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: APRIL 27, 2023 TIME: 9:00 A.M.

TO REQUEST 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

If you do not notify the other side and/or the Court, the Court will not hear oral argument and will adopt the tentative. (California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

IN PERSON HEARINGS: The Court strongly prefers in person appearances for contested law and motion matters. We are open and look forward to seeing you in person again.

VIRTUAL HEARINGS: Whenever possible, please use video when appearing for your hearing virtually through Microsoft Teams. To attend virtually, 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

TO HAVE YOUR HEARING REPORTED: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here: https://www.scscourt.org/general_info/court_reporters.shtml

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV368784	The National Collection Agency Inc vs RICK PROVENZANO BUILDERS, INC.	Parties are ordered to appear for the hearing on order of examination.
LINE 2	22CV404254	Antonio Reza vs Santa Clara University et al	Defendants' special motion to strike the Complaint is GRANTED. Please scroll down to Line 2 for full tentative opinion. Court to prepare formal order.
LINE 3	22CV406803	Strike Cupertino VFP, LLC, l vs Vallco Property Owner, LLC	Defendant's Demurrer to the First Cause of Action for Specific Performance is OVERRULED. Please scroll down to Line 3 for full tentative opinion. Court to prepare formal order.
LINE 4	19CV346663	Sz Huang et al vs Tesla Inc. et al	Plaintiffs' Motion to Compel Written Discovery, Elon Musk's Deposition and for Sanctions is GRANTED, IN PART. Please scroll down to Line 4 for full tentative opinion. Court to prepare formal order.
LINE 5	19CV346663	Sz Huang et al vs Tesla Inc. et al	The Court has no Opposition to Plaintiffs' Motion to Compel Person Most Qualified Deposition. It also does not appear to the Court that as of the time the motion was filed the Parties had completed their meet and confer. Accordingly, the Court requests that the Parties appear at the hearing to provide an update regarding this Motion to Compel.

Calendar Lines 4 and 5
Case Name: *Sz Huang et al v. Tesla, Inc. et. al.*
Case No.: 19CV346663

Before the Court is Plaintiffs' Motion to Compel Further Responses to Requests for Admission (set 2 and 3), Request for Admission as to Genuineness of Documents (Set 3), Form Interrogatory No. 71.1, Special Interrogatories (Set 3, 4 and 5), Request for Production (Set 5 and 6), the Deposition of Elon Musk and for Sanctions. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows:

I. Factual Background

This is a product liability action. Plaintiffs are the wife and children of Walter Huang who suffered a fatal crash while driving his Tesla Model X in 2018. Mr. Huang added Autopilot when he purchased his Tesla, but he did not purchase the "Full Driving Capability Package." According to Tesla, Autopilot provides numerous warnings and instructions to its users, both in the manual and in the car while the Tesla is in use, making clear that drivers need to keep their hands on the wheel and "be prepared to take over at any time" even while Autopilot is engaged. Tesla also argues that consumers are made aware of Autopilot's limitations in areas where, for example, the lanes are unclear, the light is low or the Tesla's cameras are obstructed in some way.

Mr. Huang's crash occurred on March 23, 2018, approximately four months after he purchased his Tesla Model X. He was driving his regular morning route when he approached the junction of 101 South and State Route 85 where a high-occupancy vehicle (HOV) lane splits off southbound 101 to the left to go up a ramp. A concrete median eventually begins in the middle of the two lanes, which middle is called a "gore." Mr. Huang apparently had experienced the Tesla veering towards this gore in his morning route, and complained of this to others, including his wife. On the morning of March 23, 2018, Mr. Huang's Tesla Model X veered toward the gore point, crashing into the median. Mr. Huang was pronounced dead at the scene.

According to Tesla, Mr. Huang's hands were not detected on the wheel multiple times during the 19 minutes leading up to the crash, Autopilot issued two visual and one audible alert for hands-off driving, Mr. Huang's hands were not on the wheel for the final six seconds before the crash, and Mr. Huang was playing the video game Three Kingdoms on his phone at the time of the crash.

Relevant to this motion, Plaintiffs claim Mr. Musk made the following public statements concerning Autopilot:

> In June 2014: "I'm confident that—in less than a year—you'll be able to go from onramp to highway exit without touching any controls."
>
> In October 2014: "But what [Tesla is] doing is. . .incorporating a lot of active safety features so that the car will stay in its lane, will automatically brake, will maintain a distance to other cars, will avoid like highway barriers and other obstacles."

In March 2015: Mr. Musk announced Tesla would be adding "autosteering" to its vehicles, stating "Our main test route that we're evaluating is the San Francisco to Seattle route, and we're now almost able to travel all the way from San Francisco to Seattle without the driver touching any controls at all." And, when asked if customers would be required to periodically put their hands on the wheel, Mr. Musk replied "We don't have that in mind. . .I think like actually some of the manufacturers have it kind of backwards. It's like if you take your hands off the wheel for a certain period of time, the auto steering stops working. But I mean what if somebody's distracted or conceivably fell asleep or something, then you don't want to have the car not steer. That seems backwards."

In January 2016: Tesla added a webpage entitled "tesla 7.0 Autopilot: a perfect commuter feature", which website stated "the new Autosteer feature set a milestone in automotive development. It is the first time a serial production car can drive safely on its own on freeways." That same month, Musk referred to Autosteer as "autonomous mode" and said "I believe that it is probably better than human at this point in highway driving or certainly will be as the fleet learning gets more and more sophisticated. That's actually been my observation when I've been testing the cars, that it's certainly better than human at staying in the center of the lane compared to other cars on the road. . .I'm actually not aware of any cases where the autopilot caused an accident.. . .In fact, even the cases where people did pretty crazy things like they set the car in autonomous mode and then got into the backseat and that kind of thing."

In June 2016: "I really consider autonomous driving a solved problem. I think we are less than two years away from complete autonomy, safer than humans, but regulations should take at least another year. . .On highways, particularly highways that have barriers so that you don't have pedestrians. That's also relatively easy. A Model S and Model X, at this point, can drive autonomously with greater safety than a person. Right now."

July 20, 2016: Mr. Musk released a blog post entitled "Master Plan, Part Deux" in which he explained that Autopilot "is not beta software in any normal sense of the word. . . It is called beta in order to decrease complacency and indicate that it will continue to improve. . . ."

September 11, 2016: Mr. Musk published a blog post entitled "Upgrading Autopilot: Seeing the World in Radar", representing that Teslas equipped with the most recently released software "should almost always hit the brakes correctly even if a UFO were to land on the freeway in zero visibility conditions." He further stated "I beta tested—true beta test, alpha test really—the software personally. I feel strongly in using myself and make sure it's good before anyone else uses it. I used it on an alpha basis to confirm and it's good."

October 2016: A promotional video Plaintiffs claim Mr. Musk finalized the details for states "The person in the driver's seat is only there for legal reasons. He is not

> doing anything. The car is driving itself." The video, according to Plaintiffs, then shows a Tesla Model X obeying traffic lights and signs and reacting to pedestrians, seemingly displaying a technology that, according to Plaintiffs, multiple Tesla engineers admit did not exist at the time.
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> November 2017: "I think it's really quite unequivocal that Autopilot improves safety. . . And I think it would be morally wrong to withhold functionalities that improve safety simply in order to avoid criticisms or for fear of being involved in lawsuits."

According to Plaintiffs, some of the above statements were recorded in interviews and test drives with journalists, including Bloomberg and Gayle King, and other statements were made during investor calls, in tweets and blogs and in Ted Talks.

II. Procedural Background

Plaintiffs filed this action on April 26, 2019 asserting claims against Tesla for Negligence/Wrongful Death, Strict Liability, Negligence (post-sale), and Survival. The parties have engaged in extensive discovery since, including hundreds of hours of depositions, voluminous document production and third party discovery, and hundreds of written discovery requests.

On February 23, 2023, the Court heard argument regarding Plaintiffs' Motion to Compel Tesla's further responses to Requests for Admission (Set Four), Requests for Production of Documents (Set 6), Form Interrogatories (Set 3), and Special Interrogatories (Set 3) all of which focused on Mr. Musk's public statements, Plaintiff's Motion to Compel Mr. Musk's deposition, and Tesla's Motion for Protective Order Regarding Mr. Musk's deposition. The Court issued an order dated March 10, 2023, with the following rulings:

> [T]he Court GRANTS Plaintiffs' motion to compel further responses to Requests for Admissions, except for No. 36, which the Court finds not to be relevant to any issue in the case. (Tesla already agreed to supplement Nos. 16, 37, 42, 43, 44, 45, and 46.)
>
> The Court GRANTS Plaintiffs' motion to compel further responses to Form Interrogatory No. 17.1 (which relates to Tesla's responses to the Requests for Admission), Special Interrogatory Nos. 46-48, and Request for Production No. 214. If Tesla's current response to Special Interrogatory No. 46 is the *only* fact in Tesla's possession, custody and control responsive to Interrogatory No. 46, then Tesla must so state. Similarly, if the single document referenced in response to Tesla's response to Request for Production 214 is the only responsive document in Tesla's possession, custody or control, then it must so state in its written response. In addition, if Tesla has responsive privileged, work product documents created before this lawsuit was filed, it must place them on a privilege log.

> Tesla is ordered to serve the supplemental discovery outlined herein by March 31, 2023 and to respond to any further Requests for Admissions or Special Interrogatories permitted herein according to Code.
>
> The Court GRANTS Tesla's motion for protective order, pending its responses to the additional written discovery ordered herein. The Court sets a further hearing regarding the present motion for April 27, 2023 at 9am in Department 6.

Plaintiff has now filed a motion to compel the deposition of Mr. Musk and for issue sanctions related to the discovery ordered (and permitted) by the Court on March 10, 2023.

III. Relevant Discovery Standards

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." (Cal. 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." (Cal. 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.)

Requests for admissions are different than other discovery devices; they are designed to compel admission as to all matters that cannot reasonably be controverted in order to expedite trial by reducing the number of triable issues that must be adjudicated. (*City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344, 352; *Doe v. Los Angeles County Dep't of Children & family Servs.* (2019) 37 Cal.App.5th 675, 690; *Orange County Water Dist. v. The Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96, 119.) However, requests for admission are not restricted to just facts and documents. They are also applicable to conclusions, opinions, and legal questions. (*City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344.) A party to a civil action that denies a pretrial request for admission without a reasonable basis can be ordered to pay to the propounding party the reasonable expenses incurred, including attorney's fees and costs, in proving the matter covered by the request. (See Cal. Code Civ. Pro. §2033.420(a); *Spahn v. Richards* (2021)72 Cal.App.5th 208, 216.) Unlike other discovery sanctions, an award under this Code section is not a penalty, but is instead designed to reimburse the reasonable expenses a party incurred in proving the truth of a requested admission when the admission sought was of substantial importance, such that the trial would have been expedited or shortened if the request had been admitted. (*City of Glendale, LLC* 235 Cal.App.4th at 359; *Grace v. Mansourian* (2015) Cal.App.4th 523, 526, 532-537.)

When a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management . . . the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information." (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1287; Cal. Code of Civ. Pro. §2025(i)). If the answer to that inquiry is "no", then the trial court should "first require the plaintiff to obtain the necessary discovery through less intrusive methods. These would include interrogatories directed to the high-level official to explore the state of his or her knowledge or involvement in plaintiff's case or involvement in plaintiff's case; the deposition of lower level employees with appropriate knowledge and involvement in the subject matter of the litigation; and the organizational deposition of the operation itself." (*Id.*) Only after these avenues are exhausted, and the "plaintiff makes a colorable showing of good cause that the high-level official possesses necessary information to the case, the trial court may then lift the protective order and allow the deposition to proceed." (*Id.*)

Code of Civil Procedure section 2031.310(i) provides: "if a party fails to obey an order compelling further responses, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." (See also *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154.) There are four types of terminating sanctions: (1) striking pleadings in whole or in part; (2) staying further proceedings by a party until it obeys a discovery order; (3) dismissing the action or part of it; and (4) rendering a default judgment. (Code of Civ. Pro. §2023.030(d).) An issue sanction either orders that designated facts be taken as established or prohibits a party from supporting or opposing designated claims or defenses. (Code of Civ. Pro. §2023.030(b); *Kuhns v. State* (1992) 8 Cal.App.4th 982, 989; *Marriage of Chakko* (2004) 115 Cal.App.4th 104, 109-110.

IV. Analysis

The Court does not find on this record that issue sanctions are appropriate. It is clear to the Court that Tesla made efforts to respond to Plaintiffs' discovery requests. As detailed below, in some cases, Plaintiffs simply do not like the answers received, however, in others it appears to the Court that Tesla continues to try and have it both ways in a way that is untenable. The Court addresses each of Plaintiff's requests by set below.

Request for Production, Set Six (No. 214): This request seeks "All DOCUMENTS that support Elon Musk's assertion, in an April 2018 test drive of the Tesla model 3 with CBS's Gayle King, that Tesla Autopilot can reduce accidents by a factor of ten." Tesla responds by stating that there "is no single set of documents or studies underpinning Mr. Musk's general statements about the potential for driver assistance features, like Autopilot, to save lives" then identifies publicly available documents by url. If these are the documents Tesla contends underpin this statement, those are the documents Tesla will be limited to for any dispositive motion practice and at trial. Thus, Plaintiffs' motion to compel a further response is DENIED.

Special Interrogatories, Set Three (46-48) and Set Five (72-105): These Special Interrogatories, which are quite extensive, are directed to obtaining facts, documents and witnesses with knowledge to support the various statements Plaintiffs contend Mr. Musk made and that were quoted in the Court's March 10, 2023 Order. Tesla provided a lengthy answer that largely incorporates what it said elsewhere. However, it is a response to the questions posed. The Court DENIES Plaintiffs' motion to

compel further responses to these interrogatories. Of course, this means that unless it provides further information, Tesla is confined to the content of these responses in the event the specific documents, facts and/or witnesses with knowledge regarding these alleged statements become an issue at trial.

Special Interrogatories, Set Four (49-51 and 64-69): All of these interrogatories are directed in different ways to gather information about Tesla's response, if any, to NTSB Safety Recommendation H-17-042. This subject was not addressed during the February 23, 2023 hearing or the Court's March 10, 2023 Order that resulted from that hearing. Tesla avers that Plaintiffs have not met and conferred regarding these responses. In any event, the Court has reviewed the responses and DENIES Plaintiffs' motion to compel further responses to these interrogatories. Again, this means that unless it provides further information, Tesla is confined to the content of these responses in the event its response to the NTSB Safety Recommendation H-17-042, if any, becomes an issue at trial.

Request for Production of Documents, Set Seven: These requests are all directed to obtaining data to support certain numerical conclusions by Tesla or what appear to the Court to be naming conventions. None of these requests has anything to do with the issues presented during the February 23, 2023 hearing or the March 10, 2023 order that resulted from that hearing. Further, it seems clear to the Court that the parties have not met and conferred adequately regarding these requests. It is also not clear to the Court the relevance of the material sought, despite the fact that it does appear that it would be burdensome to collect and produce. Thus, on this record, Plaintiffs' motion to compel is DENIED. Tesla is, however, ordered to continue collecting and producing documents it has already agreed to produce in its written responses.

Requests for Admission, Set Two; Form Interrogatory 17.1; Requests for Admissions, Set Three: All of these Requests for Admission relate to confirming whether Mr. Musk (or in some cases Tesla) made certain statements during various interviews or other public engagements. The Court made clear during the February 23, 2023 hearing and in both its tentative and final rulings related to that hearing, that the Court was granting Tesla's Motion for Protective Order regarding Mr. Musk's deposition on the condition that it provide fulsome responses to the written discovery regarding the statements outlined with specificity in the Court's March 10, 2023 Order. In other words, the Court was giving Tesla a chance to provide the information Plaintiffs sought in writing, which would have obviated the need for Mr. Musk's deposition.

Also important, is that the Court has already ruled that at this discovery stage, the consumer expectation test is "still in play." (March 10, 2023 Order, p. 8.) Thus, objections and arguments about relevance are not well taken at this stage of the motion practice. It is with this backdrop, that the Court makes the following additional rulings and analysis regarding particular Requests for Admission.

Plaintiffs' Motion to Compel regarding Requests 16, 27, 28, 37, 42, 44, 46, 67 and 69 is DENIED. The Court agrees that Request 27 is too vague; the other Requests are sufficiently admitted. Plaintiff's motion regarding Requests 19, 43 and 45 is GRANTED – there is no reason why Tesla cannot simply admit these Requests without referring to another Request.

Tesla objects that Requests 61, 62, 63, 66 and 68 are from its website and are not statements Plaintiffs allege were made by Mr. Musk, and therefore outside the scope of the Court's March 10, 2023 order. Tesla is incorrect. These Requests relate directly to citations set forth in the Court's March 10

order. Tesla needs to indicate whether these are Tesla statements or statements from a customer. Plaintiffs' Motion to Compel as to these Requests is GRANTED.

Citing to *Smith v. Circle P Ranch Co., Inc.* (1978) 87 Cal.App.3d 267, 275, in response to Requests 26, 31, 60, 64, and 65, Tesla contends it has answered adequately because Plaintiffs' Requests do not contain a correct quotation. *Smith* does stand for the proposition that a response that states "As framed, denied" is a sworn denial. However, *Smith* goes on to find that the party providing that sworn denial had a duty to investigate, failed to do so, and that sanctions were therefore justified for such responses. It appears to the Court that Tesla is really concerned that the quotations are taken out of context. If that is the case, as Tesla itself states elsewhere, Tesla must state the part it can admit and include the rest of the quotation it thinks needs for the answer to be complete. Thus, Plaintiffs' motion to compel complete responses to these Requests is GRANTED.

For the rest of the Requests in these sets and for all of Request for Admissions Re Genuineness, Set Three, Tesla states something akin to the following:

> Tesla has undertaken a good faith investigation of sources reasonably available to it and is unable to admit or deny the request as Tesla does not maintain possession, control or custody of a recording of the discussion. Tesla does not maintain a repository of Elon Musk's public statements or media interviews. Mr. Musk confirmed he did not independently record the discussion or maintain a copy of the original video, nor did he take notes, and therefore cannot recall the details sufficiently to admit or deny their accuracy. Consequently, while Tesla does not expect the file has been altered or manipulated, it cannot authenticate a non-Tesla document that it cannot independently validate, and is not obligated to otherwise admit the accuracy of a statement untethered to its source as presented in this request.

This is where the Court views Tesla as still trying to have it both ways, or, perhaps put more accurately, Telsa is trying to avoid at all costs tying itself to Mr. Musk's statements or denying outright that Mr. Musk made the statements. Tesla's argument that it cannot commit one way or another to the statements, or in some cases even admit that it is Mr. Musk in the videos, because of the ease with which deep fakes can be made is unconvincing for several reasons. First, the Court reviewed Exhibits B and C to the Declaration of Lauren O. Miller, in which audio is attributed to Mr. Musk that he says he did not say. Tellingly, Mr. Musk is able to identify that these videos are fake because (as must be the case) he can recall that he did not give that particular TedTalk (even though he did give *a* TedTalk) or actually give an interview about nude photos. Thus, plainly, Mr. Musk is able to have some recall as to what interviews he did and did not do.

Next, as the Court already stated at the February 23, 2023 hearing, it is not necessary to have a chain of custody like history for a video for a person depicted in the video to confirm (a) if that is the person, (b) if the person did or did not perform the act shown in the video and/or (c) if the person did or did not say something depicted in the video. Mr. Musk was either at these places or he was not; he either said these things or he did not. Ironically, Tesla's refusal to answer these questions only makes a clearer record that Mr. Musk is the only person that has this information to respond to this discovery, one of the pre-requisites to permitting an Apex deposition.

Finally, what Tesla is contending is deeply troubling to the Court. Their position is that because Mr. Musk is famous and might be more of a target for deep fakes, his public statements are immune. In other words, Mr. Musk, and others in his position, can simply say whatever they like in the public domain, then hide behind the potential for their recorded statements being a deep fake to avoid taking ownership of what they did actually say and do. The Court is unwilling to set such a precedent by condoning Tesla's approach here.

As a result, the Court now finds it appropriate to order a limited deposition of Mr. Musk. The deposition shall be limited to three hours and can only address the Requests for Admission seeking to confirm that Mr. Musk was at specific interviews and made specific already identified statements during those interviews. Plaintiffs must bring the recorded statements and show them to Mr. Musk at the deposition, so that he can state under oath whether or not he made the statements.

To the extent not already explicitly addressed above, Plaintiffs' motion is DENIED.

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