

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

NISSAN NORTH AMERICA, INC.,)
)
 Plaintiff,)
)
VS.) **NO. 16-883-BC**
)
WEST COVINA NISSAN, LLC;)
KEITH JACOBS; JEFF HESS; and)
EMIL MOSHABAD,)
)
 Defendants.)

**MEMORANDUM AND ORDER GRANTING REMAINDER OF
PLAINTIFF’S SECOND MOTION TO COMPEL**

After taking under advisement the issues numbered 1 and 8 in Plaintiff’s *Second Motion to Compel* filed June 29, 2017 against Defendant West Covina Nissan, LLC, the Court concludes that as to these issues the Plaintiff’s *Motion* shall be granted.

It is therefore ORDERED that when the deposition of Keith Jacobs resumes, Plaintiff’s Counsel is permitted to examine Mr. Jacobs concerning communications with Victor Danhi, the attorney for West Covina, concerning the audit the Plaintiff conducted at Defendant West Covina’s dealership beginning August 31, 2015.

It is further ORDERED that by August 31, 2017, Defendant West Covina shall collect from the custodians listed on Appendix 1 to the Plaintiff’s *Second Motion to Compel* any electronically stored information (“ESI”) on any personal mobile devices of the custodians identified through the use of the search terms provided.

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

With respect to Issue 1, in dispute is whether communications Mr. Jacobs had with Victor Danhi, the attorney for Defendant West Covina, concerning the audit conducted by the Plaintiff, are protected by the attorney-client privilege. The Court adopts the agreement of Counsel for both parties that California law governs this issue. That law provides in Section 956 of California's Evidence Code that there is a crime-fraud exception to the attorney-client privilege, "There is no [attorney-client] privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit a crime or fraud." Case law cited by Counsel provides that there are two elements which must be demonstrated. For the crime-fraud exception to apply, the proponent must (1) make a prima facie showing of a crime or fraud; and (2) establish a reasonable relationship between the fraud and the attorney-client communication. *See State Comp. Ins. Fund v. Superior Court*, 91 Cal. App. 4th 1080, 1090, 111 Cal. Rptr. 2d 284, 291 (2001), *as modified on denial of reh'g* (Sept. 20, 2001); *State Farm Fire & Cas. Co. v. Superior Court*, 54 Cal. App. 4th 625, 643, 62 Cal. Rptr. 2d 834, 847 (1997), *as modified* (May 1, 1997); *see also Favila v. Katten Muchin Rosenman LLP*, 188 Cal. App. 4th 189, 220, 115 Cal. Rptr. 3d 274, 299 (2010), *as modified on denial of reh'g* (Sept. 22, 2010).

With respect to the first element, case law provides that a prima facie case under Section 956 is made where the proponent of the exception demonstrates sufficient evidence

from which reasonable inferences can be drawn to show that the fraud or crime has some foundation in fact. *See Swortwood v. Tenedora de Empresas, S.A. de C.V.*, No. 13CV362-BTM (BLM), 2014 WL 895456, at *12 (S.D. Cal. Mar. 6, 2014), *clarified on denial of reconsideration sub nom, Swortwood v. Empresas*, No. 13CV362-BTM (BLM), 2014 WL 12026069 (S.D. Cal. Apr. 18, 2014). The depositions filed in this case, including the May 11, 2017, and the June 23, 2017, transcripts of Mr. Jacobs' deposition, and the Jow, Perez, Ramirez, Hernandez, Coreas, Cruces, and Santana depositions, establish the first element that the Plaintiff's claims of fraud have a foundation in fact.

As to the second element, the Jacobs deposition contains testimony demonstrating a reasonable relationship between the fraud and the attorney/client communication. Mr. Jacobs testified at page 313 of his deposition that Defendant West Covina used "kinked" payroll records and timecards to deceive the Plaintiff, and that this was communicated by West Covina to its counsel, Mr. Danhi. Also, Mr. Jacobs has admitted that the payroll record and timecards presented to the Plaintiff were altered to conceal fraud. The record additionally establishes that Mr. Jacobs communicated directly with Mr. Danhi—several times a week—regarding these payroll records, timecards, and other matters pertaining to the audit.

This testimony, the Court concludes, shows a reasonable relationship between the fraud and the attorney-client communication. This showing is made even if Mr. Danhi says he was unaware of the fraud because "[t]he lawyer does not have to be aware of the fraud for the crime-fraud exception to apply." *Swortwood*, 2014 WL 895456, at *12 (emphasis added)

(citing *State Farm*, 54 Cal. App. 4th at 645). “Instead, the application of Section 956 turns on the client’s intent.” *Freedom Trust et al v. Chubb Group of Insurance Companies*, 38 F. Supp. 2d 1170, 1171 (C.D. Cal. 1999). Thus, the Plaintiff has demonstrated the necessary elements of the crime-fraud exception to remove the attorney-client privilege as to these communications.

Additionally, after studying *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 128, 68 Cal. Rptr. 2d 844, 856 (1997) and *Kerner v. Superior Court*, 206 Cal. App. 4th 84, 112 n. 13, 141 Cal. Rptr. 3d 504, 526 (2012), as modified (May 21, 2012) the Court finds the other ground cited by the Plaintiff—that Defendant West Covina has waived the attorney-client privilege by putting the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action—applies.

Using the above case law to analyze the record, the Court finds that Defendant West Covina has put the communications between Mr. Jacobs and Attorney Danhi directly at issue with its position stated in its Answer, Amended Counterclaim and Cross-Claim filed May 11, 2017. These pleadings take the position that Mr. Jacobs was committing bad acts independently and on his own without the knowledge or involvement of Defendant West Covina. One avenue of defense and rebuttal to this is to show that Defendant West Covina did know about the conduct through Mr. Jacobs’ discussions and communications with West Covina’s attorney, Mr. Danhi. Further, on the Plaintiff’s claim for punitive damages West Covina’s defense is that it did not act intentionally. Thus, for a fair adjudication, the Court

rules that both the Plaintiff and Mr. Jacobs are entitled to introduce evidence, if any, of West Covina's communications with and use of its counsel to demonstrate that Mr. Jacobs did not act independently, but with West Covina and its Counsel to perpetrate the fraud alleged in this case.

Based on these two grounds: the crime-fraud exception and waiver, Issue 1 is decided in favor of the Plaintiff.

Issue 8 of Plaintiff's *Second Motion to Compel* concerns Plaintiff's request for production 37: "All text messages sent to or from Keith Jacobs from January 1, 2012, to the present that relate to or concern any service on any Nissan automobile pursuant to any warranty or Security Plus contract."

The position of West Covina stated in its July 10, 2017 opposition at pages 16-17 is that it does not provide company-issued cellphones, smart phones or other devices that can send or receive text messages to any of its employees, managers, directors or officers and, therefore, Defendant West Covina has no responsive text messages sent to or from Keith Jacobs that are in its possession, custody, or control. That opposition was amplified by Defendant West Covina asserting during oral argument that it had not attempted to collect the ESI requested in request number 37 because its duty under Rule 34 of the Tennessee Rules of Civil Procedure to collect ESI extends only to company-issued mobile devices, not to the personal mobile devices of its employees. Defendant West Covina's position is that

it is not obligated to search personal mobile devices of its employees for responsive information because those are not within its “possession, custody or control” as provided under Tennessee Civil Procedure Rule 34.01 to compel discovery.

In its supplemental briefing, filed July 15, 2017, the Plaintiff placed in the record quotations from Defendant West Covina’s Employee Handbook at page 44 which show that Defendant West Covina contemplates and understands that employees may use their personal mobile devices for business purposes. In fact, Defendant West Covina reimburses employees for such use, and the Handbook provides at page 47 that such data “is the exclusive property of the Dealership and may not be copied or transmitted to any outside party” The Handbook also provides that the dealership has a monitoring policy which may include but is not limited to “physical inspection of home computers, memory devices, and handheld devices.” Based upon Defendant West Covina’s internal policies, the Court concludes that the personal mobile devices of Defendant West Covina’s employees are within the Defendant’s possession, custody or control as required by Tennessee Civil Procedure Rule 34.01. In addition, the Court is guided by the authorities listed in the Plaintiff’s supplement memorandum filed July 15, 2017, in particular the *In re Pradaxa (Dabigatran Etexilate) Products Liab. Litig.*, 2013 WL 6486921, *18 (S.D. Ill. Dec. 9, 2013) in which the court found that business-related text messages on an employee’s personal mobile device are subject to production.

From these facts and authorities, the Court has concluded that Plaintiff's *Motion* as to Issue 8 is granted.

/s/ Ellen Hobbs Lyle
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CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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