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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 MICHAEL JENSEN,  
12 Plaintiff,  
13 v.  
14 BMW OF NORTH AMERICA, LLC;  
15 BRECHT ENTERPRISES, INC. dba  
16 BMW OF ESCONDIDO; and DOES 1-  
17 100, inclusive,  
Defendants.

Case No.: 18cv103-WQH (NLS)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
SECOND MOTION FOR  
SANCTIONS**

**[ECF No. 89]**

18  
19 Before the Court is the Plaintiff Michael Jensen's second motion for sanctions  
20 against Defendant BMW of North America, LLC ("BMW"). ECF No. 89. BMW filed  
21 an opposition, and Plaintiff filed a reply. ECF Nos. 101, 102, 109. After due  
22 consideration of the parties' arguments and for the reasons set forth below, the Court  
23 **GRANTS IN PART** and **DENIES IN PART** the motion.

24 **I. BACKGROUND**

25 In his complaint, Plaintiff alleges that he purchased a 2011 BMW 550i vehicle  
26 manufactured and distributed by BMW, which was covered by an express written  
27 warranty for the utility and performance of the vehicle for a period of time. ECF No. 1-3  
28 at ¶¶ 8-9. Plaintiff alleges that, during the warranty period, he experienced numerous

1 defects with the vehicle. *Id.* at ¶ 10. He claims that Defendants were unable to  
2 adequately repair the defects but failed to replace the vehicle or buy it back. *Id.* at ¶ 11.  
3 Plaintiff brings causes of action under the Song-Beverly Consumer Warranty Act, for  
4 breach of warranty, and for fraud.

5 On November 30, 2018, the parties brought a joint motion for determination of  
6 discovery dispute, where Plaintiff sought to compel BMW to respond to several  
7 discovery requests. ECF No. 49. After supplemental briefing was completed, the Court  
8 issued an order on January 15, 2019, directing BMW to produce certain documents  
9 within a certain timeframe. ECF No. 55.

10 On March 4, 2019, Plaintiff filed his first motion for sanctions. In the motion, he  
11 argued that BMW failed to comply with the Court's January 15 order by failing to  
12 produce documents within the required timeframe. ECF No. 61. BMW opposed the  
13 motion, and Plaintiff filed a reply. ECF Nos. 65, 67. On April 9, 2019, the Court issued  
14 an order granting in part and denying in part Plaintiff's first motion for sanctions. ECF  
15 No. 77. That order required BMW to produce further documents by a deadline, after  
16 which BMW would start to incur a monetary sanction. *Id.*

17 Pursuant to the April 9 order, BMW filed two declarations on April 23, 2019,  
18 stating that it was in compliance with the Court's order and further providing information  
19 required by the order. ECF Nos. 86, 87. Plaintiff then filed the instant motion, arguing  
20 that BMW's declarations and production of documents are still insufficient, and in  
21 violation of the Court's previous orders. ECF No. 89.

## 22 **II. LEGAL STANDARDS**

23 Federal Rule of Civil Procedure 37 empowers the Court to issue sanctions where a  
24 party fails to obey a previous order to provide discovery. The Rule enumerates the  
25 following actions a court may take: "(i) directing that the matters embraced in the order  
26 or other designated facts be taken as established for purposes of the action, as the  
27 prevailing party claims; (ii) prohibiting the disobedient party from supporting or  
28 opposing designated claims or defenses, or from introducing designated matters in

1 evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until  
2 the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi)  
3 rendering a default judgment against the disobedient party; or (vii) treating as contempt  
4 of court the failure to obey any order except an order to submit to a physical or mental  
5 examination.” Fed. R. Civ. P. 37(b)(2)(A). The Court has broad discretion regarding the  
6 type and degree of discovery sanctions it may impose pursuant to Rule 37 and can  
7 impose any sanction it sees as just. *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844  
8 (9th Cir. 1976). “When sanctions are warranted, the Court must determine the  
9 appropriate level or severity of sanctions based on the circumstances of the case.”  
10 *Daniels v. Jenson*, No. 2:11-CV-00298-JCM, 2013 WL 1332248, at \*2 (D. Nev. Mar. 11,  
11 2013).

### 12 **III. DISCUSSION**

#### 13 **A. Violation of Court Order**

14 First, the Court must determine whether BMW is in violation of the Court’s prior  
15 orders. The April 9 order compelled BMW to further produce on several categories of  
16 documents, some of which Plaintiff claims are still incomplete. The Court will address  
17 each of these in turn.

##### 18 **i. The Database Documents**

19 The first category of documents Plaintiff sought to compel from BMW was  
20 documents from the PuMA database, the Customer Relations/Contacts database, and the  
21 Warranty Repair database. In its original January 15 order, the Court ordered BMW to  
22 conduct a search across these three databases, limited to vehicles of the same year, make,  
23 and model as Plaintiff’s subject vehicle and limited to only those records reporting  
24 problems with the same defect codes listed in any repair records pertaining to Plaintiff’s  
25 vehicle and part numbers under warranty in Plaintiff’s vehicle. ECF No. 55 at 9-10. The  
26 Court furthered ordered the parties to meet and confer to determine what those defect  
27 codes and part numbers should be. *Id.* at 10.

28 At the time of Plaintiff’s first motion for sanctions, BMW had not yet produced the

1 documents but stated that its searches yielded 83,000 hits in the Warranty Repair  
2 Database, but 0 hits in the PuMA and Customer Relations/Contacts databases. ECF No.  
3 65 at 6. Plaintiff's counsel raised questions about the discrepancy in results between the  
4 databases. *See* ECF Nos. 67-5-67-9. Accordingly, the Court ordered the production of  
5 documents and a supporting declaration from BMW, signed under the penalty of perjury,  
6 from someone with knowledge of the searches, with at least the following information: 1)  
7 a list of part numbers and defect codes searched in each of the PuMA, Customer  
8 Relations/Contacts, and Warranty Repair databases; 2) a statement regarding how many  
9 records hit on the search terms and of these records, how many were deemed responsive  
10 for production; and 3) as for the PuMA or Customer Relations/Contacts databases, a) an  
11 explanation of why the records highlighted by Plaintiff in his reply did not produce hits;  
12 and b) if BMW concludes that the records should have produced hits and mistakenly did  
13 not, an explanation of the new search run and/or any other corrective measures taken to  
14 ensure the results are now accurate. ECF No. 77 at 5-6.

15 BMW filed a timely affidavit regarding its production of the database documents.  
16 ECF No. 86. The declaration listed the exact defect codes and defect item (part) numbers  
17 used to search the databases. *Id.* at ¶ 2. BMW stated that the search produced 82,640 hits  
18 in the Warranty Repair database, which were all deemed responsive for production and  
19 those results were produced. *Id.* at ¶ 3. BMW also confirmed that the search did not  
20 produce any hits in the PuMA or Customer Relations databases because “the part  
21 numbers and defect codes set forth above do not appear in those databases” and that it did  
22 “not believe the search of the PuMA and Customer Relations databases for the part  
23 numbers and defect codes should have produced hits and mistakenly did not.” *Id.* ¶ 4.

24 Plaintiff does not have an issue with the results from the Warranty Repair database,  
25 but takes issue with the results from the PuMA and Customer Relations databases. ECF  
26 No. 89-1 at 7-9. Plaintiff argues that BMW searched using codes that produced results in  
27 the Warranty database, but knew that they would not produce results in the other two  
28 databases because those codes and/or part numbers did not appear in the other two

1 databases.

2 After reviewing the prior submissions and the orders, the Court agrees that BMW  
3 does not appear to have been forthcoming about the search results in the PuMA and  
4 Customer Relations databases. In the briefing on the initial motion to compel, the Court  
5 ordered BMW to provide supplemental briefing to provide information on “if and how  
6 these databases can be searched or queried, including but not limited to using database  
7 fields for repair, defect, labor and part codes or any such similar codes, or through  
8 keyword searches.” ECF No. 50 at 3. In response to this order, BMW submitted briefing  
9 that stated that each of the three databases at issue can be searched “by vehicle make and  
10 model, specific part numbers, and specific fault codes that appear on a vehicle’s repair  
11 history.” ECF No. 53 at 1-2. Thus, on the basis of this almost identical language to  
12 describe how each of these databases can be searched, the Court subsequently ordered  
13 BMW to produce documents from these databases by searching with “the same defect  
14 codes listed in any repair records pertaining to Plaintiff’s vehicle and part numbers under  
15 warranty in Plaintiff’s vehicle.” ECF No. 55 at 10. This ruling was based on the  
16 reasonable assumption from BMW’s briefing that the databases can be identically and  
17 meaningfully searched using “fault codes” and “part numbers” found in Plaintiff’s repair  
18 records.

19 Therefore, even assuming BMW’s declaration that there are 0 hits in the PuMA  
20 and Customer Relations databases is literally true, this result may have been caused by an  
21 inaccurate description of those databases and how they can be searched made in the prior  
22 briefing. BMW’s opposition does not provide any additional information to explain this  
23 difference in searching between the databases. Based on the record before it, the Court  
24 cannot find that BMW acted cooperatively and in good faith to provide the discovery  
25 contemplated by the Court’s previous order. Indeed, in the last sanctions order, the Court  
26 ordered BMW to investigate the issue with the PuMA and Customer Relations databases  
27 and take corrective measures if necessary to provide accurate search results from those  
28 databases. If BMW knew that those databases could not be searched with the same

1 defect/fault codes and/or part numbers as the Warranty database—thus producing 0  
2 results—it should have found a solution such that relevant results from those databases  
3 could be produced.

4 Accordingly, the Court finds that BMW has not fully complied with its previous  
5 orders as to the PuMA and Customer Relations databases.

6 **ii. Emails Searches**

7 The second category of documents Plaintiff sought to compel from BMW was  
8 emails from certain of its engineers. Plaintiff suggested that the following terms could be  
9 used to search the emails:

- 10 • N63 or N-63 or F10 and engine and defect
- 11 • N63 or N-63 or F10 and engine and problem
- 12 • N63 or N-63 or F10 and engine and problem and fix or countermeasure
- 13 • N63 or N-63 or F101 and engine and excessive oil consumption
- 14 • N63 or N-63 or F10 and customer care package or CCP
- 15 • N63 or N-63 or F10 and engine and defect
- 16 • N63 or N-63 or F10 and engine and safety
- 17 • N63 or N-63 or F10 and excess! Oil Cons!

18 ECF No. 54 at 3-4. In its order on the motion to compel, the Court adopted Plaintiff's  
19 compromise on this issue, which was to search the emails of two engineers, but rather  
20 than adopting Plaintiff's exact search terms, for the parties to meet and confer and work  
21 cooperatively to develop a more robust search string to use. ECF No. 55 at 11-12.

22 The parties were unable to do that successfully, and Plaintiff filed the initial  
23 motion for sanctions. In that motion, Plaintiff attached correspondence that suggested a  
24 slight modification of the above, adding only the term “or complaint” to the first and  
25 sixth search strings above. ECF No. 61-7 at 2-3. In response, BMW stated that the  
26 search terms were “too broad and burdensome” and instead suggested the following:

- 27 • N63 or N-63 and defect! and 2011 and 550i
- 28

- 1 • N63 or N-63 and excess! oil consum! and 2011 and 550i
- 2 • N63 or N-63 and fix or countermeasure and 2011 and 550i

3 ECF No. 61-18 at 2. Plaintiff objected to this proposal, stating that “[b]ased on our  
4 experience, engineers generally do not identify vehicles internally by make, year, and  
5 model, but rather, by body type [i.e. F10].” ECF No. 61-19 at 2. The parties made no  
6 further progress on this issue before filing the first motion for sanctions.

7 In its opposition to that motion, BMW stated that it is now “utilizing Plaintiff’s  
8 proposed searched terms to search Mr. Murray’s email.” ECF No. 65 at 5. The Court  
9 accepted this statement and ordered the production of the emails and for BMW to submit  
10 an affidavit confirming what search terms it used after the production.<sup>1</sup> ECF No. 77 at 6-  
11 7. BMW again submitted a timely affidavit on April 23, 2019. The affidavit stated that  
12 “Michael Murray’s emails were searched for 2011 550i vehicles using the following  
13 search terms:” and listed the search terms from Plaintiff’s email correspondence during  
14 the meet and confer process. ECF No. 87 at 2; *see* ECF No. 61-7 at 2-3. BMW stated  
15 that the search produced no results. ECF No. 87 at 2.

16 Plaintiff argues that this declaration does not comply with BMW’s statement that it  
17 would used his search terms because BMW qualified the search with the emails “were  
18 searched for 2011 550i vehicles,” which means that what BMW actually did was to  
19 import the limitation Plaintiff objected to during the meet and confer—to limit the search  
20 for emails mentioning the year and make of the vehicle, which engineers do not typically  
21 use in email correspondence. ECF No. 89-1 at 11-12. BMW does not clarify in its  
22 opposition what exact search it ran and what it meant by the qualifier “for 2011 550i  
23 vehicles,” but does argue that the discovery at issue here only covered vehicles of the  
24 same year, make, and model as Plaintiff’s vehicle, a 2011 550i. ECF No. 101 at 3-4.

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26 <sup>1</sup> The first motion for sanctions raised another issue as to whether the search would be  
27 limited to Mr. Murray or another engineer in addition to Mr. Murray. The Court ruled  
28 that it would be limited to only Mr. Murray. ECF No. 77 at 7. That issue is not in  
dispute for this motion, so the only relevant emails are Mr. Murray’s emails.

1 BMW is correct that the original discovery requests did all relate to vehicles of the  
2 same year, make, and model as the subject vehicle. *See* ECF No. 55 at 3-5. However, it  
3 does not necessarily follow that a document must mention “2011” and “550i” on its face  
4 to be deemed “related” to such a vehicle. The N63 engine found in a 2011 550i vehicle,  
5 for example, is in other models of cars and BMW has not made a showing that an  
6 engineer will necessarily list the year and make of all those models of cars when  
7 discussing the engine in the car. Both parties could have worked together more  
8 cooperatively to find search terms that would have been better captured the desired  
9 emails, but the parties unfortunately did not do so.

10 Nevertheless, BMW stated—and the Court accepted its representation—that it  
11 would run the search as Plaintiff requested. The issue of whether the emails would  
12 mention 2011 and 550i came up during the meet and confer process, as evidenced by the  
13 submissions to the Court, and it was clear that the Plaintiff did not accept the suggested  
14 change to limit the search that way. BMW was aware of this issue when it told the Court  
15 it would adopt Plaintiff’s search terms and if it had wanted to argue the issue of 2011  
16 550i, the time to do so would have been on the initial motion for sanctions.

17 Accordingly, the Court finds that BMW has not fully complied with its previous  
18 orders as to the search of Mr. Murray’s emails.

### 19 **iii. *Bang* Litigation Documents**

20 The third category of documents Plaintiff sought to compel from BMW was  
21 documents from the *Bang* litigation. The Court ordered BMW to produce documents  
22 already collected and produced in the *Bang* litigation that are responsive to the discovery  
23 requests Plaintiff propounded in this case. ECF No. 55 at 9; ECF No. 77 at 8.

24 Plaintiff states that 44 pages of documents in total were produced and argues  
25 generally that because of BMW’s pattern of dishonest behavior, that Court should  
26 question whether this production is complete. ECF No. 89-1 at 14. Without a more  
27 concrete reason to believe that BMW has improperly held back *Bang* litigation  
28 documents that may actually be relevant, the Court cannot find that BMW is in violation



1 of its prior orders here.

2 As to timeliness of the production, BMW concedes the production was not timely.  
3 BMW's declaration stated that one set of documents was produced on April 9, 2019 and  
4 another set on April 23. Accordingly, BMW states that it owes fines in the amount of  
5 \$1100.00 and BMW's counsel states that he has asked for a check to be processed. The  
6 Court accepts this amount for the sanction and **ORDERS** BMW to pay it as follows:  
7 BMW shall pay a discovery sanction in the amount of \$1100.00 for its failure to comply  
8 with the Court's April 9, 2019 Order (ECF No. 77). This payment shall be made to the  
9 Miscellaneous Fines, Penalties and Forfeitures, Not Otherwise Classified, fund of the  
10 United States Treasury. The check must be made payable to the Clerk of the Court, and  
11 the memo line must include this case number. Payment may be made in person at the  
12 Clerk's office or by mail to the following address:

13 U.S. District Court  
14 Southern District of California  
15 Financial Department  
16 333 West Broadway, Suite 420  
San Diego, California 92101

17 BMW shall file a Notice of Payment of Sanction to the Court upon submission of  
18 payment.

### 19 **B. APPROPRIATE SANCTIONS**

20 Having found that BMW did not fully comply with the Court's previous orders,  
21 however, the Court declines to adopt any of the sanctions that Plaintiff suggests.

22 Before considering the appropriateness of any sanction, the Court is mindful of the  
23 connection between the discovery sought and what issues in the case it pertains to. In its  
24 order on the parties' original motion to compel, the Court found that the discovery sought  
25 as to other vehicles may be relevant to the question of willfulness, as it pertains to the  
26 civil penalty under California Civil Code § 1794(c). ECF No. 55 at 7. Indeed, Plaintiff  
27 made this primary relevance argument in his own briefs. *See* ECF No. 49-37 at 4-5  
28 ("Specifically, under Song-Beverly, BMW's knowledge and understanding of the defect

1 in the same vehicle type implicates BMW’s willfulness and intent in failing to repair  
2 Plaintiff’s vehicle after a reasonable number of attempts or to offer restitution, which may  
3 trigger civil penalties up to twice the amount of actual damages.”); *id.* at 7 (“As set forth  
4 above, BMW’s state of mind is plainly relevant—at a minimum—to the Civil Penalty  
5 claim.”). As to underlying liability, the Court stated that “generally, the Court agrees  
6 with BMW that the evidence required to prove liability under Song-Beverly focuses on  
7 records concerning **the specific vehicle at issue.**” ECF No. 55 at 7 (emphasis added).

8 Plaintiff first requests terminating sanctions as to its several causes of action,  
9 including liability under Song-Beverly, breach of implied warranty of merchantability,  
10 and fraud. ECF No. 89-1 at 16-19. While terminating sanctions are contemplated under  
11 Rule 37, they are only warranted under “extreme circumstances.” *Fjelstad v. Am. Honda*  
12 *Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985). Furthermore, any imposed sanction  
13 under Rule 37(b)(2) must be “specifically related to the particular ‘claim’ which was at  
14 issue in the order to provide discovery.” *Insurance Corp. of Ireland, Ltd. v. Compagnie*  
15 *des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). The Court finds that the terminating  
16 sanctions Plaintiff seeks are not a proportionate sanction for the discovery misconduct  
17 here because the discovery sought in the first place does not sufficiently relate to the  
18 claims for which he seeks terminating sanctions. In addition, one of the factors to be  
19 considered before ordering terminating sanctions is the availability of less drastic  
20 sanctions. *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d  
21 1091, 1096 (9th Cir. 2007). Because the Court finds a more appropriate sanction as  
22 discussed below, it declines to impose terminating sanctions.

23 Plaintiff alternatively requests issue and/or evidentiary sanctions that again relate  
24 to the same causes of action for which he requested terminating sanctions. ECF No. 89-1  
25 at 19-24. For the same reasons above as to the discovery being not sufficiently related to  
26 the claims, the Court also declines to impose these sanctions.

27 Finally, Plaintiff alternatively requests a stay of the case pending the production of  
28 the discovery. ECF No. 24-25. At this late juncture and after the considerable time and

1 motion practice that has been devoted to these documents that relate to only an ancillary  
2 issue in the case, the Court does not find that ordering production is the appropriate  
3 remedy either. BMW has had ample time to cooperate to produce the discovery and has  
4 forfeited the opportunity to do so at this time.

5         Instead, the Court finds it appropriate to issue a limited adverse inference  
6 instruction, narrowly tailored to the documents in dispute and to the issues to which they  
7 relate, subject to a few caveats. First, the Court, so far, has only ruled as to the relevance  
8 of these documents regarding other vehicles under Rule 26; their admissibility at trial is  
9 not yet determined. Thus, this instruction would only be issued if the discovery sought is  
10 determined to be admissible at trial. Second, under these circumstances, the Court finds  
11 it appropriate to limit the sanction here only as it pertains to the issue of the willfulness  
12 and the civil penalty under California Civil Code § 1794(c). Third, because of the limited  
13 scope to which the instruction applies, it would only be pertinent and/or given upon a  
14 finding by the jury of liability in the first place. Finally, the undersigned proposes this  
15 instruction should Judge Hayes decide to use it, and it is subject to any modification that  
16 he deems appropriate as the trial judge.

17         Accordingly, the Court proposes the following adverse inference instruction, to be  
18 given in accordance with the limitations above:

19         “Upon a finding of liability and only as to the issue of willfulness and the  
20 civil penalty under California Civil Code § 1794(c) when calculating  
21 damages, and in addition to the other evidence heard during trial, the jury  
may consider the following:

22             1) BMW did not fully comply with the Court’s orders to produce emails  
23 from one of its engineers and records from two of its databases, related to  
24 similar engine oil consumption and air conditioning defects in vehicles of  
the same year, make, and model as Plaintiff’s vehicle.

25             2) If BMW had complied, you may assume the following:

26                 i. Searches in the PuMA and Customer Relations/Contacts  
27 databases would have revealed a similar volume of customer  
28 complaints as retrieved from the Warranty Repair database,

1 regarding vehicles of the same make, year, and model as  
2 Michael Jensen's vehicle.

- 3 ii. Emails from Michael Murray would have revealed  
4 correspondence regarding the engine found in Michael Jensen's  
5 particular vehicle and discussed similar issues with the engine,  
6 as revealed by the complaints from the Warranty Repair  
7 database.

8 These inferences are not to be considered for any other purpose."

### 9 **C. BMW'S REQUEST FOR SANCTIONS**

10 In its opposition papers, BMW requests that the Court impose sanctions on  
11 Plaintiff for filing this motion. ECF No. 101 at 9. Because the Court grants in part  
12 Plaintiff's motion, the Court will **DENY** the request for sanctions.

### 13 **IV. CONCLUSION**

14 Accordingly, and consistent with the discussion above, the Court **GRANTS IN**  
15 **PART** and **DENIES IN PART** Plaintiff's second motion for sanctions.

16 **IT IS SO ORDERED.**

17 Dated: June 7, 2019



18 Hon. Nita L. Stormes  
19 United States Magistrate Judge  
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