

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LEO LUNA, an individual,  
Plaintiff,  
v.  
BMW OF NORTH AMERICA, LLC,  
Defendants.

Case No.: 17cv2067-BEN(KSC)

**ORDER RE PLAINTIFF'S EX PARTE MOTION TO COMPEL [Doc. No. 38] and DEFENDANT'S EX PARTE APPLICATION FOR DETERMINATION OF UNTIMELY DISCOVERY DISPUTE [Doc. No. 39]**

The following are currently before the Court: (1) plaintiff's *Ex Parte* Motion to Compel Production of [Defendant's] Dealer Policies and Procedures Manual [Doc. No. 38]; and (2) defendant's *Ex Parte* Application for Determination of Discovery Dispute [Doc. No. 39]. For the reasons outlined more fully below, the Court finds that plaintiff's *Ex Parte* Motion must be GRANTED and defendant's *Ex Parte* Motion must be DENIED.

**The Parties' Dispute**

On January 11, 2019, plaintiff served defendant with a document entitled "Notice to BMW of North America, LLC of Taking Deposition of Person Most Knowledgeable and Request to Produce Documents." [Doc. No. 39-2, at pp. 1-10 (Exhibit A); Doc. No. 39-1, at p. 2.] Defendant served plaintiff with objections to the Notice/Document

1 Requests on February 6, 2019. [Doc. No. 39-3, at pp. 1-37 (Exhibit B).] The objections  
2 are boilerplate; defendant did not provide a substantive response. The most relevant  
3 objection listed is “protected as confidential, proprietary, trade secret and/or  
4 commercially sensitive without the application of an appropriate protective order.” [Doc.  
5 No. 39-3, at p. 26.] Plaintiff sent an Amended Notice to defendant on May 7, 2019, and  
6 defendant then served plaintiff with amended objections May 9, 2019. [Doc. No. 39-1, at  
7 p. 2.]

8 Plaintiff’s Document Request No. 9 reads as follows:

9 A copy of the Dealer Policy and Procedures Manual provided to BMW of  
10 North America, LLC’s authorized repair facilities that performed repairs to  
11 the vehicle.

12 [Doc. No. 39-3, at p. 26.]

13 Plaintiff argues that the requested manual is relevant to his claims, because he  
14 alleges BMW’s Authorized Repair Facility (i.e., BMW of El Cajon) was unable to repair  
15 the vehicle “despite 7 repair attempts.” [Doc. No. 38, at p. 4.] According to plaintiff, the  
16 manual contains warranty repair policies and instructions to authorized repair facilities,  
17 including instructions to notify the manufacturer of vehicles with repeat repairs. Plaintiff  
18 represents that similar manuals that address these topics have been produced in other  
19 cases by Toyota, Jaguar, Land Rover, Fiat Chrysler (FCA), and General Motors. [Doc.  
20 No. 38, at p. 9.]

21 The PMK deposition took place on May 17, 2019. The following dialogue took  
22 place during the PMK deposition:

23 Q. Does BMW have a policies and procedures manual for its  
24 dealers that governs warranty repairs?

25 A. There is – there is this manual called – I believe it’s called a  
26 Service and Warranty Manual.

27 Q. Take a look at Item 9 on Page 5 at the bottom and continue at  
28 the top of page 6. We request a copy of the dealer policies and procedures

1 manual provided to BMW of North America's authorized repair facilities  
2 that performed repairs on the vehicle. Have you brought that document?

3 A. I did not.  
4

5 [Doc. No. 38, at p. 4.]

6 At the deposition, defendant produced only a single sheet of paper in response to  
7 all of plaintiff's document requests. [Doc. No. 38, at p. 3.]

8 Pursuant to an Amended Scheduling Order entered on March 18, 2019, the fact  
9 discovery deadline was May 24, 2019. On June 13, 2019, the deposition transcript was  
10 finalized (i.e., the deponent signed the transcript and defense counsel notified plaintiff's  
11 counsel there were no changes to the transcript). [Doc. No. 38, at p. 3.]

12 On June 14, 2019, counsel met and conferred but were unable to resolve the issue  
13 over the subject manual. [Doc. No. 38-1, at p. 2.] Plaintiff's counsel claims defense  
14 counsel has given him inconsistent information as to whether the subject manual exists  
15 and whether it was previously produced. [Doc. No. 38, at pp. 5-6.] At one point, for  
16 example, defendant produced a Warranty Booklet that goes in the glovebox of BMW's  
17 vehicles and claimed that was the subject manual. [Doc. No. 38, at p. 6.]

18 On July 12, 2019, plaintiff's counsel provided defense counsel with a draft of a  
19 joint discovery motion requesting an order compelling defendant to produce the Dealer  
20 Policy and Procedures Manual. [Doc. No. 38-1, at pp. 2-3, 10; Doc. No. 39-1, at p. 2.]  
21 Defendant responded that the proposed joint motion was untimely based on Chambers'  
22 Rules. In addition, defendant "again reiterated that BMW NA does not have a 'Dealer  
23 Policy and Procedure Manual,' and that BMW NA's Person Most Knowledgeable  
24 explicitly testified to a Service and Warranty Manual, which was previously produced at  
25 BMW-LUNA00282 through BMW-LUNA000335." [Doc. No. 39-1, at p. 3.]

26 On July 15, 2019, a Stipulated Protective Order was entered to govern the  
27 exchange of confidential documents and information between the parties. [Doc. No. 37.]  
28

1 On July 26, 2019, plaintiff filed an Ex Parte Motion to Compel Production of BMW's  
2 Dealer Policies and Procedures Manual, claiming that defense counsel refused to  
3 contribute to a joint motion. [Doc. No. 38, at p. 1.]

4 On July 29, 2019, defendant filed an Ex Parte Application for Determination of  
5 Untimely Discovery Dispute. [Doc. No. 39.] Defendant's Ex Parte Application is  
6 essentially an opposition to plaintiff's Ex Parte Application. Defendant argues that  
7 plaintiff's Ex Parte Application is untimely, because defendant objected to Document  
8 Request No. 9 on February 6, 2019, some five months before defendant received  
9 plaintiff's draft motion. In defendant's view, plaintiff should have filed the motion  
10 within 45 days after the February 6, 2019 objections. In this regard, Chambers Rule  
11 V(A) states as follows: "Unless otherwise ordered, discovery motions shall be filed no  
12 later than 45 days after the event giving rise to the dispute and only after counsel have  
13 met and conferred. . . . The event giving rise to a discovery dispute is NOT the date on  
14 which counsel reach an impasse in meet and confer efforts. For written discovery, the  
15 event giving rise to the dispute is the service of an objection, answer, or response, or the  
16 passage of a discovery due date without response or production."

17 On July 31, 2019, plaintiff filed an Opposition to defendant's Ex Parte Application.  
18 Plaintiff's view is that his Ex Parte Application is timely, because defendant effectively  
19 did not refuse to produce the Policy and Procedures Manual until June 13, 2019, the date  
20 that defendant informed plaintiff that the PMK deposition transcript was completed with  
21 no changes. According to plaintiff, his Ex Parte Application is timely, because it was  
22 filed on July 26, 2019, within 45 days after the transcript was completed. [Doc. No. 40, at  
23 pp. 2-3.] In this regard, Chambers' Rule V(B) states as follows: "For oral discovery, the  
24 event giving rise to the dispute is the completion of the transcript of the affected portion  
25 of the deposition."

### 26 Discussion

27 In the Court's view, the parties are really "splitting hairs" here on the timeliness  
28 issue. The Court's Chambers' Rules could be read either way under these

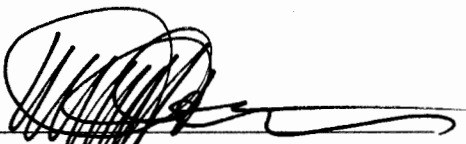
1 circumstances. Defendant's warranty policies are obviously relevant to the dispute. In  
2 addition, the parties' papers indicate defendant has been evasive about the existence of  
3 any manual or policy that deals with warranties and notification to the manufacturer  
4 about vehicles needing repeated repairs. It also appears plaintiff has been diligent in his  
5 efforts to get defendant to produce responsive documents since the first Deposition  
6 Notice/Document Request served on January 11, 2019.

7 **Conclusion**

8 Based on the foregoing, plaintiff's Ex Parte Motion [Doc. No. 38] is GRANTED  
9 and defendant's Ex Parte Application [Doc. No. 39] is DENIED. Without further delay,  
10 and **no later than October 21, 2019**, defendant shall produce the portion of any manual  
11 or other document provided to or used by its authorized repair facilities that was  
12 effective at the time the repairs at issue in this case were made and that addresses  
13 defendant's warranty repair policies and notification to the manufacturer about vehicles  
14 with repeat repairs. This document shall be produced subject to the Stipulated  
15 Protective Order filed in this case on July 16, 2019 [Doc. No. 37].

16 IT IS SO ORDERED.

17 Dated: October 7, 2019

18   
19 Hon. Karen S. Crawford  
20 United States Magistrate Judge