

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 GRANTING PLAINTIFF'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

It is ORDERED that the Plaintiff's *Motion For Judgment On The Pleadings As To West Covina Nissan LLC's Counterclaim* is granted, and the Amended Counterclaim and West Covina's affirmative defense stated at paragraph 96 of its Answer, filed May 11, 2017, are dismissed with prejudice as explained below.

This lawsuit was filed by an importer of Nissan vehicles against three of its dealerships located in California, their owners and employees. The lawsuit seeks to recover millions of dollars for an alleged massive fraudulent scheme in which bogus warranty claims were submitted from the Dealerships to the Plaintiff for payment. The Plaintiff has sued the Defendants for violation of the Tennessee Consumer Protection Act, fraud, negligent misrepresentation and breach of contract.

At the outset of the lawsuit, one of the dealerships, West Covina Nissan, LLC, sought to dismiss the case, in part, for lack of subject matter jurisdiction. West Covina had initiated an administrative case/protest with the California New Motor Vehicle Board against the Plaintiff, asserting noncompliance with the California Vehicle Code's requirements for conducting audits and alleged discriminatory treatment relative to the audit and treatment of other dealers. The argument on the motion to dismiss was that the California Board of Motor Vehicles, with the regulatory scheme at Cal. Veh. Code § 3065, was the exclusive forum for the dispute.

This ground for dismissal was denied on December 6, 2016, based on the explicit text of the Cal. Veh. Code § 3050 and case law which make it clear that notwithstanding the Vehicle Code, a party may initially file a lawsuit in court for common law and statutory claims regarding vehicle dealerships.

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.)

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).

Following denial of the motion to dismiss, Defendant West Covina reasserted the California Vehicle Code in a Counterclaim it filed along with its Answer to the Complaint. That Counterclaim, as amended, came before the Court for dismissal on the Plaintiff’s Motion for Judgment on the Pleadings.

From the bench, the Court granted the Motion based upon the following reasoning and authorities.

Four claims are asserted in the *Amended Counterclaim*: (1) Declaratory Judgment; (2) Violation of the Unfair Competition Law (Bus. & Prof. Code § 17200, et. seq.); (3) Violation of California Vehicle Code § 11713.3, Subdivision (p); and (4) Fraudulent Misrepresentation By Concealment. These have been studied by the Court under the legal standard applicable to a motion for judgment on the pleadings which “is in effect a motion to dismiss for failure to state a claim upon which relief can be granted.” *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn.Ct.App.1998). In applying this legal standard of accepting as true all well-pleaded facts and all reasonable inferences to be

drawn from them, the Court sees that the underlying legal and factual premise for all the Defendant's causes of action in the *Amended Counterclaim* are rooted in and based upon the alleged failure of the Plaintiff to comply with the procedural requirements for audits and chargebacks in the statutory scheme used by the California Motor Vehicle Board for processing administrative protests between Franchisors and Dealers. As explained by Defendant West Covina in an introduction to its *Amended Counterclaim*:

111. In this case, following Franchisor's audit of Dealer, Franchisor provided written notice to Dealer of non-fraudulent, but purportedly wrongful, warranty claims submitted by Dealer. Franchisor charged back some of those claims after a "reasonable appeal process." Franchisor apparently also found purportedly fraudulent warranty claims during its audit of Dealer during a subsequent unnoticed and improper audit, but it never gave written notice to Dealer that it disapproved them. Instead, it directly filed this state court action in Tennessee against Dealer, its general manager, service director, and parts manager, for those alleged fraudulent warranty claims ("Complaint").

112. Franchisor's failure to comply with the statutorily mandated procedure for disapproving alleged fraudulent warranty claims set forth under California Vehicle Code § 3065 is unlawful under California Vehicle Code § 40000.1.

113. Additionally, Franchisor's selective pursuit of state court actions for alleged fraudulent warranty claims against some California dealers "unfairly discriminate[s] among its [dealers] with respect to warranty reimbursement," and is unlawful under California Motor Vehicle Code §§ 3065 and 11713.3, subdivision (p) by the provisions of California Vehicle Code § 40000.1.

114. Franchisor's acts constitute unlawful, unfair, and fraudulent business act or practice in violation of the Unfair Competition Law, California Business & Professions Code §§ 17200, et. seq. ("UCL"). As a direct and proximate cause, Dealer is entitled to restitution and injunctive relief under California Business & Professions Code § 17203.

115. Dealer is further entitled to damages, injunctive relief, and reasonable attorneys fees under California Vehicle Code § 11726 for

Franchisor's willful failure to comply with California Vehicle Code § 11713.3, subdivision (p).

*Answer, Amended Counterclaim, And Cross-Claim Of West Covina Nissan, LLC*, ¶¶ 107-115 (May 11, 2017).

During oral argument, Counsel for West Covina explained that the theory of the *Amended Counterclaim* is that in this case of state law and common law claims asserted by the Plaintiff, the Defendant asserts in its *Amended Counterclaim* that the alleged failure of the Plaintiff to follow the procedure applicable to an administrative protest before the California regulatory board and alleged damages resulting from that is a claim for recovery it has against the Plaintiff that arises out of the same transaction or occurrence as the Plaintiff's claims in this lawsuit. In addition to asserting noncompliance with California's regulatory scheme as a counterclaim, West Covina also asserts that noncompliance as a defense to the Plaintiff's Complaint at paragraph 96 of its May 11, 2017 Answer.

In analyzing West Covina's pleading, the Court begins with the text of the California Code concerning the relation of the Vehicle Board and claims made in state courts. California Vehicle Code section 3050 provides that the "California New Motor Vehicle Board shall do all of the following:

(d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section . . . 3065 . . .

\* \* \*

(f) Notwithstanding subdivision . . . (d) . . . 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) (West 2017).

The Court's analysis of the above text is that the procedures of the regulatory scheme West Covina seeks to assert in this case are separate and independent from claims asserted in state court. Confirming this analysis is the explanation by the California Vehicle Board in a December 9, 2016 Order in the protest filed by West Covina. The Board's explanation further indicates that violations of its regulatory scheme are a separate species of claims.

22. The causes of action pleaded in Respondent's Complaint in the Tennessee court action are all either statutory claims under Tennessee law, or common law claims, and are cognizable in the Chancery Court for the State of Tennessee. Consequently, Respondent was permitted under Section 3050(f) to initiate its lawsuit directly in that court for the relief it seeks in that court action.

23. The Board's jurisdiction is limited to the powers created by the legislature, which means that it has no jurisdiction to adjudicate alleged violations of the Tennessee Consumer Protection Act or common law allegations of fraud, negligent misrepresentation, or breach of contract, or to grant relief in the nature of compensatory damages, punitive damages, or attorneys' fees. (*Hardin Oldsmobile v. New Motor Vehicle Bd.* (1977) 52 Cal. App. 4<sup>th</sup> 585, 593-595)

24. Section 3065(e)(6) only empowers the Board to determine whether a franchisor complied with the audit and appeal procedures set forth in the other provisions of Section 3065, including the issue whether a chargeback was properly made, in response to a timely protest filed by a franchisee.

*Notice of Filing*, April 17, 2017, "Order Denying Respondent's Motion to Dismiss Protest."

Nevertheless, even if the law permitted alleged noncompliance with the procedural requirements of the California regulatory scheme to be asserted in a state case, in this lawsuit it would not be an appropriate use of discretion by this Court to allow those claims to be asserted. That is because the claims asserted by West Covina in its Amended Counterclaim in this case and in paragraph 96 of its Answer are already pending in the administrative protest before the California Vehicle Board for determination. Moreover, there is no overlap between the specific warranty claims pending before the Board and Plaintiff's Complaint. During oral argument, in response to a question from the Court, Plaintiff's Counsel stated that none of the warranty claims pending in the administrative protest filed by West Covina are included in the damages sought by the Plaintiff in this case.

Thus, for all these reasons, dismissal of the Amended Counterclaim and paragraph 96 of the Answer of West Covina is appropriate.

Lastly, in addition to the foregoing but only related to the Fourth Counterclaim for Fraudulent Misrepresentation By Concealment, the Court concludes as a matter of law that no such cause of action exists in Tennessee. In reaching this conclusion, the Court adopts and incorporates herein by reference the argument and analysis on pages 6 and 7 of the Plaintiff's *Reply Memorandum In Further Support of Motion For Judgment On The Pleadings As to West Covina Nissan, LLC's Counterclaim* that there is no

requirement under Tennessee law to give notice to a party who has committed fraud that the party is considered to have committed fraud.

s/ Ellen Hobbs Lyle  
ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:

Eugene N. Bulso, Jr.  
Steven A. Nieters  
James W. Cameron III  
Patrick W. Merkel  
Victor P. Danhi  
Halbert Rasmussen  
Franjo M. Dolenac  
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