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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GERRIE DEKKER, et al.,  
Plaintiffs, No. C 19-07918 WHA

v.

VIVINT SOLAR, INC., et al.,  
Defendants. **ORDER GRANTING  
MOTION TO AMEND**

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**INTRODUCTION**

This unfair business practices case returns upon the court of appeals’ determination without explanation that we lack subject-matter jurisdiction. Plaintiffs timely move to amend to expressly allege jurisdiction under the Class Action Fairness Act. The motion is **GRANTED**.

**STATEMENT**

This case presents a unique posture, so it’s worth starting at the beginning. Defendant Vivint Solar, Inc., in its various corporate forms, installs residential solar systems and sells homeowners the electricity produced for a twenty year term. Plaintiffs’ complaint, however, illuminates alleged liquidated damages clauses in Vivint’s agreements, provisions which impose harsh and unlawful penalties onto dissatisfied customers.

An order dated March 24, 2020 (Dkt. No. 47), reluctantly compelled all but two plaintiffs to arbitrate, finding that though plaintiffs could not, in fact, be compelled to arbitrate their claims for public relief under *McGill v. Citibank, N.A.*, the agreements had ineluctably

1 delegated that question to the arbitrator. 2 Cal. 5th 945, 393 P.3d 85 (2017); *see also, Blair v.*  
2 *Rent-A-Center*, 928 F.3d 819 (9th Cir. 2019); *Henry Schein, Inc. v. Archer & White Sales, Inc.*,  
3 586 U.S. \_\_\_, 139 S. Ct. 524, 527 (2019). But as the agreements had not clearly delegated  
4 formation defects to the arbitrator, the same order found that plaintiff Juan Bautista had not  
5 agreed to arbitrate, given Vivint had the native Spanish speaker, with virtually no English  
6 proficiency, sign an *English*-form contract after conducting negotiations in Spanish. Cal. Civ.  
7 Code § 1632(b); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). The  
8 March 24 order also found plaintiff Gerrie Dekker, whose agreement contained no arbitration  
9 clause, traversed the statute of limitations, at least on the pleadings.

10 Vivint timely appealed the denial of arbitration and plaintiff Bautista moved to amend his  
11 complaint. A May 11 order denied Vivint’s motion to stay pending appeal, and a May 24  
12 order granted leave to amend in part. In brief, plaintiffs proceeded to discovery on two  
13 theories, seeking injunctive relief both from Vivint’s unlawful liquidated damages provisions  
14 and from those agreements never actually formed due to the language barrier (Dkt. No. 63).

15 If the language snafu wasn’t enough, though, Vivint walked into another snag. Those  
16 plaintiffs compelled to arbitrate did so. But Vivint missed JAMS’s fee deadline, a material  
17 breach of the arbitration agreements under California’s recently enacted Code of Civil  
18 Procedure Section 1281.97. So an August 14 order vacated the March 24 order as far as it  
19 compelled select plaintiffs to arbitrate and invited those plaintiffs back into this forum. 479 F.  
20 Supp. 3d 834 (N.D. Cal. 2020). True to form, Vivint timely appealed and a September 15  
21 order denied its motion to stay.

22 So then, this is how things stood. Some named plaintiffs were at JAMS. Many,  
23 including Bautista and Dekker, remained here. Vivint’s parallel appeals pended. And,  
24 discovery plodded along, though we vacated the remaining deadlines because COVID-19  
25 foiled the planned February 2021 trial.

26 Our court of appeals then issued an unexpected order on January 25:

27 We dismiss this case for lack of jurisdiction. Oral argument  
28 scheduled for February 2, 2021 is vacated. We remand to the

1 district court for it to determine if Plaintiffs should be granted  
2 leave to amend the complaint.

3 As it were, our parties had submitted supplemental briefing regarding subject-matter  
4 jurisdiction on appeal, suspecting that the court of appeals questioned whether plaintiffs'  
5 complaint and amended complaint had adequately alleged jurisdiction under the Class Action  
6 Fairness Act (Case No. 20-15572, Dkt. Nos. 40, 41, 43). But our court of appeals' delphic  
7 prescription leaves us, for the most part, to speculate. Indeed, the parallel appeal still appears  
8 to pend before the court (Case No. 20-16584).

9 Undaunted, however, plaintiffs have promptly moved to amend (Dkt. No. 112). The  
10 proposed complaint adds little new matter. Rather it formalizes, which the prior complaints  
11 had not done, plaintiffs' reliance on CAFA jurisdiction, alleging the putative class size,  
12 minimal diversity, and amount in controversy. Defendants oppose. This motion is appropriate  
13 for disposition on the papers.

### 14 ANALYSIS

15 Given the prior vacatur of all deadlines, defendants concede that Rule 15's lenient, and  
16 not Rule 16's elevated, standard governs here (Dkt. No. 95). Rule 15 dictates that leave to  
17 amend shall be freely given "when justice so requires." Absent undue delay, bad faith,  
18 repeated failure to cure deficiencies, undue prejudice, or futility, leave should be granted.  
19 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Vivint does not seriously dispute that plaintiffs  
20 timely amend in good faith. Nor could it — Vivint acknowledged subject-matter jurisdiction  
21 in the joint case-management statement (Dkt. No. 39), the undersigned labored with the  
22 understanding that CAFA conferred jurisdiction here, and Vivint relied on that jurisdiction to  
23 compel arbitration under the Federal Arbitration Act. Capitalizing on the turn of events,  
24 however, Vivint challenges the proposed amendments as futile.

25 The Class Action Fairness Act confers subject-matter jurisdiction over a proposed class  
26 action of more than one hundred members putting more than five million dollars in controversy  
27 with any plaintiff diverse from any defendant. *Fritsch v. Swift Transp. Co. of Ariz.*, 899 F.3d  
28 785, 788 (9th Cir. 2018). We interpret CAFA "expansively." *Ibarra v. Manheim Invests.*, 775  
F.3d 1193, 1197 (9th Cir. 2014).

1 Vivint contests our putative class size and amount in controversy but no one disputes the  
2 minimal diversity between our California plaintiffs and Utah defendants. As detailed below,  
3 the proposed amendments establish an adequate putative class and sufficient amount in  
4 controversy.

5 **1. AMENDMENT AN ADEQUATE REMEDY.**

6 Before diving in, however, we must assure ourselves that amendment may, in fact,  
7 remedy plaintiffs' deficient allegations of subject-matter jurisdiction. It may. Although Rule 8  
8 requires "a short and plain statement of the grounds for the court's jurisdiction," 28 U.S.C.  
9 Section 1653 provides that "[d]efective allegations of jurisdiction may be amended, upon  
10 terms, in the trial or appellate courts." And recall, Rule 15 bestows leave to amend freely  
11 "when justice so requires." Thus our court of appeals has held that defective allegations of  
12 jurisdiction may be remedied via amendment, even on appeal. *Snell v. Cleveland, Inc.*, 316  
13 F.3d 822, 828 (9th Cir. 2002) (citing *Molnar v. NBC*, 231 F.2d 684, 686 (9th Cir. 1956)); *see*  
14 *also* 5 WRIGHT & MILLER, FED. PRACT. & PROC. CIV. § 1214 (3d ed. 2004).

15 **2. PLAINTIFFS' BURDEN.**

16 Though a viable path, we next must discern plaintiffs' burden if they are to establish  
17 jurisdiction by amendment. Vivint contests the new allegations of jurisdiction with brief  
18 evidence and contends that plaintiffs must respond to a preponderance. This dispute requires  
19 some unpacking.

20 To begin, Vivint is incorrect that plaintiffs must go beyond their amended complaint.  
21 True, the party invoking federal jurisdiction must establish it. *Lewis v. Verizon Commc'ns*, 627  
22 F.3d 395, 399 (9th Cir. 2010). But allegations *can* support jurisdiction. After all, jurisdiction  
23 generally begins on the face of the well-pleaded complaint. *See, e.g., Exxon Mobil Corp. v.*  
24 *Allapattah Servs.*, 545 U.S. 546, 559 (2005). A notice of removal requires only "a short and  
25 plain statement" of its grounds. Sufficient allegations in the notice will support jurisdiction  
26 unless contested. And, Rule 8 requires no more of a complaint. For that reason the United  
27 States Supreme Court has long held that "[w]hen a plaintiff invokes federal-court jurisdiction,  
28 the plaintiff's amount-in-controversy allegation is accepted if made in good faith." *See Dart*

1 *Cherokee Basin Op. Co. v. Owens*, 574 U.S. 81, 87 (2014) (citing *St. Paul Mercury Indem. Co.*  
2 *v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938)).

3 That said, a contested removal will require evidence. *Ibid.* On a motion to remand, then,  
4 a defendant must establish jurisdiction by a preponderance. *See Fritch*, 899 F.3d at 793;  
5 *Ibarra*, 775 F.3d at 1198; *Rodriguez v. AT&T Mob. Servs.*, 728 F.3d 975, 980–81 (9th Cir.  
6 2013); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

7 So too, defendant’s contest of *original* jurisdiction will require a showing by plaintiff.  
8 The limited nature of federal jurisdiction “precludes the idea that jurisdiction may be  
9 maintained by mere averment or that the party asserting jurisdiction may be relieved of his  
10 burden by any formal procedure.” Allegations of jurisdiction, when challenged, must be  
11 supported by competent proof to a preponderance of the evidence. *McNutt v. G.M. Acceptance*  
12 *Corp. of Indiana*, 298 U.S. 178, 189 (1936). All allegations except for the amount in  
13 controversy it seems. “[W]here the amount in controversy is in doubt, the Supreme Court has  
14 drawn a sharp distinction between original jurisdiction and removal jurisdiction.” *Gaus v.*  
15 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), *overruled on other grounds, Dart*, 574 U.S. at  
16 87–89. To refute original jurisdiction, “[i]t must appear to a legal certainty that the claim is  
17 really for less than the jurisdictional amount . . . .” *St. Paul*, 303 U.S. at 288–89.

18 In short, our proposed amended complaint alone may support subject-matter jurisdiction,  
19 though that may be contested with competent evidence. In such event, the preponderance  
20 carries us forward, except that allegations for the amount in controversy will stand unless  
21 refuted to a legal certainty.

22 **3. A SUFFICIENT PUTATIVE CLASS.**

23 The amended complaint proposes a primary class of all Californians who entered into a  
24 residential solar agreement with Vivint and a sub-class of those Californians who signed an  
25 English agreement after conducting the negotiations in another language. In support, the  
26 amended complaint alleges (as had the prior two complaints) that Vivint had installed solar  
27 systems in more than one hundred fifty thousand homes nationwide by the end of 2018, with  
28 about one third of Vivint’s cumulative power production located in California. From this, the

1 amendments allege a primary class of over fifty thousand members and a thirteen hundred  
2 member subclass. The amended complaint further alleges that Vivint has held two thousand  
3 Californians in default and that six thousand have sought to cancel their agreements (Prop.  
4 Amend. Compl. at ¶¶ 13, 77–78, 81). Suffice it to say, we will have more than one hundred  
5 putative class members.

6 Vivint protests that few putative class members have accrued claims yet. This  
7 misapprehends the March 24 order and ignores the May 20 order, and it helps to begin with the  
8 substance of plaintiffs’ claims. The amended complaint (as did the prior complaints) primarily  
9 seeks relief from Vivint’s alleged liquidated damages provisions, a slew of fees and costs  
10 thrust on customers who seek early termination of the twenty-year agreement term, including  
11 the sum of the remaining monthly payment (minus a *de minimis* discount), any other amounts  
12 due, and system removal fees (Prop. Amend. Compl. at ¶ 48).

13 In practical effect, these provisions place a dissatisfied customer in a quandary: keep the  
14 solar system and make twenty years of payments, or forfeit the solar system and the electricity,  
15 yet still pay just about the remaining twenty-year sum. That is, the agreements extract *all*  
16 twenty years of payment by foreclosing any rational alternative. This, the May 20 order  
17 explained, is exactly what California prohibits. *See Blank v. Borden*, 11 Cal. 3d 963, 969–72,  
18 524 P.2d 127 (1974).

19 Because such liquidated damages provisions would coerce monthly payments from the  
20 beginning, it makes sense that a customer’s claim for relief would accrue at formation. *Cf.*  
21 *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979). So the March  
22 24 and May 20 orders addressed the statutes of limitations and observed that California’s  
23 common law claim accrual carries a battery of equitable exceptions, including continuing  
24 accrual. Rather than concluding, as Vivint now reads, that plaintiffs’ claims only accrued *upon*  
25 Vivint’s later enforcement, the prior orders instead held that those later efforts *restarted* the  
26 clock, keeping this suit timely (at least on the pleadings) (Dkt. Nos. 47, 63). *Aryeh v. Canon*  
27 *Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1191–93, 292 P.3d 871 (2013) (quotation omitted); *Howard*  
28 *Jarvis Taxpayers Ass’n v. City of La Habra*, 25 Cal. 4th 809, 818–22, 23 P.3d 601 (2001).

1 For our present purposes, this means that Vivint’s California customers have already  
2 accrued claims for relief from the alleged liquidated damages clauses and that the statute of  
3 limitations does not (at this stage at least) bar them. Invalidation of Vivint’s liquidated  
4 damages provisions would relieve all fifty three thousand alleged putative primary-class  
5 members and invalidation of Vivint’s “contracts” would release all thirteen hundred members  
6 of the translation subclass. Regardless, the proposed complaint also alleges six thousand  
7 putative class members who have requested cancellation of their agreements and two thousand  
8 who have been held in default. Even under Vivint’s narrowed construction, these several  
9 thousand claims have accrued and the putative class meets CAFA’s floor.

10 Vivint nevertheless persists that its arbitration agreements will cut our class size to fewer  
11 than one hundred members. Off the cuff this objection fails as illogical. If the anticipated  
12 compulsion to arbitrate divested us of subject-matter jurisdiction, then we too would lack  
13 jurisdiction to compel arbitration in the first place. Vivint can’t have it both ways.  
14 Unsurprisingly, this argument also fails on the law. Even more established than the principle  
15 that a defense does not grant subject-matter jurisdiction is the tenet that “if [federal]  
16 jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by  
17 subsequent events.” *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991)  
18 (per curiam) (citing, among others, *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824)); see  
19 *Louisville & Nashville Ry. Co. v. Mottley*, 211 U.S. 149 (1908).

20 Vivint’s declaration of class size relies on this errant arbitration argument and so is not  
21 probative of our operative class size, though it also seems to admit that about eight hundred  
22 customers have requested cancellation. This alone would satisfy CAFA’s class size (Dkt. No.  
23 116-5). Regardless, even excluding arbitration-bound class members, the thirteen hundred  
24 who did not agree to arbitrate due to the language barrier will remain in this forum. Under any  
25 of the frameworks presented, our putative class will exceed one hundred members.

26 **4. AN ADEQUATE AMOUNT IN CONTROVERSY.**

27 CAFA’s requisite five million dollar amount in controversy isn’t just an estimate of  
28 liability. *Lewis*, 627 F.3d at 400. It “is the amount at stake in the underlying litigation.” This

1 naturally includes any payment by defendant, excluding interest and costs, such as damages  
2 and attorney’s fees under any relevant fee-shifting statute or contract. Yet it also includes any  
3 *relief* to which plaintiffs would be entitled if successful, such as the costs of complying with an  
4 injunction. *Fritsch*, 899 F.3d at 793–94 (quotes omitted). With some basic arithmetic and  
5 inferences, the proposed complaint alleges well beyond five million dollars in controversy.

6 Recall again the underlying allegations. A Vivint customer can either make the twenty  
7 years of payments and get the electricity, or terminate the agreement early, trigger the unlawful  
8 liquidated damages provisions, receive no more electricity, and pay nearly the same amount.  
9 The proposed complaint offers (as did the prior complaints) the examples of several plaintiffs  
10 caught in this web. Vivint demanded around forty thousand dollars from plaintiff Dekker and  
11 nearly twenty three thousand each from plaintiffs Rogers and Bautista. It actually extracted  
12 twenty one thousand dollars from plaintiff Barajas and over seventeen thousand from plaintiff  
13 Hilliard (Prop. Amend. Compl. at ¶¶ 17–26, 48).

14 This sample supports the ready inference that a cancellation request or default would  
15 provoke *at least* a ten thousand dollar demand from Vivint. Plaintiffs’ attempt to invalidate the  
16 basis for that demand, the liquidated damages provisions, would undercut Vivint’s right to  
17 collect. Such financial relief may not make its way into plaintiffs’ pockets, but it would come  
18 off Vivint’s books. That puts it in controversy. *See ibid.*

19 How many plaintiffs could expect relief from a ten thousand-dollar-plus demand? The  
20 proposed complaint alleges Vivint foisted its invalid liquidated damages clauses onto fifty  
21 three thousand putative class members. An injunction would relieve *all* from coercive  
22 demands, potentially totaling five hundred thirty million dollars. But suppose we apply our  
23 conservative estimate of Vivint’s demand to only those six thousand members who have  
24 already requested cancellation. This still yields a sixty million dollar tab. And, what if we  
25 further limit ourselves to just the two thousand Californians Vivint has already held in default?  
26 A twenty million dollar amount in controversy remains. Cut the class even further to the  
27 thirteen hundred plaintiffs who never agreed to Vivint’s terms, putting their *entire* financial  
28 relationship in dispute, our low estimate of relief still places thirteen million dollars in

1 controversy. Or, perhaps look from the other direction. At ten thousand dollars per class  
2 member, plaintiffs need only five hundred members to invoke CAFA. On the unrefuted  
3 allegations of several to tens of thousands of class members, plaintiffs sail past the five million  
4 dollar mark.

5 But don't just take plaintiffs' word for it. Vivint acknowledges that its average customer  
6 defaulted for thirty-thousand plus dollars, and that the average buyout fee for cancellation  
7 came to sixteen thousand dollars. That average default bill by the two thousand defaulted  
8 customers yields sixty million in controversy. And, the average buyout times the six thousand  
9 cancellation requests yields a ninety six million dollar total. Even plaintiffs' worst-case  
10 scenario, Vivint's assertion that only seven hundred ninety five Californians sought to cancel  
11 their agreements (an undercount which does not appear to capture defaults or other disputes),  
12 generates nearly thirteen million dollars in controversy (Dkt. No. 116-5). All this without yet  
13 considering plaintiffs' entitlement to attorney's fees under California Code of Civil Procedure  
14 Section 1021.5, which offers fees in successful suits to vindicate the public interest. In sum,  
15 Vivint has not, to a legal certainty, cut the amount in controversy to below five million dollars.  
16 *St. Paul*, 303 U.S. at 288–89.

17 **5. REPLY EVIDENCE.**

18 Plaintiffs submit in reply several hundred pages in support of the putative class size and  
19 amount in controversy. Given our conclusions above, and given defendants have had no  
20 opportunity to respond, this order does not rely on the new evidence.

21 **CONCLUSION**

22 Leave to amend is **GRANTED**. The March 18 hearing is **VACATED**. Our subject-matter  
23 jurisdiction under CAFA is confirmed. The parties shall please inform our court of appeals.

24 **IT IS SO ORDERED.**

25  
26 Dated: March 3, 2021.

27 

28 WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE