UPDATED PROPOSED TENTATIVE

This matter was continued from May 22, 2024, to today, July 10, 2024.

The court in its original posted tentative denied plaintiff's motion to compel the deposition of defendant's Person Most Qualified (PMQ), because 1) plaintiff had failed to demonstrate good cause with regard to the nineteen (19) categories of documents to be produced at the deposition, a determination that impacted the six (6) categories plaintiffs wished to use to examine the deponent at the deposition; and 2) plaintiff had failed to submit a separate statement, as required by California Rules of Court, rule 3.1345(a)(5) (in the original tentative, the court inadvertently reference this as (b)(5)). The court acknowledged that neither good cause nor a separate statement was required for the six (6) categories to be explored orally with the deponent; those requirements were a procedural requirement for the document production only. The court also acknowledged that defendant had failed to submit opposition. The court nevertheless found the procedural deficiencies troubling (and thus dispositive), underscored by the fact plaintiffs, as the moving party, had made ***no*** attempt to address any of the objections raised by defendant (as outlined in the plaintiff's meet and confer letter dated February 5, 2024, and attached to plaintiffs evidentiary proffer), even though the court noted on its own (and tangentially) that defendant's objections seemed to be blunderbuss, perfunctorily raised, without nuance, and obviously repetitious. The court tentatively denied the plaintiff's motion without prejudice, denying all requests for sanctions. It did not leave the parties rudderless, however; it directed the parties to meet and confer with regard to a future third amended notice of deposition. The court identified ten (10) categories of documents (and thus topics subject to examination at the deposition), with some limitations; and directed the parties to discuss disclosure of electronically stored information; and indicated what it expected from the parties to accomplish this. In order to facilitate the good faith efforts, the court provided analysis of Items 7, 13 and 18 of document production requests (as detailed in the Second Amended Notice of Deposition), sustaining the objection to Item 7, and partially sustaining and partially overruling objections to Items 13 and 18. The court offered its analysis in this regard as an example for the parties to resolve/narrow any future discovery disputes.

At the May 22, 2024 hearing, plaintiff urged the court to reject the original tentative. First, plaintiffs' counsel argued that plaintiffs ***had*** shown "good cause" for disclosure of the nineteen (19) categories of documents, largely because, as counsel explained, "we've been using the – these categories in most of our lemon law cases, with adjustments for specific cases. . . ." Second, plaintiffs' counsel agreed (at least implicitly) that he had not filed a separate statement, but then insisted that it was not required to submit one because plaintiffs "filed this motion to compel deposition of defendant BMW's person most qualified [and apparently not to compel production of documents]. And we're not even at the point where – where they're refusing to just bring the documents. That wasn't – that wasn't at issue in their objections. So we're not moving to compel something they've agreed to do. So we're only moving to compel the

deposition itself, which is, therefore – which, therefore, does not require a separate statement under the California Rules of Court, Rule 3.1345. So I believe that nuance means that that element of Your Honor's ruling may be mistaken."

Finally, plaintiffs' counsel argued it was untrue to say "that plaintiff had written the motion to compel as if no objections were made, which is simply not the case. And you cited to the fact that it is – that when the – when there is a valid objection made by the opposition, that additional efforts need to be made to meet and confer. [¶] However, Your Honor described defendant's objections as, and a I quote,' 'a paradigm example of blunderbuss." Counsel opined that he did not "genuinely" understand "how they can be seen as valid objections, that we need to have more significant efforts to meet and confer, when we have made those efforts, which were not responded to, and Your Honor noted defendant's failure to respond to the motion." Counsel then mused: "What – how much effort can plaintiff reasonably be expected to make, Your Honor, when none is being – is being matched by defendant?"

Defense counsel, in riposte, apologized "for the lateness of the opposition. We just, for whatever reason, didn't calendar our due date, and that's on us. But our understanding of the opposition – excuse me, the motion was just to compel attendance of – you know, at the deposition. And in our late opposition, we have some dates that we proposed. So that – that's what we thought the gist of the motion was." The court observed that no opposition had been filed, and defense counsel contended it "was filed, and I don't – I don't know what to say to that." The court indicated that it was going to continue the matter to today, at which time it would assess plaintiff's arguments, and issue an updated tentative.

The court will address the arguments advanced by both parties at the May 22, 2024 hearing. It will then provide its final ruling on the merits of plaintiffs' motion, with supplemental comments based on possible changed circumstances.

A) Merits of Arguments Advanced By Parties at May 22, 2024 Hearing

Preliminarily, the court strikes defendant's opposition, filed on May 22, 2022, after the last hearing. The court indicated to defense counsel that it was looking for proof that defendant had filed a *timely* opposition, as neither the court nor plaintiff had seen one, based on defense counsel's representations at the May 22, 2024 hearing. This was made clear in the court's order filed after hearing, in which the court expressly indicated that if no timely opposition had been filed, an untimely opposition would not be accepted. Defendant presented no evidence that it filed a timely opposition; it simply filed an untimely opposition on May 22, 2024, after the hearing. The court strikes the opposition as a result.

As for plaintiff's arguments advanced at the May 22, 2024, the court observes that some of the arguments conflict with one another. For example, counsel insisted that "good cause" had been shown for purposes of requiring disclosure of the nineteen (19) categories of documents outlined in the Second Amended Deposition Notice. Yet in the very next breath, counsel argued that plaintiffs were not required to file a separate statement pursuant to California Rules of Court, rule 3.1345(b)(5), because, in counsel's own words, "we're only moving to compel the deposition itself . . . ." Why did counsel insist that "good cause" had been shown when the motion was not asking for disclosure of those documents, which necessitated "good cause"? Further, plaintiff argued that because defendant had agreed to bring the documents to a deposition, the motion had nothing to do with defendant's evidentiary disclosures. This contention is expressly contradicted by the contents of the February 5, 2024, meet and confer letter, attached to Mr. Justin Wisniewski's declaration, in which plaintiff attempts to address defendant's objections to the categories of documents at issue in the deposition notice. (See page 5 of February 5, 2024 letter, Exhibit F.) This is underscored by the March 18, 2024, meet and confer email sent by plaintiff's counsel, which incorporated the contents of the February 5, 2024 letter.

In any event, setting these initial observations aside, each of plaintiff's arguments is unavailing. The court must assess the merits of any motion as the motion is presented. Here, the motion to compel filed by plaintiff ***clearly and unequivocally*** contained a request to compel disclosure of the nineteen (19) categories of documents; accordingly, the briefing submitted belies counsel's oral representations made at the hearing on May 22, 2024. For example:

- In the Notice of Motion filed with the court, plaintiff expressly indicated that he was asking the court to compel defendant PMQ to appear and testify at a properly noticed deposition, "***and to produce documents at deposition as specified in the deposition notice served on or about October 27, 2023, which was scheduled for November 17, 2023.*** . . . [i.e., those categories and documents specified in the Second Amended Notice of Deposition, at issue in this matter]. (Emphasis added.)
- In Section (C) of their Memorandum of Points and Authorities, plaintiffs expressly argue that "good cause exists ***for the production of documents*** at the PMQ deposition."
- And lest there be any confusion about what was at issue in the motion, in the conclusion of their Memorandum of Points and Authorities, plaintiffs asked the court to "issue an Order compelling Defendant BMW of North America, LLC to produce its PMQ(s) to testify as to all designated categories at the deposition . . . and to produce all the document requested in the Notice of Deposition."

It is beyond cavil that the motion to compel as presented included a request that that the six (6) categories to be addressed by the PMQ be allowed ***and*** the nineteen (19) categories of documents to be produced. Accordingly, both "good cause" and a "separate statement" were

required. A trial court is well within its discretion to deny a motion when the motion fails to include a separate statement. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 893.) Counsel cannot simply recast the motion to be something it was not in an attempt to sidestep the procedural deficiencies that are apparent from the face of the filing.

Further, "good cause" has not been demonstrated, contrary to counsel's exhortations. The motion filed by plaintiffs had to set forth specific facts showing cause justifying the production for inspection of any and all documents requested. (*Kirkland v. Superior Court (Guess Inc.)* (2002) 95 Cal.App.4th 92, 98 [discussing "good cause" in the context of a motion to compel further].) To be clear, the burden necessitated by good cause requires the moving party to show both relevance to the subject matter (e.g., how the information in the documents would tend to prove or disprove some issues in the case); and specific facts justifying discovery (e.g. why such information is necessary for trial preparation or to prevent at trial). (*Id*. at p. 98.) As one seminal treatise has phrased it, "Declarations are generally used to show the requisite 'good cause' for an order to compel, and the declarations must contain 'specific facts' rather than mere conclusions." (Weil & Brown, Cal. Prac. Guide Civ. Proc. Before Trial (The Rutter Group 2023), ¶ 8:1495.7.)

One looks at Mr. Justin Wisnieski's declaration in vain for any mention of good cause, the outlay or identification of specific facts in support, or even a discussion of the appropriate standard. Counsel's declaration is conspicuously silent about any facts justifying good cause (focusing instead on the admissibility of Exhibits A to G). Plaintiffs in their Memorandum of Points and Authorities assert "good cause" exists because 1) they requested production of documents through an authorized method (i.e., a notice of deposition) (p. 7); 2) attempted an informal resolution of defendant's concerns as reflected in its objections (p. 8); and 3) defendant's refusal to produce the documents "constitutes a misuse of the discovery process" (p. 8.)" Distilled to its essence, however, plaintiffs ask the court to assume good cause exists as to each and every one of the nineteen (19) categories simply because plaintiff requested the documents, and defendant concomitantly refused to provide them. That is not the standard. Plaintiff must demonstrate that each document category is relevant to the lawsuit and offer specific facts justifying the discovery. Plaintiffs have failed to do this; the efforts in the end involve conclusionary allegations rather than good cause based on specific facts. (Weil & Brown, *supra,* at § 8:1496.7.) Plaintiffs cannot ask the court to assume the requirements have been met without meeting the two evidentiary predicates. And it is not enough, as counsel asserted at the May 22, 2024 hearing, to show good cause simply because counsel has used "these categories in most of our lemon law cases, with adjustments for specific cases." Counsel here failed to adjust for ***this*** specific case.

Further, based on exhibits attached to Mr. Justin Wisniewski's declaration, defendant objected to disclosure of the nineteen (19) categories of documents requested in the Second Amended Notice of Deposition. In the defendant's responses to plaintiff's First Amended Notice of Deposition, served on August 31, 2023, defendant objected not only the six (6) categories for

the PMQ, but all nineteen (19) categories of documents requested. (See Exhibit D.) And while there was a Second Amended Notice of Deposition that outlined the same six (6) and nineteen (19) categories as the First Amended Notice of Deposition; and while there is no evidence that defendant actually objected to the requests in the Second Amended Notice of Deposition; plaintiff's meet and confer letter, dated February 5, 2024 (offered as the procedural predicate to the present motion) (Exhibit F), addressed all of defendant's objections in the First Amended Notice of Deposition. The court assumed, reasonably, that this meet and confer effort applied equally well to ***all*** requests advanced in the Second Amended Notice of Deposition, as the requests at issue in the First and Second Amended Notices of Deposition are the same. Indeed, the import of Exhibit G, also attached to Mr. Wisniewski's declaration, which is a March 18, 2024 "meet and confer" email about the scheduling of the deposition of "BMW's PMQ," suggests as much, for it expressly references the February 5, 2024 meet and confer letter (and thus, by logic its contents). The objections to any and all disclosures raised by defendant in the February 5, 2024, letter were therefore incorporated into and thus remained at issue by virtue of the March 18, 2024 email meet and confer effort.[1] Yet plaintiffs never addressed the objections, something they were required to do per Code of Civil Procedures section 2025.450, subdivision (a), the statute relied upon for the motion. This latter provision provides that if after service of a deposition notice, a party to an action , "without having served a ***valid objection*** under Section 2025.410, fails to appear for examination, or to proceed with it, or to produce for inspection any documents . . . described in the deposition notice, the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document . . . ." (Emphasis added.)

The court details this background in order to address plaintiff's last three-fold argument at the May 22, 2024 hearing, offered to show why the tentative as proposed should not be adopted by the court – first, that defendants' objections to the document disclosures were not at issue in the motion; second, that "it is not the case" that the plaintiffs wrote the motion to compel "as if no objections were made"; and third, any failure to address the objections is not significant (perhaps more accurately not prejudicial) because, in plaintiff's counsel words, "how much effort can plaintiff reasonably be expected to make, Your Honor, when none is being matched by defendant?"

The first two arguments can be easily dismissed. As detailed above, defendants objections remained viable and relevant, by virtue of the meet and confer documents as presented, and by virtue of the statutory scheme relied upon by plaintiffs as the basis for the motion. Further, at no point in the motion work (notably in a separate statement but in any other document) has plaintiff addressed the merits of defendant's objections. The proof is in the

[1] Plaintiffs at no point in the briefing, either in the original motion or in the reply, suggested otherwise.

pudding, as the adage goes, and there is no mention in the plaintiff's motion or reply, or in any declaration submitted, about the substance of defendant's evidentiary objections.

Plaintiff's last argument, based on the impact of the court's use of the word "blunderbuss" to describe defendant's objections, is equally unavailing, for plaintiff overlooks the context in which the comment was made. First, it should be remembered that this is plaintiff's motion, not defendant's, and plaintiff has the ultimate burden to show its merits. Second, the court commented on the quality of defendant's evidentiary objections against the obvious backdrop that defendant failed to file opposition, meaning it made absolutely no effort to support the objections in any way. It was with these two propositions in mind that the court described defendant's evidentiary objections as rote and repetitive, amounting to blunderbuss, commensurate with past discovery efforts this court has seen in the Song-Beverly Consumer Warranty Act context. Our high court has made similar observations in similar contexts. (See, e.g., *Reid v. Google* (2010) 50 Cal.4th 512, 532-533 [condemning, in the summary judgment context, the common practice by litigants of filing "blunderbuss" evidentiary objections to virtually every item of evidence submitted].) At no point did the high court in *Reid v. Google* – nor this court in its earlier tentative – suggest that the moving party was relieved of its procedural (statutory) obligations to address the merits of evidentiary objections when filing a particular motion. Plaintiff's argument, advanced at the May 22, 2024 hearing, would essentially allow a party to forego filing a separate statement -- or otherwise address the merits of objections advanced by the moving party -- based entirely on a court's ***after-the-fact*** discretionary assessment about the ***general*** quality of nonmoving party's responses, without any input from the nonmoving party. The problem is amplified because at ***no*** place in plaintiff's motion did plaintiffs attempt to address defendant's objections in any way. The "blunderbuss" label, coupled with plaintiffs less than stellar motion work in this matter, are emblematic of more systemic discovery problems seen by courts in the Song-Beverly Consumer Warranty Act context, which result in a disproportionate use of judicial resources to resolve commonplace, routine discovery issues. The court did not intend to excuse any statutory obligation by its observation. And it would be ironic indeed for plaintiffs less them exemplary motion work to be excused based exclusively on the fact the court observed that defendants' evidentiary objections were also less than impressive. The point in the end is this - both parties have done a poor job - nothing more, nothing less. This was the gist (and import) of the court's "blunderbuss" comment.

To reinforce this, the parties should review the analysis the court provided as an example of what it expected the parties to do as part of their good faith meet and confer effort. The court expressly addressed the propriety of the disclosure requests in Items 7, 13, and 18. In the end, the court sustained objections to Items 7; the court also partially sustained the objections to Item 13, noting defendant did not have to disclose the franchise agreement. As for Item 18, the court also directed defendant to discuss documentation about nonconformities associated with the defects in the subject at vehicle, but not as to all parts (i.e., even those unrelated to the defect

claimed), and the request should be limited accordingly. Despite the "blunderbuss" designation, some of the objections advanced by defendant had some merit.[2] Plaintiff was not given a free pass to ignore their import.

In the end, the court strikes defendant's untimely opposition. It rejects plaintiffs' challenges to the tentative as advanced at the May 22, 2024 hearing.

B) Ruling on Plaintiff's Motion

Having rejected all challenges advanced by the parties at the May 22, 2024 hearing, the court, in line with its original tentative, will deny plaintiffs' motion without prejudice, but direct the parties to engage in further meet and confer efforts in the hope of resolving and/or narrowing the discovery disputes with regard to any future *third amended notice of deposition*. The parties were given this opportunity at the May 22, 2024, hearing, and the court hopes the parties took full advantage of the continuance to sort out any disagreements. The court will again give guidance to the parties as it did in the original tentative, identifying the customary scope of permissible document production to be disclosed (and thus the standard topics to be explored and/or examined at a deposition), modelled after the practices of the Los Angeles County Superior Court. The "subject vehicle" should be defined in the same way as the term is defined in the notices of deposition, meaning the 2016 BMW X5, VIN: 5UXKT90C54G0S77007.

The following categories of documents (along with topics to be examined at deposition) that are customary in this context are as follows:

1. Purchase and/or lease contract concerning the subject vehicle.
2. Repair orders and invoices concerning the subject vehicle.
3. Communications with the dealer, factory representative and/or call center concerning the subject vehicle.
4. Warranty claims submitted to and/or approved by Defendant concerning the subject vehicle.
5. Any Warranty Policy and Procedure Manual published by defendant and provided to its authorized repair facilities, within the State of California, for the date the subject vehicle was purchased to the present.
6. Any internal analysis and/or investigation regarding the defects claimed by plaintiff in vehicles for the same year, make and model of the subject vehicle.
7. Documents that evidence any policy and/or procedure used to evaluate customer requests for repurchase pursuant to the Song-Beverly Consumer Warranty Act, from the date of the purchase to the present.

[2] While defendant's objections were less than complete, and at times perfunctory and no doubt blunderbuss, something generally useless may have merit occasionally, at least in context. It should be remembered that even a broken clock is correct at least twice a day.

8. Other customers' complaints similar to the alleged defects claimed by plaintiff, limited to vehicles purchased in California for the same year, make and model of the subject vehicle. The court acknowledges that evidence of other customers making similar complaints to plaintiff's ***may*** be reasonably calculated to lead to discovery of a defective condition, but will take an incremental approach to the discovery issue. The court finds *Jensen v. BMW of North America, LLC* (S.D. Cal. 2019) 328 F.R.D. 557 ultimately useful in how this court should interpret the scope of discovery in the present context. The *Jensen* court ordered a defendant to search specific databases for other customers' complaints, but limited the scope to "vehicles of the same year, make, and model as Plaintiff's subject vehicle and limited to only those records preparing problems with the same defects codes listed in any repair records pertaining Plaintiff's vehicle and part numbers under warrant in Plaintiff's vehicle, and to product those documents." (*Id.* at p. 564.) This limitation seems reasonable in the present context at this time. If evidence suggests a broader production is required, the court can revisit the issue in the future.
9. Technical Service Bulletins and/or Recall Notices for vehicles purchased in California for the same year, make and model of the subject vehicle, whether mentioned in the repair history of the subject vehicle or not.
10. Any documents supporting plaintiff's claim for incidental and/or consequential damages.

The parties should meet and confer to discuss how to address disclosure of any electronically stored information that falls within these categories, including costs, and any potential protective order. That being said, there are certain rules of thumb to consider: 1) the search terms should be specifically tailored to the repair complaint(s) relevant to the plaintiff's, and should be limited in quantity to meet the balancing factors per Code of Civil Procedure section 1017 and 2019.030, subdivision (a); 2) the burden of creating and reviewing the results of the search should be fairly allocated; and 3) the output from the searches should be distilled in a manageable format such as an excel spreadsheet with columnar coded information, and produced on jump drive of DVD/CD.

These categories are customarily what the court will (and will not) require to be produced. The parties should apply these same guidelines to the six (6) topics to be asked of the deponent, and to the nineteen (19) categories of documents requested to be produced, all outlined in the Second Amended Notice of Deposition, and act appropriately. The court expects each party to meet and confer *in good faith*, apply the court's directives to each request, and to come to a mutually acceptable resolution as to what should and should not be disclosed, including whether a protective order is appropriate to any individual category or document. The disproportionate use of judicial resources used to resolve discovery disputes in the Song-Beverly Consumer Warranty Act context is well-documented, and the court determines that a nontraditional solution is appropriate given the deficiencies in the present motion to compel. If the parties are unable to resolve their disputes following the court's guidance herein, and after

good faith efforts have stalled, defendant can file new objections to contents of a properly served *third* amended notice of deposition; and plaintiff thereafter can file a new motion to compel, but only with an adequate showing of good cause and the attendant (and accompanying) separate statement. There should be no illusion here – if the court determines that plaintiffs' request are overinclusive and/or defendant's objections are patent blunderbuss, without thought and nuance, and/or the parties are not engaging in good faith discussions to resolve the disputes, significant monetary sanctions will be imposed. The parties should heed the court's directives.

To facilitate the meet and confer efforts, three of plaintiff's requests require separate treatment – Item 7, Item 13, and Item 18, all associated with its request for production of documents. In Item 7, plaintiff asks defendant to provide any "and all documents relied upon by you in formulating your Answer and affirmative defenses." This request is inappropriate. Defendant's "Answer" advances at least 18 different affirmative defenses (with a 19th catch all category), each with a separate factual basis. The request as formulated violates Code of Civil Procedure section 2031.030, subdivision (c)(2), by failing to either designate the documents to be inspected by "specifically identifying each individual item or by reasonably particularizing each category of item." Plaintiff's request amounts to nothing more than this: produce everything in your possession that amounts to a defense, without resort to categories of evidence or defendant's record keeping. The request is the functional equivalent of a generic demand for documents, and thus is impermissible. (See, e.g., *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222.)

In Item 13, plaintiff asks defendant for any and all "contracts between You and Your authorized dealerships that performed repairs to the Subject Vehicle, including your franchise contract and warrant polices and procedure manual." This request is overinclusive, as there is no reason why defendant should disclose its franchise contract, as opposed to its warranty policies and procedure manual, limited to the subject vehicle in question. Defendant is not required to disclose its franchise agreement (at least at this time).

In Item 18, plaintiff asks defendant to produce "all documents, including but not limited to electronic data and emails, concerning or relating in any way to a decision to modify the [nonconformities] and/or any of Your related parts used in Your vehicles which are the same year, make, and model as the Subject Vehicle." This request is also overinclusive. Plaintiff should receive documentation about nonconformities associated with the defects in the subject at vehicle, not all parts (i.e., even those unrelated to the defect claimed) The request should be limited in this fashion in the future.

The court (again) offers these three items, and the analysis, as examples to follow in the parties' attempt to make good faith efforts in resolving the issues in the future.

The court concludes with the following observations based on events that may have occurred following the original briefing and the May 22, 2024 hearing. The parties may have informally agreed that the only remaining discovery disputes between them involve the six (6) deposition categories applicable to the examination of defendant's PMQ deponent. Even in that vein, defendant at the May 22, 2024 hearing suggested it has dates to offer for the deposition, meaning a global resolution may be afoot (or even secured). If lingering issues remain, there appears no reason why the parties cannot informally resolve them and move forward with the deposition. If, however, it turns out that some intractable disputes remain, after all good faith efforts have been made to resolve them, plaintiff can again file a motion to compel, but this time focusing with laser-like precision on the matters that ***are genuinely in dispute***. The court expects both parties to be fully engaged in future motion work, which means robust filings without dilatory conduct. The court does not want a repeat of what has occurred with the present motion; if the same efforts are repeated, the parties should expect the same treatment, and as noted above, a more muscular use of sanctions. The parties are placed on notice.

The parties are directed to appear either by Zoom or in person at the July 10, 2024 hearing in Department 1, Santa Maria, at 8:30 in the morning. The parties should come prepared to discuss the court's directives outlined in this order.