roof; (2) A minimum **4-foot-wide** (1219 mm) pathways in a straight line to floor standpipes or ventilation hatches. (3) A minimum **4-foot-wide** (1219 mm) pathway around roof access hatches with not less than at least one minimum 4-foot-wide (1219 mm) pathway to a parapet or roof edge." (Emphasis added). [AE 221 (FC 605.11.3.1; 605.11.3.2)].

Additionally, the Department of Forestry and Fire Protection guidelines require a clear perimeter around the eaves and edges of the sloped roof for fire department access in case of emergency. Defense experts testified at deposition in unison, claiming that these FC requirements and guidelines were *excused* because the City of Livermore received plans depicting the placement of the solar modules, and ultimately the City permitted the project as a ***tacit*** waiver of code violations. However, as stated above, mere

permitting does not absolve MEET or Vista from compliance with the FC *or* the Department of Forestry and Fire Protection guidelines adopted by the City of Livermore. [*Governing Building Code*, 2012, Section 105.4 (Validity of permit); Section 110 of the Building Code]. The solar modules and equipment installed by MEET/Vista clearly violate the access requirements for the Fire Department. [AE 177, 184, 200, 221-222, 207 (Pages 10, 13, 15, 17-19), 236-238, 241-242, 243, 252-253, 255; RT 2197:5-25].

Furthermore, in accordance with the manufacturers' specifications and warranty requirements, the modules were supposed to be installed away from the eaves and roof ridges to prevent wind interference. The anchoring of the modules was similarly defective. Thus, the placement of the modules by Vista appears to void the manufacturer's warranty and will cause further property damage to Plaintiffs from wind effects. The modules were also placed within, and too close to, roof valleys in violation of the FC and industry standard to prevent debris and water buildup. [RT 2197:5-25; AE 207 (Pg. 11); 208 (Pg. 15-16)]. The only remedy for removal and replacement of such violating panels is to have "an authorized and qualified" technician remove and replace such panels. [AE 216 Page 8].

As stated above with respect to gutter and maintenance access and FC compliance, cost for removal and replacement of solar panels totals **$586,046** ($481,576 + $104,470). [AE 201].

Additional Unrepaired Landscaping: Additionally, due to the removal of the light poles by Vista, the landscaping must be repaired to comply with the City permit. MEET and Vista were responsible to comply with the City and repair landscaping in-kind. [AE 169 ("their city permit reflects the reinstall of landscaping in the fingers")]. After some negotiations with MEET, Vista eventually agreed to repair the landscaping. [AE 28 ("VSI accepts responsibility for the tree removal"), 132 ("the cost will not be Heritage Estate's responsibility"); 152 ("We will pay for this fix but you need to get the Landscaper Jon had obtained the quote from to go promptly and fix it")]. Yet, despite Vista's admission, the landscaping was *never* repaired. [RT 568:2-569:3; AE 178, 500 (P6. 4 item 6)]. The future cost to repair landscaping is approximately **$48,000**. [RT 1085:14-18]. Vista's expert opined that **$48,638.32** was reasonable to repair said landscaping, which is in line with Plaintiffs' claim of damages. [AE 210]. Brown estimated a reasonable cost for the same work at **$28,976.32** (not including equipment or "soft costs") [AE 228].

I. ***Stearman* Costs:** Under *Stearman v. Centex Homes* (2000) 78 Cal. App.4th 611, Plaintiffs would be entitled to their expert investigative costs as damages because of property damage. Plaintiffs have

been billed to date by professionals who investigated the problems in order to formulate an appropriate repair plan in the amount of **$133,645.60**. [AE 180, 193-199].

J. **Attorney's Fees:** If Plaintiffs are found to be the prevailing party, Plaintiffs would be entitled under the PPAs to bring a motion for an award of attorney's fees and costs against MEET and a motion for costs against Vista in any final arbitration award. [AE 2-3 ¶ 22.b].

K. ***People v. Sanchez* - Hearsay vs. Nonhearsay Objection Must Be Applied Equally**: Any objection by Defendants, based upon *People v. Sanchez,* to the testimony of Steve Norris or Tarek Khoury must be applied equally to all experts. During Arbitration, Defendants inexplicably objected when Norris and Khoury relied upon admitted exhibits, **which are not hearsay** and were never objected to as hearsay. Examples are the daily logs from Dan Fields and the photos taken by Steve Norris' associate. [AE 178; 209].

While experts may rely on hearsay, the court record must contain admissible evidence of the case-specific facts on which the expert relies, i.e., facts "relating to the particular events and participants alleged to have been involved in the case being tried." Again, all exhibits were admitted without hearsay objections.

By contrast, experts may rely on and testify to non-case-specific facts and general background information, even if it is hearsay, provided that the information is within their general knowledge in the field of expertise. [*People v. Sanchez* (2016) 63 Cal.4th 665, 676-677, 685-686 (providing examples of case-specific and non-case-specific facts); *People v. Veamatahau* (2020) 9 Cal.5th 16, 26-27].

Sanchez, *supra*, also applies to civil cases. [*People v. Bona* (2017) 15 Cal.App.5th 511, 520].

V. **COUNTER-CLAIM ISSUES**: The 150% rule raised in MEET's Arbitration Brief simply does not apply. [See MEET Arb. Brief, Page 36 Line 7 to Page 37 Line 8]. MEET Defendants would have the Arbitrator believe that the only "good faith" dispute with the solar invoices raised by Plaintiffs was somehow *just* the disputed Security Deposits in the amount of $127,191.78, which is less than half of the $286,889 in allegedly "outstanding" invoices. [*Id.*; Page 37 states the outstanding amount as $297,213]. However, at the time Marc D. Petersen, Esq. issued his April 3, 2018 letter Plaintiffs had already alleged $135,142.02 in lost energy savings in addition to property damage, extensive defects and the outstanding security deposits. [AE 110].

What MEET Defendants fail to disclose is that a "good faith" dispute has always been maintained by Plaintiffs in part because the invoices have always been OVERCHARGED. Additionally, the numerous cases cited by MEET Defendants for the proposition that the amount of an invoice is the only "good faith" dispute that may be raised are not on point. Again, when Mr. Petersen sent the April 3, 2018 letter, the lost savings were

alleged to be $135,142.02. [AE 110]. Plaintiffs expressly contested the amounts charged in the disputed invoices in April 2018 [AE 110] and June 2018 [AE 505] along with Plaintiffs claiming $135,142.02 in shortfall of Minimum Guaranteed Savings.

A. MEET is the "Defaulting Party" Under Paragraph 13 of the PPAs as Set Forth in Marc D. Petersen, Esq.'s Letter Dated April 3, 2018 [AE 110].

MEET's Defaults: Pursuant to Plaintiffs' Opening Brief [14:8-21:17] and pages 1 to 24 of this Closing Brief, Plaintiffs have presented and documented numerous grounds for MEET's defaults establishing MEET as the defaulting Party under ¶ 13 of the PPAs.

B. No Payment Default Was Established by MEET: On April 3, 2018, Marc D. Petersen, Esq. for Plaintiffs issued a demand letter giving Notice of Default identifying the breaches that establish the existence of a good faith dispute under the PPAs and the intent to place the contractual monthly payments into a blocked account until the parties engage in efforts to address the installation deficiencies. [AE 110]. The April 3, 2018 letter further informed MEET that, if the installation deficiencies were not addressed, Plaintiffs would declare MEET in default of their obligations under the PPAs and would take legal action to recover all damages.

C. Escrow Trust Accounts: MEET did not respond to Mr. Petersen's April 3, 2018 Notice of Default letter. Plaintiffs issued a June 7, 2018 letter as a follow-up to the Notice of Default demanding a response by no later than June 14, 2018 to avoid legal action. [AE 505]. After receiving no plan to cure in response to the June 7, 2018 Notice of Default letter, and after on-time payment of invoices for more than 2 years, and due to the numerous breaches of the PPAs by MEET, Plaintiffs in good faith placed the monthly utility payments into special trust accounts pending resolution of the dispute in the arbitration, per ¶ 13.b of the PPAs. [RT 611:8-23]. A Non-Defaulting Party may **suspend performance** of its obligations under the PPAs and pursue any remedy at law or in equity for damages. [¶ 13.b.i-ii).]

D. No Notice to Cure from MEET – Requires 30 days Written Notice: No Default Event was proven by MEET Defendants because a "good faith dispute" was identified on advice of counsel for Plaintiffs, Mr. Petersen at the time. [RT 216:22-222:2]. The *Assignees* failed to provide ANY Notice to Cure. The only notice received by Plaintiffs was from MEET (not the real-party-in-interest) and was related only to 2018 billing (that Akhil Suri now alleges had been offset by the security deposits) and the defective Memorandum of License ("MOL").

E. No Termination – Required 5 Days Written Notice: The purported Default Event claimed in MEET

Defendants' declaratory relief cause of action in their amended cross-claims is an alleged payment default that ostensibly occurred between Jan. 2018 and Feb. 2021. A failure to comply with conditions precedent not only will prevent an action by the Defaulting Party to enforce the contract, but also will sustain an action by the other party for a breach thereof. [*De La Falaise v. Gaumont-British Picture Corp.* (1940) 39 Cal.App.2d 461, 468–469; *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282].

The PPAs provide conditions precedent to termination, which are prerequisites for bringing a claim. The PPAs define three "Default Events": (1) a payable amount not subject to a "good faith dispute," (2) a failure to perform any other material obligation within 30 days following receipt of written notice from the Non-Defaulting Party demanding cure, and (3) **a representation, material to the transaction that proves at any time to be incorrect**. Plaintiffs made clear with the presented evidence that **MEET was in default at the time the PPAs were signed under item (3), when MEET made material misrepresentations, as inducements**.

The PPAs also define remedies for Default Events. Under Section 13.b.i., the Non-Defaulting Party may seek to terminate upon **five (5) days' notice**, which MEET never sent.

MEET ostensibly provided Notices to Cure on November 2, 2018. [AE 108-109]. However, Plaintiffs were not in default because of the "good faith dispute," per Mr. Petersen, and nevertheless, acted to "cure" by notifying MEET that they would deposit all outstanding invoice payments into special escrow trust accounts, after which MEET failed to move forward with a 5-day written notice of termination in 2018.

MEET Defendants are now foreclosed from seeking termination of the PPAs for prior alleged Default Events, in part because Plaintiffs provided notice that they were placing the payments into the escrow trust accounts, to which MEET never objected. [AE 140].

Moreover, when the parties entered into the mediated MOU, termination was effectively off the table. Under the terms of the MOU, which became effective on February 25, 2021, **there are no Purchaser "Default Events" subject to termination.** [AE 45].

In MEET's Arbitration Brief, MEET alleges that the November 2, 2018 Notices to Cure somehow also acted as 5-days' notice to terminate, effectively terminating the PPAs in 2018. This argument is nonsensical, as MEET Defendants are seeking invoice payments after November 7, 2018 and have received payment of invoices after the MOU.

Under the PPAs, MEET Defendants cannot rely on the November 2, 2018 Notices to Cure to support a future termination nearly 4 years later. Under *Civil Code* § 1654, "In case of uncertainty not removed by the

preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." The PPAs should not be interpreted to allow such *future* termination.

F. Memorandum of Understanding: On February 10, 2021, Plaintiffs and MEET Defendants met with the mediator in this matter to address the special escrow trust-accounts, and they entered into the MOU with MEET. [AE 45]. After receiving a copy of the MOU, on March 3, 2021, Plaintiffs submitted check No. 1003 from the special escrow trust-account in the amount of $275,000 pursuant to the MOU.[AE 142; RT 611:24-612:7]

According to the terms of the MOU, Plaintiffs agreed to pay MEET all future utility billings. Having not received any Notices of Default since the MOU was executed, it is not contested that all utility bills that the MOU considered due and payable under the terms of the MOU have been paid and are continuing to be paid. [RT 611:24-612:7 and 617:1-16; AE 44 (¶ 30), 45, 591 (Pg. 54 of 59)].

G. Memorandum of License – Alleged Default Event: MEET claims that it was damaged by Plaintiffs withholding signature on a MOL. Three problems exist that prevent MEET's recovery on this issue: (1) MEET is not the real-party-in-interest for any MOL, but instead its *assignees* are the real-parties-in-interest (which is one of the reasons the MOL was not signed – No MOL was ever submitted by the *assignees*) [AE 105-106]; (2) MEET never proved any damages stemming from withholding of signatures on the MOL; and (3) MEET expected Plaintiffs to sign the MOL while MEET refused to provide an Exhibit 6 to the PPAs that was consistent with the PPAs and MEET's representations (among other breaches by MEET).

H. MEET's Affirmative Claim - Construction Delay – Not Supported by Evidence: In its Arbitration Brief, MEET inappropriately promised to prove "significant cost and damage to sellers" resulting from delays during the installation of the solar power system allegedly caused by Plaintiffs.[MEET Arb. Brief, Page 27].

Importantly, MEET has not asserted a delay claim in this Arbitration against Vista or Plaintiffs. Despite the lack of a delay claim by MEET, both MEET and Vista attempted unsuccessfully to establish in this Arbitration that Plaintiffs' affiliate, Joe Callahan's, oversight of Vista's activities at the subject properties allegedly caused unreasonable delays. But Vista's only delay claim to MEET during the entire construction project at issue was $37,381.18 based on offsets reflected in Change Order No. 3. [AE 12, 95]. MEET did not tender any delays to Plaintiffs during the construction project at issue, **because Sunil Suri was on notice of *the issues that prompted* Change Order No. 3 in September 2015, before he released his signature on the PPAs. [AE 41 (Sunil Suri 9/29/2015 email acknowledging DTSC approval requirement)].**

While most of the actual delays during the installation of the solar power systems were caused by Vista's own negligence (described more thoroughly below), the issue is a red-herring. MEET has not perfected any claim of damages for alleged delay by Vista or Plaintiffs.

There were significant delays for completion of the solar power systems due to Vista's negligent design. In April of 2016, the Livermore Fire Department informed Vista that the carport design at the 900 Building failed to provide the 26-foot drive aisle required by the Fire Department. [AE 94, 548 (Page 6)]. Vista was forced by the City to redesign the carport solar system causing several months delay while Vista completed the new design. [AE 94, 548 (Page 6)]. The third phase of the project, the carport solar power system, was still not on line as of the completion dates of the Murrieta and Livermore rooftop systems.

MEET argues that the redesign of the carports occurred after steel support structures (for solar modules) were delivered to the 900 Building site. [MEET Arbitration Brief Page 27]. However, that argument is simply untrue and unsupported by the evidence. The steel support structures for the carports at the 900 Building were not delivered until approximately August 2016, well after the redesign by Vista (due to Vista's negligent design). The steel structure subcontractor (Baja Construction) corresponded with Vista regarding the multi-month delays required to obtain the steel and fabricate the structures based on Vista's new design. [AE 94, 710, 741, 743, 745; RT 788:51-789:4; 1988:8-2000:1; 2005:13-2006:22]. These delays had nothing to do with Plaintiffs. AE 79, cited by MEET, is an August 2016 discussion of additional *potential* redesigns for lighting compliance with the City permit *after* the Baja redesign. As that subsequent redesign never occurred, MEET's citation to AE 79 is irrelevant.

The only two delays even potentially attributable to Plaintiffs were: (1) 4t to 6 weeks work stoppage required while Plaintiffs completed unrelated roof repairs as part of the unrelated Sundt litigation (described above) [AE 63, 85]; and (2) 5 to 6 week delay while the DTSC approved the carport structures. [AE 38-39, 69-70]. However, MEET made no formal claim for damages related to the 4-6 weeks work stoppage until it raised the issue for the first time in its Arbitration Brief. No evidence presented at Arbitration supports any damages caused by the unavoidable 4-6 weeks work stoppage. MEET also failed to make any formal claim at any time related to the DTSC approval delay.

Without a formal delay claim by MEET seeking damages, the issue of delay by Vista (inappropriately attributed to Joe Callahan's due-diligence oversite) has no relevance to any of the claims or

defenses raised by the parties in this Arbitration. The Arbitrator should ignore any effort by Defendants to blame Joe Callahan's due-diligence oversite for any delay.

I. MEET's Affirmative Claim – Blocked Access – Pled but Unproven at Arbitration: MEET failed to put on any argument or evidence to support the allegation in its Arbitration Brief that "Purchasers repeatedly refused or greatly restricted access to solar facilities, further increasing Sellers' costs". [MEET's Arbitration Brief, Page 9 Lines 13-18; *see also* Page 28 Lines 9-13]. This unproven allegation has the distinction of being utterly false and unproveable. [*e.g.* AE 336 rescheduled access after car accident; AE 556-559].

J. MEET's Affirmative Claim for Damages: MEET Defendants are solely responsible for the costs of construction. 7 g. of the PPAs provides:

> "g. Liens and Payment of Contractors and Suppliers. Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under his Agreement and shall keep the Facility free and clear of any liens related to such charges, except for those liens which Seller is permitted by law to place on the Facility following non-payment by Purchaser of amounts due under this Agreement." [AE 2-3].

MEET's two managing agents testified that MEET's damage included loss of tax and energy credits. MEET never identified these claims in its Notice of Counter-Claims or in the Amended Notice of Counter-Claims. [JAMS Rules 9 and 10]. Even if the Arbitrator were to consider these counter-claims, the testimony of MEET's witnesses, Akhil Suri and Sunil Suri, is insufficient to support this claim. MEET produced no documentary evidence to support the loss of tax or energy credits, and the Best Evidence Rule applies. **Plaintiffs, however, established on cross-examination that tax law authorizes carrybacks and that tax credits would not be lost, only delayed – by delays caused by MEET/Vista. [RT 1627:4-1631:11].**

K. MEET's Affirmative Claim – Late Payment of Invoices: MEET sought leave to add a claim for nonpayment post January 2018, but never sought leave to amend to add a claim for late payment of invoices. This claim first appeared in opposition to Plaintiffs' Motion for Summary Adjudication. It is too late and highly prejudicial to allow a further amendment. [See, *Record v. Reason* (1999) 73 Cal.App.4th 472, 487].

Alleged "Late" Payment Claim Subject to "Good Faith" Dispute Per PPAs: Even if the Arbitrator were to consider the alleged late payments, the monthly billing invoices were subject to a "good faith" dispute as discussed above, which allowed Plaintiffs to suspend payments under the PPAs.

L. MEET Has Not Established That Plaintiffs' Payments Were Actually Late: In addition, MEET did not consistently send the invoices on a monthly basis, and Plaintiff's payments were timely under the terms

of the PPAs. [RT 601:19-608:24; AE 116, 345, 591]. Having accepted allegedly "late" payments, MEET has waived its right to enforce penalties for said payments under the PPAs.

Section 4 of the PPAs provide that MEET was to provide monthly invoices:

> "a. Seller shall invoice Purchaser monthly… monthly invoice shall state. (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser..."

Section 4 of the PPAs further provided the payment terms:

> "…amounts due under this Agreement shall be due and payable net **thirty (30) days from receipt of invoice**..." [Emphasis added.]

Thus, the PPAs require that MEET send invoices on a monthly basis that calculate the amount of electrical energy generated by the solar power systems in that month and that Plaintiffs have 30 days **from receipt of the invoice** to pay the invoice. The evidence has established that MEET did not send the invoices consistently on a monthly basis and Plaintiffs' payments were made within 30 days of receipt of all invoices unless there was a question regarding the invoices. [RT 601:19-608:24; AE 116; 345; 591].

It is Plaintiffs' receipt of each invoice that starts the clock ticking. Even if a payment was late, MEET cannot, five years later, for the first time allege that Plaintiffs were late every month until February of 2021 and now untimely seek interest or penalties as damages. No interest charges ever appeared on any invoice. [RT 608:19-24; AE 591]. No Notices of Default and opportunity to cure were ever sent with respect to the allegedly "late" payments.

M. MEET Accepted Payments from Plaintiffs Without Notice of Any Lateness: It is well settled a contracting party may waive conditions placed in a contract solely for that party's benefit. [*Sabo v. Fasano* (1984) 154 Cal.App.3d 502, 505; *Doryon v. Salant* (1977) 75 Cal.App.3d 706, 712.] Waivers of forfeiture provisions based on late performance have been routinely found where the party benefited by the provision has habitually accepted tardy payments. [See, *Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440 and *Powell v. Cannon* (1953) 119 Cal.App.2d 748, 751-752; *Lopez v. Bell* (1962) 207 Cal.App.2d 394, 398]. The waiver principle is applicable here. MEET's habitual acceptance of alleged late payments and failure to charge interest constitute a waiver of the late payment provision and interest assessments. Moreover, California law recognizes that a financial penalty such as a late payment penalty that does not

cause any actual damage suffered is an unenforceable penalty. [*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 829–830.]

VI. CONCLUSION - Based on the above, Plaintiffs have conclusively established (1) misrepresentation/ inducement; (2) breach of the PPAs with loss of promised Minimum Guaranteed Savings, (3) property damage of Plaintiffs' roof and other components of the buildings, and (4) Security Deposits not returned.

Plaintiffs have proven the reasonableness and necessity of the following damages against both MEET and Vista:

Damages	Description
$94,835.00	Loss of Minimum Guaranteed Savings in initial 3-year true-up by Khoury *without* factoring for energy conservation retrofits purchased by Plaintiffs in accordance with ¶ 4.e of the PPAs.
$3,721,734.00	22-year future loss of Minimum Guaranteed Savings *without* factoring for energy conservation retrofits purchased by Plaintiffs in accordance with ¶ 4.e of the PPAs.
$942,400.00	Energy savings from conservation retrofits over 25-year term of PPAs must be excluded from Bride's calculation of energy savings from solar and credited to Plaintiffs. (not included in calculation above)
$5,925,946.83	PG&E bills incurred for make-up power guaranteed by MEET over 25 years based on the 4% escalation of PG&E charges agreed to by MEET in AE 5 *EXCLUDING* non-bypassable charges (Note – this number includes the 3-year calculation discussed above [$431,067 ($143,698 x 3 years)]). The total would be $6,788,283.05 with non-bypassable charges included.
$111,326.08	Non-bypassable charges incurred by Plaintiffs **to date** that must be reimbursed under PPAs ¶ 4.c.
$751,010.14	Future non-bypassable charges up to 25-year term of PPAs that must be paid by MEET under PPAs ¶ 4.c, escalated at the agreed-upon PG&E rate of 4%.
$425,485.00	Out-of-pocket expenses incurred to date for the lighting reconstruction to comply with code and safety requirements for the residents, based upon code ($290,408), along with landscaping and other reconstruction costs (totaling $135,077 in paid invoices for tree removal, DTSC reports, and repair of Vista's work), excluding the future roof repair.
$127,191.78	Outstanding solar deposits demanded by MEET.
$586,046.00	Removal and replacement of solar panels to comply with code and fire safety regulations see Khoury.
$583,214.50	Future roof repair consisting of $406,614.50 for a half-roof replacement and $176,600 in future additional repairs. (Excludes cost to remove/replace solar panels to accomplish repairs).
$133,645.60	*Stearman* damages (through May 16, 2022).
$1,817,774.64	Attorney's Fees (through May 2022).
$15,220,609.57	**TOTAL DAMAGES BEFORE ADDING PREJUDGMENT INTEREST**

For the Arbitrator's information, the blocked accounts continue to maintain a balance of $126,268.74 to be used to apply to any damage award.

DATED: June 30, 2022

PIERCE CONSTRUCTION LAW

By: _____

David H. Pierce
Christian D. Molloy
Attorneys for Plaintiffs

PROOF OF SERVICE

Livermore Senior Living Assoc., L.P. / Murrieta Seniors Associates, L.P. v.

Menlo Energy Efficiency Technologies, LLC, et al.

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **PIERCE CONSTRUCTION LAW, PC**, 11835 W. Olympic Blvd, Suite 1150E, Los Angeles, California 90064. On June 30, 2022, I served the following document(s) by the method indicated below:

PLAINTIFFS AND COUNTER-DEFENDANTS LIVERMORE SENIOR LIVING ASSOCIATES, L.P.'S AND MURRIETA SENIOR ASSOCIATES, L.P.'S CLOSING BRIEF

☒ by serving the document(s) listed above via electronic service; service is being made pursuant to the Court's Emergency Rules Related to COVID-19, Rule 12(b)(1) and CCP Section 1010.6

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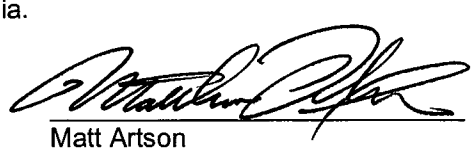
☐ by placing the document(s) listed above in a sealed envelope(s) with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. [VIA FEDERAL EXPRESS]

I declare under penalty of perjury of the laws of the State of California, that the above is true and correct. Executed on June 30, 2022, at Los Angeles, California.



Matt Artson