

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NIERAN ZETO,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC; and
DOES 1 to 10,

Defendants.

Case No.: 20-cv-1380-GPC-KSC

**ORDER (1) DENYING MOTION TO
REMAND; (2) GRANTING LEAVE
TO AMEND COMPLAINT; AND (3)
GRANTING MOTION TO COMPEL
ARBITRATION AND STAY ACTION**

[ECF Nos. 11, 16, 19]

Before the Court are three motions: (1) Plaintiff’s Motion to Remand, ECF No. 11; (2) Plaintiff’s Motion for Leave to File Amended Complaint, ECF No. 16; and (3) Defendant BMW of North America, LLC (“Defendant” or “BMW NA”)’s Motion to Compel Arbitration and to Stay Action, ECF No. 19. Upon consideration of the motions, the related documents, and relevant law, the Court **DENIES** Plaintiff’s request for remand; **GRANTS** leave to file an amended complaint and **ORDERS** the proposed amended complaint, ECF No. 16-2 at 13–19, to be deemed filed as the First Amended Complaint (“FAC”); and **GRANTS** Defendant’s motion to compel arbitration and **STAYS** all proceedings in this action until arbitration is completed.

1 **I. BACKGROUND**

2 On or about October 13, 2017, Plaintiff purchased/leased (“purchased”) a vehicle
3 that was manufactured by BMW NA. Compl. ¶ 5, ECF No. 1-2. BMW NA provided a
4 written express warranty on the vehicle. *Id.* ¶ 6. Plaintiff alleges that during the warranty
5 period, the vehicle had substantial defects, and that despite Plaintiff requesting a
6 repurchase, BMW NA failed to successfully repair the vehicle or replace it. *Id.* ¶¶ 7, 8.

7 On February 18, 2020, Plaintiff filed her Complaint in the Superior Court of
8 California, County of San Diego, North County Division, which BMW NA removed to
9 federal court on July 20, 2020 once the state court dismissed co-defendant Irvine
10 Eurocars LLC d/b/a Irvine BMW on June 19, 2020. BMW NA’s Notice of Removal,
11 ECF No. 1 at 2–3. The Complaint alleges seven causes of action: (1–3) violations of the
12 Song-Beverly Consumer Warranty Act (“Song-Beverly Act”); (4) breach of express
13 warranties under the California Commercial Code; (5) breach of implied warranties; (6)
14 violation of the Magnuson-Moss Warranty Act (“Magnuson-Moss Act”); and (7)
15 violation of the California Business and Professions Code. Compl. 2–9, ECF No. 1-2.

16 On August 19, 2020, Plaintiff filed a Motion to Remand the case back to the state
17 court. ECF No. 11. Defendant filed a Response in Opposition to Plaintiff’s Motion to
18 Remand the case, which Plaintiff filed a Reply. ECF Nos. 21, 25.

19 Plaintiff also filed a Motion for Leave to File Amended Complaint on August 28,
20 2020. ECF No. 16. According to Plaintiff, the proposed FAC re-dismisses Irvine BMW,
21 and removes the original counts 3, 4, and 6. “Plaintiff remains focus [sic] on pursuing
22 the allegations revolving around Defendant’s violations of California’s Song Beverly
23 Consumer Warranty Act and Business and Professions Code.” *Id.* at 2. While Defendant
24 notified the Court that Defendant does not object to Plaintiff filing an amended
25 complaint, Defendant stated, among others, that the proposed FAC “silently and without
26
27
28

1 explanation removes Plaintiff’s allegation related to her citizenship.” BMW NA’s Notice
2 of Non-Opp’n 2, ECF No. 22.

3 On September 9, 2020, BMW NA filed a Motion to Compel Arbitration and to
4 Stay Action (“MTC”). ECF No. 19. Defendant states that the Motion is made pursuant
5 to the “Arbitration Clause” that is contained in the Motor Vehicle Lease Agreement,
6 which Plaintiff signed in purchasing the vehicle. *Id.* at 2. Plaintiff filed a Response
7 opposing the MTC, and Defendant filed a Reply. ECF Nos. 24, 25.

8 **II. JUDICIAL NOTICE**

9 The Court **HEREBY TAKES** judicial notice of the Motor Vehicle Lease
10 Agreement (“Lease Agreement”), the BMW Financial Services Consumer Credit
11 Application (“Credit Application”), and Plaintiff’s California Driver’s License (“Driver’s
12 License”). BMW NA’s Req. for Judicial Notice, ECF No. 21. Relatedly, the Court
13 **OVERRULES** Plaintiff’s objections pertaining to these three documents. “The court
14 may judicially notice a fact that is not subject to reasonable dispute because it . . . can be
15 accurately and readily determined from sources whose accuracy cannot reasonably be
16 questioned.” Fed. R. Evid. 201(b).

17 Here, the Lease Agreement is judicially noticeable because even if it is not
18 explicitly attached to the complaint, it is integral to Plaintiff’s claims and its authenticity
19 is not questioned. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The
20 Lease Agreement is integral to the complaint, as the original complaint states: “On or
21 about October 13, 2017, Plaintiff purchased/leased (hereinafter referred to as
22 ‘purchased’) 2018 BMW 530E, vehicle identification number WBAJA9C54JB033423,
23 (Vehicle).” Compl. ¶ 5, ECF No. 1-2; *see also* FAC ¶ 4, ECF No. 16-2. The Lease
24 Agreement’s authenticity is not contested. In fact, Plaintiff attached a carbon copy of it
25 when opposing arbitration. Decl. of Nieran Zeto (“Zeto Decl.”) Ex. 1, ECF No. 24-2.

1 The Credit Application is also judicially noticeable. The information contained in
2 it, such as Plaintiff's name, city and state of residence, and signature, "can be accurately
3 and readily determined from sources whose accuracy cannot reasonably be questioned."
4 Fed. R. Evid. 201(b). Plaintiff's Objection to Judicial Notice, ECF No. 11-4, does not
5 address this document. Rather, Plaintiff makes boilerplate evidentiary objections, *see*
6 Pl.'s Obj. of Evid. 3, ECF No. 11-3, which the Court rejects as being devoid of any
7 specific argument or analysis as to why the document should be excluded. *See Ferguson*
8 *v. United States*, No. 15CV1253 JM (MDD), 2018 WL 3570283, at *2 (S.D. Cal. July 25,
9 2018), *aff'd*, 792 F. App'x 494 (9th Cir. 2020).

10 Finally, the Driver's License is judicially noticeable as true and correct copies of
11 "matters of public record." *See United States v. 14.02 Acres of Land*, 547 F.3d 943, 955
12 (9th Cir. 2008).

13 **III. REMAND TO STATE COURTS**

14 The Court first addresses whether it has jurisdiction over the case. Defendant
15 removed the case to federal court, and Plaintiff moved to remand it back to state court.
16 Notice of Removal, ECF No. 1; Mot. to Remand, ECF No. 11. A federal district court
17 has jurisdiction over any civil action under the diversity jurisdiction statute if complete
18 diversity exists between the parties and the amount in controversy exceeds \$75,000. 28
19 U.S.C. § 1332. The nature of limited jurisdiction in federal courts and comity principles
20 mean that the defendant has the burden of proof. *See Moore-Thomas v. Alaska Airlines,*
21 *Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009); *Harris v. Bankers Life & Cas. Co.*, 425 F.3d
22 689, 698 (9th Cir. 2005).

23 Based on the state court complaint as the operative complaint and additional
24 evidentiary support, Defendant has sufficiently demonstrated that this Court has diversity
25 jurisdiction over the matter, and that removal to federal court was proper. Complete
26 diversity exists. BMW NA is a citizen of Delaware and New Jersey. The original
27
28

1 complaint and various evidentiary exhibits all demonstrate that Plaintiff is domiciled in
2 California. The amount in controversy is met as well. Based on the causes of action in
3 the complaint and Plaintiff’s Initial Disclosures with specific monetary demands, it is
4 evident that the amount in dispute is greater than \$75,000. With multiple evidentiary
5 sources that support removal, and scant—if not zero—evidence to the contrary by
6 Plaintiff, Defendant has met the burden of persuasion. Accordingly, the Court **DENIES**
7 Plaintiff’s Motion to Remand.

8 **A. Operative Complaint**

9 To start, the Court conducts its jurisdiction analysis based on the original
10 complaint that was filed in state court, and not the proposed amended complaint. “[P]ost-
11 removal amendments to the pleadings cannot affect whether a case is removable, because
12 the propriety of removal is determined solely on the basis of the pleadings filed in state
13 court.” *Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006). “Any
14 other ruling would enable plaintiffs to, upon the realization that their litigation has taken
15 a sour turn in federal court, use a post-removal damage stipulation to remand their case
16 after the parties and the court have invested extensive time and resources.” *Gillette v.*
17 *Peerless Ins. Co.*, No. CV 13-03161 DDP RZX, 2013 WL 3983872, at *3 (C.D. Cal. July
18 31, 2013). BMW NA removed the case on July 20, 2020, and Plaintiff moved to amend
19 the complaint afterwards on August 28, 2020. Since the motion to amend the complaint
20 was filed after BMW NA’s motion for removal, the original complaint filed in state court
21 is the operative document for the Court’s review for remand.

22 **B. Complete Diversity**

23 Complete diversity exists because for purposes of diversity jurisdiction, Defendant
24 BMW NA is a citizen of Delaware and New Jersey, and Plaintiff is domiciled in
25 California. First, the Court agrees with BMW NA’s uncontested explanation for why it is
26 not a California citizen. Unnamed defendants are disregarded for purposes of removal,
27
28

1 28 U.S.C. § 1441(b)(1), and BMW NA, the only named defendant, is a limited liability
2 company. For diversity jurisdiction purposes, a limited liability company is a citizen of
3 every state where its owners/members are citizens. *Johnson v. Columbia Properties*
4 *Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). The sole member of BMW NA is
5 BMW (US) Holding Corp., which is organized under Delaware law with its principal
6 place of business in New Jersey. Since BMW (US) Holding Corp. is a citizen of
7 Delaware and New Jersey, *see* 28 U.S.C. § 1332(c)(1) (“[A] corporation shall be deemed
8 to be a citizen of every State . . . by which it has been incorporated and . . . where it has
9 its principal place of business”), BMW NA is also a citizen of Delaware and New Jersey.

10 In addition, Defendant has produced sufficient evidence for the Court to conclude
11 that Plaintiff is domiciled in California. In analyzing diversity jurisdiction, a person’s
12 state citizenship status is determined by where the natural person is domiciled,¹ which is
13 the person’s “permanent home, where she resides with the intention to remain or to which
14 she intends to return.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir.
15 2001). Although not definitive, a person’s residence is prima facie evidence for
16 establishing domicile. *See, e.g., Kalasho v. BMW of N. Am., LLC*, No. 20-CV-1423-
17 CAB-AHG, 2020 WL 5652275, at *2 (S.D. Cal. Sept. 23, 2020) (citing *Lee v. BMW of N.*
18 *Am., LLC*, No. SACV1901722JVSADXS, 2019 WL 6838911, at *2 (C.D. Cal. Dec. 16,
19 2019)); *see also D.C. v. Murphy*, 314 U.S. 441, 455 (1941); *Barrera v. W. United Ins.*
20 *Co.*, 567 F. App’x 491, 492 n.1 (9th Cir. 2014).

21
22
23
24 ¹ To the extent that Plaintiff argues for remand because Plaintiff is not a U.S. citizen, *see*
25 Pl.’s Reply Br. 3–4, ECF No. 23, the Court is unpersuaded. *See* 28 U.S.C. § 1332(a)(2)
26 (covering disputes between a state citizen and “citizens or subjects of a foreign state,”
27 unless that foreign citizen is “lawfully admitted for permanent residence,” in which case
28 the analysis focuses on the state domicile).

1 Here, the original complaint declares that Plaintiff “was at all material times, a
2 competent adult and resident of the State of California.” ECF No. 1-2, ¶ 1. In addition,
3 the Lease Agreement and Driver’s License state that Plaintiff resides in El Cajon,
4 California. Zeto Decl. Ex. 1, ECF No. 24-2; Decl. of Robert K. Dixon (“Dixon Decl.”)
5 Ex. 3, ECF No. 21-1; *cf. Kyung Park v. Holder*, 572 F.3d 619, 625 (9th Cir. 2009)
6 (discussing location of personal and real property, driver’s license and automobile
7 registration, etc. as evidence of domicile). Even further, Plaintiff’s Credit Application
8 indicates that by the time of her credit report, Plaintiff had lived in El Cajon for eighteen
9 years. *Id.* Ex. 2. Plaintiff cannot hide behind abstract and reactionary² burden of proof
10 arguments without producing any evidentiary support to the contrary, especially when
11 multiple sources of evidence—some of which were generated by Plaintiff herself (such as
12 the state complaint and the Lease Agreement which was attached as exhibits in Plaintiff’s
13 Court documents)—direct the Court to one conclusion.

14 Because Defendant is a citizen of Delaware and New Jersey, and because the Court
15 concludes that Plaintiff is domiciled in California based on the preponderance of
16 evidence, complete diversity exists.

17 **C. Amount in Controversy**

18 The amount in controversy far exceeds the \$75,000 threshold pursuant to 28
19 U.S.C. § 1332(a) because Plaintiff’s own documents say so. In determining whether
20 removal is proper, the court considers pleadings at the time of removal, *Williams v.*
21 *Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006), and “summary-judgment-
22 type evidence relevant to the controversy at the time of removal,” *Singer v. State Farm*
23

24
25 ² Specifically, the Court notes that challenges to Plaintiff’s domicile only arose in
26 Plaintiff’s Reply Brief, and Plaintiff’s initial Motion for Remand is completely silent on
27 Plaintiff’s domicile.

1 *Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (citation omitted). “The basic rule
2 is that, for jurisdictional purposes, the amount in controversy is measured by the amount
3 of the claim.” *Riggins v. Riggins*, 415 F.2d 1259, 1260 (9th Cir. 1969). The Court must
4 consider the aggregate amount of all damages sought in the complaint because “[t]he
5 amount in controversy is simply an estimate of the total amount in dispute, not a
6 prospective assessment of defendant’s liability.” *Lewis v. Verizon Commc’ns, Inc.*, 627
7 F.3d 395, 400 (9th Cir. 2010); *see also Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp.
8 2d 1199, 1205 (E.D. Cal. 2008) (“In measuring the amount in controversy, a court must
9 assume that the allegations of the complaint are true and that a jury will return a verdict
10 for the plaintiff on all claims made in the complaint.”). Applying this legal framework,
11 Plaintiff’s Initial Disclosures alone express that Plaintiff seeks damages of “\$52,923.99
12 restitution, \$105,847.98 civil penalty damages.” Dixon Decl. Ex. 4, ECF No. 21-1 at 19.
13 This amounts to a total of \$158,771.97, which does not even account for attorney’s fees
14 and costs, consequential and incidental damages, additional punitive damages, and
15 disgorgement of profits—all remedies requested by Plaintiff.

16 The Court rejects Plaintiff’s reliance on a “statutory offset” to avoid the amount in
17 controversy requirement, Pl.’s Mem. of P. & A. 4–5, ECF No. 11-1. Plaintiff argues that
18 under the Song-Beverly Act, damages may be reduced by Plaintiff’s usage of the vehicle.
19 *See* Cal. Civ. Code § 1793.2(d)(2)(C). However, this does not impact the amount in
20 *controversy*, which assumes that the jury will return a verdict for the plaintiff on all
21 causes of action. Even if some mitigation may occur, Plaintiff cannot both argue that the
22 statutory offset reduces the damages to “zero,” Pl.’s Mem. of P. & A. 4, ECF No. 11-1,
23 while also asserting, in the Initial Disclosures, that Defendant has the “burden to prove
24 the amount of the offset for Plaintiff’s use.” Dixon Decl. Ex. 4, ECF No. 21-1 at 19.

25 In addition, civil penalties are not speculative and should be included. In fact, the
26 amount of controversy analysis may include civil penalty damages as long as they are
27
28

1 recoverable under state law. *Davenport v. Mut. Ben. Health & Acc. Ass'n*, 325 F.2d 785,
2 787 (9th Cir. 1963); *see also Brady v. Mercedes-Benz USA, Inc.*, 243 F. Supp. 2d 1004,
3 1009 (N.D. Cal. 2002) (including Song-Beverly Act civil penalty damages in the amount
4 in controversy analysis). California law permits civil penalties up to twice the actual
5 damages. Cal. Civ. Code § 1794(c). While courts may need to be wary of punitive
6 damages inflating the amount in controversy as a general concern, not much scrutiny is
7 needed when the Song-Beverly Act expressly states the contours of the damages, and
8 Plaintiff requests that amount.

9 None of the cases presented by Plaintiff prohibit the consideration of punitive
10 damages or Song-Beverly Act civil penalty damages in an amount in controversy
11 analysis. Rather, in these cases, the courts excluded punitive damages where the
12 complaints merely stated a general request for punitive damages and the defendants
13 latched on to the prayer without providing additional “facts.” *See Fahed Ismat Zawaideh*
14 *v. BMW of N. Am., LLC*, No. 17-CV-2151 W (KSC), 2018 U.S. Dist. LEXIS 64723, at *6
15 to *7 (S.D. Cal. Apr. 17, 2018); *Pontiero v. Geico Gen. Ins. Co.*, No. EDCV 17-1125
16 JGB (DTBx), 2017 U.S. Dist. LEXIS 129165, at *10 to *11 (C.D. Cal. Aug. 14, 2017);
17 *Edwards v. Ford Motor Co.*, No. CV 16-05852 BRO (PLAx), 2016 U.S. Dist. LEXIS
18 153618, at *14 to *15 (C.D. Cal. Nov. 4, 2016); *Jackson v. Frank*, No. C12-03975 HRL,
19 2012 U.S. Dist. LEXIS 174165, at *4 to *5 (N.D. Cal. Dec. 7, 2012); *Conrad Assocs. v.*
20 *Hartford Acc. & Indem. Co.*, 994 F. Supp. 1196, 1201 (N.D. Cal. 1998). Here, Defendant
21 has provided more. Defendant submitted a detailed breakdown of how the civil penalties
22 were calculated, backed up by passages from the complaint and other evidentiary
23 exhibits. The civil penalty damages alleged are twice the actual damages (as stated in the
24 complaint), and there is a sensible calculation on what the actual damages looks like,
25 based on what is stated in the Lease Agreement. Plaintiff’s Initial Disclosures provided a
26 hyper-specific damages tabulation as well—in fact, to the cent.

1 Because Defendant has sufficiently established that Plaintiff seeks damages of
2 restitution and civil penalties which collectively exceed \$75,000, the amount in
3 controversy requirement is met regardless of attorney's fees and claims under the
4 Magnuson-Moss Act. Since the disputes over attorney's fees and the implication of the
5 Magnuson-Moss Act have no bearing on the Court's remand analysis, the Court will not
6 address these issues further.

7 **IV. FIRST AMENDED COMPLAINT**

8 Plaintiff moved to file an amended complaint. Pl.'s Mot. for Leave to File Am.
9 Compl., ECF No. 16. BMW NA does not object. BMW NA's Notice of Non-Opp'n,
10 ECF No. 22. By and through the motion and memorandum, Plaintiff has demonstrated
11 that the amendment will not unduly prejudice the Defendants and that justice requires the
12 grant of leave to file an amended complaint.

13 Therefore, pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiff's Motion
14 for Leave to File Amended Complaint is **GRANTED**. It is **HEREBY ORDERED** that
15 Plaintiff's proposed amended complaint attached to her Motion, Decl. in Support of Mot.
16 Ex. 3, ECF No. 16-2 at 13–19, is deemed filed as the FAC. Further, the FAC will be the
17 operative complaint for purposes of analyzing Defendant's MTC, especially since BMW
18 NA does not oppose the amendment.

19 **V. ARBITRATION AND STAY OF CASE**

20 Finally, Defendant has moved to compel arbitration and stay the lawsuit until
21 arbitration is complete. BMW NA's MTC, ECF No. 19. Defendant relies on the
22 Arbitration Clause, which is part of the Lease Agreement that Plaintiff signed.

23 The Court concludes that arbitration is required under the Lease Agreement.
24 Under California law, the Arbitration Clause presents a valid agreement to arbitrate—
25 Plaintiff has failed to meet her burden of proving that the Arbitration Clause is
26 unconscionable. In addition, Plaintiff's claims are all subject to the Arbitration Clause.

1 As such, the Court will enforce the broad language of the Arbitration Clause, which
2 discusses how “any” claim, dispute, or controversy relating to the vehicle shall be subject
3 to arbitration, which would also include claims arising from BMW NA’s express
4 warranties, the Song-Beverly Act, and the Magnuson-Moss Act. Finally, even though
5 BMW NA is not an express signatory to the Lease Agreement and the Arbitration Clause,
6 it still has standing to compel arbitration as a third-party beneficiary.

7 **A. Federal Arbitration Act (“FAA”)**

8 The FAA applies when arbitration agreements meet two conditions: (1) the
9 agreement to arbitrate is in writing; and (2) the agreement is part of “a contract
10 evidencing a transaction involving commerce.” 9 U.S.C. § 2. Arbitration agreements
11 that satisfy these two requirements “shall be valid, irrevocable, and enforceable, save
12 upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

13 Pursuant to the FAA, a party aggrieved by the alleged failure of another to arbitrate
14 may petition the Court to compel arbitration in the manner provided in the agreement. *Id.*
15 § 4. In ruling on the motion to compel arbitration, the Court must determine two
16 “gateway” issues: “(1) whether there is an agreement to arbitrate between the parties; and
17 (2) whether the agreement covers the dispute.” *Brennan v. Opus Bank*, 796 F.3d 1125,
18 1130 (9th Cir. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84
19 (2002)). Once these two issues are satisfied, the Court must compel arbitration and stay
20 the trial. *See* 9 U.S.C. §§ 3, 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218
21 (1985).

22 Plaintiff argues that the FAA does not apply, citing *Arthur Andersen LLP v.*
23 *Carlisle*, 556 U.S. 624, 630 (2009). Pl.’s Opp’n to MTC 2, ECF No. 24. However,
24 Plaintiff’s reliance on *Arthur Andersen* is misplaced. *Arthur Andersen* more
25 appropriately stands for the principle that state law “determine[s] which contracts are
26 binding under [the FAA] § 2 and enforceable under § 3 ‘if that law arose to govern issues
27
28

1 concerning the validity, revocability, and enforceability of contracts generally.” 556
2 U.S. at 630–31 (citation omitted).

3 The Court agrees with Plaintiff that California law governs the formation and
4 validity of the contract, including an arbitration agreement. However, once it is
5 established that a valid contract exists, the scope of the arbitration agreement is governed
6 by federal law. *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1059 (9th Cir. 2020)
7 (citing *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013)). And “as a
8 matter of federal law, any doubts concerning the scope of arbitrable issues should be
9 resolved in favor of arbitration, whether the problem at hand is the construction of the
10 contract language itself or an allegation of waiver, delay, or a like defense to
11 arbitrability.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir.
12 2000) (citation omitted).

13 **B. The Arbitration Clause**

14 The Court holds that the Arbitration Clause in the Lease Agreement constitutes a
15 valid agreement to arbitrate between the parties, and that the Arbitration Clause covers
16 the lawsuit before the Court. Plaintiff has not demonstrated that the Arbitration Clause is
17 unconscionable under California law. In addition, the Arbitration Clause’s broad
18 language accounts for Plaintiff’s current dispute over the vehicle—including Plaintiff’s
19 claims arising under BMW NA’s Warranty Manual and the Song-Beverly Act.

20 **1. Formation and Validity**

21 The Court, applying California law, first addresses whether the Lease Agreement
22 and the Arbitration Clause are valid contracts. It is undisputed that the signed Lease
23 Agreement (which contains the Arbitration Clause) is in writing, and part of a “contract
24 evidencing a transaction involving commerce,” within the meaning of the FAA, 9 U.S.C.
25 § 2. Instead, Plaintiff’s challenge is that the Arbitration Clause is unconscionable and
26 thus invalid under California law. Pl.’s Opp’n to MTC 10–13, ECF No. 24.

1 To deem a contract unconscionable under California law, there must be both
2 procedural and substantive unconscionability. *Armendariz v. Found. Health Psychcare*
3 *Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (citation omitted). However, these two elements
4 need not be present in the same degree—rather, they are evaluated on a sliding scale
5 where “the more substantively oppressive the contract term, the less evidence of
6 procedural unconscionability is required to come to the conclusion that the term is
7 unenforceable, and vice versa.” *Id.* The party asserting unconscionability bears the
8 burden of proof. *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015)
9 (citation omitted).

10 **a. Procedural Unconscionability**

11 Procedural unconscionability “concerns the manner in which the contract was
12 negotiated and the circumstances of the parties at that time.” *Gatton v. T-Mobile USA,*
13 *Inc.*, 152 Cal. App. 4th 571, 581 (2007). “The element focuses on oppression or
14 surprise.” *Id.* (citing *Armendariz*, 24 Cal. 4th at 114). Oppression arises from the
15 “inequality in bargaining power” that leads to no meaningful choice or negotiation, and
16 surprise is “the extent to which the supposedly agreed-upon terms of the bargain are
17 hidden in the prolix printed form drafted by the party seeking to enforce the disputed
18 terms.” *Id.* (citation omitted).

19 The Court concludes that the Arbitration Clause is at least partially procedurally
20 unconscionable. Courts have generally found that contracts of adhesion, typically
21 provided on a “take it or leave it” basis, are procedurally unconscionable. *See, e.g.,*
22 *Sanchez*, 61 Cal. 4th at 915 (“Here the adhesive nature of the contract is sufficient to
23 establish some degree of procedural unconscionability.”); *Little v. Auto Stiegler, Inc.*, 29
24 Cal. 4th 1064, 1071 (2003).

25 There is some element of surprise. It is true that multiple headers warn the
26 Plaintiff to closely read certain parts of the Lease Agreement. For example, the Lease
27
28

1 Agreement provides “NOTICE TO LESSEE: (1) Do not sign this Lease before you read
2 it,” or in red and all-capitalized font, “PLEASE REVIEW - IMPORTANT - AFFECTS
3 OUR LEGAL RIGHTS.” Zeto Decl. Ex. 1, ECF No. 24-2; *cf. Brookwood v. Bank of*
4 *Am.*, 45 Cal. App. 4th 1667, 1674 (1996) (“Reasonable diligence requires the reading of a
5 contract before signing it.”). Still, the text of the Lease Agreement is not so intuitive that
6 an average consumer can immediately identify the corporate relationships (and how that
7 will affect the contract) between the dealer, financier, assignee, manufacturer, and other
8 affiliates.

9 But even though there is some procedural unconscionability, that alone is
10 insufficient. The Court must still scrutinize the substantive terms of the contract.
11 *Sanchez*, 61 Cal. 4th at 915.

12 **b. Substantive Unconscionability**

13 Substantive unconscionability focuses on the harshness and one-sided nature of the
14 substantive terms of the contract. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d
15 473, 486–87 (1982). An adhesive agreement to arbitrate will be deemed substantively
16 unconscionable if it lacks a “modicum of bilaterality.” *Armendariz v. Found. Health*
17 *Psychcare Servs., Inc.*, 24 Cal. 4th 83, 116–17 (2000). This is determined by examining
18 the actual effects of the challenged provisions. *Ellis v. McKinnon Broad. Co.*, 18 Cal.
19 App. 4th 1796, 1803 (1993).

20 Here, Plaintiff has failed to demonstrate substantive unconscionability. The
21 Arbitration Clause gives Plaintiff the right to choose the arbitration forum, including the
22 option to choose the American Arbitration Association or JAMS. Zeto Decl. Ex. 1, ECF
23 No. 24-2 at 7. These organizations are recognized as “major arbitration entities” by
24 California courts. *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233, 258 (2016). Plaintiff
25 provides no case law countering Defendant’s observation that California courts have
26
27
28

1 found arbitration procedures by these organizations to be fair and neutral forums—in
2 fact, Plaintiff is completely silent on the matter.

3 Plaintiff instead makes two arguments, both of which fail. First, Plaintiff argues
4 that the agreement is unconscionable because it takes away the right to jury trial. This
5 misses the point. So long as *both* parties do not have such right, the bilaterality is
6 preserved. Further, the application of Plaintiff’s reasoning would make every arbitration
7 agreement substantively unconscionable, since the whole point of an arbitration is to
8 avoid litigation, including jury trial.

9 Second, Plaintiff argues that involuntary arbitration would strip claims arising from
10 the Song-Beverly Act and the Magnuson-Moss Act. The latter is no longer a cause of
11 action in the FAC, so it is moot. On the former, Plaintiff’s interpretation of the Song-
12 Beverly Act—that the Act makes all arbitrations optional—is wrong. The “qualified
13 third-party dispute resolution process” referenced in the Act is something that
14 manufacturers may establish, and if consumers decide to participate, the consumers may
15 then elect to discard the results and proceed with the lawsuit. Cal. Civ. Code §
16 1793.22(c), (d)(2). Importantly, this “qualified” third-party dispute resolution process
17 does not displace a contractual arbitration agreement. Plaintiff has not presented any
18 legal authority to support her interpretation, whereas multiple courts have sided with
19 Defendant’s interpretation on the issue. *See, e.g., Lanning v. BMW of N. Am., LLC*, No.
20 3:19-CV-00773-BEN-LL, 2019 WL 5748518, at *5 (S.D. Cal. Nov. 5, 2019); *Reykhel v.*
21 *BMW of N. Am. LLC*, No. 19-CV-01900-SK, 2019 WL 10056984, at *4 (N.D. Cal. Aug.
22 12, 2019).

23 Since Plaintiff cannot prove substantive unconscionability of the Arbitration
24 Clause, a valid agreement to arbitrate exists under California law.

25 ///

1 **2. Scope**

2 Next, the Court addresses whether the Arbitration Clause covers the dispute in
3 front of the Court. The Arbitration Clause, in part, states the following:

4 “Claim” broadly means any claim, dispute or controversy, whether in
5 contract, tort, statute or otherwise, whether preexisting, present or future,
6 between me and you or your employees, officers, directors, affiliates,
7 successors or assigns, or between me and any third parties if I assert a Claim
8 against such third parties in connection with a Claim I assert against you,
9 which arises out of or relates to my credit application, lease, purchase or
10 condition of this Vehicle, this Lease or any resulting transaction or
relationship (including any such relationship with third parties who do not
sign this Lease). Any Claim shall, at your or my election, be resolved by
neutral, binding arbitration and not by a court action.

11 Zeto Decl. Ex. 1, ECF No. 24-2 at 7. The Lease Agreement defines “I,” “me,” and “my”
12 as Plaintiff, and “you” and “your” as Irvine BMW or its assignee, BMW Financial
13 Services NA, LLC (“BMW FS”). *Id.* at 4.

14 Given the broad language of the Arbitration Clause, the Court finds that Plaintiff
15 agreed to arbitrate the current dispute in front of this Court in its entirety. The current
16 lawsuit is a “claim, dispute or controversy” between Plaintiff and BMW NA, a third-
17 party, “in connection with” a lawsuit originally asserted against Irvine BMW as one of
18 the defendants, which “arises out of or relates to” the “condition of this Vehicle . . . or
19 any resulting transaction or relationship.” Since the current lawsuit constitutes a “Claim”
20 under the Arbitration Clause, it is covered by the agreement to arbitrate.

21 In response to whether the Arbitration Clause’s scope extends to this lawsuit,
22 Plaintiff makes three arguments: (1) Plaintiff’s cause of action arises from BMW NA’s
23 Warranty Manual which expressly allows court action; (2) the Magnuson-Moss Act bars
24 binding arbitration; and (3) the Song-Beverly Act bars binding arbitration. Pl.’s Opp’n to
25 MTC 7–10, ECF No. 24.

1 All three arguments are unavailing. The Court has already addressed and rejected
2 the second and third arguments *supra* page 15 of this Order. As to the first argument that
3 the cause of action arises from the Warranty Manual, the Arbitration Clause’s broad
4 language renders this provision inapplicable. Here, Plaintiff’s breach of warranty claim
5 is predicated on: (1) the defective “check engine” and “restraint malfunction” lights,
6 “excessively loud strange noises emanating from the Vehicle,” transmission defects,
7 excessive shaking, and malfunctions in the backup camera and electronics; and (2) BMW
8 NA’s failure to repair these alleged problems. FAC 2–6, ECF No. 16-2. Such allegations
9 concern the “condition” of the vehicle, which are expressly covered by the Arbitration
10 Clause.

11 C. BMW NA’s Standing to Compel Arbitration

12 Lastly, Plaintiff argues that BMW NA cannot compel arbitration because it is not a
13 signatory to the Lease Agreement and Arbitration Clause. Pl.’s Opp’n to MTC 2–6, 13–
14 24, ECF No. 24. Defendant does not dispute its non-signatory status. BMW NA’s Mem.
15 of P. & A. 9, ECF No. 19-1. After all, the Lease Agreement was entered between
16 Plaintiff and Irvine BMW, and the Arbitration Clause may be invoked by “you” (Irvine
17 BMW or BMW FS) or “I,” (Plaintiff)—with no reference to BMW NA. Zeto Decl. Ex.
18 1, ECF No. 24-2 at 4, 7. Instead, Defendant moves to compel arbitration under the
19 doctrine of equitable estoppel and as a third-party beneficiary of the Arbitration Clause.

20 “[A] litigant who is not a party to an arbitration agreement may invoke arbitration
21 under the FAA if the relevant state contract law allows the litigant to enforce the
22 agreement.” *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013) (citing
23 *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009)). California law allows non-
24 signatories to an arbitration agreement to compel arbitration. *JSM Tuscanly, LLC v.*
25 *Superior Court*, 193 Cal. App. 4th 1222, 1237 (2011). Specifically, a non-signatory may
26 compel arbitration under the doctrine of equitable estoppel. *Id.* A non-signatory may
27
28

1 also compel arbitration as a third-party beneficiary to the arbitration agreement. *Ronay*
2 *Family Ltd. P’ship v. Tweed*, 216 Cal. App. 4th 830, 838 (2013); *see also* Cal. Civ. Code
3 § 1559 (“A contract, made expressly for the benefit of a third person, may be enforced by
4 him at any time before the parties thereto rescind it.”).

5 The Court holds that BMW NA may compel arbitration as a third-party
6 beneficiary. To compel arbitration as a third-party beneficiary, the third-party must be
7 “more than incidentally benefitted by the contract.” *Gilbert Fin. Corp. v. Steelform*
8 *Contracting Co.*, 82 Cal. App. 3d 65, 70 (1978). Rather, the third-party must
9 demonstrate that it is a “member of a class of persons for whose benefit [the arbitration
10 agreement] was made.” *Ronay Family Ltd. P’ship v. Tweed*, 216 Cal. App. 4th 830, 839
11 (2013) (citation omitted). At the same time, the third-party beneficiary’s name does not
12 need to appear in the agreement. *Id.* at 838–39. The court assesses whether the third-
13 party is an intended beneficiary “gathered from reading the contract as a whole in light of
14 the circumstances under which it was entered,” *Cione v. Foresters Equity Servs., Inc.*, 58
15 Cal. App. 4th 625, 636 (1997), though the intent of the parties “is to be ascertained from
16 the writing alone, if possible,” *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (2002).

17 In the instant case, the Arbitration Clause—which Plaintiff signed—is exceedingly
18 specific about covered disputes that may arise between Plaintiff and third-parties. The
19 potential “Claim” that may arise between Plaintiff and third parties relating to the vehicle
20 is expressly contemplated—twice. The text of the Arbitration Clause is clear that “any
21 third parties” is to be given broad meaning. It is more than “employees, officers,
22 directors, affiliates, successors or assigns.” In addition, the Arbitration Clause explicitly
23 discusses a scenario where the third-party did not sign the Lease Agreement. Further, by
24 including all claims against the third-party that are related to the “condition of this
25 Vehicle,” it is plain that the Arbitration Clause foresees and includes the current dispute,
26 where a consumer sues the manufacturer concerning the defects of the car.

1 Plaintiff's primary argument is that "the same set of facts were present" in a prior
2 Southern District of California case that ruled against BMW NA, *Jurosky v. BMW of N.*
3 *Am.*, 441 F. Supp. 3d 963, 966 (S.D. Cal. 2020). Pl.'s Opp'n to MTC 21–23, ECF No.
4 24. However, a review of *Jurosky* reveals that: the "set of facts" are not the same, the
5 text of the arbitration agreement matters, and the instant contract makes BMW NA a
6 third-party beneficiary of the Arbitration Clause. Consider the two arbitration provisions
7 juxtaposed below:

8 Any claim or dispute, whether in contract, tort, statute or otherwise
9 (including the interpretation and scope of this Arbitration Provision, and the
10 arbitrability of the claim or dispute), between you and us or our employees,
11 agents, successors or assigns, which arises out of or relates to . . . purchase
12 or condition of this vehicle, the contact [sic] or any resulting transaction or
13 relationship (including any such relationship with third parties who do not
14 sign this contract) shall, at your or our election, be resolved by neutral,
15 binding arbitration and not by a court action.

14 *Jurosky*, 441 F. Supp. 3d at 967–68.

15 "Claim" broadly means any claim, dispute *or controversy*, whether in
16 contract, tort, statute or otherwise, whether preexisting, present or future,
17 between me and you or your employees, *officers, directors, affiliates,*
18 *successors or assigns, or between me and any third parties if I assert a*
19 *Claim against such third parties in connection with a Claim I assert against*
20 *you*, which arises out of or relates to . . . purchase or condition of this
21 Vehicle, this Lease or any resulting transaction or relationship (including
22 any such relationship with third parties who do not sign this Lease). Any
23 Claim shall, at your or my election, be resolved by neutral, binding
24 arbitration and not by a court action.

22 Zeto Decl. Ex. 1, ECF No. 24-2 at 7 (emphases added).

23 The Zeto Arbitration Clause added the term "affiliate," which describes BMW
24 NA's relationship with BMW FS. Decl. of Tyler Weight, ECF No. 19-3; *see also*
25 *Fikhman v. BMW of N. Am. LLC*, No. 219CV03963VAPMRWX, 2019 WL 6721626, at
26 *3 (C.D. Cal. Oct. 15, 2019) (finding BMW NA, "the manager" of BMW FS, to be an
27
28

1 “affiliate” of BMW FS and thus granting BMW NA’s motion to compel arbitration).
2 Further, the Arbitration Clause provides an entire phrase accounting for the scenario
3 where Plaintiff sues third-parties relating to the vehicle. It is no surprise then that
4 numerous courts have ruled in favor of BMW NA whenever the arbitration agreement
5 was more like the instant Arbitration Clause than the provision in *Jurosky*, many times
6 explicitly informing the parties that *Jurosky* is distinguishable. *See, e.g., Saponjic v.*
7 *BMW of N. Am., LLC*, No. 20-CV-703-BAS-RBB, 2020 WL 4015671, at *2 (S.D. Cal.
8 July 16, 2020); *Rizvi v. BMW of N. Am. LLC*, No. 5:20-CV-00229-EJD, 2020 WL
9 2992859, at *2 to *3 (N.D. Cal. June 4, 2020); *Pleitez v. BMW of N. Am., LLC*, No. CV
10 19-10422 PA (JCX), 2020 WL 2084954, at *3 (C.D. Cal. Feb. 27, 2020); *Katz v. BMW of*
11 *N. Am., LLC*, No. 4:19-CV-01553-KAW, 2019 WL 4451014, at *3 (N.D. Cal. Sept. 17,
12 2019); *Reykhel v. BMW of N. Am. LLC*, No. 19-CV-01900-SK, 2019 WL 10056984, at *2
13 to *3 (N.D. Cal. Aug. 12, 2019).

14 Finally, Plaintiff’s reliance on *Norcia v. Samsung Telecommunications Am., LLC*,
15 845 F.3d 1279, 1290–91 (9th Cir. 2017) is inapposite. The superficial facts may appear
16 similar: the cellphone manufacturer defendant (Samsung) sought arbitration under the
17 “Customer Agreement” that the customer plaintiff and the cellphone dealer (Verizon)
18 signed. *Norcia* rejected the defendant’s third-party beneficiary argument because the
19 defendant could not point to any evidentiary record indicating that the customer and the
20 dealer intended to benefit the manufacturer. *Id.* However, in the current dispute, the
21 terms of the Lease Agreement are far more detailed. The Lease Agreement makes
22 explicit references to “third parties,” “affiliates,” and controversies relating to the
23 “condition of this Vehicle.” These are precise references unlike the general arbitration
24 provision in *Norcia*, which stated: “I understand that I am agreeing to . . . settlement of
25 disputes by arbitration and other means instead of jury trials, and other important terms in
26 the Customer Agreement.” *Id.* at 1282 (omission in original).

1 Based on the express terms of the Lease Agreement, the parties intended BMW
2 NA to be a third-party beneficiary that may invoke the Arbitration Clause. Because
3 BMW NA may compel arbitration as a third-party beneficiary, the Court finds it
4 unnecessary to additionally analyze BMW NA's standing to compel arbitration under the
5 doctrine of equitable estoppel.

6 **D. Stay of the Case**

7 The Arbitration Clause in the Lease Agreement is a valid agreement to arbitrate the
8 dispute in front of this Court. Further, BMW NA has standing to enforce the Arbitration
9 Clause because it was an intended third-party beneficiary. Thus, the Court **GRANTS**
10 Defendant's Motion to Compel Arbitration. Further, pursuant to 9 U.S.C. § 3 and
11 Defendant's unopposed request to stay the litigation, this case is **STAYED** pending the
12 completion of the arbitration.

13 **VI. CONCLUSION AND ORDER**

14 For the foregoing reasons, **IT IS HEREBY ORDERED** that:

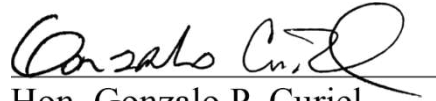
- 15 1. The Court **DENIES** Plaintiff's Motion to Remand, ECF No. 11;
- 16 2. The Court **GRANTS** Plaintiff's Motion for Leave to File Amended
17 Complaint, ECF No. 16;
- 18 3. The Clerk of Court is directed to **FILE** Plaintiff's proposed First Amended
19 Complaint, ECF No. 16-2 at 13–19, as a separate docket entry;
- 20 4. The Court **GRANTS** Defendant's Motion to Compel Arbitration and to Stay
21 Action, ECF No. 19;
- 22 5. The case is **STAYED** pending completion of the arbitration; and

23 ///

1 6. Within fourteen (14) days following the conclusion of arbitration, Defendant
2 shall **NOTIFY** the Court of such.

3 **IT IS SO ORDERED.**

4
5 Dated: November 16, 2020


6 Hon. Gonzalo P. Curiel
7 United States District Judge

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28