

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

NISSAN NORTH AMERICA, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WEST COVINA NISSAN, LLC; )  
KEITH JACOBS; JEFF HESS; AND )  
EMIL MOSHABAD, )  
 )  
Defendants. )

DF  
No. 16-0883-BC

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**MEMORANDUM AND ORDER: (1) DENYING DEFENDANTS HESS AND MOSHABAD'S MOTIONS TO DISMISS; (2) DENYING DEFENDANT WEST COVINA NISSAN, LLC'S MOTION FOR INTERLOCUTORY APPEAL; (3) LIFTING STAY ON DISCOVERY; AND (4) SETTING 3/15/17 DEADLINE FOR COUNSEL TO CONTACT COURT TO SCHEDULE RULE 16 CONFERENCE**

With respect to the pending motions and related matters listed below, the following is ORDERED.

1. The October 4, 2016 *Motion To Dismiss Jeff Hess For Lack Of Personal Jurisdiction* and the October 17, 2016 *Motion To Dismiss Emil Moshabad* are denied;
2. The January 5, 2017 *Motion And Application For Permission To Appeal* of Defendant West Covina Nissan, LLC is denied; and
3. The stay on discovery with regard to any claims and/or defenses concerning any party is lifted.

The bases for the foregoing rulings are

1. The December 6, 2016 *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* (the "Memorandum and Order") which is incorporated herein by reference;

2. The *Declaration of Keith Jacobs* filed by Plaintiff on January 26, 2017;
3. The authorities and analysis contained in *Plaintiff's Supplemental Memorandum On Personal Jurisdiction* filed February 2, 2017, which is adopted herein by the Court; and
4. The following reasoning and authorities addressing the Defendants' analysis.

In its December 6, 2016 *Memorandum and Order* at pages 47-48, the Court found the Plaintiff had not established a *prima facie* case of personal jurisdiction as to Defendants Moshabad and Hess because the Plaintiff's evidence was hearsay.<sup>1</sup> The filing of the Jacobs Declaration has cured the hearsay defect.

With the hearsay defect remedied, the Defendants' arguments now turn to weighing the credibility of the *Declarations* of Defendants Hess and Moshabad versus the *Declaration of Keith Jacobs*, and that the latter *Declaration* is not credible because Mr. Jacobs admits therein he previously presented false testimony to this Court. The Defendants' arguments are not adopted by this Court based upon the Sixth Circuit Court of Appeals authority of *Serras v. First Tennessee Bank Nat. Ass'n*, 875 F.2d 1212, 1214–15 (6th Cir. 1989) and *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991)<sup>2</sup> wherein the *Theunissen* Court explained that in disposing of a motion to dismiss for lack of personal jurisdiction, a court does not weigh the controverting assertions of the party

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<sup>1</sup> The ruling on personal jurisdiction on Defendants Hess and Moshabad was held in abeyance and the Plaintiff was given a deadline to take jurisdictional discovery and file any supplement to its opposition to Defendants' motions to dismiss.

<sup>2</sup> In deciding motions to dismiss for lack of personal jurisdiction, although stated differently, Tennessee has employed the identical jurisdictional test adopted by the Sixth Circuit Court of Appeals. *State v. NY Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 753, n. 29 (Tenn. 2013) (citations omitted) (“Although stated differently, the jurisdictional test employed by the United States Court of Appeals for the Sixth Circuit is identical in substance to our approach.”).

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seeking dismissal. If that were done, non-resident defendants would regularly avoid personal jurisdiction simply by filing an affidavit denying all jurisdictional facts.

The court's treatment of a motion under Rule 12(b)(2) mirrors in some respects the procedural treatment given to a motion for summary judgment under Rule 56. For example, the pleadings and affidavits submitted on a 12(b)(2) motion are received in a light most favorable to the plaintiff. *Serras*, 875 F.2d at 1214; *Welsh*, 631 F.2d at 439. In sharp contrast to summary judgment procedure, however, the court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal. *Serras*, 875 F.2d at 1214; *accord Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir.1981). We adopted this rule in *Serras* in order to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts, as the Appellee has done in the case before us. *Id.*; *accord Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir.1977). In *Serras*, we stated that the defendant who alleges facts to defeat jurisdiction has recourse to the court's discretionary authority to hold an evidentiary hearing if he disputes the plaintiff's factual assertions. *Serras*, 875 F.2d at 1214.

*Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991).

Next there is the Defendants' argument of citation to the Tennessee cases of *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 382 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511, 195 L. Ed. 2d 841 (2016); *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 735 (Tenn. 2013), and *Chenault v. Walker*, 36 S.W.3d 45, 56 (Tenn. 2001) for the proposition that the Court should not accept affidavits/declarations which contain "conclusory allegations or draw farfetched inferences" and that the Court is "not obligated to accept as true factual allegations...that are controverted by more reliable evidence and plainly lack credibility." The Court determines these cases are not applicable because, after studying

the Jacobs Declaration, the Court's judgment is that the Declaration is neither conclusory nor farfetched. As articulated by the Plaintiff, the record at this stage of the proceedings does not present the sort of "extreme case" where the Court should decline to accredit the *Declaration of Keith Jacobs* in determining whether the Plaintiff has made its *prima facie* showing of personal jurisdiction.

As to Defendants Hess' and Moshabad's arguments that they are not primary participants, they are not adopted for several reasons. First, that the Court previously found in its December 6, 2016 ruling that Defendant Jacobs was a primary participant was not a determination of exclusivity. By law, a primary participant is not necessarily limited to one. The facts alleged in the *Complaint*, Jacobs Declaration, and the other declarations filed by Plaintiff are misconduct which covered a two-year span and consisted of several phases including the alleged wrongdoing, the audits and the alleged cover-ups. The Jacobs Declaration provides testimony of primary participant facts of Defendant Moshabad as the "ring-leader" in the cover-up of bugging the August 2015 audit. Moreover, the cover-up was a significant element of the misconduct alleged and the legal claims.

As to Defendant Hess, the Jacobs Declaration provides more detailed facts of the allegations in paragraphs 3, 50, and 51 of the *Complaint* that as parts manager Defendant Hess directed and participated in mutilation and fraud with respect to parts. Defendant Hess argued that the *Declaration of Keith Jacobs* lacks credibility because of contradictory assertions regarding Defendant Hess' involvement and participation in

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taking the brand-new parts and mutilating or soiling them to make it appear as if they were defective. According to Defendant Hess Paragraph 50 of the *Complaint* and pages 11-12 of Keith Jacobs Declaration are contradictory because the *Complaint* identifies technicians, acting under the direction of Defendant Hess, as the ones would scuff up, mutilate and soil the brand new parts whereas pages 11-12 of the Jacobs Declaration Defendant Hess participated personally, aided by a senior parts-counter person Alphonse Rodriquez.

These allegations, the Court concludes, are not contradictory. In Paragraph 50 of the *Complaint*, the allegation of scuffing up, mutilating and soiling brand new parts, was done “under the direction of Mr. Hess.” This statement in the *Complaint* is not inconsistent with Jacobs Declaration detailing more personal involvement by Defendant Hess. In both allegations, Defendant Hess is involved in, leading, or has active knowledge that parts are being scuffed up, mutilated and soiled. It is undisputed that Defendant Hess was the manager of the parts department at West Covina, so regardless of who actually performed the act of scuffing up, mutilating and soiling brand new parts, the allegations are consistent that Defendant Hess necessarily was involved, knew about, and/or directed the conduct.

The Court also rejects Defendant Hess’ argument that “there is no allegation that parts were returned to Nissan in connection with these specific warranty claims” or that, even if parts were returned, Defendant Hess did not send any warranty claims to Tennessee. In addition to the Declaration of Keith Jacobs which refutes the Defendant Hess’ position, the Plaintiff has also filed the Declaration of David Walker, a Special

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Projects Manager in Nissan's Warranty Department, who corroborates the fact that "[i]n connection with certain of the warranty claims West Covina submitted to NNA during the period set out in the Complaint, West Covina shipped used automotive parts into Tennessee." *Declaration of David Walker*, p. 2, ¶ 5 (Oct. 31, 2016). These *Declarations* in conjunction with Paragraph 52 of the *Complaint* which states that "As part of its fraudulent scheme, Defendants returned such intentionally damaged parts to NNA in Franklin, Tennessee," when taken as true are sufficient to refute Defendant Hess' denial that he never sent any warranty claims to Tennessee or shipped scuffed up, mutilated and soiled parts.

From the combination of the Plaintiff's allegations, the evidence contained in the declarations, and the causes of action, the Court finds the Plaintiff has demonstrated a *prima facie* case that Defendants Hess and Moshabad were primary participants: they were central figures who had control of and a direct participation in the alleged fraudulent scheme. *See Poga Management partners LLC v. Medfiler*, 2013 WL 5487343 (C.D. Cal. 2013); *Tangiers Investors, L.P. v. Americhip Intern., Inc.*, 2011 WL 3299099 (S.D. Cal. 2011). Additionally, the Court denies the request of Defendant Moshabad to conduct additional discovery on the issue of jurisdiction of deposing Keith Jacobs and producing the Jacobs settlement document. Such jurisdictional discovery is unnecessary based upon the foregoing analysis.

With respect to Defendant West Covina Nissan, LLC's arguments that if the Court adopts the Plaintiff's application and analysis of *Burger King Corp. v. Rudzewicz*, 471

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U.S. 462 (1985) and its progeny, *Air Products & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544 (6th Cir. 2007) and *AlixPartners, LLP v. Brewington*, 836 F.3d 543 (6th Cir. 2016), the Court must expressly or implicitly withdraw its previous *Calder* effects test analysis, the Court does not adopt Defendant's position. As analyzed by the Plaintiff, the *Calder* effects analysis is not antithetical to *Burger King Corp. v. Rudzewicz*, and its progeny, *Air Products & Controls, Inc. v. Safetech Int'l, Inc.*, and *AlixPartners, LLP v. Brewington*.

Finally, even if one were to limit the analysis to the *Calder* effects test, *Air Products* demonstrates that jurisdiction is proper in this case. After finding purposeful availment under *Burger King*, the Sixth Circuit conducted an alternative analysis, in which it applied the *Calder* test in a case involving a corporate plaintiff that had its principal place of business (but not its charter) in Michigan.

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Applying this test to the present case, there is no question that the Sixth Circuit's interpretation of *Calder* supports jurisdiction over the Defendants. Here, as there, the defendants intentionally directed actions that caused harm in the forum state. Here, as there, Defendants knew that Plaintiff had its principal place of business in the forum state. Here, as there, the focal point of defendants' actions (both electronic and physical) and the brunt of the resulting harm are in the forum state. Finally, here (unlike there), the fraudulent acts, rather than the indirect effects thereof, were actually directed into Tennessee. Consequently, this is an easier case than *Air Products* and the *Calder* test is met under the most similar Sixth Circuit authority.

In sum there is no real issue as to jurisdiction. The additional facts from the Jacobs Declaration, when combined with the purposeful availment analysis of *Burger King* and its progeny, along with the Sixth Circuit's decisions in *Air Products* and *AlixPartners*, provide strong legal grounds and, at a minimum, *prima facie* factual support for specific jurisdiction. Consequently, the Court should not certify this issue for appeal.


*Plaintiff's Supplemental Memorandum On Personal Jurisdiction*, pp. 11-12 (Feb. 2, 2017).

Jurisdictional issues having been ruled upon, the next step is to schedule a Rule 16 Conference to plan the litigation of this case. The scheduling of the Rule 16 Conference, however, will not be productive until *Answers* to the *Complaint* have been filed. Pursuant to Rule 12.01 of the Tennessee Rules of Civil Procedure "the responsive pleading shall be served within 15 days after notice of the court's action" of denying the motions to dismiss.

For this reason, the Court has factored in the timing of when the *Answers* are due and it is therefore ORDERED that by March 15, 2017, Counsel shall contact the Court on their availability for a Rule 16 Conference on these dates and times:

- April 6, 2017 at 10:30 a.m.
- April 10, 2017 at 9:00 a.m.
- April 17, 2017 at 1:00 p.m.

At the Rule 16 Conference, in addition to any matters presented by Counsel, a discovery cutoff and selection of a trial date will be covered.

  
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ELLEN HOBBS VYLE  
CHANCELLOR  
TENNESSEE BUSINESS COURT  
PILOT PROJECT

cc: Eugene N. Bulso, Jr.      Christian J. Scali  
Steven A. Nieters      Winston S. Evans  
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Louis W. Pappas (courtesy copy – No notice of appearance filed)

  
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