SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: February 1, 2024 TIME: 9:00 A.M.

FOR ORAL ARGUMENT: **Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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FOR YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**.

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LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV417060	Annabella Gonzalez vs CITY OF PALO ALTO	Defendant City of Palo Alto's Demurrer to Plaintiff's Complaint for Damages is off calendar. Plaintiff filed a first amended complaint on January 25, 2024. To the extent that first amended complaint was after the deadline to file an opposition, the Court has discretion to consider late filed papers (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168) and will permit the late filed first amended complaint in this instance, as it is only a matter of days and will not prejudice the defendant. This order will be reflected in the minutes.
2	18CV330775	Pacific Structures, Inc. vs Balfour Beatty Infrastructure, Inc. et al	Philadelphia Indemnity Insurance Company's Motion for Summary Judgment is DENIED. Please scroll down to line 2 for full tentative ruling. Court to prepare formal order.
3	22CV404170	Scott Johnson vs Dry Creek Grill, Inc.	Off calendar
4	23CV409932	YAN LI vs CONG RAN, MD et al	Off calendar
5	23CV409932	YAN LI vs CONG RAN, MD et al	Off calendar
6	23CV409932	YAN LI vs CONG RAN, MD et al	Dr. Regenass's Motion to Quash is GRANTED. There is no dispute that Dr. Regenass is not a party to this litigation, nor is her medical spa. Whether or not Dr. Regenass can be characterized as an "apex", the Court finds that the asserted basis for her deposition is wanting. Defendants can obtain information regarding the corporate structure of Plaintiff's current business from public records and from Plaintiff's own records – there is no need to obtain such information from non-party Dr. Regenass. As the discovery gatekeeper, the Court finds the thin reed of likelihood to lead to the discovery of admissible evidence offered by Defendants is insufficient to justify this deposition of a non-party. The Court cautions Plaintiff to be forthcoming with this requested information in Plaintiff's own discovery responses, including Plaintiff's document production, to avoid Defendants returning to the Court to argue that they were unable to obtain the needed discovery. Court to prepare formal order.
7	23CV418058	Modesta Castaneda vs AMERICAN HONDA MOTOR CO., INC., a California Corporation	Plaintiff's Motion to Compel Further Responses to Plaintiff's Request For Production of Documents (Set One) is DENIED. Please scroll down to line 7 for full tentative ruling. Court to prepare formal order.

8	23CV421149	Wendy Carmona-Avila et al vs Sunpower Corporation	Sunpower Corporation's Motion to Compel Arbitration and Stay Action is GRANTED. Notice of this motion was served by email to jason@estavillolaw.com, donald@estavillola.com, and abimbola@estavillolaw.com on September 21, 2023. The Court sent notice that this motion was continued from January 25, 2024 to February 1, 2024 by U.S. mail on November 29, 2023. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff also alleges the parties' agreement is attached as Exhibit 1 to the Complaint. Exhibit 1 contains an arbitration agreement in bold text: "Either you or we may choose to have any dispute between us decided by arbitration and not in court." Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (See also *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) This matter is accordingly ordered to arbitration and stayed. A status conference to review the progress of the arbitration is set for August 15, 2024 at 10 a.m. in Department 6. Court to prepare formal order.
9	23CV425258	Seung Song et al vs Tesla, Inc.	Tesla, Inc.'s Motion to Compel Arbitration is GRANTED. The Court strikes certain language from the arbitration provision, stays this action and orders it to arbitration in the AAA, VACATES the April 16, 2024 case management conference, and sets a status conference for August 1, 2024 at 10 a.m. in Department 6. Please scroll down to line 9 for full tentative ruling. Court to prepare formal order.
10	20CV372285	THE PEOPLE OF THE STATE OF CALIFORNIA et al vs CALVARY CHAPEL SAN JOSE et al	Plaintiffs' Unopposed Motion to Vacate Dismissal is GRANTED. The Court will enter the dismissal attached as Exhibit A to the Xavier M. Brandwajn Declaration, modify the proposed judgment submitted on November 6, 2023 to reflect dismissal of that claim, and sign the judgment as so modified.
11	23CV409932	YAN LI vs CONG RAN, MD et al	Off calendar

12	2013-1-CV-247406	P. Kleidman Vs N. Shah, Et Al	Cross-Defendant's Motion to Reconsider the Protective Order filed on September 19, 2023 is DENIED. First, Cross-Defendant was given notice of the Court's reasoning regarding judicial admissions because the Court posted that reasoning in its tentative rulings according to the local rules. Cross-Defendant did not appear at the hearing, much less contest it or ask for more time. Thus, the argument that this was "new material" falls flat. Next, the judicial admission analysis remains correct: the party making the statement in a complaint is bound by that statement; Cross-Complainants cannot deny the agency relationship. This is a correct statement of the law. However, most fatal to this motion for reconsideration is that Cross-Defendant's argument ignores the heart of the Court's September 19, 2023 order that found Cross-Defendant does not have standing to challenge the agency relationship because Cross-Defendant is a third party to that relationship. (*Boteler v. Conway* (1936) 13 Cal.App.2d 79, 83.) Court to prepare formal order.

Calendar Line 2
Case Name: *Pacific Structures, Inc. v. Balfour Beatty, et.al.*
Case No.: 18CV330775

Before the Court is Cross-Defendant's, Philadelphia Indemnity Insurance Company ("Philadelphia") motion for summary judgment against Cross-complainant's, Balfour Beatty Infrastructure Inc. ("BBII") tenth cause of action for recovery of performance bond. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Factual Background

This is a contract dispute. In May 2015 pursuant to the "Prime Contract", BBII became the general contractor on a construction project to retrofit, upgrade, and replace major equipment at the existing Rinconada Water Treatment Plant (the "Project") for the Santa Clara Valley Water District ("Owner"). (BBII's Separate Statement of Undisputed Material Facts ("BBIISS" No. 1; Declaration of Erin Lackey, ("Lackey Decl.") ¶ 4.)

In September 2015, BBII entered into an agreement with Pacific Structures Inc. ("PSI") to perform concrete framework for the Project. For various reasons PSI's work was delayed. PSI asked for delay damages and filed this suit against BBII and various sureties in June 2018.

BBII also entered a written subcontract with Alamillo Rebar, Inc. ("ARI"), on September 1, 2015, pursuant to which ARI agreed to furnish and install certain reinforcing rebar work to the Project in exchange for payment of $6,732,909.00 ("Subcontract"). (BBIISS No. 2.) Pursuant to the Subcontract, ARI was required to obtain a payment and performance bond naming BBII as obligee. (BBIISS No. 8.)

On January 20, 2016, ARI, as principal, and Philadelphia, as surety, executed performance bond No. PB02139600027, wherein Philadelphia agreed to assure ARI's performance for $6,732,909.00. ("Performance Bond"). (BBIISS No. 3.) The Performance Bond is the industry standard AIA 311 performance bond. (Declaration of Andrea L. Petray, ("Petray Decl.") ¶ 4.) Philadelphia and ARI also simultaneously executed payment bond No. PB02139600027, wherein Philadelphia agreed to assure payment for lower tier subcontractors and suppliers on the Project ("Payment Bond"). (BBIISS No. 10.)

ARI performed reinforcing steel and rebar work throughout the Project from approximately October 2015 through February 2017. (Lackey Decl., ¶ 6.) Between October 2017 and August 2018, the

Owner issued a number of deficiency notices related to exposed rebar and rust stains and directed BBII to provide a corrective action plan. (Lackey Decl., ¶¶ 8, 9, 11, 13.) Between July 2018 and April 2019, BBII, engineers, and field investigators met to determine the responsible party and to plan repairs. ARI participated in the meetings and was aware of the issues with its work. (BBIISS No. 12, 13.)

On February 27, 2019, BBII sent a letter to ARI and Philadelphia explaining ARI's significant workmanship issues on the Project resulting in several deficiency and non-conforming work notices related to ARI's work installing rebar with inadequate concrete cover. (BBIISS No. 14.) BBII stated that it had incurred significant costs and expended resources to address the issues of ARI's non-conforming work and notified ARI and Philadelphia that the "costs/impacts remain the responsibility of Alamillo and its Surety, Philadelphia Indemnity Insurance Company." (BBIISS No. 15.)

On March 26, 2019, BBII received approval from the Owner to implement its repair plans. (Lackey Decl., ¶ 16.) Prior to the approval, the only work BBII performed related to the concrete cover issues on the Project was limited to field investigation to determine the extent those issues. (BBIISS No. 16.) On March 27, 2019, BBII began repairs to correct the non-conforming work that resulted in inadequate concrete cover on the structure walls on the Project. (BBIISS No. 17.)

The repairs continued through April 2020. BBII regularly provided notice of the repair costs to ARI. On January 21, 2020, BBII sent a letter to ARI and Philadelphia detailing the concrete cover issue on the Project and the costs to repair ARI's non-conforming work and demanded indemnification and reimbursement under the bonds (BBIISS No.18, 20, 21.) On February 3, 2020, Philadelphia responded disclaiming responsibility for the non-conforming work and declined BBII's demand for reimbursement and indemnification (BBIISS No. 26.)

B. Procedural Background

On June 28, 2018, PSI filed its complaint against BBII and various sureties for breach of contract, quantum meruit, account stated, recovery on payment bond, and recovery of money due on stop payment notice release bond. PSI dismissed its complaint on November 9, 2020.

On March 5, 2019, BBII filed its cross-complaint and later amended it on April 20, 2020. The operative amended cross-complaint was filed against PSI, Fidelity & Deposit Company of Maryland, ARI, and Philadelphia for breach of contract, express indemnity, equitable indemnity, negligence, and

recovery on performance bond. BBII's claim against Philadelphia is limited to recovery on performance bond. On November 16, 2020, BBII dismissed Fidelity & Deposit Company of Maryland.

On April 18, 2019, PSI filed its cross-complaint against ARI for negligence, equitable indemnity, and contribution.

II. Request for Judicial Notice

Pursuant to Evid. Code § 452(d), the Court GRANTS Philadelphia's request for judicial notice of BBII's amended Cross-complaint. "A court may take judicial notice of records and order in its own file." (*In re Martin L*. (1986) 187 Cal.App.3d. 534, 539.)

III. Legal Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

A defendant moving for summary judgment bears two burdens: (1) the burden of production, i.e., presenting admissible evidence, through material facts, sufficient to satisfy a directed verdict standard; and (2) the burden of persuasion, i.e., the material facts presented must persuade the court that the plaintiff cannot establish one or more elements of a cause of action, or a complete defense vitiates the cause of action. (Code Civ. Proc., § 437c(p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850-851; see also, *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this burden, the burden shifts to the plaintiff to show that a "triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Id*.)

"On ruling on a motion for summary judgment, the court is to 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" (*Cheal v. El Camino Hospital*—(2014) 223 Cal.App.4th 736, 760.) The court must therefore consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. "While viewing the evidence in this manner, the court must bear in mind that its primary function is to identify issues rather than to determine issues. [Citation.]" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

Defeating summary judgment requires only a single disputed material fact. (See Code Civ. Pro. § 437c(c) [a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"].) Thus, any disputed material fact means the court must deny the motion; the court has no discretion to grant summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1512.)

IV. Analysis

Philadelphia contends BBII's claim for recovery fails because (1) the performance bond expressly conditions its obligation upon BBII's declaration of default and notice to Philadelphia, and (2) BBII failed to declare default and provide notice to Philadelphia. In support of its position, Philadelphia submits:

- BBII's first amended cross-complaint with its internal exhibits
- Subcontract between BBII and ARI date September 1, 2015
- Performance bond #02139600027 issued by Philadelphia
- BBII correspondence to ARI dated February 27, 2019
- BBII correspondence to ARI and Philadelphia dated January 21, 2020
- Declaration of Shashauna Szczechowicz
- Declaration of Larry Alamillo

BBII opposes the motion arguing (1) Philadelphia improperly adds conditions precedent to liability contrary to the express terms of the performance bond, and (2) BBII properly declared ARI in

default under the terms of their subcontract and provided reasonable notice to Philadelphia. In support of its position, BBII submits:

- Performance Bond No. 02139600027 dated January 20, 2016, issued by Philadelphia.
- Payment Bond No. 02139600027 dated January 20, 2016, issued by Philadelphia.
- Correspondence from BBII to DRI and Philadelphia dated February 27, 2019.
- Correspondence from BBII to ARI and Philadelphia dated January 21, 2020.
- Subcontract dated September 1, 2015, between BBII and ARI.
- Correspondence from Philadelphia to BBII dated February 3, 2020.
- Correspondence from BBII to Philadelphia dated February 24, 2020.
- Declaration of Andrea Petray
- Declaration of Erin Lackey

Under general suretyship law, "[a] suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the surety." (Civ. Code, § 2806) Civil Code section 2807 provides: "A surety who has assumed liability for payment or performance is liable to the creditor immediately upon the default of the principal, *and without demand or notice*." (Italics added; Croskey et al., *Cal. Practice Guide: Insurance Litigation* (The Rutter Group 2015) ¶ 6:3436, pp. 61-72 to 6I-73 ["if the bond is silent, the obligee is not required to give the surety notice of the principal's default or make demand upon the surety for payment"].) Likewise, under Civil Code section 2808, a surety assuming liability "upon a conditional obligation … is not entitled to notice of the default of the principal, unless it is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof."

Thus, resolution of whether the terms of the disputed performance bond No. PB02139600027 impose condition precedent(s) to Philadelphia's liability requires contract interpretation. (*JMR Construction Corp. v. Environmental Assessment & Remediation Management Inc.* (2015) 243 Cal.App.4th 571); *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 39.)

A. Contract Language

"A performance bond, a species of a surety bond, is one in which the surety guarantees that obligations undertaken by the principal will be completed under the terms of the bonded contract." (*JMR*

Construction, 243 Cal.App.4th at 595.) A surety contract is interpreted pursuant to the same rules that govern the interpretation of contracts generally. (*Id.*; Civ. Code, § 2837; *Pacific Employers Ins. Co. v. City of Berkeley* (1984) 158 Cal.App.3d 145, 150, citing *United States Leasing Corp. v. DuPont* (1968) 69 Cal.2d 275, 284.)

Under contract law, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event. (Civ. Code, § 1434 et seq.; Rest.2d Contracts, § 224; 3A Corbin, Contracts (1960) § 631, p. 21; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 722, p. 654.) A condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises. (Civ. Code, § 1436; 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 722, p. 654; see also, *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.) "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract. [Citation.]" (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 199.) However, "stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result. [Citations.]" (*JMR Construction*, 243 Cal.App.4th at 588 citing *Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53 [contract provisions are not construed as conditions precedent in the absence of language plainly requiring such construction]; *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 493.) Because "such conditions are not favored by the law, [they] are to be strictly construed against one seeking to avail [it]self of them. [Citations.]" (*JMR Construction*, 243 Cal.App.4th at 589, citing *Antonelle v. Lumber Co*. (1903) 140 Cal. 309, 315.)

Here the relevant language in performance bond No. PB02139600027 states:

- (A) Alamillo Rebar Inc. (ARI) … called principal and Philadelphia Insurance Company …. Called surety, are held and firmly bound unto Balfour Beatty Infrastructure, Inc. BBII) …. Called Obligee, in the amount of … $6,732,909.00…
- (B) WHEREAS, Principal has by written agreement … entered into a subcontract with Obligee, … which subcontract is by reference made a part hereof, and is hereafter referred to as the subcontract.

- NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Principal shall promptly and faithfully perform said subcontract, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.
- (C) Whenever Principal shall be, and be declared by Obligee to be in default under the subcontract, the Obligee having performed Obligee's obligations thereunder:

  (1) Surety may promptly remedy the default subject to the provisions of paragraph herein, or;

  (2) Obligee after reasonable notice to Surety may, or Surety upon demand of Obligee may arrange for the performance of Principal's obligation under the subcontract subject to the provisions of paragraph herein;

  (3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract…
- [D] Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the subcontract falls due.
- [E] No right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named herein or the heirs, executors, administrators or successors of Obligee.

(Stipulation of Facts and Authenticity of Documents ("Stipulation"), Ex. 1 (bracketed letters added for clarity).)

Relying on *Union Indem. Co. v. Lang*, (1934) 71 F.2d 901(*Union*) from the District Court for the Southern District of California, Philadelphia argues "the language of the bond requires BBII to provide it with notice 'before' it owes any contractual duty to BBII and 'before' BBII was entitled to enforce its rights and remedies under the performance bond. (Motion p. 6.) However, *Union* demonstrates the language in the bond here does not create a condition precedent.

In *Union*, the bond stated: "as a condition precedent to the right of recovery hereunder, the Owner shall notify the Surety, …, of any breach by the Principal of said contract, and also of any net, or omission, on the part of the Principal, or any agent or employee of the Principal which may cause a loss for which the Surety may become liable hereunder immediately after such breach or act or omission shall have come to the knowledge of the Owner or to any representative of the Owner authorized to

supervise the performance of said contract." (*Union*, 71 F.2d at 902.) That court held this unambiguous language required timely notice of default as the precursor for the surety's obligation and refused to create a lack of hardship exception for a late notice when the contract did not expressly permit it.

BBII contends the bond made Philadelphia immediately liable for performance of the Subcontract and the only condition subsequent was that ARI "promptly and faithfully perform" the subcontract. BBII relies on *JMR Construction*, 243 Cal.App.4th 57, and out of state cases *Walter Concrete Constr. Corp. v. Lederle Labs*. (2003) 99 N.Y.2d 603 (*Walter*) and *Colo. Structures, Inc. v. Ins Co. of the W*. (2007) 161 Wn.2d 577 (*Colorado Structures*). While out-of-state court decisions may be considered for their persuasive value, they are not binding on California state courts (*Global Modular, Inc. v. Kadena Pacific, Inc*. (2017) 15 Cal.App.5th 127, 136), and the Court declines to follow them here. None of BBII's out of state authorities apply California's suretyship statutes or consider California's long standing decisional authorities disfavoring conditions precedent in the absence of clear and unambiguous express language. (*JMR Construction,* 243 Cal.App.4th 571; *Alpha Beta Food Markets v. Retail Clerks* (1955) 45 Cal.2d 764, 771; *Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53; *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 493; *Antonelle v. Lumber Co*. (1903) 140 Cal. 309, 315.)

Therefore, the Court interpreting the language of the performance bond together with the concurrently issued payment bond, notes the following:

- While the language of the performance bond states that "the condition of this obligation is such that…" it does not expressly and clearly define the condition as precedent and a precursor to recovery.
- By its plain terms in paragraph B, the condition of Philadelphia's obligation is ARI's performance. Once ARI promptly and faithfully performs its subcontract, then Philadelphia's obligation becomes null and void; otherwise, Philadelphia's obligation shall remain in full force and effect. This language negates Philadelphia's argument that its contractual duty to BBII arises after it has provided notice of ARI's default.
- By its plain terms, Philadelphia's obligation is created as of the execution date of the bond: "Principal and Philadelphia Indemnity Insurance Company … are held and firmly bound unto Balfour Beatty Infrastructure, Inc." According to Paragraph B, Philadelphia's obligation remains

in full force and effect once ARI has failed to properly perform. Thus, Philadephia's obligation does not arise from BBII's notice of ARI's default.

- Under Paragraph C certain remedial measures become available to BBII whenever ARI is declared to be in default, including (1) Philadelphia may promptly remedy the default subject to the balance of the subcontract price, (2) Philadelphia may arrange for the performance of ARI's obligation upon demand from BBII, or (3) BBII may arrange for the performance of ARI's obligation after reasonable notice to Philadelphia. As expressed by the parties, BBII's notice of intent is a condition precedent to its arrangement for repairs, which is distinguishable from BBII's notice of ARI's default as a condition precedent to Philadelphia's liability.
- There is no language in the bond requiring BBII to give Philadelphia notice of ARI's default or requiring BBII to use a particular language, method, or service of a notice of default to ARI.
- There is no express and clear language in the performance bond stating that BBII's notice of default to ARI and/or to Philadelphia is a condition precedent to Philadelphia's obligation and recovery under the bond similar to that in *Union*, cited above for example.
- Unlike the performance bond, Philadelphia's concurrently issued payment bond No. PB02139600027 contains express language creating conditions precedent: "the condition of this obligation is such that if the Principal shall promptly make payments to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the subcontract, then this obligation shall be void; *otherwise, it shall remain in full force and effect subject, however, to the following conditions...*" (Emphasis added.) The contrast in this language reflects that Philadelphia knew how to express a condition precedent to its obligation and did not intend to create such a condition in its performance bond at the time of contract formation.

Further, the Subcontract, which is incorporated by reference into the performance bond, specifically requires BBII to provide written notice to ARI when: (1) there are claims regarding ARI's payment failure, (2) there are events or work of others which may adversely affect the work schedule, (3) ARI fails to commence clean-up duties, (4) ARI is in material breach of the contract, (5) BBII intends to terminate the contract pursuant to ARI's insolvency or bankruptcy, (6) Owner suspends or

terminates the Prime Contract or any part of it which includes ARI's work, and (7) BBII elects to terminate the Primary Contract for reasons beyond its or the owner's control. (Philadelphia's Evid. Ex. 2.) None of these provisions require BBII to give written notice to the surety i.e., Philadelphia.

Based on the foregoing analysis, the Court finds performance bond No. PB02139600027 does not contain the requisite "clear unambiguous language" to support a finding that BBII was required to declare ARI's default or provide a notice of default to Philadelphia as a condition precedent to Philadelphia's obligation under the bond.

B. BBII's Required Notice to Philadelphia

Citing to four out of state cases, Philadelphia contends the performance bond is null and void because BBII performed repairs to ARI's work prior to giving Philadelphia notice of ARI's default and thus deprived Philadelphia of its performance options. For the above-cited reasons, the Court declines to follow these out of state cases.

BBII argues it properly declared ARI in default under the subcontract and provided reasonable notice of the default to Philadelphia via its correspondence dated February 27, 2019. While Philadelphia does not dispute receipt of this letter, it argues the letter (1) did not constitute a declaration of ARI's default and (2) failed to provide notice of ARI's default.

While the Court agrees with Philadelphia that BBII was required to provide it with a notice, the Court disagrees with both parties as to the nature of the required notice. While the parties debate the appropriateness of BBII's February 27, 2019, letter as a "default notice" or as a "declaration of default," they misconstrue the language of the performance bond. First, there is no express language in the performance bond that requires BBII to give Philadelphia notice of ARI's default. Second, once ARI is declared to be in default, the parties have three remedial options: (1) Philadelphia may promptly remedy the default subject to the balance of the subcontract price, (2) upon demand from BBII, Philadelphia may arrange for a subcontractor to complete or perform ARI's obligation, or (3) BBII may arrange for performance of ARI's obligation "after reasonable notice" to Philadelphia. Therefore, BBII's notice to Philadelphia is not to inform of ARI's default but to inform Philadelphia of its intent to rectify ARI's non-compliance through its own means.

BBII's February 27, 2019 letter was directed to Larry Alamillo and was sent electronically and via FedEx. It is undisputed that a copy of this letter was sent by BBII and was received by Philadelphia on March 1, 2019. The letter informed ARI and Philadelphia of the following:

- ARI's violation and breach of the Subcontract Art. 8.2 – subcontracting part of his work without BBII's express written consent. BBII asked for ARI to provide a copy of the master subcontract agreement.
- ARI's anticipatory breach – ARI did not employ any persons on the construction for the week ending February 2, 2018, and wrote the word "FINAL" across BBII's statement of Non-performance. BBII asked for confirmation of termination.
- Number of notices (deficiencies and non-conformance) given to ARI regarding ongoing and significant workmanship issues, including exposed rusting rebar with inadequate concrete coverage and Alamillo's use of plastic rebar supports in its work instead of the Contract-required stainless steel.
- BBII and ARI's attempts to obtain approval for this non-conforming work to remain in place but BBII continued to incur significant cost and to expend resources to address these issues. These costs remain the responsibility of ARI and Philadelphia.

(Stipulation, Ex. 3.)

While disputed, BBII contends it began repairing ARI's work in April of 2019, approximately one month after BBII sent its February 27, 2019 letter to Philadelphia. Therefore, triable issues of fact exist as to whether this letter gave Philadelphia (1) reasonable notice of BBII's intent to arrange for repairs to ARI's work and (2) ample time to exercise its contractual right to perform the work itself. Should it be determined that BBII failed to provide proper notice of its intent to repair, this failure will be a breach subject to damages and not a nullity of the performance bond and Philadelphia's obligation.

Accordingly, Philadelphia's motion for summary judgment is DENIED.

C. Attorney's Fees

Philadelphia seeks recovery of its attorney's fees as the prevailing party. A party requesting a determination of the prevailing party, pursuant to Civil Code section 1717, must file a separate noticed

motion. Nevertheless, as summary judgment is denied, Philadelphia's request for recovery of attorney's fees is DENIED as moot.

Calendar Line 7
Case Name: *Modesta Castaneda vs AMERICAN HONDA MOTOR CO., INC., a California Corporation*
Case No.: 23CV418058

Before the Court is Plaintiff's Motion to Compel Further Responses to Plaintiff's Request For Production of Documents (Set One). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. Modesta Castaneda purchase a 2019 Honda Odyssey ("Vehicle") on November 6, 2019. At the time of purchase, she obtained an express warranty from America Honda Motor Co., Inc. ("Honda"). Plaintiff alleges the Vehicle was sold with "serious defects and nonconformities to warranty and developed other serious defects and nonconformities to warranty including, but not limited to, electrical system defects." Plaintiff filed this action against Honda on June 22, 2023, asserting three causes of action under the Song-Beverly Act.

Plaintiff now brings this motion to compel Honda to produce documents.

II. Legal Standard and Analysis

Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) The California Supreme Court teaches in *Greyhound* that the judge exercising discretion to limit discovery should construe disputed facts liberally in favor of discovery; reject objections such as hearsay that only apply at trial; permit fishing expeditions (within limits), avoid extending limitations on discovery, such as privileges; and, whenever possible, impose only partial limitations rather than denying discovery entirely. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385; *see also Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386.)

The party to whom a request for production of documents has been directed can make one of three responses: (1) a statement that the party will comply with the demand, (2) a representation that the party lacks the ability to comply, or (3) an objection. (Code Civ. Pro. §2031.210(a).) A party may move for an order compelling a further response to a document demand on the ground that (1) an objection is without merit or too general, (2) a statement of compliance with the demand is incomplete, or (3) a representation of inability to comply is inadequate, incomplete, or evasive. (Code Civ. Pro. §2031.210(a).) A party seeking to compel is required to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Pro. §2031.210(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) This burden may be satisfied by a fact-specific showing of relevance. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448.)

Plaintiff argues the documents it seeks regarding Honda's internal investigation and analysis of certain defects "similar to" those in the Vehicle are likely to lead to the discovery of admissible evidence regarding Honda's knowledge of the defect which, presumably, relates to the "willful" requirement for a civil penalty. With respect to willfulness, one court has opined that "[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision." (*Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186.) Some factors the court (or jury) may consider when making a willfulness determination include:

1. Whether the manufacturer knew the vehicle was a lemon (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);
2. Whether the manufacturer or its representative was provided with a reasonable period of time or reasonable number of attempts to repair the vehicle (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);
3. Whether the manufacturer knew the vehicle had not been repaired within a reasonable time or after a reasonable number of attempts (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);
4. The lengths the manufacturer or its representative went through to and diagnose and repair the vehicle's problems (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);

5. Whether the vehicle usually operated normally while in the shop for diagnosis and repair (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);
6. Whether the manufacturer had reasonable suspicions that the purchaser had tampered with the vehicle (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);
7. Whether the manufacturer had a written policy on the statutory requirement to repair or replace the vehicle (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136);
8. Whether the manufacturer knew the purchaser had requested replacement or restitution (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);
9. Whether the manufacturer actively discouraged the purchaser from requesting replacement or restitution (*Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52);
10. Whether the manufacture relied on reasonably available and germane information when deciding whether to offer to replace or pay restitution (*Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186);
11. Whether the purchaser made multiple unsuccessful requests for replacement or restitution (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072);
12. Whether the manufacturer's offer to pay restitution was a lowball offer or for an incorrect amount (*Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072).

A close study of the above categories reveals that the primary focus is on the vehicle at issue in a particular case—not sweeping discovery regarding other customers' complaints. Plaintiff's citation to *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 does not change this analysis. Neither of those cases directly addressed a trial court's discovery orders in a lemon law case. *Donlen* finds the trial court did not commit error when it denied the manufacturer's motion in limine to exclude evidence of other customer complaints about the same transmission model in plaintiff's vehicle at issue in that case. *Doppes* examined the trial court's granting of terminating sanctions against the manufacturer for its repeated failure to comply with the trial court's discovery orders. Neither opinion examines a trial court's need to weigh the amount at issue in any given case against the cost of expansive discovery sought, which this Court is called to do on a motion to compel. (Code Civ Proc § 2019.030(a)(2) ("The court shall restrict the frequency or

extent of use of a discovery method. . . if it determines. . . The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.").)

Here, Honda provided code compliant responses to Plaintiff's requests and produced documents in response to virtually all of Plaintiff's request. Honda only refused to produce documents in response to Request for Production 30, which requests "All DOCUMENTS, in the form of a list or compilation, of other Customer Complaints in YOUR electronically stored information of database(s) that are SUBSTANTIALLY SIMILAR to complaints made by Plaintiff with respect to the SUBJECT VEHICLE in other 2019 Honda Odyssey vehicles."

Plaintiff defines "SUBSTANTIALLY SIMILAR" to "mean similar customer complaint that would be the same nature of the reported system, malfunction, trouble code, Technical Service Bulletin Recommendation, dashboard indicator light, or other manifestation of repair problem, as description listed in any warranty summary or repair order for the SUBJECT VEHICLE." Plaintiff goes on to provide: [The customer complaints in this matter can be found in Defendant's warranty history/summary and within the line items of the repair orders created at Defendant's authorized repair facility. If YOU are having issues determining Plaintiff's Complaints, Plaintiff is willing to meet and confer and list out the specific complaints and the language used to describe them. This should not include any routine or scheduled maintenance items.]"

First, Honda's responses to Plaintiff's requests are code compliant. Honda stated what it would produce, then produced those documents.

Next, Plaintiff's request for customer complaints "substantially similar" to Plaintiff's complaint is not likely to lead to the discovery of admissible evidence. Plaintiff has failed to come forward with specific facts to justify this production. Plaintiff's definition of "substantially similar" is also grossly overbroad.

The Court is also deeply troubled by Plaintiff's failure to adequately meet and confer. Plaintiff emphasizes that Honda received two meet and confer letters. However, Plaintiff never once picked up the phone to engaged in a conversation as Honda requested. Such a conversation could have avoided this motion practice. Code of Civil Procedure section 2023.020 states: "the court *shall* impose a

monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute); *Ellis v. Toshiba Am. Info. Sys., Inc.* (2013) 218 Cal.App.4th 843, 879-880 (substantial monetary sanction appropriate for failure to cooperate in setting protocol for expert inspection as ordered).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.)

Honda does not seek sanctions for Plaintiff's discovery failures here. Thus, the Court will not impose sanctions. Plaintiff's motion to compel, however, is DENIED.

Calendar Line 9
Case Name: *Seung Song et al vs Tesla, Inc.*
Case No.: 23CV425258

Before the Court is Tesla, Inc.'s Motion to Compel Arbitration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a lemon law case. On March 24, 2023, Plaintiffs purchased a 2023 Tesla model 3 ("Vehicle"), which purchase was accompanied by express warranties. Plaintiffs allege the Vehicle "was delivered to Plaintiffs with serious defects and nonconformities to warranty and developed other serious defects and nonconformities to warranty including, but not limited to, exterior and body component defects, infotainment system defects, electrical defects, and other serous nonconformities to warranty." (Complaint, ¶ 18.)

At the time of purchase, Plaintiffs entered a Retail Installment Sale Contract ("RISC"). (Declaration of Raymond Kim, ¶ 3, Ex. 1.) The RISC contains the following arbitration provision:

ARBITRATION PROVISION

PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

1. **EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND USE DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.**
2. **IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE IN A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.**
3. **DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.**

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, any allegation of waiver of rights under this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, *purchase or condition of this Vehicle*, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) *shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action*. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Provision shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator only on an individual basis and not as a plaintiff in collective or representative action, or a class representative or member of a class on a class claim. The arbitrator may not preside over a consolidated, representative, class, collective, injunctive, or private attorney general action. You expressly waive any right you may have to arbitrate a consolidated, representative, class collective, injunctive, or private attorney general action. *You or we may choose the American Arbitration Association (www.adr.org) or National Arbitration and mediation (www.namadr.com) as the arbitration organization to conduct the arbitration. If you and we agree, you or we may choose a different arbitration organization.* You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the appliable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you reside

unless the Seller-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this transaction was originated where this transaction was originated. *We will pay the filing fee, administration, service or case management fee and the arbitrator hearing fee up to a maximum of $5,000, unless the law or the rules of the chosen arbitration organization require us to pay more. You will pay the filing, administration, service, or case management fee and the arbitrator or hearing fee over $5,000 in accordance with the rules and procedures of the chosen arbitration organization. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law.* Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Provision, then the provisions of this Arbitration Provision shall control. Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C §§ 1 et. eq.) and not by any state law concerning arbitration. Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act.

You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate any related or unrelated claims by filing any action in small claims court, or by using self-help remedies, such as repossession, or by filing an action to recover the vehicle, to recover a deficiency balance, or for individual or statutory public injunctive relief. Any court having jurisdiction may enter judgment on the arbitrator's

> award. This Arbitration Provision shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Provision, other than waivers of class rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. You agree that you expressly waive any right you may have for a claim or dispute to be resolved on a class basis in court or in arbitration. If a court or arbitrator finds that this class arbitration waiver is unenforceable for any reason with respect toa claim or dispute in which class allegations have been made, the rest of this Arbitration Provision shall also be unenforceable.

(Kim Decl., Ex. 1 (italics and underlining added).)

Plaintiffs do not dispute that they entered the RISC containing this arbitration provision. Plaintiffs claim this provision is unconscionable and void against public policy because it "forces Plaintiffs to arbitrate under the rules of the American Arbitration Association ('AAA')" and "AAA Rule 22 does not expressly allow for depositions or even written discovery." (Opp. at 1.) Plaintiffs further argue that even if the Court does send this case to arbitration, it should send the case to JAMS. (*Id.*)

II. Legal Standard and Analysis

In a motion to compel arbitration, the Court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272*,* 1283 (citations omitted).) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Bruni,* 160 Cal. App. 4th at 1282 (citations omitted).)

Even if the Court finds the Parties agreed to arbitrate these claims, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The

prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.)

The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.)

Although the RISC is a form contract, Tesla argues it is not procedurally unconscionable because there is no evidence Plaintiffs and Tesla had unequal bargaining power or that Plaintiffs were not permitted to make changes to the arbitration provision. Tesla further argues Plaintiffs did not have to purchase the Vehicle and could have gone elsewhere to purchase a vehicle that did not require arbitration of any future disputes. Tesla is correct that there is no evidence in this record that Plaintiffs sought and were denied the opportunity to negotiate the RISC terms. Tesla is also correct that there are numerous California cases enforcing arbitration agreements between large companies and consumers, including car manufacturers. The provision is also in bold and called out in its own boxed section in the RISC; it is worded clearly and emphasizes the rights the consumer is relinquishing upon signing the agreement. Thus, despite the fact that it would appear self-evident that a company the size of Tesla and a consumer have unequal bargaining power, the weight of authority in California is that the facts here do not constitute procedural unconscionability.

While this should end the inquiry, and the Court does not agree that not permitting extensive discovery for either party in the arbitration constitutes substantive unconscionability, there are certain concerning aspects of this arbitration provision. First, Plaintiffs are correct that the trend of large companies contracting with arbitration providers at the very least creates the appearance that the

arbitration provider is not neutral. And, while there is no evidence in this record that Tesla has an agreement with either the AAA or National Arbitration and Mediation, it is understandable for a consumer to wonder what impact designating specific organizations in a form contract used to sell millions of products has on those arbitration providers. If such providers engage neutrals who routinely find for consumers, will that organization continue to be so designated? Plaintiffs provide no evidence on this issue.

Also concerning is the provision that Tesla will only pay up to $5,000 and the consumer is obligated to pay any amount above that. It cannot be disputed that companies like Tesla have greater resources than consumers like Plaintiffs. This provision could impede a consumer's ability to bring a claim. Court is free. Arbitration is not. Telsa drafted this provision requiring arbitration of all claims at the parties' election. Plaintiffs did not. Further making this provision suspect is the one sided term that permits Tesla to recover its expenses if an arbitrator finds a consumer's claim frivolous and does not provide the same protection for consumers.

While the Court finds the weight of California law requires the Court to stay this case and send it to arbitration in AAA (not JAMS which is not an option in the agreement), the Court finds this bolded, bracketed language should be stricken from the arbitration provision:

> We will pay the filing fee, administration, service or case management fee and the arbitrator hearing fee [**up to a maximum of $5,000, unless the law or the rules of the chosen arbitration organization require us to pay more. You will pay the filing, administration, service, or case management fee and the arbitrator or hearing fee over $5,000 in accordance with the rules and procedures of the chosen arbitration organization. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law**].

This provision unfairly favors Tesla, but can be stricken without impacting the balance of the arbitration provision.

Accordingly, this case is ordered to arbitration in the AAA and stayed pending completion of that arbitration. The April 16, 2024 Case Management Conference is VACATED. A status conference regarding the arbitration is set for August 1, 2024 at 10 a.m. in Department 6.