SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 04-25-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV411215 Hearing: Motion to Strike	Vandana Gariney vs Manraj Chahal et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 2	22CV403571 Motion: Compel	FRANCISCO OLIVARES ALVAREZ vs SMITH CHEVROLET CO., INC., a California Corporation et al	See Tentative Ruling. Tg=he Court will prepare the final order.
LINE 3	22CV398460 Motion: Joinder	ARCHIE DELACRUZ et al vs RICHARD GRANDQUIST et al	While it appears that all parties were served with the motion, the proof of service is not signed and the motion, which was presumably served on January 23, 2024, was not in fact filed until April 4, 2024. As a result, all parties are ordered to appear at the hearing to confirm that service was proper. If so, then the unopposed motion will be granted. If service was not proper and there is opposition, then the motion will be continued to allow for proper service.
LINE 4	23CV426929 Hearing: Petition Compel Arbitration	ASM TECHNOLOGIES LIMITED et al vs SHRIKAR KASTURI et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 5			

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LINE 6			
LINE 7			

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Calendar Line 1
Case Name: Vandana Gariney v. Manraj Chahal, et al.
Case No.: 23CV411215

Defendant filed a memorandum of costs to recover filing and motion fees, electronical filing fees, and a non-refundable deposit to pay for an arbitrator. Plaintiff moves to strike these costs, arguing that it should not have to pay attorney fees as each side should pay their own attorney fees. Defendant, however, has not asked for attorney fees, but only for costs.

Under Code of Civil Procedure 1032(b), "except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." A prevailing party includes "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Code Civ. Proc. section 1302(a)(4).) In this case, Plaintiff dismissed the action after neither party obtained relief on December 14, 2023. Accordingly, Defendant is a prevailing party entitled to recover its costs. The Court notes that Plaintiff cites *Chinn v. KMR Property Management*, 16 Cal.App.4th 175, to suggest that Defendant may not be deemed the prevailing party. This is not correct. First of all , as *Chinn* itself notes that "[a]s rewritten, section 1032 now declares that costs are available as 'a matter of right' when the prevailing party is within one of the four categories designated by statute." *Chinn*, 166 Cal.App. 4th at 188. Moreover, *Chinn* involved a case were there was a net recovery, not a case of a voluntary dismissal, and the decision has been partially overruled.

The next question is what costs Defendant is allowed to recover. Allowable costs include both filing and motion fees and electronic filing fees. See CCP section 1033.5(a)(1) and (14). As such, those costs are awarded to Defendant.

The Court has the discretion to award costs when they are incurred, reasonably necessary, and reasonable in amount. See CCP section 1033.5(c)(1-4). In this case, the nonrefundable fees paid to the arbitrator were incurred (see Decl. of Henshaw and Ex. A attached thereto). They were reasonably necessary, as the parties had been compelled to arbitration and Defendant believed Plaintiff was intending to sign the arbitration agreement attached as Exhibit A to the Henshaw Declaration, and the deadline for paying was approaching. Finally, the Fees are reasonable in amount.

To the extent Plaintiff asks the Court not to award discretionary fees, she has provided no evidence to support her claims as to why she did not follow through with arbitration or the law suit. Plaintiff failed to file a declaration or present any actual evidence, as opposed to argument, in her filings. Because the costs asked for by Defendant are authorized by law, the motion to strike is DENIED and Plaintiff shall pay the costs of $2,934.98 to Plaintiff within 10 days of the final order. Defendant shall submit the final order within 10 days of the hearing.

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Calendar Line 2
Case Name: *Alvarez v. Smith Chevrolet Co., Inc, et al.*
Case No.: 22CV403571

Factual and Procedural Background

This is an action for violations of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) ("Song-Beverly Act") brought by Francisco Olivares Alvarez ("Plaintiff") against defendants Smith Chevrolet Co., Inc., dba Smith Chevrolet Cadillac Inc. ("Chevrolet,") General Motors LLC ("Defendant" or "General Motors,").

Plaintiff alleges that on November 27, 2019, he entered into a warranty contract with Defendant and purchased a defective 2019 Chevrolet Silverado 1500 ("Subject Vehicle") that was manufactured by Defendant. (Complaint, ¶¶ 12, 14, 28-30.) In connection with this purchase, Plaintiff received an express written warranty providing that Defendants would repair the Vehicle in the event it developed a defect during the warranty period. (*Id.,* ¶¶ 14, 16, 18-19; Ex. 1.) Plaintiff also received an implied warranty of fitness. (*Id.*, ¶ 29; Ex. 1.) When the warranty period was in effect, the Subject Vehicle experienced nonconformities including, but not limited to, electrical and transmission nonconformities. (*Id.,* ¶ 15, 33.) Defendant failed to cure these defects after a reasonable number of attempts. (*Id.,* ¶¶ 17-19, 22) Additionally, Defendant failed to replace the Subject Vehicle or make restitution to Plaintiff as required by the Song-Beverly Act. (*Id.,* ¶¶ 19-21, 22, 35)

On August 22, 2022, Plaintiff filed the operative Complaint, asserting the following three causes of action:

1) Violation of Song-Beverly Act – Breach of Express Warranty [against General Motors and Does 1 through 10];
2) Violation of Song-Beverly Act – Breach of Implied Warranty [against General Motors and Does 1 through 10]; and
3) Negligent Repair [against Chevrolet]

On November 14, 2023, Plaintiff served written discovery and a Person Most Qualified ("PMQ") and Custodian of Records deposition notice on Defendant. The PMQ deposition notice sought information about various categories, including six matters for examination and seven requests for document production. (Plaintiff's Motion to Compel Deposition of PMQ ("Motion,") p. 3:14-22.)

Motion to Compel PMQ Deposition Testimony and Document Production

Currently before the Court is Plaintiff's motion to compel Defendant to produce its PMQ and "Custodian of Records" concerning six matters for examination and seven requests for document production outlined below. Plaintiff's motion was filed on January 5, 2024. Defendant filed an opposition on April 12, 2024. Plaintiff did not file a reply. Trial is set for August 12, 2024.

Legal Standard

"If, after service of a deposition notice, a party to the action, without having served a valid objection under Code of Civil Procedure section 2025.410, fails to appear for the

examination or to produce documents for inspection, 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 described in the deposition notice." (See Code Civ. Proc., § 2025.450, subd. (a).)[1]

Meet and Confer

A motion to compel compliance with a deposition notice "shall be accompanied by a meet and confer declaration under Section 2016.040, or, when the deponent fails to attend the deposition and produce the documents, electronically stored information, or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance." (Code Civ. Proc., § 2025.450, subd. (b)(2).)

"A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code Civ. Proc., § 2016.040.) A reasonable and good faith attempt at informal resolution requires that the parties present the merits of their respective positions with candor, specificity, and support. (*Townsend v. Super. Ct.* (1998) 61 Cal.App.4th 1431, 1435, 1439.) The level of effort at informal resolution which satisfies the "reasonable and good faith attempt" standard depends upon the circumstances of the case. (*Obregon v. Super. Ct.* (1998) 67 Cal.App.4th 424, 431.)

Both parties criticize the other's meet and confer efforts, but the Court finds Plaintiff's meet and confer efforts were sufficient. Further meet and confer would be fruitless. Accordingly, the Court will reach the merits of the motion to compel.

Plaintiff's Discovery Requests

Matters for Examination

Plaintiff requests that Defendant provide its PMQ for deposition on the following topics:

Category No. 1: "General Motors LLC's pre-litigation analysis as to whether the 2019 Chevrolet SILVERADO 1500, VIN: 1GCUYGED8KZ411918 should be repurchased."
Category No. 2: "All repairs and service performed on the 2019 Chevrolet SILVERADO 1500, VIN: 1GCUYGED8KZ411918."
Category No. 3: "General Motors LLC's policies and procedures for determining whether a vehicle qualifies for a repurchase or replacement under the Song-Beverly Act."
Category No. 4: "General Motors LLC's training for evaluating a pre-litigation repurchase request under the Song-Beverly Act."
Category No. 5: "The terms of General Motors LLC's response to Plaintiff(s)' pre-litigation purchase request."

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[1] Defendant argues that it is Code of Civil Procedure section 2025.480 and not 2025.450 that applies because it served objections to the deposition subpoena. Because Defendant does not contend that there is no statutory basis for production of the documents, the Court will overlook this potential error.

Category No. 6: "General Motors LLC's policies and procedures applied in this case for calculating the repurchase amount for the SUBJECT VEHICLE under the Song-Beverly Act."

Documents to be Produced

Plaintiff also requests that Defendant produce the following categories of documents:

Request No. 1: "YOUR entire pre-litigation file regarding the SUBJECT VEHICLE."
Request No. 2: "YOUR pre-litigation communications with Plaintiff(s) regarding the SUBJECT VEHICLE."
Request No. 3: "YOUR policies and procedures for determining whether a vehicle qualifies for a repurchase under the Song-Beverly Act."
Request No. 4: "All training materials provided to YOUR employees or YOUR call-center agents regarding the handling of pre-litigation consumer requests for a vehicle repurchase in California."
Request No. 5: "All DOCUMENTS evidencing your pre-litigation evaluation of whether the SUBJECT VEHICLE qualified for a repurchase under the Song-Beverly Act."
Request No. 6: "All DOCUMENTS that YOU reviewed in YOUR pre-litigation evaluation of whether the SUBJECT VEHICLE qualified for a repurchase under the Song-Beverly Act."
Request No. 7: "YOUR policies and procedures for calculating a repurchase under the Song-Beverly Act.

Good Cause Requirement and Defendant's Relevance and Overbreadth Objections

Code of Civil Procedure section 2025.010 provides that a party may obtain discovery by taking a deposition "of any person" which includes "a natural person, an organization such as public or private corporation, a partnership, an association, or a governmental agency." Where a party seeks to depose a corporation, Code of Civil Procedure section 2025.230 directs that "the deposition notice shall describe with reasonable particularity the matters on which examination is requested" and "the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent."

To compel the production of documents requested in a deposition notice, Plaintiff is required to "set forth specific facts showing good cause justifying the production." (See Code Civ. Proc., § 2025.450, subd. (b)(1).) The moving party establishes good cause by showing: (1) relevance to the subject matter of the case; and (2) specific facts justifying discovery. (*Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98 (*Kirkland*) [the party who seeks to compel production has met his burden of showing good cause simply by a fact-specific showing of relevance].) Discovery is allowed for any matters that are not privileged and relevant to the subject matter, and a matter is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.010.) Moreover, for discovery purposes, information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (*Gonzalez v. Sup. Ct.* (1995) 33 Cal.App.4th 1539, 1546.)

Plaintiff asserts, the matters for examination, outlined *supra,* are relevant to his claims because they assist in determining not only whether a violation of the Song-Beverly Act

occurred, but whether Defendant acted in good faith or whether it willfully refused to comply with its obligations under the Song-Beverly Act when it failed to provide replacement or refund for the Subject Vehicle. (*Id.*, p. 8:20-28.) Plaintiff also asserts that Defendant's policies and procedures are relevant to show whether Defendant's conduct lacked good faith. (*Ibid*.)

Defendant argues Plaintiff's motion seeks testimony that is overly broad and irrelevant. (Opp., p. 5:6-13.) Defendant indicates it "has already produced, and has agreed to supplement production of, documents directly responsive to Plaintiff's discovery requests." (*Ibid*.) Specifically, Defendant argues that it has agreed to provide PMQ testimony related to the Subject Vehicle, "including repair and service documentation, communications and correspondence regarding the Subject Vehicle, request and evaluation for repurchase, and communications between Plaintiff and Defendant's customer service, among other things." (*Ibid*.) Defendant argues that the requested testimony and materials that are unrelated to any repairs to the Subject Vehicle under warranty, namely, the internal policies and procedures concerning employee training, are irrelevant to Plaintiff's specific claim on Defendant's failure to repair Subject Vehicle because breach of warranty claims are unique to the individual consumer and his or her vehicle. (Opp., pp. 5:21-27, 7:1-10.)

Testimony and documents relating to the Subject Vehicle are relevant to establishing a violation of the Song-Beverly Act. Plaintiff's PMQ deposition and requests for production pertaining to the Subject Vehicle, are neither irrelevant nor overbroad. Consequently, Plaintiff's request for category of examination nos. one, two, five, and six is GRANTED. The Court finds that Plaintiff has met his burden of establishing good cause with respect to request for document nos. one, two, five, and six, because these all relate specifically to the Subject Vehicle.

With respect to the categories of documents not related to the Subject Vehicle, Plaintiff contends that the information requested in the categories concerning Defendant's policies regarding repair, replacement, and repurchase will provide evidence of willfulness relevant to the issue of civil penalties. (MTC, pp. 8-9.) Plaintiffs are permitted to pursue penalties for willful violations of the Song-Beverly Act and thus, evidence of Defendant's willful violation of the Act supports a civil penalty. (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104.)

Pursuant to Civil Code section 1794, subdivision (c), if a purchaser of a vehicle establishes that the failure to comply with the provisions of the Song-Beverly Consumer Warranty Act was willful, the judgment may include a civil penalty not to exceed two times the amount of actual damages. A violation is not considered "willful" if "the defendant's failure to replace or refund was the result of a good faith and reasonable belief that facts imposing the statutory obligation were not present." (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 185 [e.g. manufacturer reasonably believed that product conformed to warranty].) In claiming it is entitled to testimony and documents not related the subject vehicle, Plaintiff cites *Jensen v. BMW of North America* (1995) 35 Cal.App.4th 112, 136. But that case did not involve the scope of discovery. What is relevant to determining good faith is whether the manufacturer reasonably believed the product conformed to the warranty, whether a reasonable number of repair attempts had not been made, or whether buyer desired further repair rather than replacement or refund. See K*wan v. Mercedes-Benz of North America, Inc.*, 23 Cal. App. 4th 174, 185. Again, these factors relate to the subject vehicle. Accordingly,

Plaintiff has not established good cause for requests for documents or examination of requests nos. three , four, and seven.

Consequently, this Court GRANTS Plaintiff's request for one, two, five and six of matters of examination, and GRANTS Plaintiff's request for production of document nos. one two, five and six. The Court DENIES the remaining requests.

Trade Secrets/Attorney-Client Privilege/Work Product

Defendant contends that the discovery requests at issue improperly seek items that qualify as trade secrets. "The Uniform Trade Secret Act (Civ. Code, § 3426 et seq.) defines a 'trade secret' as 'information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.' (Civ. Code, § 3426.1, subd. (d).)" (*Global Protein Products, Inc. v. Le* (2019) 42 Cal.App.5th 352, 367.)

The party claiming a trade secret privilege has the burden of establishing its existence. (*Bridgestone/Firestone, Inc. v. Sup. Ct.* (1992) 7 Cal.App.4th 1384, 1393.) "Either party may propose or oppose less intrusive alternatives to disclosure of the trade secret, but the burden is upon the trade secret claimant to demonstrate that an alternative to disclosure will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure." (*Bridgestone/Firestone, Inc. v. Sup. Ct., supra,* 7 Cal.App.4th at p. 1393.)

Here, Defendant objects to all six categories for deposition and all seven requests on the ground that they seek information covered by the trade secret privilege. In its Separate Statement, through the use of boilerplate objections, Defendant argues that Plaintiff's requests impermissibly lead to the production of trade secrets. (See Sep. Stat.; see also Opp., pp. 7-8.) Specifically, it asserts plaintiff is impermissibly requesting "wholesale disclosure" of Defendant's confidential and internal information, which would put it at a competitive disadvantage in the marketplace. The party claiming a trade secret privilege has the burden of establishing its existence. (*Bridgestone/Firestone, Inc. v. Sup. Ct.* (1992) 7 Cal.App.4th 1384, 1393.) Defendant has failed to meet this burden, and instead merely asserts broad conclusions.

However, Defendant intends to file a motion for protective order "to ensure its document production is adequately protected if further document production is ordered." (Opp., p. 8, fn. 1.) Thus, it does not contend that a protective order would be insufficient to protect its trade secrets. Accordingly, the court finds that a protective order would adequately dispel any concerns regarding the potential disclosure of trade secret privileged material. Defendant and Plaintiff are ordered to meet and confer regarding the terms of an appropriate protective order, and shall stipulate to a protective order consistent with the terms of the Model Confidentiality Order published by the Complex Division of the Santa Clara County Superior Court, that includes an attorney's eyes only (AEO) provision. The objection based on trade secret privilege is OVERRULED.

Defendant also made boilerplate objections to Plaintiff's requests for production and categories of testimony, on grounds that they contain work-product and information subject to

attorney-client privilege. (Def. Objections., p. 2.) However, Defendant makes no effort to explain or justify these objections in its opposition, objections, or separate statement. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 ["The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.]".) Accordingly, the Court need not rule on these objections at this time and they are preserved. (See *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1129 [Boilerplate objections in an initial response are sufficient to preserve attorney client and work product privilege objections].)

All Other Objections

Defendant objects to the entirety of Plaintiff's requests and categories on the grounds that they are ambiguous, vague, expensive, and burdensome. Defendant's boilerplate objections do not sufficiently address how Plaintiff's requests for production are vague and ambiguous. In its objections, Defendant simply highlights terms in each request and category, concluding they are "vague and ambiguous," without stating more. (See *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255 [burden on responding to party justify any objection].) Unless the categories and requests are totally unintelligible, Defendant must respond in good faith as best as it can. (See *Deyo v. Killbourne* (1978) 84 Cal.App.3d 771, 783.) Additionally, Defendant fails to explain or justify its objection on the grounds that Plaintiff's requests are unduly burdensome and expensive, in its opposition or separate statement. Thus, these objections are OVERRULED. (See *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549 ["trial court 'shall limit the scope of discovery if it determines that the . . . expense . . . of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.' . . . However, as with other objections . . . the party opposing discovery has an obligation to supply the basis for this determination"]; *Coy v. Sup. Ct.* (1962) 58 Cal.2d 210, 220-221 (*Coy*) [if a timely motion to compel has been filed, the burden is on responding party to justify any objection].)

Plaintiff's Request for Monetary Sanctions

Plaintiff seeks monetary sanctions pursuant to Code of Civil Procedure section 2025.450, subdivision (g)(1), which provides:

> If a motion under subdivision (a) is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust
> .

Plaintiff asserts Defendant to produce a PMQ to testify at its properly noticed deposition and thereafter failed to respond to Plaintiff's meet and confer efforts despite providing a date for the deposition. (Motion, p. 8.) Plaintiff argues Defendant's failure to both respond to the notice and attend the deposition was willful, and warrants the imposition of monetary sanctions in the amount of $1,860. (See Thomas Decl., pp. 3-4.)

Defendant argues that Plaintiff's request for monetary damages is "groundless," reasserting Plaintiff's lack of substantial meet and confer efforts. (Opp., p. 8:6-15.) Defendant concludes that sanctions should only be reserved for "blatant discovery misconduct." (*Ibid.*) Defendant does not cite any authority for this proposition. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority may be disregarded].) It argues that Plaintiff should be sanctioned because Defendant had to oppose a "procedurally defective" and "substantively bereft motion." (Opp., p. 8:6-15.) Defendant has not made a code-compliant request for monetary sanctions. Accordingly, the court will not award sanctions to Defendant.

Plaintiff seeks a total of $1,860 in monetary sanctions against Defendant. Plaintiff has made a code-compliant request for monetary sanctions and, as the partially prevailing party, Plaintiff is entitled to monetary sanctions *unless* Defendant acted with substantial justification or imposition of sanctions would be unjust. (Thomas Decl., ¶¶ 15-17.) Here, Defendant did agree to produce PMQ testimony on several matters of examination, and validly objected to requests three, four and six. Consequently, Defendant was substantially justified in bringing this motion. Accordingly, Plaintiff's request for sanctions is DENIED.

The Court shall prepare the Final Order.

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Calendar line 4
Case Name: *ASM Technologies Ltd., et al. v. CloudPassage Inc.*
Case No.: 23CV426929

According to the allegations of the complaint, on July 9, 2018, plaintiff ASM Technologies Limited ("ASM India") entered into an agreement with defendant CloudPassage Inc. ("CloudPassage") for the supply of ASM India's personnel as consultants to CloudPassage, and also assigning ASM India's right to recover payments from CloudPassage to plaintiff ASM Digital Technologies Inc. ("ASM USA"). (See complaint, ¶¶ 17-18, exh. A.) Paragraph 10 of the agreement states:

> 10. Arbitration. Any controversy or claim (except those regarding Inventions, Proprietary Information or intellectual property) arising out of or relating to this Agreement, or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, provided however, that each party will have a right to seek injunctive or other equitable relief in a court of law. The prevailing patty will be entitled to receive from the nonprevailing party all costs, damages and expenses, including reasonable attorneys' fees, incurred by the prevailing party in connection with that action or proceeding, whether or not the controversy is reduced to judgment or award. The prevailing party will be that party who may be fairly said by the arbitrator(s) to have prevailed on the major disputed issues. Consultant hereby consents to the arbitration in the State of California.

(Complaint, exh. A.)

In May 2021, defendant Fidelis Cybersecurity LLC ("Fidelis Cybersecurity") acquired CloudPassage. (See complaint, ¶ 20.) ASM India continued to provide consultancy services to CloudPassage and Fidelis Cybersecurity, and on July 7, 2022, Fidelis approved the rate increase for consultants to $4,500. (See complaint, ¶ 21, exh. B.) Plaintiffs ASM India and ASM USA (collectively, "Plaintiffs") last received payment from Fidelis Cybersecurity on May 26, 2023, for an amount of $34,300 for services provided in February 2023. (See complaint, ¶ 21, exh. C.)

From March 2023 through August 2023, CloudPassage and Fidelis Cybersecurity were provided services, but did not pay invoices for the amounts of: $41,108.70 for services provided in March 2023, $41,500 for services provided in April 2023, $41,500 for services provided in May 2023, $41,500 for services provided in June 2023, and $41,500 for services provided in July 2023. (See complaint, ¶ 22, exhs. D-H.) On July 31, 2023, Plaintiffs sent a reminder email to CloudPassage and Fidelis Cybersecurity, and Defendants responded, apologizing for the delay, and promising to reach out to their management team for clarity on a payment date. (See complaint, ¶ 23, exh. I.) In August 2023, defendant Partner One Capital Inc. ("PartnerOne") acquired all the assets and contracts of Fidelis Cybersecurity and transferred them to its wholly owned subsidiary Fidelis Security LLC ("Fidelis Security").

(See complaint, ¶ 24.) On August 25, 2023, Plaintiffs' consultants were abruptly denied access to CloudPassage's IT systems and did not receive further communication from CloudPassage or Fidelis Cybersecurity. (See complaint, ¶ 25.) Plaintiffs sent several emails about the unpaid invoices to no response. (See complaint, ¶ 26, exh. I.) Defendants owe Plaintiffs $207,108.70 for the unpaid invoices. (See complaint, ¶ 27.)

On November 29, 2023, Plaintiffs filed a complaint against defendants CloudPassage, Fidelis Cybersecurity, Fidelis Security, PartnerOne, former Fidelis Cybersecurity President Shrikar Katsuri ("Kasturi"), current Fidelis Security CEO and former Fidelis Cybersecurity CEO Eric Moseman ("Moseman") and PartnerOne's founder and CEO Daniel G. Charron ("Charron") (collectively, "Defendants"), asserting causes of action for:

1) Breach of written contract (against CloudPassage and Fidelis Cybersecurity);
2) Breach of implied covenant of good faith and fair dealing (against CloudPassage and Fidelis Cybersecurity);
3) Quantum meruit (against all defendants);
4) Unjust enrichment (against all defendant); and,
5) Alter ego liability (against Kasturi, Moseman and Charron),

Defendants CloudPassage, Fidelis Cybersecurity and Kasturi (collectively, "moving defendants") move to compel arbitration and to stay the action pending arbitration.

I. DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO STAY ACTION PENDING ARBITRATION

Code of Civil Procedure section 1281 states that "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc. § 1281.) Section 1281.2 states that "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: … [t]he right to compel arbitration has been waived by the petitioner; or… [g]rounds exist for rescission of the agreement… [or a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc. § 1281.2.)

Here, it is clear that the parties entered into an arbitration agreement that encompasses the claims in the complaint. The complaint attaches the agreement and alleges causes of action for breach of the contract. (See complaint, ¶¶ 12 (alleging that "Plaintiffs state that they had a business relationship with CloudPassage in accordance with the Consulting Agreement executed on July 9, 2018"), 17-52, exh. A.) The language of the arbitration provision mandates arbitration, stating that "[a]ny controversy or claim… arising out of or relating to this Agreement, or the breach thereof shall be settled by arbitration…." (Complaint, exh. A.) "[W]here the parties have admittedly agreed in writing, as in the present case, that "Any disagreement arising out of this contract . . . shall be submitted to arbitration," then the only 'default' which need be shown before an order for arbitration may be made under section 1282

is that a 'disagreement' has arisen and that a party has refused to submit such 'disagreement' to arbitration." (*Weiman v. Super. Ct. (John A. Nelson Inc.)* (1959) 51 Cal.2d 710, 712-713.)

Moreover, as moving defendants argue, the arbitration provision is neither procedurally nor substantively unconscionable. (See Defs.' memorandum of points and authorities ("Defs.' memo"), pp.4:15-28, 5:1-28, 6:1-17.) Again, Plaintiffs are seeking to enforce the terms of the agreement—and are not asserting that the Consulting Agreement was a contract of adhesion. (See *24 Hour Fitness, Inc. v. Super. Ct. (Munshaw)* 66 Cal.App.4th 1199, 1212-1213 (stating that "unconscionability has both a procedural and a substantive element, both of which must be present to render a contract unenforceable… [t]he procedural element focuses on the unequal bargaining positions and hidden terms common in the context of adhesion contracts… [w]hile courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms").) Plaintiffs concede this point as they fail to respond to this argument. (See *Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1164-1165 (stating that "[t]he opposing party then must prove any defense to enforcement of the arbitration agreement… "Plaintiff[has the] burden… to prove both procedural and substantive unconscionability").)

Instead, Plaintiffs argue that "[o]ther than CloudPassage, none of the other six (6) Defendants signed the Consulting Agreement containing the arbitration clause and are therefore neither bound by nor have any basis to enforce the arbitration agreement." (Pls.' opposition to motion to compel arbitration ("Opposition"), p.5:6-8.) Plaintiffs present no evidence in opposition. (See *Crippen*, *supra*, 124 Cal.App.4th at p.1164 (stating that "[t]he party seeking to compel arbitration bears the burden of proving that an arbitration agreement exists… [t]he opposing party then must prove any defense to enforcement of the arbitration agreement"); see also *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (stating that "a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense").) However, while it is true that generally, "only parties to an arbitration contract may enforce it or be required to arbitrate," it is also true that "[n]onsignatory defendants may enforce arbitration agreements 'where there is sufficient identity of parties'… Enforcement is permitted where the nonsignatory is the agent for a party to the arbitration agreement [citation], or the nonsignatory is a third party beneficiary of the agreement." (*Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 8.) Here, Plaintiffs allege that CloudPassage was acquired by Fidelis Cybersecurity in May 2021 and that Fidelis Cybersecurity was receiving benefits from the Consulting Agreement and even agreeing to amended terms of the agreement. (See complaint, ¶¶ 20-21.) In *Jenks*, *supra*, law firm Gray Cary Ware & Friedenrich merged into DLA Piper, and after the employee hired by Gray Cary argued that DLA Piper did not have standing to enforce the arbitration agreement because it was not a signatory to the offer letter containing the arbitration provision, the *Jenks* court determined that the continued relationship between the parties served as implied consent preserving the original terms of employment, including the arbitration agreement, and that DLA Piper automatically acquired the right to enforce the arbitration agreement when it merged with Gray Cary. (See *Jenks*, *supra*, 243 Cal.App.4th at pp.5-14.) Here, likewise, the continued relationship with Plaintiffs and Fidelis Cybersecurity's acquisition of CloudPassage demonstrates that Fidelis Cybersecurity has the right to enforce the arbitration agreement. Further, Kasturi, as the alleged President of Fidelis Cybersecurity, also may enforce the arbitration provision. (See Jenks, supra, 243 Cal.App.4th at p.8; see also *Nguyen v. Tran* (2007) 157 Cal.App.4th 1032, 1036-1037 (stating that "[e]xceptions in which an arbitration agreement may be enforced by or against nonsignatories include… when a nonsignatory and one of the

parties to the agreement have a preexisting agency relationship that makes it equitable to impose the duty to arbitrate on either of them").)

Plaintiffs argue that the legal disputes involving Fidelis Security, PartnerOne, Moseman and Charron will be resolved in a court setting and not through arbitration, and that there is thus a possibility of conflicting rulings on common issues of law and facts. (See Opposition, pp.5:19-26, 6:1-28, 7:1-18.) In reply, moving defendants acknowledge that Fidelis Security, PartnerOne, Moseman and Charron are not subject to arbitration. (See Defs.' reply brief, p.1:19-23.) However, "merely naming third party defendants not subject to the arbitration agreement '[falls] far short of showing the existence of third party claims which would create 'a possibility of conflicting rulings on a common issue of law or fact.'" (*Henry v. Alcove Investment, Inc*. (1991) 233 Cal.App.3d 94, 102.) Moreover, "[t]he existence of this possibility of conflicting rulings on a common issue of fact is sufficient grounds for a stay under section 1281.2." (*Id*. at p.101.) A stay of the instant action pending resolution of the arbitration would ensure that there would be no possibility of conflicting rulings on common issues of law and facts. Plaintiffs have failed to demonstrate reasons as to why the arbitration provision should not be enforced as between them and moving defendants.

The motion to compel arbitration as between Plaintiffs and moving defendants CloudPassage, Fidelis Cybersecurity and Kasturi, and to stay the entire action pending resolution of the arbitration is GRANTED.

Moving defendants shall prepare and submit the proposed order for the Court's signature.

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