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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SZ HUA HUANG, Individually and as successor in interest to WEI LUN HUANG, deceased; TRINITY HUANG, a minor; TRISTAN HUANG, a minor; HSI KENG HUANG; and CHING FEN HUANG, Plaintiff, vs. TESLA, INC. dba TESLA MOTORS INC. THE STATE OF CALIFORNIA, and DOES 1 through 100, Defendants.	Case No. 19CV346663 DEFENDANT TESLA, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL RE TESLA INC.'S SUPPLEMENTAL RESPONSES TO WRITTEN DISCOVERY; MOTION FOR THE DEPOSITION OF ELON MUSK; AND MOTION FOR SANCTIONS Date: April 27, 2023 Time: 9:00 a.m. Dept. 6 Assigned for all purposes to: Hon. Evette Pennypacker; Dept. 6

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I. INTRODUCTION

After years of discovery and preparation, the trial of this case is finally in sight. The underlying facts are clear: Mr. Huang crashed his vehicle because he was playing a video game instead of driving his car. Plaintiffs contend it was perfectly appropriate for him to play a video game while he was behind the wheel because the subject 2017 Tesla Model X was equipped with a driver assistance feature called Autopilot. They make this contention despite the many clear warnings that explain drivers must maintain control and responsibility for their vehicles when Autopilot is engaged, that they must keep their eyes on the road and their hands on the wheel. Mr. Huang, of course, did neither.

Faced with these difficult facts, Plaintiffs seek, through their Motion, to avoid them entirely. They ask the Court to issue an extreme sanction that would deem the Consumer Expectations Test (CET) applicable to this case, despite the Court having already acknowledged it might not apply (Tesla contends it does not) and further deem there is a defect under that test. Their hook for this ambitious strategy is Tesla's inability to admit or deny the authenticity of certain recordings that appear to show its CEO, Elon Musk, making various statements about either Autopilot's abilities or aspirations for the continued development of advanced driver assistance systems. The relationship of the statements in the recordings to this case is unclear because none of them say, or even suggest, that it is appropriate to play video game while driving.

Regardless, as will be shown, Tesla's responses were truthful, complete, and in compliance with the Court's prior discovery order and the Civil Discovery Act. Plaintiffs' Motion should be denied.

A. Overview of the Contents of Plaintiffs' Motion

Plaintiffs' Motion challenges Tesla's responses and supplemental responses to 119 different discovery requests. (See Plaintiffs' eight Separate Statements in Support of Motion to Compel.) Many of Plaintiffs' challenges are simply one-sentence, conclusory statements. However, all of the 119 different discovery challenges are offered, explicitly or implicitly, in support of Plaintiffs' request for the following forms of extreme, unwarranted relief: (1) an issue sanction that would have this Court order that the consumer expectations test (CET) is applicable in this dispute (ignoring the Court's recent statement in its February 24, 2023, Order that the Court would have to contend with that question at a later, appropriate time) **and** that the Model X's Autopilot

feature is defective under the CET; (2) an order deeming Plaintiffs' Requests for Admission admitted; and (3) an order compelling the "apex" deposition of Tesla's CEO, Elon Musk.

Again, this is a massive overreach. Before addressing why Plaintiffs are not entitled to any of these remedies, it is important for the Court to recognize that, while Plaintiffs throw many arguments at the wall, they fall into two categories: (1) those that arise directly from the Court's February Order and concern alleged violations of that Order, and (2) those that are ancillary to the Order. Plaintiffs' blanket, conclusory arguments reflect a deliberate attempt to blur this critical distinction.

The latter category concerns arguments Plaintiffs make in regard to responses and objections Tesla provided either in response to interrogatories and corresponding requests for production that were served before the Court's February Order and that were not even arguably addressed by that Order, or requests for admission and corresponding special interrogatories served under color of permission granted by that Order, but are not actually within the limited scope of the additional discovery requests permitted by that Order[1]. None of these responses have previously been before the Court, meaning they cannot have violated the Court's Order and could not form the basis of sanctions, even if they were somehow improper (they are not). *See* Cal. Code Civ. Proc. § 2033.290(e); 2033.300(e).

Plaintiffs' efforts to obfuscate the ancillary nature of these arguments, the fact that the majority of Plaintiffs' Motion concerns the issues addressed by the February Order, and the fact that a violation of that Order is the prerequisite for even the theoretical ability to obtain the relief sought, makes it clear that the entirety of the Motion is intended to convince the Court that its Order has been violated. Again, if you throw enough mud on the wall maybe the Court will see a muddy wall. But that is not the case.

For this reason, and in consideration of the Court's Rules concerning page limits, this Opposition will respond to the arguments arising directly from the Order in greater detail than the ancillary ones, whereas the ancillary ones will be addressed in the separate statements concerning those requests.

For ease of reference, the following summarizes the various sets of discovery responses that Plaintiffs challenge, with reference to their relationship (or lack thereof) to the Court's Order:

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[1] The Court's Order recognized discovery is closed and the Court expressly refused to reopen discovery.

Supplemental Responses Ordered by the Court:

a) Supplemental Responses to Requests for Admission (RFA), Set 2, Nos. 16-31, 37-52 related to purported Elon Musk statements identified in the Order.

b) Supplemental Responses to Special Interrogatories (SROG), Set 3, Nos. 46-48 related to factual support for a purported Elon Musk statement to CBS reporter Gayle King.

c) Supplemental Responses to Request for Production (RFP), Set 6, No. 214 related to documents supporting a purported Elon Musk statement to CBS reporter Gayle King.

d) Form Interrogatory (FROG) No. 17.1 concerning the above-described RFAs.

Responses to Requests Served After the Court's Order:

e) Responses to RFA Set 3, Nos. 53-70. Concerning RFAs that are inside and outside of the scope of the Court's Order permitting limited additional discovery requests concerning alleged quotes from Mr. Musk that were quoted in the Order.

f) Responses to RFAs as to Genuineness of Documents, Set 3, Nos. 1-7. Containing RFAs that are inside and outside of the scope of the Court's Order permitting limited additional discovery requests concerning alleged quotes from Mr. Musk that were quoted in the Order.

g) Responses to SROG Set 5, Nos. 72-105. Containing SROGs that are inside and outside of the scope of the Court's Order permitting limited additional discovery requests concerning alleged quotes from Mr. Musk that were quoted in the Order.

Responses to Requests Served Before the Court's Order that are Entirely Unrelated to Alleged Statements by Elon Musk:

h) Responses to SROG Set 4, Nos. 49-69

i) Responses to RFP Set 7, Nos. 216-229

Out of the 119 discovery requests at issue, only the 31 RFAs challenged from Set 2, three SROGs (Nos. 46-48) from set 3, one FROG, and one RFP (No. 214) were actually subject to a prior Court order compelling further responses. All of the remaining complaints that Plaintiffs have, regardless of merit, cannot support their request for issue sanctions.

B. Overview of Tesla's Position

Plaintiffs' Motion should be denied for two overarching reasons. First, there is nothing wrong with Tesla's discovery responses. The responses are truthful, complete, and comply with this Court's February Order specifically and with the Code more generally. Second, even if Tesla's responses were somehow improper and they are not, the requested relief is prohibited by governing authority.

A close look at Plaintiffs' requested relief reveals their true motivation. They have manufactured this dispute in an effort to accomplish what the evidence will not allow: a determination that the CET applies in this

complex automotive design defect case and then relief from their burden of actually proving a defect under that test. But Tesla did not violate the Court's Order, and the requested sanction would be impermissible even if it had.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Activity Preceding the Court's February Order

As the Court will recall, this dispute relates to Tesla's responses to RFAs that seek to establish the authenticity of a number of statements allegedly made by Elon Musk in various speeches and interviews over a period of nearly ten years. (See Order pp. 3-4.) Tesla initially responded to the Requests at issue by stating that after, a reasonable inquiry, it could not admit or deny them. (Declaration of Lauren O. Miller ¶ 3.)

While at first glance it might seem unusual that Tesla could not admit or deny the authenticity of video and audio recordings purportedly containing statements by Mr. Musk, the reality is he, like many public figures, is the subject of many "deepfake" videos and audio recordings that purport to show him saying and doing things he never actually said or did. (Miller Decl. ¶ 5.) In fact, a Google search of the phrase "Elon Musk deepfake generator" immediately brings up websites that explain to people how they can create Elon Musk deepfake videos. (Miller Decl. ¶ 5.) The internet contains examples of these deepfakes. Some are obviously fake, such as one that Mr. Musk shared on his Twitter account, in a joking fashion, that purported to show him, and other public figures, having a conversation concerning their alleged moonlighting gigs as nude models. (Miller Decl. ¶ 6.)[2] This one was clearly a joke. Others, however, are not so obvious. For instance, a purported TED Talk conversation appeared to show Mr. Musk discussing crypto-currency investments—*a conversation that did not happen*—yet, it and others like it are freely available online and are nowhere near as easily identified as those made in jest.[3] (Miller Decl. ¶ 7.) Thus, the existence of an apparent recording does not by itself actually establish the reality or authenticity of its contents. And, if entire interviews can be faked, so, too, can portions—even certain words or phrases.

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[2] Warning: this video contains some very off-color language of a sexual nature.

[3] While not the cited deepfake video, it should be noted that some of the purported statements from Mr. Musk that are at issue allegedly were made in a TED Talk.

Plaintiffs moved to compel further responses to these RFAs (along with corresponding FROGs, SROGs and a RFP that sought additional information regarding the bases for the content of a select few of the alleged statements in the recording). (Miller Decl. ¶ 3.) Separately, Plaintiffs noticed Mr. Musk's deposition and, as this Court knows, Tesla filed a motion for protective order regarding the deposition. (Miller Decl. ¶ 4.) The Court held a hearing on both motions and then issued an Order that granted both parties' motions, overruled Tesla's objections (while expressly noting that it was not deciding at that time whether the CET applied, which had been the basis of the objections), and ordered Tesla to provide supplemental responses that required Tesla to conduct further inquiry into whether the RFAs could be admitted or denied. (Miller Decl. ¶ 8.)

The Order also permitted Plaintiffs to serve additional but "*limited*" (emphasis in original) discovery requests—specifically RFAs and corresponding SROGs—about statements purportedly made by Mr. Musk that had been previously identified by Plaintiffs (and that were quoted in the Order) about which Plaintiffs had not yet served discovery requests.[4] *See* Order at pp. 3-4 and 10. The Order explained that Mr. Musk's deposition was not permissible at that time, but suggested it could become so if he was not consulted as a part of the further inquiry required by the Order. *Id.* at p. 9.

B. Tesla's Actions After the Court's February Order

Tesla heard the Court loud and clear. It provided the language of the purported statements to Mr. Musk and provided him with copies of the recordings Plaintiffs had produced. (Declaration of Ryan McCarthy ¶ 3.) In response, Mr. Musk confirmed that he did not independently record the discussions or maintain a copy of the original recordings, did not take notes, and cannot specifically recall the details about the discussions or statements (all of which Tesla explained in its new responses). (McCarthy Decl. ¶ 4.) Therefore, even after

[4] This was limited only to statements purported to have been made by Mr. Musk, not by Tesla. This is an important distinction because several of the post-Order requests Plaintiffs now challenge concerned statements Plaintiffs do not attribute to Mr. Musk. As such, Tesla objected to those requests because they exceeded the Court's Order. Thus, the requests were improper in the first instance, and it is especially improper for Plaintiffs to now seek sanctions over them when the responses cannot even arguably be violative of the Court's Order. And there is simply no excuse for Plaintiffs' attempt to obfuscate this distinction by burying these amongst the hundreds of other responses they challenge. *See* RFA, Set 3, Nos. 61-68, SPROG, Set 5, Nos. 84-86; Plaintiffs' Motion pp. 9:9-15.

consulting directly with Mr. Musk, Tesla remains unable to admit or deny whether the recordings are authentic. This is not surprising considering Tesla did not generate the content, does not have a copy of the original, and given the age of the statements. It is unrealistic to expect anyone to have total recall of everything they might have said, and all the more so for someone like Mr. Musk who regularly discusses matters about the various large companies with which he is involved along with his many other, non-business interests. However, Tesla also stated in its post-Order responses that "while [it] does not expect the file has been altered or manipulated, it cannot authenticate a non-Tesla document that it cannot independently validate." (See Miller Decl. ¶ 9; Tesla's Responses to RFA 3, and Supp. Responses to RFA 2). Plaintiffs' accusations notwithstanding, there is no gamesmanship here. Instead, neither Tesla nor Mr. Musk have the detailed knowledge or recollection of what was said that is necessary to truthfully admit or deny authenticity.

Additionally, though Plaintiffs make no mention of it, before Tesla provided its post-Order responses, it requested detailed information about the origins of the recordings from Plaintiffs, as permitted by C.C.P. § 2033.060(g,) because such information might be helpful in determining whether they are authentic. (See Miller Decl. ¶ 11; Exhibit E.) Plaintiffs ignored Tesla's request. (Miller Decl. ¶ 11.) Plaintiffs' refusal to provide this information suggests the effort to obtain the requested sanction is their real motivation.

It should also be noted that there has been no showing by Plaintiffs that they tried and failed to obtain original or authenticated copies of the recordings from the source of the recordings, or tried and failed to obtain testimony from other percipient witnesses to the alleged comments. While Plaintiffs presumably prefer the cheaper and easier means of authentication—downloading what they found on the web and asking Tesla to figure out if it is legitimate or not—that is not the only way to obtain discovery. For instance, in this case Plaintiffs found a YouTube video of a Tesla owner attempting to replicate Mr. Huang's crash; they found the owner, subpoenaed him, and deposed him. (Miller Decl. ¶ 13.) They wanted that evidence and they did the leg work to get it. Now, they want Tesla to either admit the accuracy of statements Tesla and Mr. Musk cannot say are accurate, or hire some internet deepfake expert to analyze the content to try to figure out if it has been altered, or just have the Court deem them admitted notwithstanding that Tesla complied with its obligations under the Code.

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In sum, Tesla made further reasonable and good faith efforts to attempt to authenticate the recordings, including the precise action (consulting Mr. Musk) contemplated by the Court's Order. Despite these efforts, it remains unable to admit or deny the requests.

III. ARGUMENT

A. Tesla Complied with the Court's February Order and the Code

1. Requests for Admission[5]

First, Plaintiffs argue that Tesla did not provide "meaningful responses" to the challenged RFAs; they do not define "meaningful," and instead simply assert that Tesla's responses violate the Court's February Order. They then misrepresent Tesla's responses, asserting that Tesla merely "refuse[d] to admit the requests on grounds that the Court has already rejected, e.g. Tesla does not have the original recording; it does not have chain of custody knowledge; and Mr. Musk did not keep notes about his interviews." Plaintiffs' Motion at p. 4.

Cal. Code Civ. Proc. § 2033.220(c) provides, "If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter." However, "[e]ach answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits." Cal. Code Civ. Proc.§ 2033.220(a).

During the hearing that preceded the Court's February Order and in the Order itself, the Court indicated that a reasonable inquiry seemed to require Tesla to consult with Mr. Musk about the purported recordings. *See* Order at p. 9 and Hearing Transcript at p. 13. Tesla did precisely that, and more. (McCarthy Decl. ¶¶ 3-4.) Despite doing so, it remains unable to admit or deny the authenticity of the purported recordings. Plaintiffs ignore the very legitimate concern about deepfakes (though Tesla raised it in its response to their initial motion), and instead accuse Tesla of gamesmanship.

Essentially, through their Motion, Plaintiffs are asking the Court to issue an extreme and unwarranted sanction against Tesla *for <u>not</u> committing perjury*. Having conducted a reasonable inquiry that involved Mr.

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[5] This Section responds to Section III(A) of Plaintiffs' Motion, excepting RFA, Set 3, Nos. 61-68.

Musk and knowing the risk of deepfakes, Tesla provided truthful answers: the authenticity of the purported recordings cannot be admitted or denied. (McCarthy Decl. ¶¶ 3-4; Miller Decl. ¶ 5.) But Plaintiffs then go one step further to attack Tesla for responding that it "does not expect the file has been altered or manipulated." *See* Plaintiffs' Motion at p. 4. Though it was not strictly required to do so, Tesla provided that information because it was consistent with the spirit of § 2033.220(a)'s requirement that responses be "as complete and straightforward as the information reasonably available to the responding party permits."[6]

Plaintiffs also complain about "deny as phrased" and "deny as worded" responses to Requests 60, 64, 65 (Motion p. 5).[7] These complaints are unfounded for both factual and legal reasons. First, the Requests selectively quote the purported recordings so as to omit important context. (Miller Decl. ¶ 12.) Second, the responses are compliant with the Code's requirement that denials of all or part of a request be unequivocal. See *Smith v. Circle P Ranch Co., Inc.* (1978) 87 Cal.App.3d 267, 275 (explaining that the language, "As framed, denied" is a sworn denial under the Code."); see also *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist. of Southern Calif.* (2005) 126 Cal.App.4th 247, 268 ("It has been said that a denial of all or portion of the request must be unequivocal."). Tesla's responses are truthful and indeed were necessary because the requests at issue were about verbatim quotes, and Tesla's inquiry determined that the purportedly quoted language was **inaccurate**. (Miller Decl. ¶ 12.) It is especially unfair for Plaintiffs to accuse Tesla of wrongdoing when they could not be bothered even to accurately quote the statement for which they seek authenticity.

The responses and supplemental responses discussed in Section of III(A) of Plaintiffs' Motion do comply with the Court's February Order, comply with the response form required by the Code, are truthful, and actually assist Plaintiffs with their stated goal of establishing authenticity. Nothing sanctionable has occurred. Plaintiffs' Motion should be denied.

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[6] The statement, while not sufficient to establish authenticity, can be used by Plaintiffs in support of an argument for authenticity if there ever is need for one.

[7] These were served after the Court's Order.

2. Special Interrogatories and Requests for Production 8

Plaintiffs next attack Tesla's responses and supplemental responses to the requests that seek "to determine whether and what facts, if any, Tesla has in its possession, custody or control to back up" (*See* Court's February Order at p. 9) the statements Mr. Musk allegedly made in the various purported recordings that are the subject of the above-discussed RFAs.

Tesla supplemented its responses to SROGs 46-48 and RFP 214 as required by this Court's Order. These supplements provide extensive information, including references to documents, that provide substantial additional support for the general thrust of the statements purportedly made by Mr. Musk in the statements at issue.[9] (See Miller Decl. ¶ 10.)

Plaintiffs, however, argue that these responses violate the Court's Order because they are not strictly limited to Tesla or Autopilot. (Plaintiffs' Motion at pp. 7-8.) But Plaintiffs do not even attempt to explain why statements about the benefits of advanced driver assistance systems from people and organizations that have studied them do not apply to Tesla. Moreover, it is absurd for Plaintiffs to argue that Tesla should be sanctioned for providing information in response to SROGs that is consistent with, and supportive of, the statements referenced in the interrogatories when Tesla possesses knowledge of facts referenced in those statements. In other words, they want Tesla sanctioned for answering the question. Plaintiffs' unhappiness with these facts is not a basis for sanctions.[10]

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[8] This Section responds to Sections III(B) and (C) of Plaintiffs' Motion, excepting those that ancillary, SPROG, Set 4, Nos. 49-51, 64-69, RFP, Set 7, Nos. 216-229, SPROG, Set 5, Nos. 84-86.

[9] This includes statements from NHTSA, the federal regulator, and the former Secretary of the U.S. Department of Transportation that are consistent with Mr. Musk's aspirational statements, as well several studies from multiple organizations that research and collect data on highway safety that show a substantial positive effect in regard to crash reduction that is associated with ADAS systems, including Autopilot. Plaintiffs argue that Tesla somehow committed discovery abuse because it also provided this information in response to other, new requests. This argument is meritless because the information was also responsive to those requests.

[10] There is another fundamental contradiction in Plaintiffs' Motion that cannot be overlooked. All of the information they assert they are entitled to but have not received is relevant only if the risk-utility test applies. It is very telling—indeed it gives the game away—that they argue they are entitled to a sanction that applies the consumer expectations test (and finds a defect under it) because they have not received information that has nothing to do with that test. If they are right that Mr. Musk's purported statements are relevant to the CET, then it does not matter what the statements were based on. This, along with the fact that they apparently have not sought to authenticate the recordings through other means known to them about the recordings' origins, suggests Plaintiffs know the consumer expectations test does not apply and that they could not establish a defect under it by way of these purported statements even if it did.

B. The Requested Relief is Prohibited by Governing Authority

Although the Court's Order has not been violated, it is important to recognize that Plaintiffs' requested relief would be prohibited even if Tesla had violated the Order.

1. There is No Basis for Modifying the Court's Order Prohibiting Mr. Musk's Deposition

Through its Order, the Court prohibited Mr. Musk's deposition but suggested it might become appropriate on the limited question of the authenticity of the statements, and the basis for them, if less intrusive methods of supplemental discovery did not adequately address those questions. *See* Court's Order at pp. 9-10. As explained above, Tesla's post-Order discovery responses *do* answer both questions. Given these responses, and under the legal authority presented in this Court's February Order, there is no reason to compel Mr. Musk to re-state in a deposition what Tesla has already said, which incorporated input from Mr. Musk and thus reflects what he *would* say were he deposed. Plaintiffs' Motion to Compel Mr. Musk's deposition should therefore be denied.

2. The Requested Relief Regarding Tesla's RFA Responses is Not Permitted by the California Code of Civil Procedure

i. Deeming RFAs Admitted is an Improper Sanction Request

When a requesting party does not agree it was appropriate for a responding party to give a response that was not an unequivocal admission, the remedy (if one is appropriate) is an order that, after trial, they be awarded the costs incurred in proving the matter at trial. C.C.P. § 2033.420. A party cannot be compelled to admit an RFA on the ground that the matter is claimed to be obviously true, even if it is obviously true. "In the event, however, that the defendant denies a request for admission submitted by the plaintiff, he cannot be forced to admit the fact prior to trial despite its obvious truth." *Smith v. Circle P Ranch* (1978) 87 Cal.App.3d 267, 273 (citing *Holguin v. Superior Court* (1972) 22 Cal.App.3d 812, 820). The sole basis for an order deeming an RFA to be admitted is violation of an order compelling further response. CCP § 2033.290(e). A "deeming" order is unavailable here, however, because Tesla did not violate the order compelling further response.

Thus, the only theoretically available remedy is a monetary sanction *after* trial *if* the statements are found to be authentic at trial. But even this theoretical availability will not be available here under the facts here because, not only did Tesla not violate the Order, but, at minimum, Tesla "has good reason for the failure to

admit." See CCP § 2033.420(b)(4). Tesla cannot admit the genuineness of recordings that it does not possess, that were furnished by a third party from some other third party, and that Tesla does not affirmatively know to be genuine after reasonable inquiry that, among other things, involved consultation with Mr. Musk (see McCarthy Decl. ¶¶ 3-4), simply because Tesla also does not have reason to believe they have been altered. Thus, the practical effect of a monetary sanction would be to punish Tesla for telling the truth in its responses.

ii. Issue Sanctions Are Not Available for RFA Responses

A response to an RFA, a failure to respond to an RFA, or a failure to comply with an order compelling further response to an RFA *cannot*, under any circumstance, be the basis for an issue sanction. Substantive (as opposed to monetary) sanctions for discovery misuse are permitted only to the extent authorized by the chapter governing any particular discovery method or any other provision of the Civil Discovery Act. CCP § 2023.030. While the statutes governing other discovery procedures clearly authorize evidence, issue, and terminating sanctions, the chapter governing RFAs just as clearly does not. see CCP §§ 2033.010-2033.420.

Plaintiffs do not seem to disagree, but by blurring the lines of their arguments and sanction requests, they improperly attempt to use *all* of Tesla's responses, including RFA responses, as fodder for their sanctions request. The Court should not consider the RFA responses in ruling on Plaintiffs' issue sanction request.

3. The Requested Issue Sanction Would Violate Both the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and California Law

"Constitutional Due Process imposes limitations on the power of courts, even in aid of their own valid processes, to order discovery sanctions that deprive a party of his opportunity for a hearing on the merits of his claims." *Newland v. Superior Court* (1995), 40 Cal.App.4th 608, 614 (internal quotations omitted). As the Second District Court of Appeal has explained, in a case that analyzed a host of U.S. Supreme Court decisions, sanctions can be permissible when the failure to comply amounts to an admission that the party's case lacks merit, but such sanctions violate Due Process when they are issued as a punishment. *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 64-65 (discussing *Hammond Packing Co. v. Arkansas* (1909) 212 U.S. 322, 29 S.Ct. 370).

"Following [Supreme Court authority], California courts have held that the sanctions a court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the

discovery but to impose punishment." *Id.* at 64 (internal quotations omitted). "[T]he sanction chosen should not provide a windfall to the other party, by putting the prevailing party in a better position than if he or she had obtained the discovery sought and it had been favorable." *Rutledge v. Hewlett-Packard Co.* (2015), 238 Cal.App.4th 1164, 1193.

The sanction Plaintiffs seek—application of the CET along with a finding that a defect is present under that test—would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and California law because it would punish Tesla by imposing a test of liability that the Court has already acknowledged very well may not apply in this case (Tesla contends it does not) and a finding that Autopilot is defective pursuant to that test.[11] *See* Court's Order at p. 8. Additionally, the Court has also already acknowledged that the discovery at issue—whether Mr. Musk made these statements and, if so, identification of their bases—might not even be relevant to the consumer expectations test (indeed, it would seem they are not). *Id.* at p. 7. Thus, the sanction is not fairly tethered to nor flows from the discovery at issue.

Under these circumstances, application of the CET as a sanction would serve only to punish Tesla. This sanction, if it was imposed, would, at a minimum, risk imposing the wrong liability test despite controlling legal authority requiring a case-by-case determination about the appropriate liability test to be applied. *See Soule*, 8 Cal.4th at 568. This alone would be punitive, and thereby violate Due Process. Plaintiffs go farther, however, requesting a sanction that applies the CET *and* finds the subject vehicle to be defective under that test. Clearly, such a sanction would punish Tesla.

Moreover, the requested sanction would have no relationship to the requested discovery because the CET because does not contemplate public statements, no matter how prominent the speaker, as relevant to what customers actually expect. *See Soule*, 8 Cal.4th at 567 ("As we have seen, the consumer expectations test is

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[11] Tesla is mindful of the Court's admonition that a discovery dispute is not the proper forum for the determination of which test of liability applies to any given design defect case. Tesla simply notes that, as the Court has recognized, *Soule v. General Motors Corp.* (1994), 8 Cal.4th 548, provides an in-depth discussion of the circumstances when the consumer expectations test should be found to apply and those where the risk-benefit test applies.

reserved for cases in which *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of its design*." (emphasis in original)).

There can be no question a sanction that has the effect of determining the CET applies (when *Soule* and its line of case make clear the test does not) and then finds a defect under that test would punish Tesla. Clearly it would leave Plaintiffs far better off than if they had received favorable answers to the requested discovery because Mr. Musk's public statements, even assuming they are authentic, simply have nothing to do with the CET. This only underscores the punitive nature of the requested sanction.

As such, Plaintiffs' requested sanction would violate the Due Process Clause of the 14th Amendment to the United States Constitution and California law.

IV. CONCLUSION

Tesla did not violate the Court's Order. It has complied with its discovery obligations in regard to that Order and more generally. Despite this, Plaintiffs have sought to put Tesla's discovery responses on trial in hopes of obtaining a sanction that would be impermissible even if there had been discovery misconduct. But the Court should not be misled. Plaintiffs' Motion should be denied in full.

Dated: April 20, 2023

BOWMAN AND BROOKE LLP

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Sz Hua Huang, et al. v. Tesla, Inc., et al.
Case No. 19CV346663

PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in San Jose, California at 1741 Technology Drive, Suite 200, San Jose, California 95110-1355.

On the date indicated below, I served the foregoing documents DEFENDANT TESLA, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL RE TESLA INC.'S SUPPLEMENTAL RESPONSES TO WRITTEN DISCOVERY; MOTION FOR THE DEPOSITION OF ELON MUSK; AND MOTION FOR SANCTIONS on all interested parties, or through their attorneys of record, in the manner noted, addressed as follows:

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___ VIA FIRST CLASS MAIL. I caused such envelope to be deposited in the mail at San Jose, California, in a sealed envelope with postage fully prepaid thereof. I am readily familiar with the firms business practice for

collection and processing of correspondence for mailing with the United States Postal Service. The mail is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

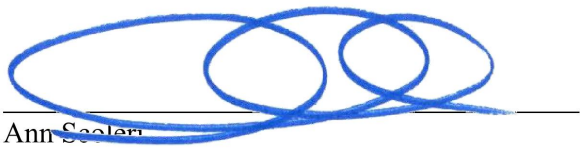
___ VIA OVERNIGHT DELIVERY SERVICE. The documents were enveloped, properly labeled, and caused to be deposited into an overnight delivery (Federal Express, United Parcel Service, etc.) receptacle or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or a package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the case and served on that person; otherwise, at that person's place of residence.

_X__ BY ELECTRONIC SERVICE. The document was served electronically and the transmission was reported as complete and without error. The document was served on the above parties in this action by causing a true copy of said document to be transmitted by email pursuant to Emergency Rule 12 of Appendix I of the California Rules of Court.

__ VIA FACSIMILE TRANSMISSION. The document was served on the above party in this action by causing a true copy of said document to be transmitted by facsimile to the number listed adjacent to the name on this Proof of Service. The transmission was reported as complete and without error.

____ VIA PERSONAL SERVICE. I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 20, 2023, at San Jose, California.



Ann Sooleri