IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

NISSAN NORTH AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 16-0883-BC
	)	
WEST COVINA NISSAN, LLC; KEITH JACOBS; JEFF HESS; AND EMIL MOSHABAD,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) DENYING MOTIONS TO DISMISS DEFENDANT WEST COVINA NISSAN, LLC AND DEFENDANT KEITH JACOBS; AND (2) HOLDING IN ABEYANCE, FOR DISCOVERY, RULING ON MOTIONS TO DISMISS DEFENDANTS JEFF HESS AND DEFENDANT EMIL MOSHABAD

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Case Summary

Nissan North America, Inc. ("NNA") is a corporation organized and existing under the laws of California with its principal place of business located in Franklin, Tennessee. NNA has filed this lawsuit against one of its automobile dealers: West Covina Nissan, LLC ("West Covina"), and three of West Covina's employees: Emil Moshabad, the general manager; Keith Jacobs, the service director; and Jeff Hess, the manager of the parts department. All of the Defendants are located in California.

The *Complaint* alleges that the Defendants have been engaged, and continue to be engaged, in a massive scheme to defraud NNA out of millions of dollars by submitting fraudulent warranty and repair claims to NNA for payment. The alleged scheme included monitoring repair orders created by service advisors and then writing on the repair orders instructions for "bogus" add ons. Junk yards were allegedly used to buy and sell new parts. Another part of the scheme allegedly was to rough up new Nissan parts to make it appear that such parts had been removed when warranty repair work was performed. The Plaintiff alleges that the defects for which West Covina sought and obtained payment never existed.

Three causes of action are asserted against all the Defendants: (1) violation of the Tennessee Consumer Protection Act ("TCPA"), (2) fraud, and (3) negligent misrepresentation. In addition, breach of contract is asserted against Defendant West Covina. The Plaintiff seeks to recover actual, compensatory and consequential damages, and punitive and treble damages, and attorneys' fees.

The Defendants have not yet filed Answers. All four Defendants have filed preliminary motions to dismiss on these various grounds: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) *forum non conveniens*; and (4) failure to state a claim under the TCPA. After considering the record, the arguments of Counsel, and the applicable law, the Court rules as follows.

Rulings

It is ORDERED that:

(1) *Defendant West Covina Nissan, LLC's Motion To Dismiss For Lack Of Subject Matter Jurisdiction, Personal Jurisdiction, And Failure To State A Claim* is **DENIED**;

(2) *Defendant Keith Jacobs' Motion To Dismiss For Lack Of Personal Jurisdiction And Forum Non Conveniens* is **DENIED**;

(3) The *Motion To Dismiss Defendant Jeff Hess For Lack Of Personal Jurisdiction* and *Defendant Emil Moshabad's Motion To Dismiss* are **HELD IN ABEYANCE**, and the stay on depositions in California, issued October 27, 2016, is lifted for Plaintiff to obtain discovery on the colorable basis for jurisdiction it has thus far demonstrated against Defendants Jeff Hess and Emil Moshabad; and

(4) *Defendants' Collective Motions To Strike* are **DENIED**.

It is additionally ORDERED that by February 10, 2017, Plaintiff shall obtain and file any additional evidence and briefing it has to support its claim of personal jurisdiction and convenience of a Tennessee forum with respect to Defendants Hess and Moshabad. These Defendants shall file by February 24, 2017 any additional opposition. A reply, if any, is due by March 1, 2017. The Court will then determine if oral argument is necessary, and the Docket Clerk will notify Counsel if the jurisdictional and convenient

forum motions to dismiss of Defendants Hess and Moshabad shall be decided on the papers.

As to Defendant West Covina, Nissan, LLC and Defendant Keith Jacobs, it is ORDERED that written discovery may proceed, now that their motions to dismiss have been denied, but that, except for the depositions in California referred to above in paragraph 3, all other depositions are stayed until a ruling on the motions to dismiss Defendants Hess and Moshabad is issued.

Lastly, as to Defendants' motions to strike, as inadmissible hearsay, Declarations filed by the Plaintiff, it is ORDERED that the motions are denied. The Declarations have not been used by the Court for the truth of the matters asserted therein but to determine if the Plaintiff has shown, per *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, the likelihood that jurisdictional discovery will be productive. 489 S.W.3d 369, 406 (Tenn. 2015).

The facts and law on which these rulings are based are as follows.

Analysis

In deciding whether the Defendants are subject to specific personal jurisdiction, the Court has analyzed each Defendant separately as required by law, including addressing jurisdiction relating to the Corporate Defendant, West Covina, separately from the individual Defendants.

1. Corporate Defendant West Covina

(a) Parties' Positions

(1) Defendant West Covina

In support of its motion to dismiss on jurisdictional grounds, Corporate Defendant West Covina presents two arguments.

First, Defendant West Covina argues that this Court lacks subject matter jurisdiction because Nissan failed to comply with California's administrative process for resolving disputes between a California new motor vehicle distributor, the Plaintiff Nissan North America, Inc., and its authorized California Dealer, the Defendant West Covina Nissan, LLC:

> This Court can, in its discretion, dismiss the Complaint, because Nissan and the Dealer have not yet exhausted their administrative remedies. California law requires Nissan first to seek a "chargeback" from the Dealer for any "false or fraudulent" warranty claims through a statutory resolution process. *See, generally* Cal. Veh. Code § 3065 (Ex. B. [Appendix ¶ 1 & Ex. B.1].) The Dealer may file, and has filed, a protest before the Board to "hear and determine" if Nissan complied with that law. The Board has plenary jurisdiction over that claim, and further can determine the merits of Nissan's claims alleged here. This Court therefore respectfully should defer to the Board's authority and expertise, permit the parties to exhaust their administrative remedies, and dismiss the Complaint.

Memorandum In Support OF West Covina Nissan, LLC's Motion To Dismiss For Lack Of Subject Matter Jurisdiction, Personal Jurisdiction, And Failure To State A Claim, pp. 6-7 (Oct. 7, 2016).

Second, as a separate and distinct ground for dismissal, Defendant West Covina argues that this Court lacks general or specific personal jurisdiction over the Defendant:

> The Dealer is not "at home" in Tennessee, so general jurisdiction does not apply. Specific jurisdiction also does not apply. As a licensed California entity with all of its dealer operations, including warranty repairs, located solely in California, the Dealer lacks sufficient contacts that are purposefully directed at this State. And the territorial limits incorporated in due process protections require this Court to consider California's sovereign right to hear and decide this matter, and to exercise judicial restraint.
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> Looking at the Dealer's contacts, it clearly is a California-based operation, there is no disputing that. (Ex. A [Schrage Affid. ¶¶ 2-7, 9-13, 14].) But at the heart of this issue is if, based on the Dealer's attenuated contacts with Tennessee, it is afforded the proper due process protection of predictability to be haled into court here. Certainly not under contract, as the Dealer Agreement has a California choice of law provision. (Ex. A [Schrage Affid. ¶¶ 8-9 & Ex. A.1].) Definitely not based on its contacts with Nissan in the regular course of business, as those contacts are all with local Nissan personnel. (Ex. A [Schrage Affid. ¶¶ 10-11].) And clearly not under California law or as a condition of its California license, as the Dealer expected any warranty reimbursement dispute to fall under California jurisdiction, subject to Section 3065. None of the Dealer's purposely directed contacts even remotely target Tennessee.
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> Not surprisingly, the idea of reciprocity – that a nonresident defendant who benefits from the forum's laws also should face the obligation to litigate in the forum – does not apply here. The Dealer has not benefited, nor has it been protected by, any of Tennessee's laws, based on its minimal contacts with Tennessee. Its benefits all derive from California dealer protection laws based on its licensure with California. And so it follows that the Dealer should not be obligated to litigate in this forum.
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> Nissan's personal jurisdiction argument rests solely on the fact that Nissan is headquartered in Tennessee, and therefore allegedly suffered injury there, while ignoring that any contacts the Dealer had with the State were initiated by Nissan alone. It further ignores that California's statutory framework

> regulating the franchisor/franchisee relationship unambiguously intended all contacts between an out-of-state franchisor and a California franchisee to be purposefully directed to California. In particular, under California law, a "distributor" is defined as "any person other than a manufacturer who sells or distributes new vehicles subject to registration under this code...to dealers in this state and maintains representatives for the purpose of contacting dealers or prospective dealers in this state." Cal. Veh. Code § 296 (emphasis added). Therefore, to the extent that any California-based dealer has any contacts with an out-of-state franchisor, those contacts are a result of the franchisor directing them to California as a condition of its licensure. California obviously intended that any disputes relating to the franchise relationship between a franchisor and a California dealer remain in California regardless of where the franchisor may be headquartered.
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> Nissan, in fact, maintains local representatives in California for the purpose of contacting its California Dealers. (Schrage Aff., ¶ 13.) To the extent that Nissan chooses to maintain representatives in Tennessee to process warranty claims submitted by the Dealer, their purpose still is to contact the Dealer in California, regardless of who initiated that contact. Therefore, any Dealer contact with Tennessee, including submission of warranty claims, stems from a contact initiated by Nissan and directed at California. The Dealer's contacts with Tennessee therefore are incidental, and arise only because Nissan chose to maintain the Dealer's contact representatives mandated by California law at its headquarters located here, not because the Dealer purposefully directed its contact with Tennessee. *See Walden v. Fiore*, 134 S.Ct. 1115, 1122 (2014) ("But the Plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum state that is the basis for its jurisdiction over him."); *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 389 (Tenn. 2015) ("It is well established that, in order for a nonresident defendant's contacts with the forum state to be sufficient to give rise to personal jurisdiction there, those contacts must arise out of the defendant's own purposeful, deliberate actions directed toward the forum state.") For these reasons, the Court should dismiss this action for lack of personal jurisdiction.

Memorandum In Support OF West Covina Nissan, LLC's Motion To Dismiss For Lack Of Subject Matter Jurisdiction, Personal Jurisdiction, And Failure To State A Claim, pp. 2, 22 (Oct. 7, 2016); *Reply In Support Of West Covina Nissan, LLC's Motion To Dismiss*

For Lack Of Subject Matter Jurisdiction, Personal Jurisdiction, And Failure To State A Claim, pp. 10-11 (Nov. 2, 2016).

(2) Plaintiff

In opposition, the Plaintiff argues, first, as a matter of fact and law, that California Administrative Law is not a bar to nor a reason to defer proceeding in this forum and that this Court has subject matter jurisdiction over Defendant West Covina regardless of the California Administrative Law:

> Factually, the argument ignores the Complaint's allegations as to fraudulent submissions under Security+Plus Contracts (also referred to as "Service Contracts" or Policies), which are customer-purchased agreements that provide repair services beyond the standard warranty. See Complaint ¶¶ 21-23, 28, 31, 40-43, 45-48. Such contracts and abuses of reimbursement under them are not subject to § 3065, as the Statute is limited to the *warranty* reimbursement and chargeback process – it nowhere mentions service contracts. Therefore, even if WCN's legal arguments were proper, they would not reach the myriad claims arising out of WCN's fraudulent claims under Security+Plus Agreements.
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> Legally, WCN's arguments rely upon a farfetched interpretation of the California Statutes that is contrary to both the statutory language and interpretive case law. The Board's relevant statutory authorization is set forth in Vehicle Code §§ 3050 and 3065. Section 3050 authorizes the Board, *inter alia*, to "[h]ere and decide, within the limitations and in accordance with the procedure provided, *a protest presented by a franchisee* pursuant to Section 3065." Cal. Veh. Code § 3050(d). Section 3065(e) grants the Board jurisdiction to hear and decide disputes between the franchisor and franchisee related to amounts that a franchisor has or will chargeback the franchisee *as the result of a warranty audit.* That provision makes clear that a "chargeback" is a specific self-help remedy, wherein a manufacturer debits a dealer's open account for amounts determined via an audit to have been incorrectly paid. Section 3065 does not address a situation such as the present, in which a manufacturer discovers widespread fraudulent conduct outside of the audit process and chooses to sue for damages rather than using the chargeback process.

Rather, such situations are governed by § 3050(f), which expressly provides that, notwithstanding the jurisdiction of the Board to hear certain types of protests including those under § 3065 and allow or disallow chargebacks, "courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action *directly* in any court of competent jurisdiction." Cal. Vehicle Code § 3050(f) (emphasis added). The Board, under its limited jurisdiction, has no power to hear common law fraud and breach of contract causes of action, or to award damages. *Hardin Oldsmobile v. New Motor Vehicle Bd.,* 60 Cal. Rptr.2d 583, 590 (App. 1997). This is precisely the present situation, despite WCN's ham-handed mischaracterization of this action as "a protest for violation of the California Vehicle Code." (WCN Memo. 12.)

The foregoing analysis is buttressed by California case law. California courts have repeatedly held that while the "'Board is a quasi-judicial administrative agency of limited jurisdiction' ...[,] [i]t "does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee." *Mazda Motor of Am. Inc. v. New Motor Vehicle Bd.*, 2 Cal.Rptr.3d 866, 870 (App. 2003) (quoting *Hardin Oldsmobile v. New Motor Vehicle Bd.*, 60 Cal.Rptr.2d at 586 (App. 1997)). Instead, the Board's jurisdiction to preside over disputes is limited to those specifically committed to its jurisdiction by statute and when "the Board's activities exceed its authorization, the Board violates the judicial powers clause of the California Constitution." *Mazda Motor*, 2 Cal.Rptr.3d at 870-71 (citing *Hardin Oldsmobile*, 60 Cal.Rptf.2d at 590-91); *Tovas v. Am. Honda Motor Co.*, Inc., 67 Cal.Rptr.2d 145, 57 Cal.App.4th 506, 521 (1997) ("We conclude that the Board can only exercise the authority granted by the Legislature in the Vehicle Code."). WCN's effort to extend the Board's role under § 3065 to encompass myriad matters outside of the statutory audit and chargeback process is the very type of jurisdiction expansion rejected by the California courts. *See Roadtrek Motorhomes v. New Motor Vehicle Bd.*, 2016 WL 3885006, *4, *6-7 (Cal. App. July 14, 2016) (unpublished/not citable in California).

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Here too, the primary focus of this litigation is the extent to which NNA was damaged by Defendants' misfeasance and corruption. The adjudication of such matters is the general province of the courts and at the very heart of the policies underlying § 3050(f). Consequently, even if WCN's protest to the Board regarding chargebacks in the August 2015 audit avoids dismissal, it has no bearing on the present dispute, which involves completely

> different allegations that arise under the common law and Tennessee statute.
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> WCN fares no better when it segues into arguing that the regulatory framework establishing the Board compels NNA to exhaust its administrative remedies before litigating. (WCN Memo. 12-17) Once again, it ignores § 3050(f), which unambiguously states that "the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action *directly* in any court of competent jurisdiction." Cal. Veh. Code § 3050(f) (emphasis added). "Directly" adds nothing to the statutory language unless a party is free to file suit without first engaging in administrative proceedings. See DaimlerChrysler Motors Co. v. Lew Williams, Inc., 48 Cal.Rptr.3d 233, 239 (App. 2006) ("Although the Board has statutory authority to hear and decide protests, including the authority to dismiss a protest for good cause..., state law expressly grants a party to a protest the option to initiate an action on common law and statutory claims '*directly* in any court of competent jurisdiction.'"). Thus, the inclusion of "directly" in the statutory language dispenses with the pages of text devoted to this topic by WCN; litigation of the present type is expressly contemplated by the very statutory framework upon which WCN relies.

Response To Motions To Dismiss, pp. 4-7, 8-9 (Oct. 31, 2016) (footnotes omitted).

With regard to the Defendant's second argument, asserting a lack of general or specific personal jurisdiction, it is undisputed that the Plaintiff is asserting that this Court has "specific" personal jurisdiction over Defendant West Covina, not general jurisdiction. *Response To Motion To Dismiss*, p. 11 (Oct. 31, 2016) ("NNA is invoking 'specific' personal jurisdiction . . . ").

As to specific personal jurisdiction, the Plaintiff argues that Corporate Defendant West Covina purposefully targeted Tennessee with false and misleading communications designed and intended to garner undeserved payments from NNA:

> Here, NNA has made a strong prima facie showing of personal jurisdiction over WCN by alleging that WCN purposefully directed warranty claims to NNA for reimbursement and that, as a result of these fraudulent

submissions, NNA, headquartered in Tennessee, incurred significant financial injury as well as reputational injury and loss of good will with its customers. (Compl. ¶¶ 8, 20-57.) Although West Covina touts its purported lack of physical contact with Tennessee, that factor – even if it were true – is of little relevance. Where, as here, "a tortious act is committed outside the state and the resulting injury is sustained within the state, the tortious act and the injury are inseparable, and jurisdiction lies in Tennessee." *Chenault v. Walker*, 36 S.W.3d 45, 51 (Tenn. 2001). *Accord Humphreys v. Selvey*, 154 S.W.3d 544, 552 (Tenn. Ct. App. 2004) ("[E]ven a single act by defendant directed toward Tennessee that gives rise to a cause of action can support a finding of minimum contacts sufficient to exercise personal jurisdiction without offending due process.") (quoting *Neal v. Janssen*, 270 F.3d 328, 331 (6th Cir. 2001)).

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Contrary to Defendants' protestations, the targeting of thousands of fraudulent communications to this state in a successful effort to initiate unwarranted payments from WCN's Tennessee contracting partner is hardly "incidental." Rather, "the actions of sending false information into Tennessee by [electronic means] had foreseeable effects in Tennessee and were directed at [an entity] in Tennessee. These false representations are the heart of the lawsuit – they were not merely incidental communications sent by the defendant into Tennessee." *Neal v. Janssen*, 270 F.3d 328, 332 (6th Cir. 2001) (finding jurisdiction over individual resident of Belgium on basis of fraudulent scheme involving phone calls and facsimile transmissions to Tennessee residents). Under such circumstances, the necessary contacts for specific jurisdiction are clearly present. *See id.* ("The acts of making [electronic communications] into the forum, standing alone, may be sufficient to confer jurisdiction on the foreign defendant where [those communications] form the bases for the action....It is the quality of the contacts, not the quantity, that determines whether they constitute 'purposeful availment.'" (citations omitted).

Response To Motions To Dismiss, pp. 12-13, 16 (Oct. 31, 2016).

(b) Subject Matter Jurisdiction – California Administrative Law

(1) No Mandatory Exhaustion of Remedies or Exclusive Jurisdiction

Case law establishes that the California Board of Motor Vehicles "is not the exclusive forum for disputes between dealers and manufacturers." *Miller v. Superior Court*, 50 Cal. App. 4th 1665, 1676, 58 Cal. Rptr. 2d 584 (1996).

As provided in the following quoted case law, the California statutory scheme does not supersede a dealer or manufacturer's right to file a civil action for common law and statutory claims.

> Although certain portions of sections 3050 and 3060 appear to give the Board broad authority to resolve distributor-dealer disputes, a series of appellate decisions have limited its power. (*Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 1675, 58 Cal.Rptr.2d 584; *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, 590, 60 Cal.Rptr.2d 583 (*Hardin*); *Mazda Motor of America, Inc. v. New Motor Vehicle Bd.,supra,* 110 Cal.App.4th at p. 1457, 2 Cal.Rptr.3d 866.) Specifically, language in section 3050, subdivision (c), giving the Board authority to "[c]onsider *any* matter concerning the activities or practices" (italics added) of a licensee, has been limited to authority to investigate, regulate licensing, and resolve disputes between the public and licensees. (*Hardin,* at p. 590, 60 Cal.Rptr.2d 583; *Mazda Motor of America,* at p. 1457, 2 Cal.Rptr.3d 866.) The delegation of greater powers to the Board would violate the judicial powers clause of the California Constitution. (*Hardin,* at p. 598, 60 Cal.Rptr.2d 583; *Mazda Motor of America,* at p. 1457, 2 Cal.Rptr.3d 866.)
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> In addition, section 3050 was amended in 1997 to add subdivision (e), which expressly provides that "[n]otwithstanding subdivisions (c) and (d), the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts" and "a party may initiate an action directly in any court of competent jurisdiction." This amendment preserves the right of dealers and other licensees to file a civil action for all common law and statutory claims. (*See Tovas v. American Honda Motor Co., supra,* 57 Cal.App.4th at p. 519, 67 Cal.Rptr.2d 145; *DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 352–353, 48 Cal.Rptr.3d 233.)

Powerhouse Motorsports Grp., Inc. v. Yamaha Motor Corp., 221 Cal. App. 4th 867, 878–79, 164 Cal. Rptr. 3d 811, 821 (2013), *as modified on denial of reh'g* (Dec. 24, 2013); *see also Miller v. Superior Court*, 50 Cal. App. 4th 1665, 1675-76, 58 Cal. Rptr. 2d 584 (1996) ("The Board does not possess exclusive jurisdiction over a case *merely* because the litigants are a new car dealer and a manufacturer.... The Board is not the exclusive forum for disputes between dealers and manufacturers.... There simply is insufficient indicia from the Legislature that it intended the Board to occupy the field exclusively.")

Thus, there is no mandatory requirement under either California or Tennessee law requiring exhaustion of administrative remedies and mandatory resolution before the California Board of Motor Vehicles. The next question is whether, even if the California administrative proceeding is not mandatory, should this case be stayed to await a decision for the Board.

(2) Doctrine of Primary Jurisdiction Inapplicable

Both California and Tennessee recognize the doctrine of primary jurisdiction which "generally requires that parties resort first to an administrative agency before they seek judicial action involving a question within the competence of that agency." *Freels v. Northrup*, 678 S.W.2d 55, 57 (Tenn. 1984); *Miller v. Superior Court*, 50 Cal. App. 4th 1665, 1676, 58 Cal. Rptr. 2d 584 (1996) ("Just because a party is not absolutely required to bring a claim to an administrative agency before suing in court does not mean the claim *should* still not be heard by that agency before a court gets it. Some common law claims, by their nature, benefit from administrative expertise even though there is no steadfast requirement that the claim be first adjudicated by an administrative agency.").

As the Tennessee Supreme Court explained in *Freels v. Northrup*, the doctrine of primary jurisdiction is exercised in the discretion of a court and is one of deferral. A court will defer proceeding with a lawsuit and cede resolution to the agency where uniformity of the law will be aided and/or if agency expertise would be helpful:

> The doctrine applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. In deciding whether to defer to the administrative agency, courts generally make two inquiries: (1) will deferral be conducive toward uniformity of decision between courts and the agency, and (2) will deferral make possible the utilization of pertinent agency expertise.
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> The doctrine of primary jurisdiction is discretionary and a court is never *required* to defer to agency expertise.

678 S.W.2d 55, 57-58 (Tenn. 1984) (citations omitted) (emphasis in original).

Applying the doctrine to this case, the Court concludes that neither of these considerations is present. This case does not contain novel issues of law on which there might be differing outcomes. Uniformity of law is not a concern. The dispute involves credibility and facts of misconduct which a jury will decide. Moreover, because the lawsuit is proceeding in Tennessee, it does not appear that a judgment will have any appreciable effect on the uniformity of decisions between the courts here and current or future cases heard before the California Motor Vehicle Board. This is especially the case since it is unclear whether California would even give full faith and credit to a judgment rendered in Tennessee or whether this Court would be bound to give full faith and credit to a decision rendered by the California Motor Vehicle Board.

As to the second consideration, whether deferral will make possible the utilization of pertinent agency expertise, the Court also concludes that is not present in this case. The causes of action in this lawsuit: fraud, negligent misrepresentation, violation of the TCPA, and breach of contract are routinely determined by juries in Tennessee, nor has Defendant West Covina articulated with any particularity why or how the expertise of the California Board of Motor Vehicles would be needed or helpful in this case. Further, as recognized by *Miller v. Superior Court*, even if the Court were to allow the case to proceed before the Board first, any decision by the Board would at best be an advisory decision, akin to that of a recommendation by a special master. 50 Cal. App. 4th 1665, 58 Cal. Rptr. 2d 584 (1996) ("Intuitively at least, it would seem that if one has a *right* to a trial by jury, a requirement that one take a detour via an administrative agency which could, at best, only render an advisory decision on the dealer's common law claims, is both a waste of time and, indeed, a "tax" on the right to a jury trial. . . . Under that doctrine, a trial court may avail itself of the specialized expertise of an administrative agency before hearing a matter-the agency in effect becomes a kind of special master for the trial court.") (footnotes omitted).

Also relevant to the Court's decision not to defer the case to the California Board of Motor Vehicles is that the Plaintiff has requested a jury trial. As analyzed in *Miller v. Superior Court*, where fraud and unfair business practices were alleged against a new car dealership and a jury trial was demanded, the case explains that a court should weigh the delay in proceeding to a trial by jury which ensues if the doctrine of primary jurisdiction is applied.

> Having concluded the doctrine of exhaustion is *not* applicable, whatever benefits *the court* might acquire from preliminary adjudication by the Board concerning allocation patterns must be balanced against the burden to the plaintiffs from the delay and their right to have questions of fact-particularly bearing on the bribery alleged-determined by a jury, not the Board. If one has a right to a trial by jury, one has a right to a trial by jury-particularly in a dispute over whether bribery ever actually occurred.[8]
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> > FN 8. Because we conclude that the Millers are entitled to have their day in court at least eventually, and the doctrine of exhaustion of remedies does not apply, we need not address the thorny question of whether the Board is empowered to give them an adequate remedy. We do, however, make one observation: The doctrine of exhaustion of administrative remedy necessarily entails the idea that there *is* an administrative remedy. The absence of any provision for damages in the statutory scheme governing the Board is thus itself some confirmation of our conclusion that the Legislature never intended the Board to completely occupy the field of disputes between dealers and manufacturers.
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> The trial court is in the best position to consider how much is to be gained by delaying that right.

Id. at 1677-78 (emphasis in original).

In Tennessee, the right of trial by jury is "inviolate." TENN. CONST. ART. I, § 6 (West 2016). In weighing the above interests, the benefit of specialized agency fact-finding expertise versus the burden to the Plaintiff from the delay and its right to have questions of fact determined by a jury, the Court concludes that the right to a trial by jury in Tennessee takes precedence over any incidental expertise from the California New Motor Vehicle Board.

For all of these reasons, the Court concludes that (1) as a matter of law the California New Motor Vehicle Board does not have exclusive jurisdiction and there is no exhaustion of remedies requirement with respect to disputes between dealers and manufacturers involving common law and statutory claims originally cognizable in court;

and (2) the record does not demonstrate a need for agency fact-finding expertise for a stay of this lawsuit and deferral to the California New Motor Vehicle Board. Defendant West Covina's motion to dismiss for lack of subject matter jurisdiction is denied.

(c) Specific Personal Jurisdiction – *Calder* "Effects" Test

(1) Case Law Context

Moving to Defendant West Covina's second, independent argument for dismissal, lack of specific personal jurisdiction, the Court concludes that it does have specific personal jurisdiction over this Defendant based on the United States Supreme Court's *Calder* "effects" test. Before applying *Calder*, however, the Court provides the following case law context.

In the recent case of *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, the Tennessee Supreme Court examined the two-step analysis of first establishing minimum contacts and then analyzing the fairness of exercising jurisdiction to be applied in deciding if a court has specific personal jurisdiction. 489 S.W.3d 369 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016). Quoted below is the Tennessee Supreme Court's explanation of the requirements of purposeful availment and contacts of a defendant with the forum state to establish sufficient minimum contacts for the exercise of specific personal jurisdiction. This lengthy quotation is provided because it is the basis for much of the analysis that follows.

> While general jurisdiction "may be proper even when the cause of action does not arise out of the defendant's activities in the forum state," specific jurisdiction "exists when a defendant has minimum contacts with the forum

state and the cause of action arises out of those contacts." *Sumatra,* 403 S.W.3d at 744; *see also Goodyear,* 131 S.Ct. at 2851 (explaining that specific personal jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation") (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L.Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman)). That is, "[s]pecific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear,* 131 S.Ct. at 2851 (quoting von Mehren & Trautman at 1136).

Determining whether a forum state may exercise specific personal jurisdiction over a nonresident defendant is a two-step analysis which requires a court to analyze first whether the defendant's activities in the state that gave rise to the cause of action constitute sufficient minimum contacts with the forum state to support specific jurisdiction and, if so, whether the exercise of jurisdiction over the nonresident defendant is fair. *See International Shoe,* 326 U.S. at 316, 66 S.Ct. 154 (stating that personal jurisdiction could be extended over out-of-state defendants who have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ") (quoting *Milliken,* 311 U.S. at 463, 61 S.Ct. 339); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' ") (quoting *International Shoe,* 326 U.S. at 320, 66 S.Ct. 154); *Sumatra,* 403 S.W.3d at 759 (stating that specific jurisdiction over a nonresident defendant is established "only when the defendant has sufficient minimum contacts with the state [such] that jurisdiction does not offend traditional notions of fair play and substantial justice"); *Gordon,* 300 S.W.3d at 646–47 (applying a "two-part test which requires evaluating whether the requisite minimum contacts are present and whether the exercise of jurisdiction is fair"). . . .If we find that sufficient minimum contacts do exist, our inquiry will proceed to the second step, in which "the [D]efendant[s] bear[ ] the burden of showing that, despite the existence of minimum contacts, exercising jurisdiction would be unreasonable or unfair." *Sumatra,* 403 S.W.3d at 760; *see also Gordon,* 300 S.W.3d at 647.

It is well established that, in order for a nonresident defendant's contacts with the forum state to be sufficient to give rise to personal jurisdiction

there, those contacts must arise out of the defendant's own purposeful, deliberate actions directed toward the forum state. *See Burger King,* 471 U.S. at 473, 105 S.Ct. 2174. In *Burger King,* the Court explained:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King, 471 U.S. at 475–76, 105 S.Ct. 2174 (internal citations omitted); *see also Sumatra,* 403 S.W.3d at 746. In other words, "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cnty.*, 480 U.S. 102, 109, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (quoting *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174); *see also Walden v. Fiore,* 571 U.S. ——, 134 S.Ct. 1115, 1122, 188 L.Ed.2d 12 (2014) (stating that a "relationship" justifying jurisdiction "must arise out of contacts that the defendant *himself* created with the forum State"); *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); *McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *Sumatra,* 403 S.W.3d at 746.

The defendant's connection with the forum state must be not only intentional, but also "substantial" enough to give rise to jurisdiction. *Walden,* 134 S.Ct. at 1121 ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State."); *Burger King,* 471 U.S. at 475, 105 S.Ct. 2174 (citing a "substantial connection" with the forum

state). In considering whether the defendant's contacts with the forum state are substantial enough to give rise to specific personal jurisdiction, we must consider "the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts." *Sumatra,* 403 S.W.3d at 759–60. Furthermore, "[a] defendant's contacts are sufficiently meaningful when they demonstrate that the defendant has purposefully targeted Tennessee to the extent that the defendant should reasonably anticipate being haled into court here." *Id.* at 760. However, while foreseeability is "critical to due process analysis," the "mere likelihood that a product will find its way into the forum State" is not alone sufficient. *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *see also Sumatra,* 403 S.W.3d at 743. That is, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state." *Asahi,* 480 U.S. at 112, 107 S.Ct. 1026; *see also Sumatra,* 403 S.W.3d at 746. Indeed, as we recently held in *Sumatra,* "it is perfectly clear that placing a product into the stream of commerce, 'without more,' is not an act 'purposefully directed' at the forum state, and 'awareness' of where a product will end up is not purposeful direction." *Sumatra,* 403 S.W.3d at 751. In other words, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction." *World–Wide Volkswagen,* 444 U.S. at 295, 100 S.Ct. 580.

Furthermore, the United States Supreme Court recently has emphasized that, in performing the minimum contacts analysis discussed herein, we must look "to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden,* 134 S.Ct. at 1122. In *Walden,* the Supreme Court noted that it had "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* (citing *Helicopteros,* 466 U.S. at 417, 104 S.Ct. 1868; *Hanson,* 357 U.S. at 253–54, 78 S.Ct. 1228). In other words, "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 1123; *see also Helicopteros,* 466 U.S. at 417, 104 S.Ct. 1868 ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

First Cmty. Bank, N.A. v. First Tennessee Bank, N.A., 489 S.W.3d 369, 388–90 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016) (footnotes omitted).

In conducting the minimum contacts analysis, the Plaintiff, citing to the cases of *Chenault v. Walker* and *Neal v. Janssen*, has focused on the foreseeable effect on Tennessee of the alleged tortious conduct committed by Defendants outside of Tennessee. This type of specific personal jurisdiction analysis was recognized by the United States Supreme Court in the case of *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) and is known as the *Calder* "effects" test, hereinafter referred to as the "Calder test".

(2) Elements of *Calder* Test

Courts have stated the following elements of the *Calder* test:

> (1) the defendant must commit an intentional tort; (2) the plaintiff must feel the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by plaintiff as a result of the tort; and, (3) the defendant must expressly aim his or her tortious conduct at the form such that the forum can be said to be the focal point of the tortious activity.

> In order to satisfy the "effects" test, there must be proof the alleged tortious conduct was expressly aimed at the forum state. Further, tortious conduct aimed at a forum resident is different from tortious conduct aimed at the forum state, and tortious conduct aimed at a forum resident does not satisfy the "effects" test.

Mark Hanby Ministries, Inc. v. Lubet, No. 106-CV-114, 2007 WL 1004169, at *7–8 (E.D. Tenn. Mar. 30, 2007) (citations omitted).

In addition to the foregoing, the Sixth Circuit has explained that the *Calder* test should be applied narrowly:

> The Sixth Circuit, as well as other circuits, have narrowed the application of the *Calder* "effects test," such that the mere allegation of intentional tortious conduct which has injured a forum resident does not, by itself, always satisfy the purposeful availment prong. *See Scotts Co. v. Aventis S.A.*, 145 Fed.Appx. 109, 113 n. 1 (6th Cir.2005) ("[W]e have applied *Calder* narrowly by evaluating whether a defendant's contacts with the forum may be enhanced if the defendant expressly aimed its tortious conduct at the forum and plaintiff's forum state was the focus of the activities of the defendant out of which the suit arises."); *Reynolds,* 23 F.3d at 1120 (distinguishing *Calder* and making a particularized inquiry of the relations and dealings between the parties to find that an allegedly defamatory article did not establish sufficient minimum contacts); *see also Far West Capital, Inc. v. Towne,* 46 F.3d 1071, 1079 (10th Cir.1995) ("Our review of these post-*Calder* decisions indicates that the mere allegation that an out-of-state defendant has tortiously interfered with contractual rights or has committed other business torts that have allegedly injured a forum resident does not necessarily establish that the defendant possesses the constitutionally required minimum contacts."). Although the "effects test" has been limited, the existence of intentional tortious conduct nonetheless "enhances" a party's other contacts with the forum state for purposes of a purposeful availment analysis. *See Scotts,* 145 Fed.Appx. at 113 n. 1.

Air Prod. & Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 552–53 (6th Cir. 2007).

(3) Application of *Calder* Test To A Business Entity

The case law makes a distinction between application of the *Calder* test when the plaintiff is an individual as opposed to when the plaintiff is a business entity. As to the latter, the case law acknowledges the difficulty of identifying the focal point of interaction with a company, and the analysis becomes much more case-specific:

> Applying *Calder* to cases involving corporate plaintiffs or other non-corporeal entities can create difficult and intensely case-specific factual determinations. The intended forum or "focal point" regarding one international company's interactions with another international company is substantially more difficult than the classic instance of "effects" jurisdiction

> where, for example, a person standing in Illinois intentionally kills a person standing in Iowa by firing a shot that crosses over the Mississippi River into Iowa. Undaunted, our circuit and others have implicitly agreed that *Calder* does apply to jurisdictional disputes between large corporations. *See, e.g., Core–Vent,* 11 F.3d at 1487; *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376, 1388–89 (8th Cir.1993); *Hicklin,* 959 F.2d at 739; *Dakota Indus.,* 946 F.2d at 1390; *Blue Ridge Bank v. Veribanc, Inc.,* 755 F.2d 371 (4th Cir.1985).

EFCO Corp. v. Aluma Sys., USA, Inc., 983 F. Supp. 816, 821–22 (S.D. Iowa 1997); *see also Three Rivers Provider Network, Inc. v. Meritain Health, Inc.*, No. 07CV1900WQH(BLM), 2008 WL 2872664, at *16 (S.D. Cal. July 23, 2008) ("The Amended Complaint details allegations of conversion and fraud by Defendants Calarco and Coffey, and a fair reading of the Amended Complaint indicates that the conduct harmed Plaintiff in California, the State where Plaintiff is principally located. Though a corporate plaintiff does not necessarily suffer harm under *Calder's* effects test in the same way that an individual suffers harm in the state of his or her residence, *see Core-Vent Corp. v. Nobel Industries,* 11 F.3d 1482, 1486 (9th Cir.1993), the Court finds that the Amended Complaint and supporting affidavits indicate intentional conduct expressly aimed at Plaintiff in California, and sufficient injury to Plaintiff in California to support purposeful availment. *See also Yahoo!, Inc. v. La Ligue Contre Le Racisme,* 433 F.3d 1199, 1207 (9th Cir.2006) ("If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.")").

With this principle in mind, the Court has researched the application of the *Calder* test under similar facts as are present in this case – including application where the

tortious conduct was targeted at a corporate plaintiff rather than an individual plaintiff. In conducting this research, the Court located several analogous cases. The reason the following lengthy quotations are provided is because of the "intensely case-specific factual determinations" involving corporate plaintiffs to analogize to the facts of West Covina's targeting of Tennessee.

In *Pharmacy Providers of Oklahoma, Inc. v. Q Pharmacy, Inc.*, a federal District Court of Oklahoma, applying the *Calder* test, held that both corporate and individual defendants were subject to personal jurisdiction based on claims of fraud and breach of contract involving a scheme by the defendants of submitting false claims for prescription payments by the plaintiff. No. CIV-12-1405-C, 2013 WL 1688921, at *4–5 (W.D. Okla. Apr. 18, 2013). In this case, the plaintiff was a pharmacy provider who administered various pharmacy benefit programs with numerous pharmacy companies in other states. *Id.* at *1. The plaintiff company had its principal place of business in Oklahoma. *Id.* The defendant company was located in Texas. *Id.* at *5. The heart of the plaintiff's claim was that the defendants fraudulently submitted claims for reimbursement of prescriptions and then reversed the claims, with the intention of wrongfully obtaining the reimbursement funds from the plaintiff company in the amount of $450,000. *Id.* at *7.

In analyzing whether the defendants' alleged tortious conduct of preparing, in Texas, and submitting false prescriptions to the home state of Plaintiff's business in Oklahoma, with the intent of recovering the claims after payment created sufficient minimum contacts under the *Calder* test, the court held that the home state of the

Plaintiff's business and forum state of the lawsuit was the "focal point" of the fraudulent scheme and the harm suffered.

> The "purposeful direction" doctrine applies equally to Plaintiff's tort-based claim for fraud, although the determination of whether the Defendants purposefully directed fraudulent conduct at the forum state involves a different analysis. In *Dudnikov,* the Tenth Circuit distilled the purposeful direction test set out by the Supreme Court in *Calder v. Jones,* 465 U.S. 783 (1984), into three factors: (1) "an intentional action" by the Defendants; (2) "that was ... expressly aimed at the forum state"; (3) with the "knowledge that the brunt of the injury would be felt in the forum state." *Dudnikov,* 514 F.3d at 1072. The Court concludes that Plaintiff has met all three of the *Dudnikov/Calder* factors.
>
> First, Plaintiff has alleged an intentional action by the Defendants: Plaintiff contends that Defendants fraudulently submitted false claims for prescriptions with the intention of reversing the claims after payment. Moreover, as in *Continental Resources,* "Oklahoma is the 'focal point' of both the alleged fraudulent scheme ... and the harm suffered." *Continental Res.,* 2013 WL 593398 at *5. Although much of the allegedly fraudulent conduct by Defendants occurred in Texas—preparing and submitting the false prescriptions—"the fraud was aimed at Plaintiff's business in Oklahoma with knowledge that Plaintiff's injury—[payment for fraudulent claim reversals]—would be suffered in its home state." *Id.* Thus, the Court finds Plaintiff has made a sufficient showing to establish personal jurisdiction over all Defendants for Plaintiff's tort action in this forum.

Id. at *4–5 (footnotes omitted).

Similarly, in *Zuffa, LLC v. Pavia Holdings, LLC*, a federal District Court in Nevada held that a Delaware limited liability company was subject to specific jurisdiction in Nevada based on the Defendant's alleged tortious conduct of misappropriating the plaintiff's confidential and proprietary information which the defendant knew would have an effect in the plaintiff's home state and the forum of the lawsuit. No. 2:10-CV-01427-RLH, 2011 WL 222456, at *1 (D. Nev. Jan. 24, 2011). In this case, the plaintiff was a Nevada business that promotes mixed martial arts ("MMA") contests under its Ultimate

Fighting Championship ("UFC") brand name. *Id.* The dispute arose because the defendant, a company that promotes MMA contests sent an e-mail to an MMA sports agent indicating that it had procured and utilized the plaintiff's confidential and proprietary information. *Id.* The plaintiff company filed suit alleging causes of action for (1) violation of the Nevada Uniform Trade Secrets Act; (2) civil conspiracy; (3) breach of contract, (4) breach of the implied covenant of good faith and fair dealing; (5) civil aiding and abetting/inducement; (6) conversion; and (7) injunctive relief. *Id.*

In analyzing whether the defendant company had sufficient minimum contacts, because the allegations involved tortious activity, the court applied the *Calder* test. The court reasoned that because the defendant knew the plaintiff was based in Nevada and injured the plaintiff by emails sent to the plaintiff, "Zuffa has met its burden in establishing the express aiming requirement."

> Because this dispute involves allegations of tortious activity, the Court will address only the purposeful direction analysis. The Ninth Circuit evaluates purposeful direction using the *Calder* test, which examines whether the defendant (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id.* at 803.
>
> i. Intentional Act
>
> To satisfy the "intentional act" requirement of the *Calder* test, it is sufficient to demonstrate that Bellator had "an intent to perform an actual, physical act in the real world rather than an intent to accomplish a result or consequence of that act." *Schwarzenegger,* 374 F.3d at 806. The Court finds that Bellator committed an intentional act because Mr. Rebney, Bellator's CEO, allegedly sent an e-mail to Ken Pavia, a sports agent that heads MMA Agents, wherein he requests Pavia to re-send all the "seminal" documents from UFC so that Bellator could alter them enough to use them in its business. This alleged email is sufficient to establish an intentional act, and weighs toward purposeful direction under the *Calder* test.

ii. Expressly Aimed in the Forum State

The Ninth Circuit has held that the "express aiming" requirement of the *Calder* test is satisfied when "the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters v. Augusta Nat'l,* 223 F.3d 1082, 1087 (9th Cir.2000). In this case, Bellator knew that its conduct was targeting Zuffa because the e-mail giving rise to Zuffa's alleged injuries shows that Bellator was trying to appropriate all of the seminal documents used by UFC in conducting its business in Nevada. Therefore, because Bellator knew that Zuffa is based in Nevada, the Court finds that Zuffa has met its burden in establishing the express aiming requirement.

iii. Harm Suffered in the Forum State

With respect to "harm suffered in the forum state," the third requirement of the *Calder* test, the Ninth Circuit has held that a corporate plaintiff feels harm where it maintains its principal place of business. *Panavision Int'l, L.P. v. Toeppen,* 141 F.3d 1316, 1322 (9th Cir.1998). Furthermore, "the 'brunt' of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *Yahoo! Inc. v. La Ligue Contre Le Racisme,* 433 F.3d 1199, 1207 (9th Cir.2006). As discussed above, Zuffa is a Nevada limited liability company that has its principal place of business in Nevada. Thus, the alleged misappropriation and use of Zuffa's confidential documents would certainly cause Zuffa harm in Nevada. Whether or not Zuffa suffers more harm in other states is irrelevant. Therefore, the Court finds that Zuffa has suffered harm in Nevada.

Accordingly, the Court finds that Zuffa has shown that the three requirements of the *Calder* test are satisfied. Consequently, the first prong of the specific jurisdiction test—the purposeful direction prong—is satisfied. The Court will now address the second prong of the specific jurisdiction test.

Zuffa, LLC v. Pavia Holdings, LLC, No. 2:10-CV-01427-RLH, 2011 WL 222456, at *4–5 (D. Nev. Jan. 24, 2011).

In *EFCO Corp. v. Aluma Sys., USA, Inc.*, a federal District Court in Iowa held that it had specific personal jurisdiction over a California corporation and two Canadian corporations after applying the *Calder* test. 983 F. Supp. 816 (S.D. Iowa 1997). In this case, the plaintiff was an Iowa corporation in the business of customized-construction-forms. *Id.* at 817. The defendants, a California corporation and two Canadian corporations, were a major competitor of the plaintiff. *Id.* at 818. The dispute arose between these parties when the plaintiff allegedly discovered that the defendants had obtained the plaintiff's database and used it to submit a bid for a construction project. *Id.* The plaintiff argued that its former employees gave the database to the defendants and that information was used to help prepare the bid for the construction project. *Id.*

The plaintiff brought the lawsuit in Iowa alleging the following causes of action: (1) violation of the Iowa Uniform Trade Secrets Act; (2) inducement of breach of fiduciary obligation; (3) conversion; and (4) unjust enrichment. *Id.* In response, the defendants filed a motion to dismiss for lack of personal jurisdiction alleging that they had no contact with the state of Iowa, had no reason to expect to be haled before an Iowa court, nor had they availed themselves of the benefits of the forum. *Id.*

In concluding that it had specific personal jurisdiction over the non-resident Defendants, the court explained that:

> Two conditions must be met for the *Calder* effects test to apply. First, the defendant's act must be intentional and not merely negligent. *Dakota Indus.*, 946 F.2d at 1390. Second, the "focal point" of the act, i.e., where the "brunt" of the harm is intended, must be within the chosen forum. Id. The "brunt" of the harm need not actually occur in the forum. *Core–Vent Corp. v. Nobel Indus.*, 11 F.3d 1482, 1492–93 (9th Cir.1993)(Wallace, C.J., dissenting and joined on this point by Fernandez, J.)(citing *Keeton v.*

Hustler Magazine, 465 U.S. 770, 780, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984)).

These two conditions coincide relatively easily in cases, such as *Calder,* where the plaintiff is an individual. As long as the plaintiff can show an intentional act by the defendant, it is hard to imagine instances where the "focal point" of both the act and the injurious effect would not be in the plaintiff's home forum; individuals tend to live and work in the same state. Indeed, the singular location of Jones and her interests (e.g., her work and reputation) may have played a very significant part in the Court's opinion. At the outset of the opinion, the Court stated that although "*[t]he* plaintiff's *lack of 'contacts' will not defeat otherwise proper jurisdiction, ... they* may be so manifold as to permit jurisdiction when it would not exist in their absence." *Id.* at 788, 104 S.Ct. at 1486 (emphasis added).

Applying *Calder* to cases involving corporate plaintiffs or other non-corporeal entities can create difficult and intensely case-specific factual determinations. The intended forum or "focal point" regarding one international company's interactions with another international company is substantially more difficult than the classic instance of "effects" jurisdiction where, for example, a person standing in Illinois intentionally kills a person standing in Iowa by firing a shot that crosses over the Mississippi River into Iowa. Undaunted, our circuit and others have implicitly agreed that **822 Calder* does apply to jurisdictional disputes between large corporations. *See, e.g., Core–Vent,* 11 F.3d at 1487; *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376, 1388–89 (8th Cir.1993); *Hicklin,* 959 F.2d at 739; *Dakota Indus.,* 946 F.2d at 1390; *Blue Ridge Bank v. Veribanc, Inc.,* 755 F.2d 371 (4th Cir.1985).

****

The court, furthermore, finds the facts presented by EFCO, seen in the light most favorable to the plaintiff, make out a prima facie case of specific personal jurisdiction as to all counts. EFCO and Aluma are two of three major competitors in the same market. They have been engaged in direct competition for several years. Former EFCO employees, who most certainly knew of the companies Iowa Center for operations, were the ones who allegedly delivered the information in question to Aluma when they went to work for Aluma.

Although, if what has been alleged is taken as true, Aluma certainly had its own interests in the front of its corporate mind when it misappropriated the information and used it to place bids, etc., it would be a stretch to assume

> that Aluma did not understand that all benefits obtained were at EFCO's expense. It would also be far from "logical" to assume Aluma's actions were aimed "uniquely" at EFCO's Canadian branch. The physical act of theft is certainly aimed at the place of the theft, but the reasonable expectation and understanding in the mind of the thief is that he takes something that belongs to someone else and that the *effect* of his theft will be where that someone is located. In this case, the thing belonged to EFCO and both the person who physically took the information and the company that used it knew who and where EFCO was. EFCO's headquarters and principal place of business, and therefore the Iowa forum, was clearly the focal point of the alleged misappropriation.

EFCO Corp. v. Aluma Sys., USA, Inc., 983 F. Supp. 816, 821–22, 823 (S.D. Iowa 1997).

(4) Application of *Calder* Test To This Case

In applying the *Calder* test to this case, the Court concludes that the Plaintiff has established a *prima facie* showing of specific personal jurisdiction of Defendant West Covina Nissan, LLC. Although allegedly fraudulent conduct by Defendant West Covina occurred in California, nevertheless, the fraud, which is at the heart of this lawsuit: preparing and submitting the false warranty claims, was aimed at Plaintiff's business in Tennessee with knowledge that Plaintiff's injury, the payment of fraudulent warranty claims, would be suffered in its home state.

In so concluding the Court draws upon the above reasoning in *EFCO Corp.* where the court determined that while theft is certainly aimed at the place of the theft, the reasonable expectation and understanding in the mind of the thief is that he takes something that belongs to someone else and "that the effect of his theft will be where that someone is located." This reasoning led the *EFCO Corp.* court to conclude that EFCO's headquarters was clearly the focal point of the alleged misappropriation. Based on the allegations in the *Complaint*, for example at paragraphs 12, 14, 16, 18, 28-39, that West

Covina submits warranty claims to NNA electronically and as a result NNA pays for such services, Defendant West Covina knew or should have known that the brunt of the injury, payment of the alleged fraudulent claims, would necessarily be suffered in Tennessee where the Plaintiff is headquartered. The effects of Defendant West Covina's alleged fraudulent conduct connects Defendant West Covina to Tennessee, not just the Plaintiff.

Pharmacy Providers of Oklahoma, Inc., quoted above, similarly reasoned that although fraudulent submission of false prescription claims to reverse the claims after payment occurred in Texas, the fraud was aimed at plaintiff's business whose home state was Oklahoma. Assertion of personal jurisdiction in Oklahoma was proper as it was determined to be the focal point of the scheme.

Moreover, as reasoned by the *Zuffa, LLC* court, whether one state suffers more harm than another is irrelevant if a jurisdictionally sufficient amount of harm is suffered in the forum state. The *Zuffa, LLC* court, as quoted above, explained that the "express aiming" requirement of *Calder* is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state. "In this case, Bellator knew that its conduct was targeting Zuffa because the e-mail giving rise to Zuffa's alleged injuries shows that Bellator was trying to appropriate all of the seminal documents used by UFC in conducting its business in Nevada. . . . Bellator knew that Zuffa is based in Nevada. . . ." *Zuffa, LLC v. Pavia Holdings, LLC*, No. 2:10-CV-01427-RLH, 2011 WL 222456, at *4 (D. Nev. Jan. 24, 2011).

The foregoing analysis is also consistent with *Neal v. Janssen* which looked to see what the "heart of the action" was in determining whether specific personal jurisdiction was appropriate. *See, e.g., Nat'l Pub. Auction Co., LLC v. Anderson Motor Sports, LLC*, No. 3:10-00509, 2011 WL 465912, at *5 (M.D. Tenn. Jan. 31, 2011) ("As to whether Plaintiffs' claims arise from the Defendants' activities in the forum, the Sixth Circuit rule is that "when a foreign defendant purposefully directs communications into the forum that cause injury within the forum, and those communications form the "heart" of the cause of action, personal jurisdiction may be present over that defendant without defendant's presence in the state." *Neal v. Janssen,* 270 F.3d 328, 333 (6th Cir.2001).").

In this case, the numerous electronic contacts with Tennessee through the submission of fraudulent warranty claims to the Plaintiff form the heart of the Plaintiff's lawsuit. The alleged deception, misleading and fraudulent submission of warranty claims with Defendant West Covina obtaining payments from Tennessee furthered the Defendant's business while creating continuous consequences in Tennessee. These misrepresentations form the elements of the cause of action itself, and the quality of the contacts combined with their effect on Tennessee are sufficient for finding purposeful availment in Tennessee, which is the first step of specific personal jurisdiction as to Defendant West Covina.

(5) Distinguishing *Walden v. Fiore* and *First Cmty. Bank*

In addition, the Court has considered the cases of *Walden v. Fiore*, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) and *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty.*

Bank, N.A., 136 S. Ct. 2511 (2016) cited by the Defendants. Assertion of specific personal jurisdiction over Defendant West Covina, however, is not inconsistent with either of those cases. The facts and circumstances leading to the decisions in both of those cases are considerably different from this case.

In *Walden v. Fiore*, the Supreme Court held that the *Calder* test was not applicable based on the specific facts of the case. In declining to apply *Calder*, the Supreme Court stated that the "[p]etitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." Id. at 1124. Based on this lack of contacts with the forum state, the Supreme Court held that *Calder* did not apply because "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 1125.

Not decided, however, in *Walden* was how to apply the *Calder* test "in cases where intentional torts are committed via the Internet or other electronic means (*e.g.*, fraudulent access of financial accounts or "phishing" schemes)." *Id.* at 1125, n. 9. Specifically on that point, the Supreme Court declined to address that jurisdictional analysis saying that "this case does not present the very different questions whether and how a defendant's virtual "presence" and conduct translate into "contacts" with a particular State. To the contrary, there is no question where the conduct giving rise to this

litigation took place: Petitioner seized physical cash from respondents in the Atlanta airport, and he later drafted and forwarded an affidavit in Georgia. We leave questions about virtual contacts for another day." *Id.* The alleged fraudulent communications in this case are warranty claims totaling millions of dollars sent electronically to the Plaintiff in Tennessee. For this reason, the outcome of the jurisdictional issue in *Walden* is different from this case.

Similarly, the facts supporting the decision in *First Cmty. Bank, N.A. v. First Tennessee Bank* do not resemble the facts of this case. 489 S.W.3d 369, 390–91 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016). In *First Cmty. Bank*, the Tennessee Supreme Court held that nationwide Credit Ratings Agencies had not established minimum contacts in Tennessee because the conduct was not directed toward and sufficiently connected to Tennessee. The Supreme Court does not mention or apply the *Calder* test, but instead discusses the Rating Agencies' contacts under a stream of commerce/foreseeability analysis:

> We first address the Plaintiff's general assertion in its amended complaint that the Ratings Agencies are subject to specific personal jurisdiction because it was "reasonably foreseeable that all Defendants in these nationwide transactions knew that purchases of these investment products would occur in Tennessee and that the fraudulent misrepresentations and omissions would cause tortious harm in Tennessee." The Ratings Agencies' knowledge that investors or purchasers in Tennessee might rely on their credit ratings is not alone sufficient to constitute minimum contacts for the basis of specific personal jurisdiction. *See World–Wide Volkswagen,* 444 U.S. at 295, 100 S.Ct. 580 ("'[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction."); *State ex rel. State Treasurer of Wyoming v. Moody's Investors Serv., Inc.,* 2015 WY 66, ¶ 18, 349 P.3d 979, 984 (Wyo.2015) ("[W]hether the Rating Agencies knew that investors in Wyoming would rely on their credit ratings cannot alone form the basis for exercising personal jurisdiction over the Rating Agencies."). In

> other words, when the Ratings Agencies issued credit ratings for the investment products generally, the mere fact that those ratings were later relied upon by Tennessee agents or caused harm to Tennessee investors alone does not constitute the purposeful availment necessary to give rise to specific personal jurisdiction. *Asahi,* 480 U.S. at 112, 107 S.Ct. 1026 ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."); *World–Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. 580 (holding that "the mere likelihood that a product will find its way into the forum State" is insufficient to give rise to personal jurisdiction); *Sumatra,* 403 S.W.3d 726, 753–55 (declining to apply a pure stream of commerce analysis); *Davis Kidd Booksellers, Inc. v. Day–Impex, Ltd.,* 832 S.W.2d 572, 576 (Tenn.Ct.App.1992) (holding that a "nationwide distribution agreement [was] not evidence of a specific intent or purpose to serve the Tennessee market" sufficient to justify personal jurisdiction). Therefore, foreseeability alone being insufficient, the Plaintiff must establish some additional facts to show that the Ratings Agencies' conduct giving rise to the instant litigation was directed toward and sufficiently connected to the State of Tennessee.

Id. at 390–91.

The conduct of Defendant West Covina alleged in the *Complaint* in this case is not like the stream of commerce cases cited by the Defendants. The alleged conduct in this case was targeted fraudulent communications with the Plaintiff whom the Defendants knew was located in Tennessee. In the stream of commerce cases, like *First Cmty. Bank*, a distinction is made between contacts with a forum that are foreseeable versus contacts with a forum that are purposeful or targeted at the forum state. In *First Cmty. Bank*, the Court focused on the general rating of products by the Defendant Rating Agencies for all 50 states, nationwide, and that while it might be foreseeable that the Ratings Agencies would make contact with Tennessee, "the Plaintiff must establish some additional facts to show that the Ratings Agencies' conduct giving rise to the instant litigation was directed toward and sufficiently connected to the State of Tennessee." *Id.* at 391; *see also, id.* at

393 ("The Ratings Agencies' conduct as it relates to the underlying controversy was to rate investment products that were sold in all fifty states, backed by securities from all fifty states, and purchased by the Plaintiff, a Virginia corporation. As already established herein, nothing about the products rated by the Ratings Agencies specifically was connected to Tennessee.").

In direct contrast to the facts in *First Cmty. Bank*, in this case it was not merely foreseeable that the Defendants' alleged fraudulent communications would find their way into Tennessee. These were not merely general fraudulent communications that might end up in any state, let alone Tennessee. Rather, the verified proof is that the Defendants knew and intended at the time they sent the alleged fraudulent communications that the electronic submissions would go to the Plaintiff, and only the Plaintiff, who was located in Tennessee. It was not just foreseeable that the communications might end up in Tennessee, but rather inevitable that the alleged fraudulent communications would be sent to the Plaintiff in Tennessee because that was to whom the alleged fraudulent scheme was targeted. For this reason, the outcome of the jurisdictional issue in *First Cmty. Bank* is different from this case.

(d) Specific Personal Jurisdiction – Fairness

With respect to the second step in the specific personal jurisdiction analysis, the Court must determine "whether the exercise of jurisdiction over the nonresident

defendant is fair." In *Gordon v. Greenview Hosp., Inc.*, the Tennessee Supreme Court explained this second step of the analysis:

> The nonresident defendant's contacts with the forum state must be sufficient to enable a court to conclude that the defendant 'should reasonably anticipate being haled into court [in the forum state].' If the plaintiff can make that showing, the defendant will have the burden of showing that the exercise of specific jurisdiction would be unfair.

Gordon v. Greenview Hosp., Inc., 300 S.W.3d 635, 647 (Tenn. 2009) (citations omitted).

In determining whether the exercise of personal jurisdiction would be fair in light of the sufficient minimum contacts, the United States Supreme Court in *Burger King Corp. v. Rudzewicz* articulated the particular factors a court should consider.

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' Thus courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. As we previously have noted, jurisdictional rules may not be employed in such a way as to make

> litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–78, 105 S. Ct. 2174, 2184–85, 85 L. Ed. 2d 528 (1985) (citations omitted) (footnotes omitted).

In applying the above factors, the Court finds that Defendant West Covina has not made the requisite "compelling" showing of unfairness in this case. Although the Defendant cites to the relevant factors in its brief, those arguments do not demonstrate the unreasonableness of litigating the Plaintiff's claims in Tennessee when the allegations of widespread fraud intentionally directed at the Plaintiff and the State of Tennessee are taken into account. As analyzed by the Plaintiff and adopted by the Court, exercising specific personal jurisdiction over Defendant West Covina is not unreasonable:

> Both the United States Supreme Court (in *Burger King*) and the Tennessee Supreme Court (in *NV Sumatra*) have stated both that a state has a *manifest interest* in giving its residents a convenient forum against foreign defendants and that when such a defendant has purposefully targeted a known resident for harm, it may well be unfair to the Plaintiff to deprive it of a forum in the targeted state. *See* 471 U.S. at 473-74; 403 S.W.3d at 754. Moreover, California's laws are readily accessible to this Court and the parties, and both California and Tennessee share an interest in punishing purveyors of fraud – punishment that is likely to be more readily available in this Court because of the differences between the statutory frameworks of California and Tennessee that are discussed more fully below. Thus, California's putative interest in this dispute does not outweigh, much less compelling outweigh, much less compellingly outweigh, NNA's choice of forum and Tennessee's manifest interest in protecting its residents against fraud.

Response To Motions To Dismiss, pp. 17-18 (Oct. 31, 2016).

Based upon the foregoing analysis of legal authorities and their application to this case, the Court concludes that it is neither unreasonable nor unfair to litigate the claims against Defendant West Covina in Tennessee. Specific personal jurisdiction of Defendant West Covina has been established in this Tennessee forum.

2. Individual Defendants – Keith Jacobs, Jeff Hess, and Emil Moshabad

In determining whether the Court is authorized to exercise specific personal jurisdiction over the individual Defendants in this case, the Court is required to follow the same two-step process of (1) analyzing first whether a defendant's activities in the state that gave rise to the cause of action constitute sufficient minimum contacts with the forum state to support specific jurisdiction and, if so, (2) whether the exercise of jurisdiction over a nonresident defendant is fair.

(a) Parties' Positions

(1) Plaintiff

With regard to the three individual defendants, Keith Jacobs, Jeff Hess, and Emil Moshabad, the Plaintiff argues that because they were all "primary participants" in the wrongdoing intentionally directed at NNA, they too are subject to specific personal jurisdiction in Tennessee:

> [J]urisdiction exists over each individual defendant here to the extent that such defendant was a primary participant in the fraudulent warranty schemes directed at NNA. Here, there can be no question but that defendant Keith Jacobs was the "guiding spirit" spearheading the generation and submission of fraudulent warranty claims, and that defendants Emil

Moshabad and Jeff Hess were primary participants in the scheme to defraud NNA out of millions of dollars.

Response To Motions To Dismiss, pp. 20-21, 16 (Oct. 31, 2016).

In support of its argument that it has established a *prima facie* case of personal jurisdiction of all three defendants, the Plaintiff has submitted the following verified proof: (1) Declaration of Eugene N. Bulso, Jr., Plaintiff's Attorney (Oct. 25, 2016); (2) Declaration of Josh Clifton, Senior Manager for Corporate Communications at Nissan (Oct. 31, 2016); (3) Declaration of David Walker, Special Projects Manager in Nissan's Warranty Department (Oct. 31, 2016); and (4) Second Declaration of Eugene N. Bulso, Jr., Plaintiff's Attorney (Oct. 31, 2016). In addition, with regard to Defendant Keith Jacobs, the Plaintiff also relies on the allegations of paragraphs 20-49 of the *Complaint* as further support for establishing personal jurisdiction when taken as true.

(2) Defendants' Proof and Motions To Strike

In opposition, none of the individual Defendants disputes the theory of "primary participant" as a valid method for establishing specific personal jurisdiction. Rather, all three Defendants argue that even under the "primary participant" theory, the Plaintiff has failed to submit admissible evidence to establish sufficient minimum contacts for each individual Defendant with the forum state.[1]

[1] The collective arguments of all three individual Defendants regarding their claim of a lack of specific personal jurisdiction can be found on the following pages of their briefs: *Memorandum Of Law In Support Of Motion To Dismiss For Lack Of Personal Jurisdiction And Forum Non Conveniens By Keith Jacobs*, pp. 13-20 (Oct. 7, 2016); *Reply In Support Of Motion To Dismiss For Lack Of Personal Jurisdiction And Forum Non Conveniens By Keith Jacobs*, pp. 2-5 (Nov. 3, 2016); *Memorandum Of Law In Support Of Motion To Dismiss Jeff Hess For Lack Of Personal Jurisdiction*, pp. 6-8 (Oct. 4, 2016); *Jeff Hess' Reply To Nissan North America, Inc.'s Response To Motions To Dismiss*, pp. 2-5 (Nov. 2, 2016); *Memorandum Of Emil Moshabad In Support Of Motion To Dismiss*, pp. 8-20 (Oct. 17, 2016); *Reply Memorandum In Further Support Of Motion To Dismiss*, pp. 1-5 (Nov. 3, 2016).

In response to the verified proof submitted by the Plaintiff, the Defendants collectively have submitted the following countervailing verified proof: (1) Declaration of Jeff Hess (Oct. 4, 2016); (2) Affidavit of Joseph Schrage (Oct. 7, 2016); (3) Declaration of Keith Jacobs (Oct. 7, 2016); (4) Declaration of Emil Moshabad (Oct. 17, 2016); and (5) Supplemental Declaration of Jeff Hess (Oct. 26, 2016).

In addition, the Defendants collectively filed motions to strike as inadmissible hearsay the following four items of proof filed by the Plaintiff in opposition to Defendants' *Motions to Dismiss*:

(1) Exhibit 1 to the Declaration of David Walker which contains a purported letter from an anonymous employee of Defendant West Covina detailing the defendants knowledge, intent, participation and communications regarding the alleged fraudulent warranty scheme;

(2) Exhibit 2 to the Declaration of David Walker which contains a purported e-mail thread between and among Mr. Walker, Defendant Keith Jacobs, and Joseph Schrage, an owner of Defendant West Covina;

(3) Paragraph 3 of the Second Declaration of Eugene N. Bulso, Jr.:

> ¶ 3. Former employees of West Covina have advised me of the following, and would testify to the following, if called to testify in this case:
>
> a. Technicians at West Covina routinely told Jeff Hess, "This is a bogey," when requesting parts from the Parts Department for a putative warranty repair;
>
> b. Emil Moshabad conceived of the idea of submitting to Nissan North America, Inc. ("NNA") bogus warranty repair claims upon vehicles customers had just traded-in on the purchase a new vehicles, where such trade-in vehicle was covered by an unexpired Security Plus extended warranty contract;
>
> c. Emil Moshabad participated in the process of submitting to Nissan North America, Inc. bogus warranty repair claims

upon vehicles customers had just traded-in on the purchase a new vehicles, where such trade-in vehicle was covered by an unexpired Security Plus extended warranty contract;

d. A service advisor discussed with Emil Moshabad compensation that should have been paid to such advisor for revenue the service department received from its submission of fraudulent warranty claims to NNA;

e. Jeff Hess used a junkyard in Los Angeles to buy and sell new and used Nissan parts in connection with fraudulent warranty repair claims West Covina submitted to NNA;

f. A parts department employee saw Jeff Hess and other employee of parts department roughing up brand new Nissan parts to make it appear such parts had just been removed from a vehicle on which a warranty repair had been performed;

g. Jeff Hess and the employees in parts department were fully aware of, and participated in, West Covina's submission of fraudulent warranty claims to NNA;

h. Emil Moshabad pressured Keith Jacobs to generate more revenue from fraudulent warranty repairs;

i. Emil Moshabad was fully aware of, and was a willing participant in, West Covina's submission of fraudulent warranty claims to NNA;

j. Keith required service advisors to do prepare bogus "add ons" to the repair orders of customers on days when Jacobs was absent from the service department;

k. When one service advisor, prior to submission of a warranty claim to the warranty claims administrator, failed to remove Keith Jacobs' handwritten instructions to add bogus warranty repairs, Mr. Jacobs asked him, "What's the matter with you. Do you want me to go to jail?"

l. Emil Moshabad stated to Keith Jacobs, "I want more money out of warranty"; and

(4) Exhibit 1 to the Second Declaration of Eugene N. Bulso, Jr. which purports to be a copy of a text message Defendant Keith Jacobs sent to several service advisors at West Covina.

(3) Plaintiff's Opposition To Motion To Strike

In opposition to the motions to strike, the Plaintiff argues that the motions should be denied, and the Declarations and Exhibits are admissible as party opponent admissions and admissions where a declarant is unavailable.

(1) The anonymous letter which is Exhibit 1 to the Declaration of David Walker is an admission by a party opponent under Rule 803(1.2)(D) because the statements in the letter were made by an agent of Defendant West Covina.

(2) The email thread which is Exhibit 2 to the Declaration of David Walker qualifies as an admission by a party opponent under Rule 803(1.2)(D) and is authentic because, on its face, it was printed from Defendant Keith Jacobs Microsoft Outlook Account.

(3) The facts set forth in paragraph 3 of the Second Declaration of Eugene N. Bulso, Jr. are admissible because they show that the defendants were all "primary participants" in the fraudulent warranty scheme and are not excluded as hearsay because under Rule 804(b)(3) the declarant is unavailable. Additionally, Rule 3.7(a) regarding a lawyer's testimony is inapplicable because it prohibits a lawyer's testimony "at a trial in which the lawyer is likely to be a necessary witness".

(4) The text message attached as Exhibit 1 to the Second Declaration of Eugene N. Bulso, Jr. because it is a party opponent admission under Rule 803(1.2)(D) and is authentic because one of the service advisors to whom it was sent has stated that Jacobs in fact sent the message.

Proceeding from the statement of the positions of the parties, the Court shall first examine specific personal jurisdiction of Defendants Hess and Moshabad.

(b) Minimum Contacts Analysis – Defendants Hess and Moshabad

(1) *Prima Facie* Case

Defendants Hess and Moshabad have supported their motions to dismiss for lack of personal jurisdiction with Declarations denying participation in the fraudulent scheme and denying connections to the task of submitting warranty claims. These Defendants deny any connection to a Tennessee forum.

- *Declaration of Emil Moshabad*, pp. 1-3 (Oct. 17, 2016):

> 3. I have no contacts with the state of Tennessee. I have never traveled to Tennessee. I have never been employed in Tennessee or operated any business in Tennessee. I do not have an agent for service of process in Tennessee. With the exception of this particular case before the Court, I have never defended, initiated, appeared in, or specially appeared in any lawsuit in Tennessee. I do not own any business interests or property (personal or real) in Tennessee.
>
> ****
>
> 5. I have reviewed the Complaint. It alleges wrongful conduct. I did not participate in any such conduct, assuming that any such wrongful conduct occurred.
>
> 6. I worked as the General Manager of West Covina Nissan and Sage Covina Chevrolet from December 2009 until August 2016. My primary duties as General Manager were to ensure that the dealerships operated smoothly, with my greatest focus being on the performance of the Sales Department of each dealership. I also ensured that financial statements were consistent with our accounting records. West Covina and Sage Covina Chevrolet are two of over a dozen dealerships operated under the Sage Automotive Group ("Sage") umbrella. I am not a corporate officer in any entity that owns or operates West Covina or any other Sage dealership. At all times, I reported to one of the owners of West Covina and Sage Covina Chevrolet, Michael Schrage (aka Mike Sage). The decision to hire director-level personnel, such as the Service Director, was at all times made by Michael Schrage. Human Resources issues were handled by corporate Human Resources Director Carol Calagero. Policies, procedures and practices were developed, implemented and overseen for the Service

Department by Cliff Wong, the Fixed Operations Director for Sage; Fixed Operations also had the responsibility of providing oversight of the Service Department. Responsibilities for major decision-making were above my level of authority and were discharged by higher levels of corporate management.

7. I did not directly supervise employees in the day to day operation of the Service Department. The task of directly supervising the employees in the Service Department was the responsibility of Keith Jacobs, in his role as Service Director. While Mr. Jacobs reported to me, he also reported to Michael Schrage. My role, as General Manager, was to ensure that the service department was operating smoothly and efficiently under the direction of Mr. Jacobs, and that financial statements were accurate. I did not set monthly goals or quotas for Service Department staff, and I did not establish operational guidelines.

8. I never participated in the negotiation, memorialization, or execution of any dealership agreement between Nissan North America and West Covina Nissan.

9. During my decades-long career in the retail automotive industry, I never worked in the service department of a dealership. Moreover, I never received any training in connection with the service department operations of an auto dealership. At all times during my employment as General Manager of West Covina Nissan and Sage Covina Chevrolet, warranty service work, warranty claim submission and warranty claim administration were all tasks that were performed by employees in the service department of each dealership.

10. As General Manager of West Covina Nissan and Sage Covina Chevrolet, at no time did I have any involvement with the submission of warranty claims, nor did I review any warranty claims. As stated above, I was not in charge of establishing policies and procedures for the Service Department. I would briefly participate in monthly meetings held between Nissan's Factory Service Director and the Director of the Service Department at West Covina Nissan to go over parts sales and other figures. No concerns of any sort of wrongdoing were ever raised in any of these meetings.

- *Declaration of Jeff Hess In Support Of Motion To Dismiss For Lack Of Personal Jurisdiction*, pp. 1-2 (Oct. 4, 2016); *Supplemental Declaration of Jeff Hess*, p. 1 (Oct. 26, 2016):

  2. I have never resided in Tennessee, never owned any property in Tennessee, never personally done business in Tennessee and never traveled to Tennessee for either business or pleasure.

  3. I am presently employed and have been employed for the last 10 ½ years as the parts department manager at West Covina Nissan, LLC ("West Covina Nissan").

  4. I do not have a membership or ownership interest in West Covina Nissan.

  5. I am not a director, officer or involved in the upper management of West Covina Nissan and do not formulate business decisions of the dealership, particularly with respect to warranty work.

  6. My job duties at West Covina Nissan do not require me to nor have I ever participated in the submission of warranty claims to Nissan in Tennessee.

  7. My job duties at West Covina Nissan do not require me to contact nor to my best recollection have I ever contacted Nissan North America, Inc. ("Nissan") in Tennessee including, but not limited to, through U.S. mail, overnight carrier, e-mail or by telephone.

  8. To the best of my recollection. I have never directed any employees under my authority to make any contacts with the State of Tennessee.

  ****

  1. Neither I nor anyone at my direction at West Covina Nissan, LLC defaced, mutilated or soiled brand new parts to make them appear as though they were defective and removed from vehicles.

  2. Neither I nor anyone at my direction at West Covina Nissan, LLC knowingly participated in any warranty fraud scheme.

With the filing of these Declarations by the Defendants, the law requires the Plaintiff to "establish its prima facie showing of personal jurisdiction over the defendant by filing its own affidavits or other written evidence." *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 644 (Tenn. 2009). "If the defendant challenges the trial court's personal jurisdiction over him by filing a properly supported motion to dismiss, 'the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.'" *Manufacturers Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 854–55 (Tenn. Ct. App. 2000) (citations omitted).

In evaluating the Plaintiff's proof the Court "should not credit conclusory allegations or draw farfetched inferences." *Chenault v. Walker*, 36 S.W.3d 45, 56 (Tenn. 2001) (citation omitted).

If, as in this case, the Defendants support their motion with admissible contradictory proof, the Plaintiff has the burden to come forward with its own affidavits and other written evidence. Plaintiff's allegations of facts of personal jurisdiction of Defendants Jeff Hess and Emil Moshabad are found in Paragraph 3 of the Second Declaration of Eugene N. Bulso, Jr. quoted *supra* at 40-41. *Response To Motions To Dismiss*, pp.21-22 (Oct. 31, 2016). In that paragraph Attorney Bulso states numerous acts Defendant Hess and Moshabad allegedly engaged in as part of the fraudulent scheme. Defendant Moshabad allegedly conceived of the idea of the scheme and how to obtain compensation from it. Defendant Hess allegedly roughed up parts and used a junkyard to work the scheme. In addition, the Plaintiff relies on Exhibit 1 of the David Walker

Declaration where Defendant Moshabad purportedly told Defendant Keith Jacobs that West Covina "need[ed] more warranty money and to find other cars." *Id.* at 22.

The Defendants assert that the evidence the Plaintiff has presented can not establish the required *prima facie* showing because it is inadmissible hearsay. Based upon the following authorities, the Court reaches the same conclusion that the Plaintiff's refutation is hearsay and is therefore insufficient to establish a *prima facie* case. *See, e.g.*, *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 506 (6th Cir. 2014) ("In general, it is improper for a court to consider hearsay statements when ruling on a motion to dismiss.") (citation omitted); *Sealed Appellant 1 v. Sealed Appellee 1*, 625 F. App'x 628, 631 (5th Cir. 2015) ("To the extent the plaintiffs' evidence is hearsay and is 'directly contradicted by defendant[s'] affidavit[s],' hearsay evidence 'will not defeat a motion for dismissal under Rule 12(b)(2).'"); *United Techs. Corp. v. Mazer,* 556 F.3d 1260, 1278 (11th Cir.2009) (plaintiff could not use hearsay evidence to establish personal jurisdiction over the defendant when the hearsay statements were controverted by the defendant's affidavit); *Mark Hanby Ministries, Inc. v. Lubet*, No. 106-CV-114, 2007 WL 1004169, at *9 (E.D. Tenn. Mar. 30, 2007) (declining to consider hearsay testimony in an affidavit filed by Plaintiff in opposition to motion to dismiss for personal jurisdiction); *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) (While a 12(b)(1) motion cannot be converted into a Rule 56 motion, Rule 56 is relevant to the jurisdictional challenge in that the body of decisions under Rule 56 offers guidelines in considering evidence submitted outside the pleadings....[C]ourts have required that evidence submitted outside the pleadings be 'competent.'...In accord with principles of

fundamental fairness and by analogy to Rule 56(e) and (f), it was improper for the district court, in ruling on the 12(b)(1) motion, to have considered the conclusory and hearsay statements contained in the affidavits submitted by defendants, and to deny plaintiff limited discovery on the jurisdictional question.") (citations omitted); *but see Campbell Pet Co. v. Miale*, 542 F.3d 879, 889 n. 1 (Fed. Cir. 2008) ("Although the defendants argue that hearsay evidence may not be admitted in connection with a motion to dismiss for lack of personal jurisdiction, this court has held that there is no strict prohibition on a court's consideration of hearsay in connection with such a motion.") (citation omitted).

Thus, the Court concludes that the evidentiary record at this stage fails to establish a *prima facie* showing of personal jurisdiction as to Defendants Jeff Hess and Emil Moshabad.

(2) Jurisdictional Discovery

Having concluded that the Plaintiff has failed to make the required *prima facie* showing of personal jurisdiction at this stage of the proceedings as to Defendants Hess and Moshabad, the Court must nevertheless take into account that no jurisdictional discovery has taken place because of an order of stay.

Prior to the hearing on the *Motions To Dismiss*, the Plaintiff filed commissions and notice of subpoenas for depositions on seven witnesses in California who were former employees of Defendant West Covina to obtain discovery on the Declarations of Defendant Hess and Moshabad refuting participation in the alleged fraudulent scheme. *Plaintiff's Response To Defendants' Motions To Quash*, pp. 4-6 (Oct. 25, 2016).

In response, the Defendants filed motions to quash the depositions. The Court stayed indefinitely the depositions until further order to first hear oral argument on the motions to dismiss and "[t]hen with that full context, the Court will have more information and understanding to determine if there are material facts and/or disputed facts for the Plaintiff to need to discover to defend against the Motions to Dismiss and the extent of any discovery, with the option to take all or some of the Motions to Dismiss under advisement pending limited discovery." *Order Staying Depositions in California Set For 10/31/16, 11/1/16, and 11/2/16*, pp. 1-2 (Oct. 27, 2016).

The decision to stay the depositions and obtain further discovery is consistent with a trial court's "considerable procedural leeway" in deciding motions to dismiss based on personal jurisdiction and the obligation "to proceed carefully and cautiously to avoid improperly depriving the plaintiff of its right to have its claim adjudicated on the merits." *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 644 (Tenn. 2009) (footnote omitted).

Under Tennessee law, a Plaintiff is permitted to take limited jurisdictional discovery if it can make a "colorable showing" of personal jurisdiction.

> [T]o establish a colorable claim, the plaintiff must present sufficient facts that, if taken as true, in the light most favorable to the plaintiff, would demonstrate a showing of jurisdiction. We note that this threshold is lower than a prima facie showing, which we defined earlier as requiring that the plaintiff establish sufficient contacts between the defendant and this state with reasonable particularity.

First Cmty. Bank, N.A. v. First Tennessee Bank, N.A., 489 S.W.3d 369, 404–05 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016) (citations and footnotes omitted).

In evaluating the Plaintiff's evidence at this stage of the proceeding, the Court concludes that the Plaintiff has met the showing of a "colorable claim" of jurisdiction and should be permitted to proceed with limited jurisdictional discovery. In reaching this conclusion, the Court has applied the standard adopted by the Tennessee Supreme Court in *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*:

> [W]e hold that determining whether to permit limited discovery prior to ruling on a motion to dismiss for lack of personal jurisdiction is an extremely fact-based determination that is best left to the discretion of the trial court. In making such a determination, trial courts, as a threshold issue, first should determine whether the plaintiff has set out sufficient facts to establish a colorable claim for personal jurisdiction. If the threshold of a colorable claim is met, trial courts then should consider the following non-exclusive factors to determine whether to grant jurisdictional discovery: (1) whether the plaintiff has shown that there is a likelihood that discovery will yield facts that will influence the personal jurisdiction determination; (2) whether the plaintiff has laid out with particularity the evidence sought by discovery; (3) whether the evidence sought is the type which would normally be in the exclusive control of the defendant; (4) whether the case is particularly complex; and (5) whether the plaintiff's interest in discovery outweighs the policy concerns of subjecting a nonresident defendant to burdensome discovery at such an early stage and seeking to avoid allowing the plaintiff to conduct a "fishing expedition."

489 S.W.3d 369, 406 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016).

Applying this standard to the record, the Court finds that factors (1) and (2) are established by the Plaintiff by the four items of proof, listed *supra* at 40-42, wherein the Plaintiff describes particular testimony and documents which, if obtained and authenticated, are likely to influence the personal jurisdiction determination. As to factor 4, this is a complex case. As to factor (5), by ordering the discovery to be limited to the depositions of the seven witnesses in California, there is no fishing expedition. Factor (3)

is inapplicable given that the requested additional discovery sought is from non-party deponents, not the Defendants. Also, the Court adopts the arguments stated in the *Plaintiff's Response To Defendants' Motions To Quash* as further support for the decision to allow limited jurisdictional discovery on Defendants Hess and Moshabad.

(3) Defendants' Motions To Strike

The Defendants' motions to strike the four items of the Plaintiff's evidence as inadmissible hearsay are denied. The evidence has not been used by the Court for the truth of the matter asserted therein, but to determine if the Plaintiff has shown, as per the *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.* case, a "likelihood that jurisdictional discovery will be productive." 489 S.W.3d 369, 406 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016).

Additionally, because the Court has not considered the testimony for the truth of the matter asserted therein but only if it is likely that jurisdictional discovery will be productive, it is unnecessary for the Court to address the Defendants' other challenge that Attorney Bulso's affidavit is in violation of Supreme Court Rule 8, RPC 3.7 Lawyer as Witness.

(c) Defendant Keith Jacobs

(1) Minimum Contacts

As to Defendant Keith Jacobs, the Court concludes that the Plaintiff has established sufficient contacts between the Defendant and this State with reasonable

particularity sufficient to establish a *prima facie* case of specific jurisdiction in Tennessee.

In so concluding, the Court begins with the allegations of the *Complaint* which must be taken as true and which must establish sufficient contacts between Defendant Jacobs and Tennessee with particularity. The *Complaint* does this. Starting at paragraph 23, the *Complaint* alleges that a former service advisor at West Covina called into NNA and reported that it was Jacobs who would invent, authorize and handwrite bogus repairs to be made.

Paragraphs 24 and 25 of the *Complaint* allege that Defendant Jacobs instructed service advisors to contact NNA's Warranty Call Center in Murfreesboro, Tennessee:

> 24. Jacobs, during times when NNA had reduced West Covina's "DCAL" (see paragraph 56 *infra*) and a warranty repair required dealer authorization, instructed the service advisors at West Covina to call NNA's Warranty Call Center in Murfreesboro, Tennessee, to obtain the authorization to perform bogus repairs. Defendants frequently obtained such authorization but did so knowingly and intentionally misrepresenting facts to NNA's Warranty Call Center.
>
> 25. Jacobs, as part of the fraudulent scheme, not only directed service advisors to misrepresent facts to customers to obtain authority to add bogus lines of warranty repairs to a repair order but also enlisted the express writers at West Covina to do likewise.

Next, paragraphs 27-39 of the *Complaint*, reference at least 12 separate Exhibits, which in precise detail, state the different types of schemes used by Defendant Keith Jacobs to initiate "bogey" repairs by monitoring the repair orders created by service advisors and then writing on the repair orders specific instructions for "add on" of bogus warranty repairs. Paragraphs 28-39 allege instructions given by Defendant Jacobs orally

or in his handwriting for bogus repairs and, as to each, allege that "payment from NNA" was received.

Unlike Defendants Hess and Moshabad, Defendant Jacobs' following Declaration does not directly refute or contradict these foregoing key allegations in the *Complaint* linking him to the alleged fraudulent scheme and to Tennessee:

> 2. I have been a citizen and resident of California since 1980. I have never been a citizen or resident of Tennessee. I have been in Tennessee on only two occasions during my life, the last of which was in 2008. I do not own, own an interest in, or rent any property in Tennessee, and I have never owned, owned an interest in, or rented any property in Tennessee. I have never worked in Tennessee. I have never conducted business in Tennessee.
>
> 3. I do not have, and have never had, a membership or ownership interest in West Covina Nissan, LLC ("West Covina Nissan"). I am not, and have never been, a director or officer of West Covina Nissan. I am not, and have never been, involved in the upper management of West Covina Nissan.
>
> 4. I was the service manager for West Covina Nissan from April 10, 2010 to September 16, 2016.
>
> 5. At all times during my employment at West Covina Nissan, West Covina Nissan used a computerized data management system ("DMS") to manage virtually every aspect of the dealership, including, without limitation, new and used car inventory, parts inventory, vehicle financing, service, warranty, and customer satisfaction. When a person is logged on to the West Covina Nissan DMS, (a) all of the branding, logos, and trade dress with respect to the DMS is that of West Covina Nissan, not Nissan North America, Inc. ("NNA"), (b) it appears that the person is viewing West Covina Nissan confidential and proprietary business information or is providing West Covina Nissan confidential and proprietary information, and (c) there is no indication that the person is viewing information belonging to NNA or is providing information to NNA. When there were technical difficulties with West Covina Nissan's DMS from time to time over the years, those difficulties were resolved locally in West Covina, California by West Covina Nissan.
>
> 6. When West Covina Nissan performed service on a vehicle that was covered under an NNA warranty program, the West Covina Nissan

> warranty administrator would log the warranty claim into the West Covina Nissan DMS. Once the warranty claim was input into the West Covina Nissan DMS, the claim was transmitted in some fashion by West Covina Nissan to NNA. It is my understanding that NNA received the warranty claim electronically through West Covina Nissan's DMS. However, I do not know whether NNA obtained the warranty claim by (a) NNA manually logging in to West Covina Nissan's DMS, (b) by West Covina Nissan manually directing its DMS to transmit the warranty claim to NNA, (c) by West Covina Nissan configuring its DMS to automatically transmit the warranty claim to NNA, or (d) by some other electronic means. I had no involvement in these aspects of the West Covina Nissan's warranty claim submittal procedure.
>
> 7. At no time during my employment with West Covina Nissan did I input any warranty claims into the West Covina Nissan DMS. At no time during my employment with West Covina Nissan did I submit any warranty claims to NNA. At no time during my employment with West Covina Nissan did I send any parts to NNA.

Declaration of Keith Jacobs, pp. 1-3 (Oct. 7, 2016).

When comparing the allegations of the *Complaint* with Defendant Jacobs Declaration, the facts stated by Defendant Jacobs do not dispute the critical jurisdictional facts of the *Complaint* which link Defendant Jacobs to the fraudulent scheme targeted to Tennessee. Defendant Jacobs refutation is that he physically did not push the so-called "send button" for submitting the warranty claims.

Taking all the allegations in the *Complaint* as true and resolving all factual disputes in favor of the Plaintiff, the *Complaint* sets forth precise allegations and specific facts supporting a *prima facie* showing of personal jurisdiction. Similar to the allegations relating to Defendant West Covina, a reasonable inference can be drawn that because Defendant Jacobs does not dispute or contradict his involvement with the alleged fraudulent scheme of directing the fraudulent warranty claims, he knew his tortious

conduct was purposefully aimed at Tennessee. "The physical act of theft is certainly aimed at the place of the theft, but the reasonable expectation and understanding in the mind of the thief is that he takes something that belongs to someone else and that the *effect* of his theft will be where that someone is located." *EFCO Corp. v. Aluma Sys., USA, Inc.*, 983 F. Supp. 816, 821–22, 823 (S.D. Iowa 1997).

Taken collectively under the *Calder* test, the factual allegations of directing/supervising the fraudulent warranty repairs against Defendant Keith Jacobs, despite physically occurring in California, are at the heart of this lawsuit, and it was undisputedly aimed at Plaintiff's business in Tennessee with knowledge that Plaintiff's injury, the payment of the fraudulent warranty claims, would be suffered in its home state. *Simplex Healthcare, Inc. v. Marketlinkx Direct, Inc.*, 761 F. Supp. 2d 726, 733 (M.D. Tenn. 2011) (Rejecting the fiduciary shield doctrine, and holding individual corporate officers subject to personal jurisdiction under *Calder v. Jones*, 465 U.S. 783 (1984) in recognition of the primary participant doctrine); *see also*, *Hamilton Cty. Emergency v. Orbacom Commc'ns Integrator Corp.*, No. 1:04-CV-7, 2005 WL 1513166 (E.D. Tenn. June 24, 2005) (finding personal jurisdiction over individual corporate officers after applying primary participant effects theory from *Calder v. Jones*, 465 U.S. 783 (1984)); *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) ("As the Supreme Court held in *Calder v. Jones,* employees of a corporation that is subject to the personal jurisdiction of the courts of the forum may themselves be subject to jurisdiction if those employees were primary participants in the activities forming the basis of jurisdiction over the corporation.").

For all these reasons, the Court concludes that Defendant Keith Jacobs has sufficient minimum contacts with Tennessee.

(2) Fairness

With regard to the second step of determining whether exercising personal jurisdiction over Defendant Jacobs would be fair, the Court concludes that given the egregious and numerous acts of alleged fraudulent conduct aimed at Tennessee in this case and allegations of Defendant Keith Jacobs' direct involvement and supervision, exercising personal jurisdiction over Defendant Keith Jacobs is fair.

The only testimony from Defendant Jacobs regarding the burden of defending this lawsuit in Tennessee is at paragraphs 8-10 of his Declaration:

> 8. If I was required to defend myself in Tennessee, it would cause me considerable hardship. I am currently employed as a service manager for another dealership in California. I began working for my present employer on September 16, 2016. My compensation package with my present employer is $4,000 per month plus commissions, and I am not allowed any personal time off. If I miss multiple days of work for personal reasons, my salary and commissions will likely be reduced, and I would be subject to termination.
>
> 9. If I was required to defend myself in Tennessee, I would want to meet with my attorney there, attend key depositions that are taken there, attend important hearings that are conducted there, and attend the trial there. Given the distance between San Pedro, California and Nashville, Tennessee, I anticipate that each trip to and from Nashville would add costs to travel by airplane or car for at least two days for travel by airplane and four days for travel by car. I also anticipate that each trip to and from Nashville would add the cost of meals and lodging for at least one day for travel by airplane and two days for travel by car. Whereas, if I am able to defend myself in California, I do not anticipate having to pay any costs for travel, meals and lodging.
>
> 10. I currently have two attorneys defending me in this case, one in Tennessee and one in California. If I am required to defend myself in

> Tennessee, it would be necessary for me to continue to employ those two attorneys, the one in Tennessee to represent me before this Court and in depositions and other activities that are conducted in Tennessee, and the one in California to represent me in depositions and other activities that are conducted in California. With my attorney in Tennessee billing his time at $350.00 per hour and my attorney in California billing his time at $500.00 per hour, it would be a considerable financial burden for me to defendant myself in Tennessee—so considerable that I might be forced to direct my attorneys not to conduct activities that would be in my best interest, and that would put me at a severe disadvantage. Whereas, if I am able to defend myself in California, I would not require an attorney in Tennessee.

Declaration of Keith Jacobs, pp. 3-4 (Oct. 7, 2016).

In balancing the fairness of litigating the claims against Defendant Jacobs in Tennessee, the Court is unpersuaded that financial and geographic burdens are sufficient alone to deny the Plaintiff of its right to litigate this case in Tennessee. The allegations in this case against Defendant Jacobs are egregious. When taken as true, these allegations leave no doubt that Defendant Jacobs should have reasonably anticipated being haled into Court in Tennessee. When weighing financial and geographical burdens against Tennessee's interest in preventing injury to be perpetrated and occur in the state from fraud, the balance tips in favor of exercising jurisdiction in Tennessee.

The Court therefore concludes that it has specific personal jurisdiction over Defendant Keith Jacobs.

3. Forum Non Conveniens

In addition to the other grounds for dismissal, two of the individual Defendants, Keith Jacobs and Emil Moshabad, argue that the Court should exercise its discretion and dismiss the action against them on the basis of *forum non conveniens*.

Invoking the doctrine of *forum non conveniens* "'is a drastic remedy to be exercised with caution and restraint.'" *Iman v. Iman*, No. M2012-02388-COA-R3CV, 2013 WL 7343928, at *5 (Tenn. Ct. App. Nov. 19, 2013) (citing 20 Am.Jur.2d Courts § 116). Reviewing the facts and circumstances of this case in light of the discretionary standard for determining whether to apply *forum non conveniens* – (1) whether there is another forum where the Plaintiff may bring the action and (2) the public and private factors – the Court dismisses the *forum non conveniens* argument as to Defendant Jacobs. In reaching this conclusion, the Court adopts the Plaintiff's analysis and authorities at pages 28-36 of its October 31, 2016 *Response To Motions To Dismiss*.

With respect to the *forum non conveniens* argument asserted by Defendant Moshabad, it is held in abeyance and shall be ruled upon after completion of the depositions of the 7 witnesses in California and in conjunction with ruling upon Defendant Moshabad's lack of personal jurisdiction claim.

4. <u>Motion To Dismiss For Failure To State A Claim – TCPA</u>

In addition to the two independent grounds for dismissal of the entire lawsuit, Defendant West Covina also argues that dismissal is appropriate of Count 1 asserting Violation of the Tennessee Consumer Protection Act for failure to state a claim. Specifically, Defendant West Covina argues that the Tennessee Consumer Protection Act requires that any alleged unfair or deceptive practices must affect the conduct of "trade or commerce." Because the alleged conduct only affects Nissan, "and the Dealer is not involved in the 'distribution' of 'services' within the meaning of 'trade of

commerce'"..."even if Nissan can allege unfair and deceptive practices it cannot allege that those practices violate the Act." *Memorandum In Support OF West Covina Nissan, LLC's Motion To Dismiss For Lack Of Subject Matter Jurisdiction, Personal Jurisdiction, And Failure To State A Claim*, p. 2 (Oct. 7, 2016).

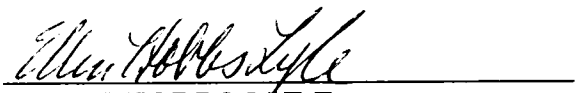
After considering the Defendant's argument, the Court adopts the response provided by the Plaintiff that the Defendant's interpretation of the Tennessee Consumer Protection Act is refuted by the plain language of the statute:

> West Covina claims that NNA has failed to state a claim under the Tennessee Consumer Protection Act ("TCPA" or the "Act"). (WCN Memo., p. 23) According to West Covina, its submission of warranty claims to NNA does not constitute "trade or commerce" as defined in Section 47-18-103(19). *Id.* West Covina therefore concludes that it cannot be found liable under Section 47-18-104 for having engaged in an "unfair or deceptive affecting the conduct of any trade or commerce." West Covina's argument is refuted by the plain language of the TCPA, especially when one considers that the Act "is to be liberally construed to protect consumers and others from those who engage in deceptive acts and practices." *Morris v. Mark's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992).
>
> Section 47-18-103(19) defines "trade" and "commerce" to include, *inter alia*, the "distribution of goods, services, or property, tangible or intangible..." The repair of an automobile under warranty involves the distribution of both goods (parts) and services (labor). Section 47-18-104(13) makes it unlawful for a party, such as West Covina, to represent that "a service, replacement or repair is needed when it is not." Section 47-18-104(19) of the Act makes it unlawful to represent that a "warranty confers or involves rights or remedies which it does not have or involve..." If one were to summarize the claims asserted in the Complaint, one need look no further than the language of Section 47-18-104(13) & (19). One could accurately say that this is a case in which West Covina repeatedly misrepresented to NNA that service and repairs were necessary when they were not and that a warranty conferred rights when it did not. Given the allegations of the Complaint, and the language of Sections 47-18-104(13)

& (19), West Covina's position that the Complaint fails to state a claim under the Act is puzzling and should be rejected.

Response to Motions To Dismiss, pp. 36-37 (Oct. 31, 2016).

Based on the foregoing citation to authority and analysis, the Court denies Defendant West Covina's motion to dismiss Count I – Violation of Tennessee Code § 47-18-101, *et. seq.* for failure to state a claim.



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CHANCELLOR
TENNESSEE BUSINESS COURT
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