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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; UNIVERSAL CITY NISSAN, INC.; GLENDALE NISSAN/INFINITI, INC.; MICHAEL SCHRAGE; JOSEPH SCHRAGE; STACY STEPHENS; JEFF HESS and EMIL MOSHABAD, and LEONARD SCHRAGE,	)	
	)	
	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S SECOND MOTION FOR PREJUDGMENT ATTACHMENT

After reconsidering the briefs filed prior to oral argument, the proposed Order and Objections thereto filed subsequent to oral argument, and the transcript excerpts from the oral argument, it is ORDERED that pursuant to Tennessee Civil Procedure Rule 54.02 the Court revises the reasoning stated from the bench on January 26, 2018, but does not revise the outcome/ruling, and it is ORDERED that Plaintiff's Second Motion for Prejudgment Attachment is granted based upon the following findings, reasoning and authorities.

1. Tenn. Code Ann. § 29-6-101 provides that

> Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity, against the property of a debtor or defendant, in the following cases:
>
> (1) Where the debtor or defendant resides out of the state . . . .

2. The record establishes that both Defendants West Covina Nissan, LLC and Universal City Nissan, Inc. reside out of state and, therefore, grounds exist under Tennessee Code Annotated section 29-6-101 for granting Plaintiff's motion for prejudgment attachment.

3. Three grounds are asserted by the Defendants West Covina and Universal City in opposition to prejudgment attachment. With respect to the first one, the Defendants have objected to the attachment on the ground that the accounts in issue are in the possession and custody of the California Court-appointed Receiver, Byron Moldo. The Defendants assert that any property that is *in custodia legis*—in the custody of the law—cannot be subject to attachment, including property that is subject to a receivership under control of a court. The Defendant asserts that this Court cannot order attachment of property held by the Receiver, because to do so would interfere and invade the jurisdiction of the California court itself. This objection is overruled based upon the reasoning and authorities at page 2 of the Plaintiff's *Reply* and facts established in the record concerning the situs of the property to be attached.

The Court adopts the Plaintiff's *Reply* at page 2, quoted as follows:

> "A state court has no jurisdiction to empower a receiver to take charge of assets … that are situated outside the state. Nor does the appointment of a

> receiver ordinarily give the court control of the property of the corporation in other jurisdictions." 17A *Fletcher Cyclopedia of the Law of Corporations* § 8561. *Accord, e.g., Sec. Trust Co. v. Dodd*, 173 U.S. 624, 628–29 (1899). This has long been the rule in Tennessee: receivers operating under appointment by foreign courts may not, by virtue of their appointment, lay claim to property situated in Tennessee. *See Davis v. Amra Grotto M.O.v.P.E.R. Inc.*, 91 S.W.2d 294, 295 (Tenn. 1936); *Commercial Nat'l Bank of Columbus v. Matherwell Iron & Steel Co*., 31 S.W. 1002, 1004, 1006 (Tenn. 1895)

4. With respect to the situs of the accounts, the Court finds that Defendants' nonvehicle dealer accounts are located in Franklin, Tennessee based upon Tennessee law that the situs of accounts is the domicile of the trustee, *see Town of Gallatin v. Alexander ex rel. Wallace*, 78 Tenn.475, 476-77 (1882), and based upon the Dennis O'Dwyer Declaration detailed below in paragraphs 5-7.

5. At its headquarters in Franklin, Tennessee, Plaintiff maintains a non-vehicle account for defendant West Covina Nissan, LLC and a separate non-vehicle account for defendant Universal City Nissan, Inc.

6. Defendant West Covina Nissan, LLC currently has $193,931.85 on deposit with Plaintiff in its non-vehicle account. (Declaration of Dennis O'Dwyer, ¶ 2)

7. Defendant Universal City Nissan, Inc. currently has $248,953.55 on deposit with Plaintiff in its non-vehicle account. (Id. at ¶ 4)

8. The Defendants' next objection is that the Plaintiff "cannot seek prejudgment attachment in Chancery Court based upon causes of action founded on torts. This action undisputedly is founded on alleged fraud. NNA already argued and admitted that, and in fact, relied on this Court's finding in an analogous case to support that conclusion. An order of prejudgment attachment in this case therefore would be outside

the statutory authority of this Court." Defendants' *Memorandum in Opposition*, January 22, 2018 at 2. This objection is overruled based upon the two points provided at pages 3-5 of the Plaintiff's *Reply* that even though the gravamen of the complaint is a tort action, there nevertheless is a contract claim asserted in the complaint. That contract claim provides a basis for granting prejudgment attachment. In addition, based upon the tort claims in the complaint, the Court is permitted by statute to grant an ancillary prejudgment attachment. The *Reply* at pages 3-5 is adopted by the Court and quoted as follows.

> [T]he Amended Complaint sets out two overlapping theories of recovery: first, fraud in the submission of false warranty claims and, second, breach of contract in the submission of warranty claims that did not comply with the parties' agreement on the topic. The fact that the Plaintiff has described the action in general as arising out of the Defendants' fraudulent scheme to enrich themselves via false warranty claims is irrelevant. "A contract may be negligently or fraudulently breached and the cause of action remain in contract rather than in tort." *Mid-South Milling Co. v. Loret Farms Inc.*, 521 S.W.2d 586, 588 (Tenn. 1975). Nissan's allegation that the Defendants acted with fraudulent intent while breaching their contract governing warranty submissions neither changes the gravamen of the contract claim nor eliminates it from the case. Thus, even if an ancillary prejudgment attachment were not permissible in an action sounding in tort, this case contains an undeniable claim sounding in contract that would support the attachment.
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> * * *
>
> [T]he second point . . . [is that] the Chancery Court may in fact issue an ancillary prejudgment writ of attachment in a tort case . . . is even clearer.
>
> Section 29-6-110 provides, "Suits by original attachment may be brought in any court, or before any magistrate, having jurisdiction of the cause of action." Defendants rely upon the immediately following section, 29-6-111: "Any person may also sue out an attachment in the chancery court, upon debts or demands of a purely legal nature, except causes of action founded on torts, without first having recovered a judgment at

> law . . .” (emphasis added). Section 111, especially when read in conjunction with its neighbor, Section 110, clearly applies to actions seeking to levy original attachments. The cases discussing Section 110 makes this clear: they involve original attachments. *See Hall v. Jordan*, 227 S.W.2d 35, 37 (Tenn. 1950); *Herndon v. Pickard*, 73 Tenn. 702, 703–04 (Tenn. 1880); *Lane v. Marshall*, 48 Tenn. (1 Heisk.) 30, 31–32 (1870); *W & O Constr. Co. v. IVS Corp.*, 688 S.W.2d 67, 69 (Tenn. Ct. App. 1984) (“§ 29-6-111 … allows attachment suits in Chancery”). Thus, the only limitation on the Court’s power to issue attachments predicated on tort claims is that it may not entertain an original action to attach the property of a defendant based solely upon an unliquidated tort claim. But that is not what Nissan has sought in this case. By contrast, other provisions of Title 29, Chapter 6 makes clear that the Court possesses jurisdiction to issue ancillary attachments in tort cases. *See* Tenn. Code Ann. § 29-6-106.

9. The Defendants lastly assert that the Plaintiff cannot meet its burden of showing that attachment is just against Universal City. This objection is overruled based upon *Orolowski v. Bates*, No. 2:11-cv-1396, 2015 WL 615949 (W.D. Tenn. Oct. 20, 2015), particularly because that court rejected the defendant’s statement that the affidavits submitted in support of prejudgment attachment were false. “The requirement of Tenn. Code Ann. § 29-6-113 is modest,” and the plaintiff’s agent must merely make a written statement under oath stating the nature and amount of the debt or demand, *et cetera*. *Id.* at *8. After considering the guidance and facts of *Orolowski*, and having compared that to the record of this case, the Court finds there is sufficient evidence that the cause is just to satisfy the standard that is required under this prejudgment attachment statute based upon the circumstantial evidence from the Glen Perdue findings of excessive claims, payments at Universal City, the testimony of Keith Jacobs, and also that the contradictory evidence presented by Universal City comes from its own employees and may reflect bias.

10. The Court therefore finds that Nissan is entitled to an attachment of the nonvehicle dealer accounts of West Covina and Universal City, which, based upon the evidence presented, contain approximately $193,931.85 and $248,953.55, respectively.

IT IS ACCORDINGLY ORDERED AS FOLLOWS:

A. All funds on deposit in the nonvehicle dealer accounts of West Covina and Universal City are hereby ATTACHED;

B. Nissan hereby is ORDERED to secure all funds on deposit in such nonvehicle dealer accounts by depositing them into the registry of the Court;

C. The Clerk and Master, upon receipt of those funds, is ORDERED to maintain them pending further order of this Court; and

D. The deposit of the funds into the Court's registry being equivalent to a bond, no further surety is required.

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

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