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.	)	

FILED
2016 DEC -6 PM 3:59
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
D.C. & M.

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) <u>Specific Personal Jurisdiction – *Calder* "Effects" Test</u>

(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