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JAMS REFERENCE NO. 1100107416

Livermore Senior Living Associates LP and Murrieta Seniors Associates, LP, **Claimants,** **v.** **Vista Solar Inc., Menlo Energy Efficiencies Technologies, LLC, Heritage 800 East Solar Owner, LLC, and Heritage 900 East Solar Owner, LLC** **Respondents.**	**CORRECTED AND FINAL ARBITRATION AWARD**
Menlo Energy Efficiencies Technologies, LLC, Heritage 800 East Solar Owner, LLC, and Heritage 900 East Solar Owner, LLC **Counter-Claimants,** **v.** **Livermore Senior Living Associates LP and Murrieta Seniors Associates, LP** **Counter-Respondents**	

On January 20, 2023 a Final Award was issued to the parties. By letter dated January 27, 2023, counsel for MEET requested, pursuant to JAMS Rule 24(j) requested that the Arbitrator correct certain computational, typographical or similar errors. No response to the request was filed by any other party. The Arbitrator is now issuing his Corrected Final Arbitration Award.

Counsel: David H. Pierce of Pierce Construction Law for Claimants and Counter-Respondents; Brent G. Cheney of Parker, Milliken, Clark O'Hara & Samuelian and Jennifer Willis of Hugo Parker LLP for Respondents and Counterclaimants MEET, LLC, Heritage 800 East Solar Owner, LLC, and Heritage 900 East Solar Owner, LLC; and Brian M. Sanders of Ericksen Arbuthnot on behalf of Respondent Vista Solar, Inc.[1]

Arbitrator: Hon. William J. Cahill (Ret.)

Place of Arbitration: remotely *via* Zoom

Dates of Arbitration Hearing: April 12-15, April 19-22, and May 4, 2022

Date of Interim Award: October 13, 2022

Date of Final Award: January 20, 2023

I. FACTS AND PROCEDURAL HISTORY

The facts referred to in this Final Award are necessary for the determination of this proceeding. Any discrepancy between the statement of facts in this Final Award and the presentation of facts by either party is the result of the Arbitrator's determination of factual disputes, credibility of witnesses, relevancy of evidence, burden of proof and weight of the evidence presented.

This arbitration arose out of the installation of a solar panel system at Claimants and cross respondents Livermore Senior Living Associates ("Livermore") and Murietta Senior Associates, L.P, ("Murietta") (Collectively "Claimants" or "Purchasers") buildings located at 800 and 900 Stanley Blvd in Livermore, California ("Assisted Living Facilities" or "Facilities").

Under two Power Purchase Agreements ("PPAs") executed in the fall of 2015,

[1] Mr. Sanders, as of December 15, 2022, Mr. Sanders email indicated that he was no longer with the Ericksen Arbothnut firm and on December 30, 2022 Mr. Sanders, by email, indicated that he had moved his practice to the Koeller Nebeker firm, and this arbitration had come with him to his new firm for handling through final award/closure.

Purchasers contracted with Respondent MEET, LLC ("MEET")[2], the financier of the project MEET separately contracted with Respondent Vista Solar, Inc. ("Vista") under two Solar Installation Agreements ("SIAs") to have Vista design and install the solar panel systems on Purchasers facilities. There is no contract between Vista and Purchasers.

The Arbitrator presided over a nine-day evidentiary hearing on April 12-15, April 19-22, and May 4, 2022, after which, the parties filed simultaneous closing arbitration briefs on June 30, 2022. The Arbitrator submitted follow up questions to all counsel on July 29, 2022 and conducted a follow-up hearing on August 1, 2022. There was a further delay which resulted in the Interim Award being served in October 2022.

On October 17, 2022, after consultation with counsel, the arbitrator issued a Post Interim Arbitration Award Scheduling Order which addressed the timing further briefing on Unresolved Issues remaining after the Interim Award, briefs on Prevailing Party, Attorneys' fee awards, the issue of the 2.38% Credit for Meter Replacement and Prejudgment Interest.[3] All briefing was timely submitted by December 14, 2022.

II. THE PPAs NEGOTIATIONS AND TERMS

Purchasers are the owners of two senior assisted living facilities. In September 2015, Purchasers entered into two Power Purchase Agreements with MEET ("PPA's") whereby they both agreed that MEET could construct a solar panel system on the roofs of each of the Purchaser's its two buildings. (Exs. 2, 3). The Purchasers would purchase the power generated

[2] MEET sold the Systems and assigned its rights in the PPAs and Solar Installation Agreements to Heritage 800 East Solar Owner, LLC ("Heritage 800") and Heritage 900 East Solar Owner, LLC ("Heritage 900"), respectively, for the 800 and 900 buildings on Stanley Blvd.

[3] This Final Award contains the arbitrators review of the briefs submitted and his final decision on the disputes raised in the Post Interim Arbitration briefing.

and MEET would remain the owner of the solar system. (Id.).

A. Discussions Between MEET and Purchasers Prior to Execution of the PPAs in September 2015.

Beginning in 2013 and 2014 Claimants' management[4] became concerned about the rising utility costs of operations at the Facilities. Mr. Klein testified that the concern was that 40 percent of the rents are controlled for 30 years and if utility costs continue to rise, the quality of service for the residents could be decreased over time. (RT 143-145).

The evidence presented at the arbitration showed that as early of February 2014 Mr. Callahan had decided to investigate the "potential for a solar install" (Ex.31). Beginning in late 2014 or late 2015, Mr. Klein and Sunil Suri[5] began discussing the possibility of MEET selling a solar option to Purchasers (RT 895) and Mr. Klein let Mr. Suri know that Mr. Callahan was willing to look at a proposal (RT 150.)

In anticipation of having an agreement with Purchasers, MEET retained Vista to evaluate, design and install the solar systems in accordance with the law and reasonable business standards. (Ex. 10 and 11 (the Solar Installation Agreements ("SIA's) between MEET and Vista).

On August 15, 2015, Mr. Suri sent Mr. Klein an email in which he stated "we have figured out how to deliver the $100k annual savings . . . Please sign the PPA's are return ASAP." (Ex 4). Attached to that email was a PowerPoint entitled Solar Project Overview and Analysis

[4] Robert Klein President of BT Livermore Associates, Managing General Partner or Livermore and a General Partner of Murietta. Joe Callahan was a Manager of the General Partner owning Livermore and Murietta. See Ex. 2 and 3.

[5] Sunil Suri is the managing partner of MEET (Ex 2 bates 7037. Ex. 3 bates 7008.)

("SPOA") (Ex. 5).[6] [7]

B. The PPAs Terms

Purchasers and MEET executed the PPAs in September of 2015. (Exs. 2, 3.). Section 22.1 of the PPAs include integration clauses, which states that the PPA are the complete and exclusive agreement of the Parties and that each PPA "supersedes all prior proposals, agreements or other communications between the Parties, oral or written" regarding the subject matter. (Exs. 2, 3 at Ex. 4, Sec. 22.1.)[8]

In drafting the PPAs, the parties started with the standard Solar Access Public Capital (SAPC) form and included an initial term of 25 years, beginning on the "Commercial Operation Date." (RT 227, 921, 1499; see, e.g., Ex. 2, Ex. 1.) Under the PPAs, MEET remained the owner of the solar system and the PPAs required no upfront cost to be paid before for the installation. (Exs. 2, 3.) The "Expected First Year Energy Production" was 1,362,720 kWh for 900 Heritage and 256,542 for 800 Heritage. (Ex. 2, Ex. 2; Ex. 3, Ex. 2.)

The PPAs terms obligated Purchasers to buy all solar electricity generated by the system "delivered to the Delivery Point." (Ex. 2, Ex. 4; Ex. 3, Ex. 4.) The rates that MEET could charge each year for solar generated electricity is set forth in Exhibit 1 to the PPAs. (Exs. 2, 3.) Based on the total Estimated First Year Energy Production of 1,619,263 and the price per kWh set forth

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[6] This SPOA was provided to Purchasers almost a month before the PPAs were executed and Purchasers received at least two copies and emails in August (Ex. 6-9). However, the PPAs contain an integration clause, which makes it clear that this document cannot be relied on as evidence in analyzing a breach of the terms of the PPAs.

[7] In its closing brief, MEET cites to Ex. 32 which is a July 2015 SOPA regarding the same project. MEET cites to Disclaimer language which states that that SOPA is for informational purposes only and not an offer to sell and Purchasers could not rely on this SOPA as evidence that it was intended to mislead Purchasers (MEET Closing pg 34). Purchasers tells the arbitrator that MEET did not produce this exhibit in discovery, Vista produced Ex 32. The Disclaimer language in Ex. 32 will not be given any weight in this Award.

[8] Mr. Klein, a former member of the California State Bar, testified that the integration clause meant that all price negotiations and representations were "thrown out" and the terms of the written contract controls (R.T. 293-294).

for each facility, Purchasers could expect to pay $254,349.36 to MEET for solar electricity generated during the first year of operation. The PPAs also stated that MEET is the "owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits." (Id.)

Under the "Billing and Payment" provisions, MEET was to invoice Purchasers "monthly, either manually or through ACH.," and:

> All amounts due under this Agreement shall be due and payable net thirty (30) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) days period shall accrue interest at the annual rate of two and on-half percent (2.5%) over the prime rate, as published in the Wall Street Journal.

(Id.) Additionally, the "Minimum Solar Savings" provision states that:

> 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 systems, be at least one hundred thousand a year – derived solely from the energy produced by this solar system.

(Id.) Section 7(j) of the PPAs describe the "Guaranteed Savings" as follows:

> In connection with this Agreement and that certain Solar Power Purchase Agreement by and between Seller and Livermore Independent Living Associates, L.I.C. an affiliate of Purchaser ("independent Living Associates"), dated as of even date herewith (the Independent Living PPA," and together with this Agreement, the "PPA"), the Parties have agreed that based on the historical energy usage of Seller and Independent Living Associates and the projected price of energy from the Utility over the Term (and the "System" contemplated by the Independent Living PPA), together with the expectation that the Contract Price (and the 'Contract Price" under the Independent Living PPA) will be lower than the price of energy from the Utility throughout the Term, Purchaser's and independent Living Associates' entry into their respective PPAs will result in **substantial savings** in the costs of energy **over the Term** incurred by Seller and Independent Living Associates under the PPAs as **compared to the energy costs that would be incurred if Seller and independent Living Associates did not enter into the PPAs and continued to purchase their energy from the Utility**. For purposes of establishing a baseline for measuring such savings, the Parties have agreed that if Seller and Independent Living Associates did not enter into the PPAs, continued to purchase their energy from the Utility during the Term and did not otherwise modify either of their respective Facilities in a manner that would materially change its expected energy consumption, **Seller's and Independent Living Associates' aggregated annual costs of energy from the Utility for each Contract Year of the Term would be as set forth in Exhibit 6 (the "Baseline**

Energy Cost"). So long as neither Facility has been modified in a manner that materially increases its expected energy consumption, **Seller hereby guarantees that for the first Contract Year of the Term the aggregate amounts paid to Seller under this Agreement and the Independent Living PPA will no less than $100,000 less than the Baseline Energy Cost for the first Contract Year prorated between Phase I and Phase 11 based upon their relative electrical generation and savings, with such savings escalating by 2.9% each subsequent Contract Year (the projected savings for each such Contract Year as set forth in Exhibit 6, the "Guaranteed Savings"**). In the event that the Guaranteed Savings are not realized in any particular Contract Year for seasons such as a) weather, b) utility matters or c) absence of a utility baseline for power rates then the amount of such Guaranteed Savings not so realized shall be paid by Seller to Purchaser upon a true-up, every 3 years, so as 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). **In the event that Seller fails to pay such Guaranteed Savings to Purchaser in a timely manner, Purchaser shall be entitled to offset such unpaid Guaranteed Savings against any then current or future payment obligations of Purchaser under this Agreement.** The Guaranteed Savings shall be allocated between Livermore Senior Living Associates, L.P and Murrieta Senior Associates, L.P, pro-rata for an aggregate annual savings of $100,000 to be split based upon the relative energy utilization and savings of each entity."

(Id., (*emphasis added*).)

However, when Purchasers and MEET executed the PPAs, the **"Exhibit 6"** referred to in Sec. 7(j) was **not drafted or attached** to the PPAs. In fact, the parties have never agreed upon the contents of what would have been Exhibit 6. (*See,* Undisputed Fact 6).

Under Section 22 of the PPA's, "any dispute arising from or relating to this Agreement shall be arbitrated in California" in accordance with JAMS Comprehensive Arbitration Rules and Procedures and the law of the state where the System is located shall govern this Agreement.

The parties executed the PPAs in September 2015, and before the start of construction, MEET sent Purchasers invoices totaling $127,191 for a deposit that was to be paid prior to construction beginning (Ex. 43). There was no provision in the PPAs requiring a deposit and while Purchasers objected, Purchasers paid the money after MEET agreed that it would be repaid.

III. Solar Installation Agreements

Prior to MEET's and Purchasers execution of the PPAs, MEET and Vista executed two SIAs in July of 2015. Under the SIAs, Vista agreed to design and install a solar panel system at Purchasers' facility that would generate 1,655,196 kWhr per year. (Exs. 10, 11.) Vista provided MEET with a warranty that the system installed would generate at least 90% of the 1,655,196 kWhr/year promised under the SIAs. (Id., 00000499.

IV. Disputes Between Purchasers and MEET

The solar panel system installation occurred in three phases. 800 Heritage was completed first, then 900 Heritage, and then the carport. PG&E provided permissions to operate each system on varying dates: February 9, 2016 for 800 Heritage; September 23, 2016 for 900 Heritage; and March 27, 2017 for the carport. (Exs. 309, 310, 320, 323.)

The parties knew that when the three phases were completed the combined systems would not generate all of Purchasers' electricity needs, thus it was always understood that Purchasers would have to purchase electricity from PG&E after the installation was fully completed. Prior to the installation of the solar panel system, Purchasers paid PG&E for electricity under PG&E's E19 tariff. After the installation of the solar panel system, Purchasers migrated to PG&E's A6 tariff.

A. Unpaid Invoices.

MEET noted that at some point, Purchasers stopped paying monthly invoices for solar energy provided by MEET. By February 2021, Purchasers had deposited $676,268.74 in what was described as a "blocked trust account." The parties disputed whether Purchasers were entitled to withhold that money from MEET, and on February 10, 2022 the parties mediated that dispute and agreed that, with neither party waiving their rights, Purchasers would begin making

timely payments on monthly invoices, each party would receive $275,000 from the blocked accounts, and $126,268 would remain in the account, to be disbursed upon the final arbitration award. (Memorandum of Understanding "MOU", Ex. 45). MEET now seeks full payment of all unpaid invoices (Purchasers have timely paid the monthly invoices since executing the MOU on February 25, 2021).

Purchasers contend that MEET breached the PPAs by failing to deliver the savings that MEET promised to Purchasers before the execution of the PPAs. Additionally, Purchasers argue that MEET and Vista constructed a solar panel system that does not generate the amount of kWh promised under the PPAs. Furthermore, due to Vista's recommendation that Purchasers switch to the PG&E A6 tariff, Purchasers' cost to purchase electricity from PG&E is a higher per kWh such that Purchasers state they are paying more for its electricity now than if they had not installed the solar panel system. Lastly, Purchasers allege that Vista's design and installation of the solar power systems were defective and damaged their facilities.

B. Notices of Default

On April 3, 2018, Purchasers counsel, Mark Petersen, sent MEET a letter which listed alleged "Installation Deficiencies" under the PPA's. He explained that Purchasers tried to negotiate a resolution of these problems but had not heard from MEET since mid-December 2017. He demanded that a plan for correction be provided by April 20,2018.

Mr. Petersen also mentioned that MEET "held" $135,142.02 for "unrealized savings" and $127.191.78 for the unrefunded deposit made after execution of the PPAs. He directed MEET to "offset current invoices against the funds held. Finally, he referred to proposed "Exhibit 6 to the PPAs" which he forwarded to MEET on 9/28/2017 (Ex. 110).

Receiving no response from MEET, Purchasers current counsel, David Pierce (then a

member of Castro & Associates) on June 7, 2018, sent MEET a follow-up letter reiterating Purchasers claims that MEET was in default and requesting a response within five business days, otherwise his client would pursue its remedies, including return of the deposit and lost guaranteed energy savings under the PPAs (Ex. 505.) Purchasers then began placing monthly utility payments into "special trust accounts," pending resolution of the disputes raised in this proceeding. (RT 611.)

On November 2, 2018, MEET sent Purchasers Notices of Default, informing them that MEET considered them to be in default for failing to pay MEET within 30 days of invoice for electricity generated and failing to execute a Memorandum of License.

Purchasers filed a JAMS Rule 9 Notice of Claims on August 11, 2020, and a Notice of Change of Claims on September 3, 2020. Vista filed its Response to Notice of Claims on August 25, 2020. MEET filed its Response, Counter-Claims, and Cross-Claims on September 17, 2020.

V. DISCUSSION

A. Purchasers Claims Against MEET

1. Negligent Misrepresentation Discussion

Purchasers argue that MEET is liable for negligent misrepresentation because MEET stated that Purchasers would save no less than $100,000 per year, escalated by 2.9% every year, of its electricity costs after the solar power system was operative. Additionally, Purchasers argues that MEET represented that its system would generate 1,619,263 kWh per year and thus would offset all of Purchasers' costs to purchase electricity from PG&E except for $19,311. They also allege that MEET stated it would build a carport system that generated 3.25.08 kW of alternating current ("AC") and a rooftop system that generated 763.56 kW AC.

Purchasers contend that MEET represented during discussions prior to the execution of

the PPAs that the Purchasers would incur "Zero Upfront Costs" and that MEET would conduct yearly systems testing and review.

To prove their claim for negligent misrepresentation, Purchasers must present evidence demonstrating that it is more likely than not that: (1) MEET represented to Purchasers that a fact was true; (2) MEET's representation was not true; (3) MEET had no reasonable grounds for believing the representation was true when MEET made it; (4) MEET intended that Purchasers rely on the representation; (5) Purchasers reasonably relied on MEET's representation; (6) Purchasers was harmed; and (7) Purchasers' reliance on MEET's representation was a substantial factor in causing Purchasers' harm. (CACI 1903.)

There is no dispute that the system created for Purchasers generates less than 1,619,263 KWh per year or that MEET required Purchasers to pay an upfront deposit of $127,191.78. There is a dispute over Purchasers' contentions that it has not realized savings of $100,000 per year, that MEET failed to provide the yearly testing and review required under the PPAs, and that MEET failed to conduct a 3-year true-up.

As evidence of these commitments, Purchasers points to MEET's August 15, 2015 PowerPoint ("PP") presentation sent by MEET's Sunil Suri to Purchasers' Robert Klein. (Exs. 4, 5.)[9] As detailed above, that presentation stated that Purchasers would pay only $19,311 per year to PG&E and $254,386.00 to MEET for electricity, and the presentation states that Purchasers' cost savings would escalate at 2.9% per year and result in $2,836,464 in savings over the 25-year term of the PPAs. (Id.) Acknowledging that "without a 'guarantee," there was no interest in the solar project, MEET informed Purchasers on August 15, 2015 that MEET had "figured out how to deliver $100k annual savings!" and urged Klein to "[p]lease sign the PPA's are return [sic]

[9] See Section I.A. above, the PPA's Integration Clause prevents these being part of the actual PPA contract. This is a discussion of the negligent misrepresentation claim.

ASAP." (Exs. 37, 89.) Purchasers also introduced several emails between the parties and between internal staff at MEET that reiterate MEET's statement that Purchasers would save $100,000 in electricity costs per year under the solar panel system. (*See, e.g.*, Ex. 37 ("[w]e ran the insolation math and compared your bills to feel comfortable in saying that you will realize $100K"), *see also*, Exs. 40, 89, 151.)

Purchasers' expert, Tarek Khoury, opined that MEET's statement that Purchasers would realize $100,000 in savings was false when MEET made the statement. Khoury analyzed Purchasers' energy consumption from 2014 for 900 Heritage and 2014 and 2015 aggregated data for 800 Heritage and calculated the cost of electricity with and without solar. (Ex. 186, p. 2, 4.) Khoury concluded that even if the solar panel system generated 1619,263 kWh as initially proposed, based on MEET's rate of $0.157 per kWhr, Purchasers would still not achieve the promised savings, regardless of whether PG&E charged Purchasers under pre-solar E19 or the post-solar A6 rates. (Id. at p. 4.)

MEET argues that Purchasers cannot pursue a negligent misrepresentation claim, or any other tort claim, against MEET because Purchasers cannot recast a breach of contract claim as a tort cause of action. Furthermore, MEET argues that even if Purchasers could assert its tort claims, Purchasers failed to prove negligent misrepresentation.

"[T]he economic loss rule precludes recovery for damages such as 'the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury.'" (*State Ready Mix. Inc. v. Moffatt & Nichol*, 232 Cal.App.4th 1227, 1232 (2015).) The rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations unless the purchaser can demonstrate harm above and beyond a broken contractual promise. Thus, a claim for negligent misrepresentation is

barred if the plaintiff's allegation suggests no misrepresentation beyond a broken contractual promise to perform. (*See, Food Safety Net Service v. Eco Safe Systems USA, Inc.*, 209 Cal.App.4th 1118, 1131.) And while the economic loss rule does not preclude a plaintiff from seeking recovery for fraudulent inducement/false promise (*see, id.* at 1132), Purchasers have not alleged such a claim.[10]

Purchasers argue that the economic loss rule applies only to contracts for the sale of goods or products, and thus does not apply to this case because MEET provided utility *services* and not a good or product. Furthermore, Purchasers notes that the installation caused physical damage to their facilities.

Although "[e]lectricity is a commodity which, like other goods, can be manufactured, transported and sold," (*see, Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 819 (1962)), the PPAs obligated MEET to provide both goods and services. Some of the statements that Purchasers assert in support of their negligent misrepresentation claim relate to the electricity provided, but other statements relate to services that MEET agreed to perform.

Purchasers contend that MEET made the following untrue statements:

> (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].

[10] Even if Purchasers had alleged a claim for fraudulent inducement, the evidence presented by Purchasers would not support it. To establish a claim of fraudulent inducement against MEET, Purchasers would need to prove that MEET did not intend to honor its contractual promises when they were made. (*See, Tenzer v. Superscope, Inc.* 39 Cal.3d 18, 30 (1985).) "[S]omething more than nonperformance is required to prove the defendant's intent not to perform his promise." (*Id.*) Purchasers submitted no evidence that MEET did not intend to perform its obligations under the PPAs. To the contrary, Purchasers submitted evidence of internal MEET discussions that suggest that during the negotiations over the PPAs, MEET believed Purchasers *would* achieve $100,000 in savings under the solar panel system. (See, e.g., Ex. 89.)

(Purchasers Closing Arbitration Brief, p. 8.) Each of these statements relates to both MEET's obligation to deliver electricity to Purchasers and to MEET's obligation to install functional solar panels at Purchasers' facilities. The promises relate to both goods and services and thus Purchasers' claim for negligent misrepresentation is barred.

MEET argues that the alleged statements do not constitute negligent misrepresentations because MEET did not make false statements about current, knowable facts, but rather, MEET made predictions regarding Purchasers' future electricity needs and costs. Predictions as to future events "are deemed opinions and are not actionable fraud." (*Nissan Motor Acceptance Cases*, 63 Cal.App.5th 793, 823 (2021).) "Although a false promise to perform in the future can support an intentional misrepresentation claim, it does not support a claim for negligent misrepresentation." (*Id.*) Additionally, MEET's estimate of Purchasers' future savings over the 25-year term of the PPAs was contingent on factors outside of MEET's control, such as Purchasers' electricity usage and PG&E's fluctuating rates. Thus, to the degree that Purchasers relied upon this statement, their reliance was unreasonable.

Similarly, MEET argues that its statement that the solar panel system would completely offset Purchasers' PG&E energy bills except for $19,311 is not actionable because it was not a false statement of fact, but rather a prediction regarding future circumstances. The amount of excess energy that Purchasers must purchase from PG&E fluctuates based upon Purchasers' energy consumption, which is a variable that MEET cannot control. Additionally, the costs for the electricity generated by PG&E are variable because PG&E tariffs fluctuate.

The arbitrator finds that MEET's statements that its solar panel system would produce 1,619,263 kwh per year from a carport system size of 325.08 kW AC and a rooftop system size of 763.56 kW AC are not actionable because Purchasers failed to prove that MEET had no

reasonable grounds for believing these statements were true when MEET made the statements. MEET made these statements based upon the original design of the solar panel system, and Purchasers presented no evidence that the original design was incapable of generating 1,619,263 kwh per year.

Instead, Purchasers and MEET both presented evidence that, for a variety of reasons, the design of the solar panel system installed changed after the PPAs were executed, and that the modified design produced less electricity. Similarly, Purchasers presented no evidence that MEET had no reasonable grounds for believing that it could conduct yearly system testing and review.

2. Breach of PPAs

a. MEET's Demand for $127,191.878 Deposit

Purchasers argue that MEET breached the PPAs by demanding that Purchasers pay a pre-construction deposit of $127,191.878. As noted above, the PPAs do not obligate Purchasers to pay an upfront deposit as a condition precedent to MEET's obligation to commence the installation of the solar panel system. The PPAs also do not allow MEET to cancel the project if Purchasers failed to pay the deposit. MEET's obligation to commence construction was conditioned under Paragraph 6(c) of Exhibit 4 to the PPAs, and payment of a deposit is not one of the enumerated conditions. (Exs. 2, 3.)

MEET's stated refusal to perform under the PPAs without the payment of a deposit was a breach of MEET's obligations under the PPAs and qualified as a "Default Event" under Exhibit 4, ¶13 of the PPAs. Under ¶13(b) (ii), Purchasers had the right, "at any time during the continuation of the Default Event," to "terminate the Agreement or suspend its performance upon five (5) days written notice to the Defaulting Party [MEET] and . . . pursue any remedy

under the Agreement . . .." (Exs. 2, 3.)

However, Purchasers did not provide notice to MEET that MEET's demand for a deposit and stated refusal to construct the solar panel system without payment of a deposit constituted a breach of the PPAs. Instead, Purchasers agreed to pay the deposit after MEET agreed to refund it, according to Purchasers, within 90 days. MEET claims that Purchasers agreed to pay the rebate subject to Purchasers making all payments for solar electricity on a timely basis, but the evidence submitted by MEET fails to show that Purchasers agreed to those terms. (*See*, Ex. 303.) At best, the evidence demonstrates that Purchasers were "fine with . . . providing the deposit to be rebated 90 days after completion." (Id.)

By April of 2018, MEET had not refunded the deposit and Purchasers notified MEET that it deemed MEET to be in default of the PPAs in part due to MEET's failure to repay the deposit. (Ex. 12, AE 110.) However, Purchasers' attorney instructed MEET to utilize funds from the deposit as payment for any outstanding solar electricity invoices that MEET contended were owed. (Id.)

b. Failure to Provide Guaranteed Minimum Savings

Purchasers contend that under Paragraph 7(j) of the PPAs, MEET guaranteed that Purchasers would realize an aggregate savings on its electricity costs of no less than $100,000 per year escalated by 2.9% every year (the "Minimum Guaranteed Savings"). The PPA allows MEET to "true-up" the guaranteed savings on a three-year basis. However, Purchasers' expert calculated that the true-up savings for the initial three-year term of the PPAs was only $213,949, or $94,835 short of the minimum savings guaranteed under the PPAs. (Ex. 186, p. 10.) Purchasers argue that the solar panel system installed by MEET falls short of the system promised by MEET because it generates less electricity than MEET promised under the PPAs

and thus Purchasers are forced to purchase greater amounts of electricity from PG&E than MEET forecasted. Additionally, Purchasers state that the rates charged by PG&E for additional electricity under the A6 tariff are higher than the rates the Purchasers paid to PG&E prior to the installation of the solar panel system, and thus has paid approximately $165,000 to PG&E for electricity each year.

Purchasers argue that MEET breached the "Minimum Guaranteed Savings" clause under the PPAs and that ¶4(e), which requires Purchasers to pay only "undisputed portions[s] of the invoice amount" within thirty (30) days, entitled Purchasers to withhold payments to MEET for solar electricity generated until the parties resolved the breach.

Purchasers seek the following damages for MEET's breach of the "Minimum Guaranteed Savings" clause: (1) $94,835.00 for the initial 3-year true-up; and (2) $3,721,734 for the future loss of the Minimum Guaranteed Savings. Purchasers also seeks damages of $5,925,946.83 for PG&E bills that Purchasers will incur over 25 years to purchase additional electricity due to the deficit of solar energy generated by the system installed by MEET.

MEET argues that the Minimum Guaranteed Savings provision contains uncertain and incomplete terms and thus the provision is unenforceable. Paragraph 7(j) states that:

> So long as neither Facility has been modified in a manner that materially increases its expected energy consumption, Seller hereby guarantees that for the first Contract Year of the Term the aggregate amounts paid to Seller under this Agreement and the Independent Living PPA will no less than $100,000 less than the **Baseline Energy Cost** for the first Contract Year prorated between Phase I and Phase 11 based upon their relative electrical generation and savings, with such savings escalating by 2.9% each subsequent Contract Year (the projected savings for each such Contract Year **as set forth in Exhibit 6, the "Guaranteed Savings"**).

MEET notes that the parties failed to include an Exhibit 6 to the PPAs and thus failed to agree upon the "Baseline Energy Cost" required to measure whether Purchasers were realizing a $100,000 per year savings on the solar panel system.

MEET argues that the lack of agreement upon terms crucial to the enforcement of Paragraph 7(j) renders the provision null and void. Although experts hired by MEET and Purchasers attempted to estimate a reasonable baseline for the PPAs, MEET argues that no baseline value is enforceable because there was no "meeting of the minds" by the parties regarding the baseline. Certain metrics regarding Purchasers' historic energy usage are required to create a baseline, including time frame (*i.e.*, immediately prior to the execution of the PPAs or prior to the completion of the solar arrays), time of year (*i.e.*, winter vs. summer), and length of time (*i.e.*, 12 months or three years). The PPAs state that the baseline should be calculated using Purchasers' "historical energy usage," but do not provide any of the parameters required to determine *which* historical energy usage.

A comparison of the expert reports submitted by MEET and Purchasers to reconstruct a proper baseline demonstrate the problem. MEET's expert, James Bride, calculated the baseline by utilizing Purchasers' energy usage for twelve months prior to the completion of each solar panel site, which, as noted above, were completed on different dates. Conversely, Purchasers' expert, Khoury, utilized a baseline of twelve months from January to December of 2014 for 900 Heritage and December 2014 through December 2015 for 800 Heritage. He stated that he had to use different time periods for each site because records for the 800 Heritage site were "incomplete," but he did not explain why he utilized historical data for the year before the parties executed the PPAs as opposed to usage immediately before the completion of the solar systems. (Ex, 186, p. 5.)

Both experts agreed that Purchasers' savings amounted to less than $300,000 over the first three years of the solar panel system's operation. Khoury calculated Purchasers' savings for the initial 3-year term to be $213,949. (Ex. 186, p. 10.) Bride calculated Purchasers' savings for

the initial 3-year term to be $291,196 (RT 1832-1833; 1861.) However, Bride deducted $10,000 from the baseline based on his summary conclusion that "[s]hortfalls in solar savings of up to $10,000 per year are excused under the contracts." (Ex. 262, p. 2.) Paragraph 7(j) that states:

> In the event that the Guaranteed Savings are not realized in any particular Contract Year for reasons such as a) weather, b) utility matters or c) absence of a utility baseline for power rates then the amount of such Guaranteed Savings not so realized shall be paid by Seller to Purchaser upon a true-up, every 3 years, so as 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).

(Exs. 2, 3.) It is unclear what the parties intended when they used the phrase "absence of a utility baseline for power rates." Regardless, Bride did not conclude that "weather," "utility matters," or an "absence of a utility baseline for power rates" occurred during the three years he analyzed such that a $10,000 adjustment would be warranted. Bride merely concluded that MEET was required to deliver only 90% of the Minimum Guaranteed Savings in any given year. If the parties intended to allow MEET to reduce the minimum savings target by $10,000 every year, they would not have qualified that reduction by stating that one of three events had to occur. Bride's off-the-top $10,000 reduction is inaccurate.

Nonetheless, the confusion regarding the meaning of the phrase "absence of a utility baseline for power rates" as it applies to the $10,000 reduction underscores the problem with ¶7(j). Lack of clarity regarding multiple terms under Paragraph 7(j) render it impossible to determine how to calculate whether Purchasers obtained the level of "Guaranteed Savings" that the parties intended under the PPAs. Thus, it is impossible to determine whether Bride's or Khoury's calculations are correct, or whether neither expert is correct.

Purchasers argue that MEET drafted the PPAs and thus any uncertainty must be

interpreted against MEET. "[A]mbiguities in written agreements are to be construed against their drafters." (See, *Sandquist v. Lebo Automotive, Inc. Eyeglasses*, 1 Cal.5th 233, 247 (2016).

However, while MEET started the drafting process by utilizing the SAPC as a starting point, the record indicates that the Purchasers representative specifically negotiated the insertion of ¶7(j) and that Purchasers were required to provide data of their historical usage to allow the parties to create the baseline. (Exs. 34, 37; RT 277, 292, 921-22, 1499, 1514-15, 1582.) Paragraph 7(j) states that savings is presumed "based on the historical energy usage," "projected price of energy from the Utility," and the "expectation that the Contract Price . . . will be lower than the price of energy from the Utility throughout the Term." (Exs. 2, 3.) Because only the Purchasers had data regarding its historic energy usage, MEET was reliant upon them to provide this information and it would be impossible for MEET to draft the missing Exhibit 6 without assistance from Purchasers.[11] Therefore, the Arbitrator cannot presume that the ambiguities of ¶7(j) and the lack of an Exhibit 6 must be interpreted against MEET.

Paragraph 22(l) of the PPAs states that:

> If any provision of the PPA is found unenforceable or invalid, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law.

(Ex. 2, 3.)

Thus, the Arbitrator must "change and interpret[]" Paragraph 7(j) to "best accomplish the objectives" of that paragraph. Purchasers argue that evidence of the parties' pre-contract discussions supports a conclusion that the parties agreed that Purchasers would save no less than

[11] In their Post Interim Award briefing, Purchasers argue that this statement is a "typo" but in fact, Purchasers are asking for reconsideration of this statement by saying the evidence was that MEET was given direct access to the PG&E. There is no citation to the record supporting this assertion and the Arbitrator will be unable to change this "typo".

$100,000 a year.

MEET argues that the PPAs' Integration Clause forbids the consideration of any pre-contract discussion of the project to determine the meaning of the terms of the PPAs. As detailed above, the PPAs state that the terms of the PPAs constitute the complete and exclusive agreement of the Parties and the PPAs' terms supersede "all prior proposals, agreements or other communications between the Parties, oral or written" regarding the subject matter.

Purchasers' argument that the Integration Clause should not be enforced because MEET engaged in a "bait and switch," but the argument is unpersuasive Mr. Klein, who was an inactive member of the California State Bar at the time of his arbitration testimony[12] understood and agreed that an integration clause meant that prior negotiations and representations were "thrown out", and that the terms of the written contract controls (RT 293-294).

Thus, the Arbitrator must "change and interpret []" Paragraph 7(j) to "best accomplish the objectives" of that paragraph by examining only the terms of the PPAs and not pre-contract communications between the parties.

The terms of the PPAs make clear that the parties agreed that MEET would deliver a solar panel system that saved Purchasers *some* amount of money in electricity costs. Thus, if Purchasers presented evidence that they pay more for solar electricity now than they would pay if the solar panels were shut off and purchased all its electricity from PG&E, it would be reasonable to conclude that the "objectives" of ¶7(j) have not been met.

Although Purchasers' briefing implies that they are paying more for electricity under the solar panels than they would without the panels, their own expert's report indicates that that is not the case. Khoury calculated Purchasers' "hypothetical no solar" cost of electricity for the

[12] California State Bar records shows Mr. Klein was an active member from June 1974 to January 15, 2015.

initial three years of the PPAs and determined that Purchasers' actual bill is lower. Khoury also concludes that Purchasers are not realizing a savings of $100,000 per year, based upon the Baseline Energy Costs formulated under Khoury's analysis. However, Khoury does acknowledge that even under his calculation of the Baseline Energy Costs, Purchasers saved, on average, $71,316.33 by implementing the solar panel system.

Because Purchasers have not demonstrated that they lose money each year by utilizing MEET's solar panel system, they failed to demonstrate that MEET breached the Minimum Guaranteed Savings provision.

c. Failure to Generate 1,619,263 kWh Per Year

Purchasers also failed to demonstrate that MEET breached the PPAs by failing to deliver a system that generated at least 1,619,262 kWh per year. Exhibit 2 to the PPAs refer to the system capacity as the "*Expected* First Year Energy Production," not the "Promised First Year Energy Production." Thus, terms of the PPAs do not support Purchasers' assertion that MEET promised that its solar panel system would generate at a minimum capacity.

Additionally, Purchasers' agent, Callahan, admitted that the final system had not been designed when the parties executed the PPAs. (RT 479 ("Q: Okay. Now, when you signed the PPAs, the final design of the systems was still taking place, correct? A. That's my recollection, yes). Additionally, the systems described in the SIAs executed by Vista and MEET were not built due to design alterations. (RT 803-806.) As discussed below, the capacity of the solar panel system installed was reduced, in part, due to changes in design demanded by Purchasers. MEET informed Purchasers that changes to the design that reduced the capacity of the system would also reduce the savings realized. (Ex. 23)

d. Non-Bypassable Charges

Purchasers argue that MEET owes them $111,326.08 in charges by PG&E that MEET is required to pay. Paragraph 4(c) of the PPAs state:

> 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."

Purchasers asserts that after the installation of the solar panel system, PG&E began charging for "Non-Bypassable Charges" in the total amount of $111,326.08 to date and estimated to amount to $751,010.14 over the remaining portion of the 25-year contract term. Purchasers contend that MEET is required to pay these costs under the PPAs and thus must reimburse Purchasers for these payments.

The arbitrator notes that Purchasers cite to no evidence supporting this claim (see Purchasers' Closing Brief pg. 21.) Further, MEET does not mention this issue at all in its closing brief and neither does Vista.

Therefore, Purchasers have not met its burden of proof and cannot prevail on this claim.

e. Placement of Meter on Roof vs Delivery Point

Purchasers argue that Vista placed the meter for the roof top installation at 800 Heritage at the site of generation as opposed to the site of delivery, which is 75 feet away. Because the voltage drops with the transmission, Purchasers argue that they are entitled to a credit against MEET's energy bills to account for the reduction in electricity. Purchasers' expert reported that

the reduction of energy due to the transmission amounts to a 2.38% overpayment and seeks a credit of $43,099.92 for the "remainder of the effective dates of the PPAs." (Ex. 187, p. 3-4.)

The PPAs state that:

> Purchaser shall purchase from Seller . . . all of the electric energy generated by the System.... Electric energy generated by the System will be delivered to Purchaser at the delivery point.... Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. ...

(Ex. 3, Ex. 4, §2.) In reference to the "Delivery Point" for 800 Heritage, Attachment A to Exhibit 2 to the applicable PPA states only "See Below." However, the map copied below does not clearly identify a "Delivery Point."

In their Closing Briefs, neither MEET nor Vista addressed this issue in briefing and the Interim Arbitration Award found that therefore have conceded the issue and the Interim Award found that Purchasers were entitled to a credit of 2.38% for the charges associated with the electricity generated by 800 Heritage from project completion date to the present.

In Supplemental Briefing, dated November 14, 2022, Purchasers calculate the total amount due for overcharges on the 800 building between 2016 and 2022 to be $6,303.23 and the overcharge for the remaining 19 years of the PPA to be an additional $24,870.

In its Supplemental briefing dated November 21, 2022, MEET argues that ***"ZERO"*** damages be awarded because of lack of proof in the hearing itself. It argues that this issue was first identified in Purchasers' Closing Brief.

Purchasers respond that the finding in the Interim Award cannot be changed at this time to do so would require a motion under CCP Sec. 1008 and they object to the present value calculation submitted by MEET.

After review of the parties' briefing, the arbitrator agrees with Purchasers that the issue of

liability has been decided, however future economic damages must be reduced to present cash value (CACI 3904A).

Thus, the arbitrator will award $6,303.23 in overcharges through 2022, and add $11,996.14 in Present Cash Value future damages. The total damages are therefore $18,299.37 awarded to Purchasers. This amount is owed by MEET, but Vista is required to indemnify MEET for this amount under the SIAs.

3. Purchasers' Claims Against Vista for Physical Damages

a. Purchasers Have No Viable Claims Against Vista Directly

In July 2015, MEET and Vista entered into two Solar Installation Agreements ("SIAs") (Ex. 10 and 11) in which they agreed that Vista would install a solar electric system at the 800/900 Stanley Blvd properties and that MEET would purchase and own the systems (Purchasers would have no ownership interest in the systems). No agreement was executed between Vista and Purchasers and these SIAs do not adopt any of the terms of the MEET/Claimant Power Purchase Agreements ("PPAs") executed two months later in September 2015 (Ex 2 and 3). In fact, the PPAs did not exist as of the date the SIAs were executed. The PPAs are agreements that MEET will install, own, and operate and sell the power generated by the solar system Vista installed and sold to MEET.

California law only permits lawsuits to be maintained in the name of the real party in interest (CCP Sec. 367) and to maintain a suit for damage to real property that party must "own, lawfully possess or have a right to possess the property." (*Del Mar Beach Club Owners v. Imperial Contracting* (1981) 123 Cal.App.3d 898, 906). It is undisputed that MEET is the only owner of the system.

Despite not being the owner, Claimant is seeking damages from Vista for:

1. Deficient Design/layout with improper solar panel installation blocking access to rain gutters, preventing maintenance and cleaning of gutters.

2. Deficient Design/layout with inadequate separation between solar panels and ridge and other roof edges as prescribed by fire code.

3. Deficient design/layout with improper solar panel installation blocking access to the plumbing vents in the roof precluding proper plumbing vent operation and maintenance. (See Para 9B of Claimants Rule 9 Notice of Claims and Para 24 E, F, G and W in the attached as Ex 1 (Complaint)).

Purchasers claims that they are an expressly named third-party beneficiary in the SIAs and thus may seek damages directly from Vista for Vista's breach of the SIAs. Purchasers cite to §2(a)(iii) of Exhibit 1 to the SIAs, under which Vista provides the following "Repair Promise" to MEET:

> During the entire Limited Warranty Term, Vista Solar will honor the Workmanship Warranty and will repair or replace any defective part, material or component or correct any defective workmanship, exclusive of the manufacturer's coverage, at no cost or expense to you (including all labor costs), when you submit a valid claim to us under this Limited Warranty. Vista Solar may use new or reconditioned parts when making repairs or replacements. Vista Solar may also, at no additional cost to you, upgrade or add to any part of the System to ensure that it performs according to the guarantees set forth in this Limited Warranty. Cosmetic repairs that do not involve safety or performance shall be made at the sole discretion of Vista Solar.

(Exs. 10, 11.)

Purchasers cite to California Civil Code §1559, which states that a "contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." While the SIAs state that the solar systems will be installed at Purchasers' facilities, the SIAs do not state that the SIAs between MEET and Vista are "expressly for the benefit" of Purchasers. They note that a third party need not be expressly named or identified individually to be an express beneficiary. It is sufficient if the "intent of the contracting parties to benefit expressly that third party" is apparent under the "terms of the contract." (*Kaiser Engineers, Inc. v. Grinnell Fire Protection Sys. Co.*, 173 Cal.App.3d 1050, 1055 (1985).)

The terms of the SIAs do not indicate that MEET and Vista executed the agreements with the intent to benefit Purchasers. Had MEET and Vista intended that the Purchasers would be a third-party beneficiary of the SIAs, there would be no need for MEET to contract separately with Purchasers. Additionally, had MEET and Vista intended for Purchasers to be a third-party beneficiary of the SIAs, there would be no need for Purchasers and MEET to agree under the PPAs that MEET is liable to Purchasers for any damages that incurred because of Vista's performance under the SIAs. The SIAs are subcontracts of the PPAs. Purchasers cannot assert breach of contract claims directly against Vista under the SIAs.

Purchasers have no standing to bring a suit for these damages and judgment will be entered on behalf of both MEET and Vista on these claims.[13]

4. Purchasers' Claims Against MEET for Physical Damages

Claimant alleges breach of contract claims against MEET and, if damages are proven, the parties agree that MEET would be entitled to indemnification by Vista. Claimant's Rule 9 Notice of Claims (Para 9) and the Complaint attached list 24 items of alleged damages caused during construction (Para 24 A-D, 24 H-V).

If proven that these damages were caused by Vista, Claimant is entitled to indemnification from Vista under the terms of the SIAs.

Claimant listed Damages it has incurred for "Out-of-Pocket" repair for physical damages beginning at page 25 of its brief. The following section addresses those claims in the order in which Claimant presented them.

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[13] Claimant argues that it has standing to sue even though it does not own the system and cites case law indicating that it can sue under breach of contract. (Claimant Closing Brief pg 23). This argument is correct as to breach of contract for damages against MEET, but Claimant provides no argument that it has standing to sue Vista, or that Claimant would be permitted to sue for defects in design or construction.

a. Defective Carport Lighting

Claimant seeks $290,408 from Vista because "Vista's Design of the carport required Vista to remove 11 light poles in the parking area at the 900 Building to accommodate carport support structures". Claimant then asserts that Vista had a "duty to reinstall lighting in the carports and drive aisle that complied with local regulations and building codes." As evidentiary support for that statement Claimant refers to AE 62, 100, 132, 152, 61 and 78. (Claimant's Closing Brief, p. 25.) Those exhibits fail to support Claimant's allegation that Vista was responsible for the Carport lighting.

As stated above, the SIAs are the only contract under which Vista is obligated on this project and Claimant is not a party to the SIAs. Despite having no contract, Claimant argues that the evidence contained in seven exhibits justifies an award against Vista for almost $300,000. Not only are these exhibits hearsay (none of which would be admitted into evidence in a court for the truth of the matters asserted), a simple reading shows that the exhibits do not prove Claimant's assertion that Vista is liable for any defective Carport Lighting

The following documents discuss events that occurred more than six months after the PPAs and the SIAs were executed and nothing in the documents suggests that the PPAs or SIAs were modified. (*See* Claimant's Closing Brief, Pg 25).

- **AE 62** is an August 10, 2016, email from Debbie Clausen[14] to Robert Klein which Claimant maintains establishes a "duty to reinstall lighting in the carports and drive aisle that complied . . ." with regulations. AE 62 simply discusses the City of Purchasers' requirement of approval for a change of parking and lighting at the project. Ms. Clausen does mention to Mr. Klein that she believed that Claimant was expecting Vista to reimburse "for costs incurred to date," but nowhere does it state that Vista agreed to pay any amounts. Simply put, this exhibit does not stand for what Claimant says it does.

[14] Ms. Clausen is employed by Callahan Property Company.

- **AE 100** is also cited as evidence that Vista had a duty to reinstall the carport lighting, and, like AE 62, AE 100 says nothing of the sort. AE 100 is an email from Mr. Callahan of Integral Group discussing "trouble shooting a project in Livermore" and the failure by the owner "when they hired us" to get preapproval to change the lighting and that Vista had agreed to "take point" on getting a photometric plan for the existing lighting so that the new lighting is equal to or greater than currently on site. The document does not discuss any duty on Vista to reinstall lighting.

- **AE 132.** Claimant states that this document establishes that Vista had an obligation to prepare a plan that provided a lighting plan as to current code. This exhibit does not refer to any obligations that Vista took on after it executed the SIAs, which do not require Vista to perform any obligations with regard to the Carport lighting.

- **AE 152**. This exhibit is cited by Claimant as evidence that Vista had an obligation to "solve the darkness issue in the driveway". This exhibit is an email chain between Sunil Suri and Jon Broenen.[15] Claimant is not a recipient. The main topic of the email is an attempt to close out the project and get final payment to Vista. Vista makes clear that the driveway darkness problem is outside of Vista's scope of work and in fact when it suggested to Claimant the solution of light packs on the canopies, Joe Callahan rejected that idea and submitted the lighting plan to Livermore for approval. Nothing in AE 152 supports the argument that Vista is obligated to resolve the darkness in the driveway issue.

- **AE 78.** Finally, Claimant cites to Ex 78 for the proposition that Mr. Callahan gave written notice in August 2016 that Claimant's considered that "this is a Vista Cost," meaning that the entire new lighting plan $290,408 was at Vista's cost. Claimant appears to misstate contents of the document. When using the word "this," Mr. Callahan refers only to the cost to have Killen Construction remove the light poles and infill landscape fingers; it is not a reference to the entire new system. Nowhere in this document does Mr. Callahan explain why this is a Vista cost.

Claimant argues that the defective lighting that Vista installed, and which it claims it never approved, caused "night-blindness" and "dark spots" and that Vista is obligated to arrange for a glare study by a licensed engineer. Claimant also argues that Vista "failed to make good on its promise to repair the "dark spots." Claimant requests damages for repairing the defective carport lighting of $290,408 (Purchasers' Closing Brief, p. 26.)

[15] Mr. Broenen is Vista's Senior Project Manager (Ex. 152).

At the start of the work on the carport, Vista's subcontractor McCalmont Engineers submitted a lighting plan to Purchasers for its approval. Construction commenced and there is no evidence that the City has provided Purchasers with notice that any lighting violations exist.

However, Mr. Callahan, a lay person, determined that he believes there is a problem with the lighting. Callahan believes that the lighting was too dim in the parking areas and that lights under the carports could cause temporary blindness for senior drivers. But Purchasers provided no testing or expert testimony at the arbitration to support Mr. Callahan's opinion that a defect exists.

Claimant argues that Vista was to provide carport lighting that complied with state and local regulations, but Vista points out that the City has not complained about the lighting, and the projects was approved by the City as after the build out was completed.

Vista also refers to testimony from Claimant's experts, Steven Norris and Tarek Khoury, who both state that the baseline for determining the adequacy of the lighting was to compare the lighting in the parking area at the time of construction in 2004 with the lighting constructed by Vista. Vista disagrees but argues that even if the two experts are correct, in the intervening 17 years, unlighted carports were added in 2006 and considerable growth in surrounding trees darkened the parking area.

Vista also objects that the testimony regarding lighting submitted by Mr. Norris and Mr. Khoury is inadmissible under the ruling of *People v. Sanchez* (2016) 63 Cal.4th 665.

MEETs argues that neither MEET nor Vista had any responsibility for the money Purchasers spent on lighting. According to MEET, the lighting at the carport exceeded code requirements, all changes implemented were in response to requests from Mr. Callahan, and the existing lighting is better than the lighting that existed prior to the solar system installation.

Furthermore, Purchasers acknowledged that only $40,000 in lighting defects was attributable to Vista (AE 174, RT 529:3-14) and that Vista and MEET would resolve that between themselves.

The Arbitrator finds that MEET is correct that changes to the lighting is a result of the solar system installation improved the preexisting lighting on the facilities, and that any lighting issues that Purchasers current has are outside the scope of either the PPAs or the SIAs. Additionally, because the residents and the City have not complained about the lighting, the only evidence that the lighting is "defective" because it is too dim and created blind spots is Mr. Callahan's unsupported lay opinion, as the lighting testimony of Mr. Norris and Mr. Khoury inadmissible under *People v. Sanchez* (2016) 63 Cal.4th 665.

The preponderance of the evidence on the issue of Defective Lighting indicates that MEET's and Vista's arguments are more likely to be true than Purchasers'. (CACI 200). The Arbitrator finds for Vista and MEET and against Claimant on this issue.

b. Non-Carport-Lighting Repairs of $135,077

This item relates to tree removal associated with bringing the lighting "up to code" (see page. 27 of Claimant's Closing Brief) Purchasers state that these costs are "undisputed". These repairs are related to the improvements to lighting that Purchasers performed. For the reasons detailed above, Purchasers has not met its burden of proving that MEET is obligated to improve the lighting implemented by Vista.

Judgement for Vista and MEET and against Claimant on this issue.

c. Future Repair Costs of Physical Damage $1,169,260.50

1) Roof Repair $586,046

Purchasers argue that Vista damaged the roof because it failed to use protective mats to protect the roof from high foot traffic during installation of the solar system. They argue that

Tony de Kerf estimated that before construction the roof had a 12–15-year life expectancy, but after Vista's work, the roof's lifespan was reduced to 5-7 years.[16]

Claimant also cites to what it describes as an admission by David Velasco that there are "areas on both phases where the roofing materials were damaged" during the installation of the solar system and that 10% of the composite shingles were affected by Vista's work. (See, Exs. 99, 175; Claimant's Closing Brief, p. 28).

In Exhibit 99, Mr. Velasco refers to the roof damages as an item that "[o]ur partner (Mr. Klein) has identified as an issue." Mr. Velasco does not admit that the damage exists or that Vista was responsible for the damage, his email merely reports what Mr. Klein told him. Thus, Exhibit 99 does not support Purchasers' claim for damages.

Exhibit 175 also fails to establish that Mr. Velasco admitted to damaging the roof. Exhibit 175 relates to Mr. Callahan's assertion that 10-12% of the roof was damaged by the solar installation and that the cost of the damage is "approx. $60-85K).[17]

Lastly, Purchasers rely on Exhibit 177, which contains Mr. Norris's opinion that roof damage was caused by Vista's failure to use a protective mat/blanket and that the cost to repair the damage is $406,614 for the 900 series buildings.[18]

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[16] The evidence cited in the closing brief for this shortened roof life expectance is AE 74, an email from Mr. Callahan to Mr. Klein, among others. In the email, Mr. Callahan refers to an "attached brief 3/2/16 email" from Mr. de Kerf on this subject, but the 3/2/16 email is not included in AE 74. Mr. Callahan references a conversation in which Mr. de Kerf apparently confirmed that the life expectancy of the roof after Vista's work was projected to be 5-7 years.

AE 74 is incomplete and contains hearsay which would not be admitted in court, which will go to the weight of this evidence in deciding this issue.

[17] This is quite a bit less than the $406,614 that Claimant is now seeking.

[18] In Claimant's closing brief there is a contradiction as to how much Claimant is seeking for the roof repair. On page 27 of its brief Claimant says "(1) **roof repair ($586,046)**". Yet Claimant seems to be seeking $406,614, the amount that Mr. Norris references in AE 268. This confusion regarding damages turns out to be irrelevant because the arbitrator is finding for MEET and Vista on the issue of liability for roof repair.

In its closing brief, Vista cites to contradictory testimony that blankets were in fact used during construction.

Vista believes that the evidence shows that the roof was installed in 2003 and had received no maintenance during that time. It was exposed to weather for several years and, according to Mr. Villabala, after an inspection in October 2021, the condition of the roof was consistent with an 18-year-old roof. He also observed that the roof's condition in the area where the solar panels were installed was the same as the condition of the roof in areas in which panels were not installed; thus, he concluded that Vista's installation did not cause damage.

MEET contends that the "overwhelming" evidence is that the roof was damaged and worn before the solar installation commenced. The shingles were old, brittle, curling and losing granules. MEET cites to Exhibit 52, an October 2015 email from Mr. de Kerf in which he states that the roofs were at their "half-life."

MEET also cites Mr. Brown's testimony that he thought that foot traffic during the installation did not degrade the shingles, and that the shingles were in poor condition before Vista started work. (RT 1413: 3-16.)

Based on the testimony, documents and photos submitted into evidence, it appears that Vista used the protective blanket on some days but neglected to use it on other days. However, regardless of whether Vista used the blanket, Purchasers' claim for damages fails because they failed to prove that Vista caused so much damage that it is liable for the cost of a new half roof for $406,614.

The roofs were installed on the 900 building in September 2003 and on the 800 building in April 2006 (Ex. 52) and during that time, there was no maintenance. The evidence indicates that when Vista arrived the roof was already damage from being exposed to the weather for 10

and 12 years. Purchasers' argument that Vista damaged the roof by not using the protective blanket is not as persuasive.

The preponderance of the evidence on the issue of Roof Repair favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200).

Judgement for MEET and Vista and Claimant shall take nothing on its claim for Roof Repair.

2) Defective Temporary Safe Anchors

Purchasers state that "it is not disputed that the deficiencies in the temporary safety anchors are the direct result of Vista's installation." As evidence. Purchasers cite to:

Ex. 177: Mr. Norris opinion.

Exs. 229, 234, 244, 251, 178, 207 (pgs 6, 10,12, 13, 20), 208 (pgs 8-9, 11-12): photos of the anchor bolts and the roof.

Exs. 2, 3: PPAs.

Exs 53: an email from Ms. Clausen describing her understanding that Vista is planning on installing roof anchors and instructing Vista not to proceed until Mr. Callahan can approve the planned installation.

Ex 54: an email from Ms. Clausen stating that "Joe would like Dan Fields to install the 850 and 900 roof anchors."

Ex 55: a shop drawing of an anchor bolt.

Ex 57: email from Mr. Callahan to Vista directing them to utilize 32 temporary anchors installed by Field construction on the 800 building, who will remove the anchors and insure there are no leaks.

Ex 208, pg 7: states that this work is not in Vista's scope of work.

Ex 76: Email to Leisurecare reporting that Mr. Callahan had talked to experts who told him that the anchors on both buildings were installed incorrectly.

Ex 77: Vista email to Mr. Callahan stating that Vista, "[u]pon the removal of the temporary anchors will fix and waterproof anchor locations". And a second email from Dan Fields to Vista and Mr. Callahan stating that he believes this work was within Vista's obligation and his company will field check each temporary anchor repair.

Ex. 152: 4/27/2018, 11:55 am email from Mr. Suri to Vista stating "start immediately to fix all anchors" in response to Vista's 4/27/2018 11:17 am to Mr. Suri agreeing to install and weatherproof anchors on the 800 and 900 building.

Purchasers seek $26,250 to repair the Temporary anchors, but these damages would be redundant to the damages included in Mr. Norris' estimate of the cost of half roof replacement. (Sec C. 1. Above).

Vista argues that the roof anchors were installed incorrectly by Purchasers' subcontractor Fields Roofing (owned by Dan Fields) and thus Vista has no liability.

Additionally, Vista argues that making the temporary anchors permanent was not part of Vista's scope of work under the SIAs. Vista cites to Exhibit 208, in which Mr. Villalba of Peter Fowler Construction (Vista expert) agrees.

MEET argues that neither Vista nor MEET is responsible to fix the Temporary Anchors. The Temporary Anchors were installed by Mr. Fields and even Mr. Norris admitted that the 800 repairs were due to Mr. Fields work, and not the work of Vista. (RT 1160.) Additionally, Mr. Norris agreed that all roof anchor leaked. (RT 1187-1188.)

Therefore, MEET argues that Purchasers failed to prove that any anchors installed by anyone other than Mr. Fields were defective, and Vista and MEET have no responsibility on this issue.

Purchasers state that "it is not disputed that the deficiencies in the temporary safety anchors are the direct result of Vista's installation".

However, as the above recitation of the supporting evidence demonstrates, there is no support for Purchasers' argument that damages caused by the temporary safety anchors is "not

disputed." The documents put forth by Purchasers demonstrate only that various people associated with Purchasers made statements about the project and pictures, and that when questioned either Vista or MEET about the temporary anchors, they disagreed with Purchasers' assessment.

The preponderance of the evidence on the issue of Temporary Anchors favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200.)

3) Unused Mounting Holes ($40,000)

Purchasers believe that there are Unused Mounting Holes remaining on the roof. It cites to Exhibit 59, in which Mr. Fields states that as of February 16, 2016, "all roof repairs look acceptable." Purchasers compare this statement with Mr. Norris' March 2016 photos that show unused mounting holes that "appears from the dates that unused mounting holes occurred after Mr. Fields February 2016 inspection." Claimant deduces that MEET or Vista must be responsible for the holes and that they are obligated to pay to repair them.

An October 2021 inspection of the premises by the parties indicated that a "handful of holes" were found, but each hole was repaired with sealant to prevent leaks as seen in the photos in Exhibit 209.

Purchasers did not present any evidence that any unused or unrepaired mounting hole caused a roof to leak. In addition, the roof was damaged before the solar installation.

Purchasers failed to demonstrate that the March 2016 holes were Vista's or MEET's responsibility because purchasers' conclusion that the holes were apparently drilled in the month following Mr. Fields inspection and Mr. Norris' photos is insufficient to prove that Vista is responsible.

The preponderance of the evidence on the issue of Unused Mounting Holes favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200).

4) Damaged Bird Abatement, Bird Shock Track ($15,233) and Netting ($126,365).

Purchasers state that Exhibit 72 "prove[s] that Vista cut the netting in order to place solar modules and equipment, but that document does not support purchaser's contention. (Ex. 72, 800 building only).[19] /

Purchasers state at Page 30 of their Closing brief that "Vista damaged the bird shock trap and admitted that fact." A reading of the evidence cited does not support Purchasers' assertion. (Ex. 28[20], 177[21], 178[22], 184[23], 209[24]).).

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[19] AE 72 is a request by Vista to have the netting cut and Dan Fields agrees to cut the netting. So, Fields cut the netting, not Vista.

[20] AE 28 is an email from Vista to MEET. In Para. 11, Bird Stop Offline Vista says that this was caused by the installation and damage of the original permanent anchor installation: **"these anchors were installed by another party and not VSI".** This does not support purchasers' statement that "Vista admitted that it cut the Shock Track. s

[21] AE 177 is also not evidence of admission by Vista that it cut the Shock Track. It is simply a statement by Mr. Norris it was damaged and needs to be replaced. There is no reference to Vista admitting to anything nor does Mr. Norris identify who damaged the Shock Track.

[22] AE 178 is a document entitled Solar Installation Defects. Claimant does not cite to the actual pages that support its assertion that Vista damaged the Shock Tracks and the arbitrator was unable to find where in 178 that confirms that statement. Pages 102-107 are pictures of damaged shock strips, but nothing is said about Vista doing anything to them.

[23] AE 184 is Mr. Khoury's report that simply says, "Bird nesting abatement was removed" and have not been installed. Vista is not mentioned as the entity that damaged the shock track; therefore, this document cannot support purchasers' argument.

[24] AE 209 is an undated document entitled Heritage Estates Vista Solar and lists "damages and concerns" reported by Fields. It says that the shock track was damaged during installation of mounting tracks and panels and destroyed during roof anchor installation. While Vista is not specifically named, other evidence indicates that Visa may have done the work described.

Mr. Callahan testified that the shock track and netting was always going to be installed after the solar installation. (RT 431-433.) Field's cut the netting and shock tracks and was going to reattach it, but Fields was later terminated from the project and the netting and shock track were not replaced. (Ex. 72)

Additionally, bird abatement was expressly excluded from Vista's scope of work. (Exs. 10 and 11.)

MEET argues that Purchasers hired Fields and that the failure to reinstall the netting or shock track is Purchasers' responsibility. In addition, MEET contends that Purchasers knew of Vista's contractual exclusions for bird abatement at the time Purchasers executed the PPAs. (Vista Closing Brief, pg 30, fn 15.)

The evidence shows that Fields cut the netting and the shock track. Purchasers' evidence does not support its argument that Vista admitted to cutting the shock track nor does it support that Vista cut the netting. And the evidence shows that neither Vista nor MEET has any contractual obligation regarding Bird Abatement.

The preponderance of the evidence on the issue of Bird Abatement favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200.)

*5) **Removal of Modules for Gutter Access ($586,046)***

Purchasers argue that 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 and believe that approximately 20-25% of the existing panels need to be removed.

Purchasers contends that Mr. Velasco admitted that the solar panels were installed incorrectly and cites to Exhibit 99 as support. Exhibit 99 is a document that sets forth Mr. Klein

opinion that the panels were improperly installed around the gutters and does not evidence an "admission against interest" by Vista or MEET.

Finally, Purchasers state that Mr. Norris established that the gutters cannot be accessed by a lift. (RT 1038-1039.)[25] Vista points out that there is no evidence that the gutters must be accessible from the roof top because access can be gained from the ground. In fact, Mr. Norris testified that access to gutters can be gained by use of a lift.

Mr. Callahan initially approved the layout of the panels before the start of construction. Purchasers did not present evidence that building codes require roof access, as opposed to the use of lifts, to clean gutters. Purchasers have not and will not suffer any damage because it can clean the gutters when needed, without removing solar panels.

Because Mr. Norris admitted that a lift can be used to clean the gutters, the contract does not contemplate roof access to gutters, and Mr. Callahan approved the layout before construction, Purchasers failed to demonstrate that they are entitled to damages because the gutters are inaccessible via the roof.

The preponderance of the evidence on the issue of Gutter Access favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200.)

6) Inadequate Plumbing Vents/Roof Penetrations Access (included in the $586,046).

Purchasers argue that due to panel placement, there is inadequate plumbing vent access and roof penetration access that must be resolved by removing 20-25% of the solar panels.

[25] RT 1038-1039 does not support purchasers' argument. Mr. Norris is in fact testifying that one would need "special lift equipment" and maybe cause collateral damage to landscaping which is "a problematic condition, in my opinion". This is not saying the gutters cannot be accessed.

Purchasers cite Mr. Norris' opinion which states that the solar panels improperly block plumbing vents and vent operation.

Vista points out that building codes do not require access to plumbing vents from the roof. According to Vista, Purchasers should have little to no maintenance in the future on these items and thus the panels do not need to be removed and Purchasers have suffered no damage.

MEET cites Mike Brown, its expert, who opined that no maintenance is needed, the vents are not blocked, and therefore Purchasers suffered no damage.

Vista and MEET presented evidence that there is no need for maintenance at these roof penetrations. Although Mr. Norris discusses "proper plumbing maintenance" and "vent maintenance," he does not explain why this maintenance needs to be performed, and therefore the preponderance of the evidence on this issue favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200.)

7) Fire Code Violation (Included in the $546,046 above)

Purchasers argue that the entire system needs to be removed or replaced because the solar panels, as constructed, do not meet fire codes and cite to Fire Code Sec. 605.11.3. 1 which requires residential solar panel sections to be no greater than 150 feet by 150 feet in either axis to provide access paths. Purchasers also cite to Department of Forestry and Fire Protection Guidelines. Although defense experts testified that the City of Livermore's approval of the plans is a tacit waiver of code violations, Purchasers disagree.

Purchasers also contends that Vista's layout of the panels so close to eaves and gutters "appears" to void the manufacturer's warranty and "will" cause further property damage.[26]

[26] As evidence Purchasers cites to numerous documents, the actual fire codes and photos.

Vista states that there are clear pathways for fire fighter access and the roof sides nearest to fire lanes around the building have no solar panels which would obstruct a fire fighter.

Vista states that the plans were reviewed and checked for permitting purposes and that the City has not issued any code violations or notices regarding the fire codes. Thus, Vista argues that Purchasers have suffered no damage and there is no reason to believe the warranty is voided.

MEET cites to testimony that the Livermore Fire Department would review the plans and approve them prior to construction and the fact that Purchasers has not incurred any damages.

According to the City of Livermore, the plans are approved and if there were any code violations the Livermore Fire Department would have let it be known. Vista's description of the access firefighters would enjoy is persuasive. Purchasers has not demonstrated that it has suffered damage as a result of possible code or warranty violation and there is no reason to spend $546,046 to replace the solar panels as they exist today.

The preponderance of the evidence on the issue of the alleged fire code violations favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200.)

8) Unrepaired Landscaping ($48,000)

Purchasers argue that when Vista removed the light poles, it was required to repair any landscaping damaged during the remove. Purchasers cite to Exhibit 169 in support of its

argument.[27] According to Purchasers, Vista agreed to repair the landscaping (Ex. 28),[28] but has not kept that commitment.

Landscaping is expressly excluded from Vista's scope of work described in the SIAs. Under the SIAs, Vista need only bring the landscape area back to grade.

Purchasers do not contend that Vista breached its contract, however, they argue that Vista agreed to replace the landscaping because the arose from Purchasers' change in the carport design.

However, the evidence demonstrates that it was Purchasers responsibility to pay to repair the landscaping after Vista brought the area up to grade (AE 2 and 3), and even Mr. Callahan believed that it was of "little value" to have Vista replace the landscaping.

The preponderance of the evidence on the issue of Unrepaired Landscape favors MEET's and Vista's evidence, as their evidence is more likely to be true than Claimant's evidence on this issue. (CACI 200.)

i. Stearman Costs

Stearman v. Centrex Homes (2000) 78 Cal.App.4th 611 entitles a plaintiff to their expert investigation costs as damages due to actual property damage. Purchasers seeks $133,645.60 for its expert costs.

Purchasers has not met its burden to show that it is entitled to recovery for property damages, and therefore it is not entitled to recover *Stearman* expert costs.

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[27] AE 169 is a November 8, 2017, email from Mr. Callahan to Mr. Klein and others associated with Claimant. In it, Mr. Callahan states: "As to landscaping their City permit reflects the reinstall of landscaping the fingers. From my perspective there is little value in Vista's completion of the landscape install. We should do a proper job of it ourselves".

[28] AE 28 is 4/27/2018 email from Vista to MEET, but it is not evidence that Vista agreed to repair the landscaping, all it says is Vista will pay $7,650 for Jensen Landscaping Tree removal and that "VSI accepts responsibility for tree removal". In fact, in another section of AE 28 Vista will not cover the cost charged by Jensen for replanting the plants that were removed.

5. MEET's Claims Against Purchasers

1. Delays Allegedly Caused By Purchasers

MEET alleges that it is owed "at least" $251.381.18 in damages for delays caused by Purchasers. The delays are identified as Encapsulation Delays, Rooftop Delays, and other delays.

There is a dispute as to the cause of these delays. There is no dispute that the evidence proffered for the damage to support the amount alleged owed is insufficient to meet the needed burden of proof for the alleged damages.[29]

2. MEET is Entitled Total Unpaid Invoices plus late fees.

The PPAs require Purchasers to purchase all electricity generated by the solar panel system. There is no dispute that Purchasers refused to pay invoices submitted by MEET for electricity generated after January 1, 2018 through March 2021 or that MEET sent Purchasers Notices of Default on November 2, 2018, requesting payment within ten (10) days. (Exs. 138, 139.)

Each PPA provides for interest on unpaid invoices at "the annual rate of two and one-half percent (2.5%) over the prime rate, as published by the Wall Street Journal (but not to exceed the maximum rate permitted by law (PPAs, para 4.d).

The evidence submitted by MEET[30] shows the following owed on the unpaid invoices and interest as of November 23, 2022.[31] Interest is calculated using the Wall Street Journal prime rate + 2.5% (PPAs para. 4.d) during the time the invoices were not paid until November 2022.

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[29] Ex. 506: attorney Belter letter to Purchasers counsel, Ex 85, 319: email exchange discussing disagreement re car ports, Ex. 23: Email with Vista

[30] Ex 137, AT 1732:14-1738:3.

[31] The arbitrator takes judicial notice of Exs. D and E attached to MEET's November 23, 2022 letter brief entitled "Seller's Prejudgment Interest Calculation".

- 900 Building PPA (Livermore): $233,561.36 unpaid invoices, plus $78,365.06 in interest through November 23, 2022 (and continues to accrue at $60.79/day from November 23, 2022 until paid in full).
- 800 Building PPA (Murietta): $53,327.53 for unpaid invoices, plus $18,322 in interest through November 23, 2022 (and interest continues to accrue at $13.88/day until paid in full).

Purchasers in their November 30, 2022 Post Interim Award brief argue that MEET used an incorrect number of days that interest accrued, the Security Deposit was not offset, and that no interest is owed because the invoices were disputed.[32]

3. MEET Seeks a Finding that Purchasers are Deemed to be the "Defaulting Party" Under the PPAs and Payment of over $4,500,000.

MEET contends that Purchasers' payment default is a "Defaulting Event" whereby they are the "Defaulting Party" under PPA Sec. 13.a.

MEET seeks an award that permits it to suspend performance, terminate the agreement, remove the Solar System and receive a Termination Payment in excess of $4,500,000. (Exs. 2, 3, §13b, Remedies).

a. Are the Purchasers the "Defaulting Party"?

In Sec. 13.a.i. the PPA defines a Defaulting Party who fails to perform its responsibilities and Purchasers will fit that definition if they fail to pay any amount due and payable under the PPA, "**other than an amount that is subject to a good faith dispute"** within 10 days following receipt of written notice of failure to pay.

Purchasers contend that its failure to pay the invoices was not a default because the amount at issue was "subject to a good faith dispute." They had not been refunded their deposit as promised and believed that there was a shortfall in the "guaranteed savings." Purchasers

[32] In their November 30 brief, Purchasers argue that no prejudgment interest is owed because the unpaid invoices are unliquidated damages because they could not have calculated the amount actually owed. The arbitrator finds the argument unpersuasive and will simply apply the PPA Para 4.d.

placed the disputed moneys in an escrow account, because they believed that the amounts due were disputed, and they also believe that Vista caused property damage.

Purchasers were obligated to pay for all electricity generated by the solar panel system monthly, within thirty (30) days of receipt of MEET's invoice. However, Purchasers have met their burden of proof that they indeed, in good faith, believed that it had a dispute over whether the Guaranteed Savings provision was breached due to the installation of a system that generated less electricity than the parties originally planned.

MEET argues that Purchasers were entitled to the minimum savings only after a three-year true up, and thus had no right to claim default within the first year, but the language of 7(j) indicates that the three-year true-up would occur only when one of three conditions applied (weather, utility matters or absence of a utility baseline for power rates.) The provision states that the aggregated amounts paid to MEET "will be no less than $100,000 less than the Baseline Energy Cost for the first Contract Year."

Additionally, §7(j) also states that "[i]n the event that Seller fails to pay such Guaranteed Savings to Purchaser in a timely manner, Purchaser shall be entitled to offset such unpaid Guaranteed Savings against any then current or future payment obligations of Purchaser under this Agreement."

Purchasers are not the "Defaulting Party" as defined in the PPA and thus MEET is not entitled to the Remedies listed in Sec. 13. b.[33]

4. Purchasers Failure to Execute Interconnection Agreements with PG&E entitle MEET to be Awarded $65,000

[33] The arbitrator, after hearing all the oral evidence submitted in the hearing, reviewing the exhibits and the papers submitted by the parties, concludes that Purchasers had what it believed to be a good faith dispute with MEET. The fact that MEET disputed purchasers' arguments and this Award finds for MEET on many issues is irrelevant on the issue on whether Purchasers was acting in good faith. The arbitrator finds that the parties engaged in a good faith dispute.

Section 5 of the PPAs state that MEET is the owner of "all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits . . .." (Exs. 3, 4.) Purchasers were required to "cooperate" with MEET "in obtaining, securing and transferring" all attributes, incentives, and tax credits to MEET. (Id.)

MEET presented evidence that Purchasers failed to provide MEET with executed interconnection agreements with PG&E and that, as a result, MEET lost the benefit of $65,000 in environmental attributes. (RT 1496-1499; 1623-1626.) Purchasers failed to address this issue in their post-hearing briefs and thus it is presumed to have conceded this argument.

Purchasers are obligated to provide MEET with executed interconnection agreements with PG&E and MEET is entitled to $65,000 in damages for Purchasers' past failure to provide these agreements.[34]

5. Failure to Provide Non-Exclusive Licenses

Section 8(a) of the PPAs state that Purchasers are required to provide MEET with non-exclusive licenses for access to Purchasers' premises. (Exs. 3, 4; see also, §14(c)(i) (Purchaser's Representations Warranties and Covenants.) Although Purchasers stated that they would execute the licenses, MEET presented evidence that they have failed to do so. (Exs. 104, 138, 139, 171 and 327; RT 1569-1570.)

The Interim Arbitration Award was in error when it stated that Purchasers, failed to address this issue in its post-hearing briefs and thus were presumed to have conceded this argument.

[34] In its November 3, 2022 Post Interim Award letter brief, MEET requests 10% statutory interest on this $65,000. Purchasers object in their November 30, 2022 brief. Because there is no evidence as to when this $65,000 became due, the arbitrator will exercise his discretion under CCP Sec. 3287 (b) and find that 10% interest will accrue on this $65,000 from the date of court approval of the Final Arbitration Award ($17.81/day).

The fact is that this issue was addressed in Purchasers closing brief and they argue that MEET is not the real party in interest for any MOL and instead are assignees, there are no damages incurred, and MEET did not provide an Exhibit 6 to the PPA's. And in their Post Interim Award briefing they state another reason, that there is a danger to residents during Covid.

It is true that there are no damages suffered by MEET and it is unclear how this issue relates to Covid. Nevertheless, Murietta must execute and have notarized a Memorandum of License in favor of Heritage 800 and Livermore must execute and have notarized a Memorandum of License in favor of Heritage 900.

III. Prevailing Party Attorneys' Fees and Costs.

The Arbitrator in his November 18, 2022, Order Re: Prevailing Party in Arbitration found that MEET was the prevailing party and was entitled to recover from Purchasers reasonable attorneys' fees and costs under the terms of the PPAs.

That order also found that Vista was required to indemnify Meet for reasonable attorney's fees under the terms of the SIA's and that because it had no contract with the Purchasers Vista was not entitled to be paid for fees by Purchasers. Vista had made no claim for fees from MEET.

A. MEET Requests Purchasers to pay Reasonable Fees and Costs of $1,107,236.83 for Attorneys' Fees, $170,712.23 in costs and $51,606.50 for Expert Fees.

1. MEET's Attorneys' Fees Request Re: Purchasers

MEET asks for an attorney fee award of $1,107,236.83.[35] In support of this request,

[35] See Para 14 of Mr. Cheney's December 14, 2022 Supplemental Declaration and Ms. Willis' December 13, 2022 in which they explained adjustments to their original $1,101,770.33 fee request to account for work performed after the Interim Award was issued.

MEET submitted declarations of Brent Cheney, Jennifer Willis and Peter Liaskos as well as detailed time records (with some information redacted) from Parker Milliken which detailed the work performed during this litigation. In Mr. Cheney's declaration he describes the role of paralegals assigned to the case, his firm's billing practices, how Mr. Liaskos became actively involved and how Traveler's Panel Counsel, Hugo Parker, came to be involved.

Mr. Cheney reported that his hourly rates were $575/ hour, increased to $595/hour in 2022. The 2022 rates for associate Ms. Cynn were $395/hour, paralegal Ms. Byrnes at $250/hour, $250/hour for the firm's research librarian and $150/hour for two junior paralegals. Mr. Liaskos submitted a declaration in which he explained that he discounted his standard $500/hr rate to $397.79/hr. He testified that these hourly rates are at or below market for attorneys in the Los Angeles legal community.

Purchasers opposed the MEET's fee request by arguing that the defense attorneys' staffing was inefficient, the results of the arbitration was mixed, and Mr. Liaskos' time is not recoverable because he was "in house counsel". Purchasers do not question the hourly rates as being unreasonable, and despite having access to all of defense detailed bills they do not identify a single task that took an unreasonable amount of time to complete. The general objections presented are unpersuasive.

However, the most persuasive fact that supports the reasonableness of the fees sought by MEET is the fact that Purchasers' counsel has incurred more than $700,000 than did defense counsel to litigate the same case, a 40% increase.[36] Purchasers are correct when they cite *Mountjoy v. Bank of America* for the proposition that a comparison of fees spent by each side, cannot by itself, establish the reasonableness of a fee award, however, "a comparative analysis of

[36] See Purchasers' Closing Brief, pg 40, which shows fees incurred of $1,817,774.64,

each side's respective litigation costs may be a useful check on the reasonableness of any fee request (*Donahue v. Donahue* (2010) 182 Cal.App.4th, 259, 272.)

Purchasers' final argument is that MEET's fee request be reduced downward because MEET lost the "Defaulting Party" claim for more than $4.5M because the award found that there was a "good faith" dispute as to whether the PPAs were breached and therefore the MEET's lodestar should be reduced by half "to account for MEET's limited success in the litigation." (Purchasers' December 7, 2022 Opposition, pg 7).

However, having presided over this arbitration it is clear to this arbitrator that MEET prevailed on almost all the approximately 20 issues raised by Purchasers (e.g., the Interim Award devotes 31 pages to claims made by the Purchasers). While Purchasers did prevail on the "Defaulting Party" claim, it was unsuccessful on many more issues. There is no reason to reduce the lodestar due to MEET's "limited success".

The arbitrator finds that MEET's lodestar of $1,107,236.83 is reasonable.

2. Vista and Purchasers are Joint and Severally Obligated to pay MEET's fees and costs.

In this arbitration, Vista has been found liable to indemnify Meet for reasonable attorney's fees under the terms of the SIA's.

Both the Purchasers and MEET agree that Vista and the purchasers are jointly and severally liable to pay this obligation and to avoid double recovery the Arbitrator should apportion payment of those fees between Purchasers and Vista.[37]

Vista disagrees. In its December 6, 2022 brief, it argues that it is not required to indemnify MEET because the claim was not properly tendered to Vista per CC Sec. 2782.05. In

[37] See Purchaser's December 7, 2022 letter brief by Mr. Petersen, page 8 and MEET's December 14, 2022, letter brief by Mr. Cheney, pg 8.

addition, it cites to a provision of the SIA that states that in an arbitration "We will Each bear all of our own attorney's fees and costs". And to hold Vista liable for any fees would result in double recovery.

Most of Purchasers' claims concerned a common set of underlying facts and therefore precisely calculating responsibility for MEET's fees is not possible. In addition, Vista's arguments were untimely filed, thus the decision that Vista is jointly and severally liable remains unchanged

However, all parties agree on two legal concepts, MEET is not entitled to double recovery and the arbitrator has the authority to apportion MEET's fees between Vista and Purchasers.

After presiding over this arbitration and observing the evidence and arguments, the Arbitrator will apportion 5% of MEET's fees to be paid by Vista and 95% to be paid by Purchasers. This ratio is to also to apply to recovery of MEET's costs discussed below.

3. MEET's Request for $170,712.33 in Costs

As prevailing party, MEET requests an award of $170,712.23 in costs. Purchasers challenge the request for reimbursement of expert costs, duplication of documents and court reporter fees.

MEET requests reimbursement of $51,606.50 for expert costs. It argues it is entitled to those costs because Purchasers previously in this arbitration had asserted a right to reimbursement of their expert fees and thus admitted that reimbursement for experts was included in the language of the PPAs.

Purchasers point out that expert fees are not reimbursable unless ordered by a court (CCP Sec. 1033.5(b)(1).

MEET requests $4,246.28 for duplication costs for trial exhibits. Purchasers do not contest this request in their opposition. In fact, CCP Sec. 1033.5(b)(3) permits reimbursement for copies of trial exhibits.

MEET requests reimbursement for $29,973.65 for court reporter fees. Purchasers cite to CCP Sec. 1033.5(b)(5) arguing that transcripts are only recoverable as a cost if a court orders it. MEET responds by saying this is an arbitration, not a court trial and that the arbitrator requested a Court Reporter, which all parties agreed to provide.

The arbitrator will DENY MEET's request for expert fees and court reporter costs.[38]

The arbitrator will GRANT MEET's request for $4,246.28.

MEET has requested a total of $222,318.73 for its expert fees and costs. After these findings the arbitrator awards MEET its costs of $140,738.58.[39]

Purchasers and Vista are jointly and severally liable for these costs, 95% for Purchasers and 5% for Vista.

4. Vista's Request for Fees from MEET

In its Prevailing Party Opposition Brief filed by Vista, Vista argues that it is the prevailing party against MEET. That request was objected to by MEET in a November 15, 2022 email as is untimely. MEET's objection is Sustained

B. 2.38% Credit for Misplaced Meter

MEET argues that there should be no award on this issue and but if there are future damages, those must be awarded after determining present value. (CACI 3904B).

[38] It is true that this matter is not a court, but that is a distinction without a difference and all parties equally benefited from the transcript. Also, in a case of this significance a court reporter is routinely utilized.
[39] This is a correction to the Final Arbitration Award which incorrectly calculated these costs as $89,132.08.

Purchasers argue that MEET's argument requires a change in the interim award and must be requested under CCP 1004.

The arbitrator will award $6,303.23 for past damages and $11,996.14 in future present value damages for a total of $18,299.37 total damages on this issue. Vista is to indemnify MEET for these damages.

V. CONCLUSION

A. Purchasers have not met their Burden of Proof on these following claims against MEET:
    1. Misrepresentation/Inducement
    2. MEET's Breach of the PPA with loss of promised Minimum Guaranteed
    3. Property Damage Caused by MEET or Vista
    4. Security Deposit Not Returned.

B. MEET has not met its Burden of Proof on its following Claims against Purchasers.
    1. Purchasers Caused Delay Claims
    2. Purchasers is the "Defaulting Party" under PPA Sec. 13.a and therefore is not entitled to the Remedies outlined in Sec. 13.b.

C. Purchasers has met their Burden of Proof on the following claim against MEET:
    1. The meter at 800 Heritage is incorrectly located and Purchasers are entitled to a credit of $18,299.37 ($6,303.23 for past due invoices and $11,996.14 for future invoices).

D. MEET has met its Burden of Proof on the following Claims against Purchasers:
    1. Purchasers owe for unpaid invoices plus interest
    2. Purchasers failed to provide PG&E Interconnection Agreements and MEET is awarded damages of $65,000.
    3. Purchasers failed to provide recordable Licenses as required and are hereby ordered to do so if MEET still requires them for their Lender.

E. MEET has met its Burden of Proof against Vista under the SIAs as follows:
    1. MEET is entitled to be indemnified for credits MEET gives to Purchasers of 2.38% for invoices at 800 Heritage.
    2. Vista is jointly and severably liable for 5% of MEET's Attorney's fees and costs.

V. FINAL AWARD

1. MEET is awarded damages against Purchasers for unpaid invoices as follows.
    a. 900 Building PPA (Livermore): $233,561.36 unpaid invoices, plus $78,365.06 in interest through November 23, 2022 (and continues to accrue at $60.79/day from November 23, 2022 until paid in full.)

b. 800 Building PPA (Murietta): $53,327.53 for unpaid invoices, plus $18,322 in interest through November 23, 2022 (and interest continues to accrue at $13.88/day until paid in full).

2. Purchasers and Vista are jointly and severally liable for MEET's Reasonable Attorneys and costs, with 95% to be paid by Purchasers and 5% to be paid by Vista.
   a. Reasonable Attorneys' Fees of $1,107,236.83.
   b. Reasonable Costs of $140,738.58.
3. Purchasers are obligated to provide MEET as soon as possible with executed interconnection agreements with PG&E.
4. MEET is awarded damages of $65,000 in damages for Purchasers' past failure to provide the PG&E Interconnection Agreements. Interest will accrue on this $65,000 from the date of court approval of the Final Arbitration Award ($17.81/day).
5. Purchasers are required to Provide MEET with Non-Exclusive Licenses
   a. Murietta must execute and have notarized a Memorandum of License in favor of Heritage 800.
   b. Livermore must execute and have notarized a Memorandum of License in favor of Heritage 900.
6. Purchasers are awarded damages for the misplaced meter in the amount of $6,303.23 for past damages and $11,996 in future present value damages for a total of $18,299.37 total damages. Interest of 10% will accrue on this amount from the date of Final Approval of this award by the Superior Court.

Dated: February 21, 2022

Hon. William J. Cahill (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Livermore Senior Living Associates, LP, et al. vs. Menlo Energy Efficiency Technologies, LLC, et al.
Reference No. 1100107416

I, Scott Schreiber, not a party to the within action, hereby declare that on February 21, 2023, I served the attached Corrected and Final Arbitration Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Francisco, CALIFORNIA, addressed as follows:

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Christian D. Molloy Esq.
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Murrieta Seniors Associates, LP

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Parties Represented:
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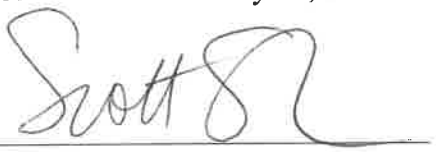
Parties Represented:
Livermore Senior Living Associates, LP
Murrieta Seniors Associates, LP

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA on February 21, 2023.



Scott Schreiber
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