

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

NISSAN NORTH AMERICA, INC.,)
)
Plaintiff,)
)
VS.)
)
TUSTIN IMPORT AUTO SALES, LLC,)
d/b/a TUSTIN NISSAN; RICKY)
RAYMOND ENRIQUEZ; MARIA)
VILLEGAS; and DOES 1 through 25,)
)
Defendants.)

NE
NO. 16-117-BC

2016 JUN - 8 PH 3: 14
CLEM & MASTER
DAVIDSON CO. CHANCERY CT.
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FILED

**MEMORANDUM AND ORDER: (1) DENYING THE DEFENDANT LLC'S
MOTION TO DISMISS ASSERTING LACK OF
PERSONAL JURISDICTION AND FORUM NON CONVENIENS
AND (2) HOLDING IN ABEYANCE DEFENDANT VILLEGAS'
SIMILAR MOTION TO OBTAIN ADDITIONAL EVIDENCE**

It is ORDERED that the motion to dismiss filed by Defendant Tustin Import Auto Sales, LLC d/b/a Tustin Nissan is denied.

With respect to the motion to dismiss filed by Defendant Villegas, it is held in abeyance until June 24, 2016, to provide all parties an opportunity to file proof of the scope of Defendant Villegas' duty as Warranty Claims Administrator.

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

This lawsuit has been filed by the importer, distributor and wholesaler of new Nissan motor vehicles and related and accessory parts throughout the United States against a Nissan Dealership LLC located in California and its agents and employees who perform warranty and customer-paid maintenance and service on Nissan vehicles. The Complaint asserts that the Defendant LLC was paid \$3.8 million on false, fictitious and fabricated warranty repair claims submitted to the Plaintiff by the Defendants over at least the course of June 23, 2014 through March 20, 2015. As to Defendant Villegas, the Complaint asserts that, as the former Warranty Claims Administrator of the Defendant LLC, she used software programs to electronically communicate with the Plaintiff to submit and process the 7,000 warranty claims in issue sent to and received by Plaintiff's corporate office in Tennessee. As to all of the Defendants the Plaintiff alleges three causes of action: violation of the Tennessee Consumer Protection Act, Fraud, and Negligent Misrepresentation; and, as to the Defendant LLC, breach of contract. In addition to actual, compensatory and consequential damages, the Plaintiff seeks to recover punitive and treble damages, and attorneys fees.

The case is before the Court on preliminary motions of two of the Defendants, the LLC and Defendant Villegas, to dismiss the case for (1) lack of personal jurisdiction and (2) *forum non conveniens*.

The facts provided in declarations filed by the Defendant LLC and relied upon in support of its motion to dismiss include these:

- The Plaintiff is a California corporation with its headquarters located in Williamson County, Tennessee, with regional centers operating in

California. The Plaintiff's website lists 96 authorized Nissan dealers in California.

- The Defendant LLC is a California-based dealer. It holds a California automobile dealer license and is physically located in Tustin, California, eight miles from Plaintiff's Irvine, California regional office. The Defendant LLC's primary market area is a geographic region in Southern California. The vast majority of the warranty and repair work at issue in this case was on vehicles of California residents.
- The LLC's employees reside in California as do the named individual Defendants.
- None of the Defendants are Tennessee citizens or residents.
- The Defendant LLC is not registered to do any business in Tennessee; does not have an automobile dealer license in Tennessee; and does not conduct, advertise, or solicit sales, warranty claims, or repair services in Tennessee. Neither the Defendant LLC nor its members own any physical property or offices in Tennessee, pay rent in Tennessee or have bank accounts or assets in Tennessee. The Defendant LLC and its members have never paid taxes, initiated or defended (except for specially appearing in this action) a lawsuit in Tennessee, or appointed an agent for service of process in Tennessee.
- The contract on which Plaintiff bases its claim—the "Nissan Sales and Service Dealer Agreement" and its attached "Standard Provisions," which were drafted by Plaintiff—was negotiated by Plaintiff's regional office in California, contains an express provision stating that the contract is "deemed to have been entered into in the State of California," is governed by California law, and was required to be submitted to and approved by the State of California.
- California law sets forth a specific statutory framework governing the relationship between Plaintiff and Tustin Nissan and provides an additional forum, California's New Motor Vehicle Board, for disputes like this one between vehicle manufacturers and dealers, including specific provisions governing warranty audits such as that underlying this case.

- The Defendant LLC entered into the Nissan Dealer Agreement in California on January 3, 2012, and, in light of the California choice-of-law provision, reasonably expected that any disputes would be adjudicated in California and would apply California law. This continues to be so, even though the Plaintiff amended the Dealer Agreement in 2014, because the Standard Provisions and the California choice-of-law provision were not modified.

- Plaintiff's Complaint includes allegations that Defendants "defrauded [Plaintiff] out of millions of dollars by submitting fraudulent warranty and repair claims to [Plaintiff] for payment." Each of the Complaint's four causes of action arise from this alleged scheme, although only 250 of the approximately 7,000 warranty claims are alleged to be fraudulent. The remainder of the warranty claims at issue are alleged to involve a lack of documentation, or noncompliance with or failure to follow written repair processes. According to the Complaint, all warranty and repair services and claims are subject to the Dealer Agreement and Standard Provisions, which, among other things, grant Plaintiff the right to audit Tustin Nissan's warranty, repair, and employment records. Plaintiff concedes that Tustin Nissan's records are located in California, and claims that Defendants' alleged fraudulent scheme was discovered after Plaintiff conducted on-site investigations and audits of Tustin Nissan's California facility.

- Plaintiff concedes that any other Tustin Nissan employees that may have been involved in, or may have been a witness to, these allegedly fraudulent claims also would be residents of California, not Tennessee. Any repairs and services related to these allegedly fraudulent claims most likely would have involved California customers and accounts, would have taken place at Tustin Nissan's physical facility in California, and would have been performed and submitted by its employees in California. Plaintiff's on-site audit of Tustin Nissan's warranty and repair records took place at Tustin Nissan's California facility.

- Since 1973, California's Vehicle Code has regulated warranty reimbursement disputes between dealers and manufacturers, such as the one Plaintiff alleges here. *See* Cal. Veh. Code § 3065. Vehicle Code Section 3065 sets forth detailed procedures relating to disputed warranty claims, including procedures for auditing franchisee warranty

records, Cal. Veh. Code § 3065(e), notifying franchisees of claim disapprovals, Cal. Veh. Code § 3065(d)(1), providing franchisees the opportunity to appeal claims disapprovals and cure noncompliance, *id* § 3065(d)(3), and permitting franchisees to “file a protest with the board for determination of whether the franchisor complied with the requirements of this subdivision,” *id.* § 3065(d)(6).

As to Defendant Villegas, she has filed a *pro se* Answer and Declaration asserting the following facts in support of her defense that she is not personally subject to the jurisdiction of Tennessee and that defending litigation in this State would present a personal and economic hardship in support of her defense of *forum non conveniens*.

- Her sole function was to input data into the Defendant LLC’s computer and transmit it to the Plaintiff without regard to the accuracy of the content. She was not aware of any fraudulent content.
- Defendant Villegas is a California resident of limited financial means. She is a single mother of two children, and is the sole provider for them and her mother.
- She was employed as a part-time outside contractor for the Defendant LLC to enter warranty claims into the computer which requires her to input information onto a website from the LLC’s computers in Orange County without specific knowledge that the claims would be received in Tennessee.
- The Plaintiff had unilateral control over the warranty claims submission process, and Defendant Villegas had no control over this.

The facts the Plaintiff relies upon in support of Tennessee asserting jurisdiction are provided in Declarations of Nissan employees and include the following:

- When the Defendant LLC entered into the Dealer Contract with the Plaintiff in January 2012, the Plaintiff had been located in its headquarters and financial operations in Tennessee for six years.

- Certain of the obligations of the Dealer Contract called for sending Notices to Tennessee.
- One of the obligations the Defendant LLC assumed in its relationship with the Plaintiff was to perform warranty-related repairs on Nissan vehicles. After making such repairs, the Defendant LLC submits warranty-related payment claims to the Plaintiff, which requires the preparation and submission of an individual claim for each warranty repair.
- Defendant Villegas was the person who submitted and processed the warranty claims to the Plaintiff for payment. Each such claim contains the repair order number, the identifying number of the technician making the repair, the number for any parts used in the repair, and other similar information.
- The importance of valid warranty claim information is heightened by the Transportation Recall Enhancement, Accountability and Documentation Act, which mandates that Plaintiff report to the National Highway Traffic Safety Administration of the Department of Transportation any systemic safety defects that are apparent from analysis of warranty claims.
- Throughout this process, the Plaintiff must rely upon the integrity of its dealers, because it receives in excess of 1,000,000 such claims each year.
- Upon receipt of a properly formatted and supported warranty claim at the Plaintiff's headquarters in Franklin, Tennessee, the Plaintiff immediately credits the dealer for the costs of providing the warranty service. Such credit is provided through a set-off in the dealer's non-vehicle account, which account is maintained by Plaintiff at its headquarters in Franklin. For the crediting to occur, the claim must arrive in Franklin; otherwise, the Defendant LLC and other dealers cannot get paid for their warranty work. So too, all overview and verification of warranty claims is directed by headquarters personnel in Franklin. Thus, all administration of the warranty claims occurs at Plaintiff's headquarters.

- The Plaintiff asserts that the Defendants, over a nine month period, electronically transmitted 7,159 deficient warranty claims to the Plaintiff's Franklin, Tennessee offices which included the following indicia of fraudulent submissions:
 - 4,008 instances in which the technician's hours were inconsistent with Defendant LLC's payroll records;
 - 3,847 instances in which the warranty claims were altered prior to submission to Plaintiff;
 - 1,106 instances in which the Defendant LLC's employees' time clocking was missing or non-compliant—indicating that it was claiming reimbursement for physically impossible concurrent work; and
 - 1,303 instances in which the parts allegedly installed, and for which reimbursement was sought, were never purchased.

- The Defendant LLC shipped used automotive parts into Tennessee. Also, both before and during the audit period, the Defendant LLC and its agents routinely called the Plaintiff's warranty service and powertrain call centers in Murfreesboro, Tennessee, for assistance in making or submitting warranty claims.

Tennessee Law Determines Personal Jurisdiction and *Forum Non Conveniens*

Derived from the authorities cited in Plaintiff's brief¹ the Court's analysis begins with the conclusion of law that issues of personal jurisdiction and *forum non conveniens* in this case are determined by Tennessee law. This is so even through the parties' Dealer Contract contains a California choice of law provision because matters of procedure are governed by the law of the forum.

Tennessee law on personal jurisdiction is the long-arm statute, Tennessee Code Annotated section 20-2-223 which has been extended as much as is permitted by the Tennessee and United States Constitutions. TENN. CODE ANN. §§ 20-2-214(a)(6); 20-2-225(2). Accordingly, the personal jurisdiction analysis is whether the exercise of Tennessee jurisdiction in this case satisfies due process.

Of the two prongs—general and specific—personal jurisdiction, the Plaintiff's assertion in this case, that Tennessee exercising jurisdiction is permissible, is based upon the

¹“[W]hile a choice of law provision may well govern which state's contract law governs a dispute, the forum state's law will nonetheless govern questions of jurisdiction and procedure. *Boswell v. RFD-TV The Theater, LLC*, M2015-00637-COA-R3-CV, 2016 WL 1091296, at *4 (Tenn. Ct. App. Mar. 18, 2016) (“Matters of procedure are governed by the law of the forum. ... In other words, we apply our own procedural rules even if the law of another state governs the substantive issues.”). See *Restatement (Second) of Conflict of Laws* § 122 (1971) (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”); see also *Cole v. Mileti*, 133 F.3d 433 (6th Cir. 1998) (California choice of law provision; trial court properly applied Ohio long-arm statute and limitations period); *Invisible Fence, Inc. v. Fido's Fences, Inc.*, 687 F. Supp. 2d 726 (E.D. Tenn. 2009) (applying Tennessee and Sixth Circuit law to jurisdiction and venue issues while recognizing Connecticut choice of law provision governed substantive issues); cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.9 (1984) (distinguishing between questions of substantive law and issues of personal jurisdiction).” Plaintiff's April 20, 2016 Memorandum in Opposition to Motion to Dismiss, at page 10, footnote 3.

Defendants' contacts with the forum state, i.e. specific personal jurisdiction. There are two steps to demonstrating specific personal jurisdiction:

Assessing minimum contacts involves a two-part test. The first step is the fact-gathering exercise of identifying the relevant contacts. The plaintiff is required to establish that minimum contacts exist by a preponderance of the evidence. The court should consider the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts. A defendant's contacts are sufficiently meaningful when they demonstrate that the defendant has purposefully targeted Tennessee to the extent that the defendant should reasonably anticipate being haled into court here. If the court finds sufficient minimum contacts, then the inquiry should proceed to the second step. At step two, the defendant bears the burden of showing that, despite the existence of minimum contacts, exercising jurisdiction would be unreasonable or unfair.

State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 759-60 (Tenn. 2013).

With respect to the first step of identifying the relevant contacts, the Court's survey of cases cited by Counsel and its own research, to discern the quality and kinds of conduct which constitute purposeful targeting of the forum state, confirmed the analysis of Counsel for the Defendant LLC in oral argument that the issue boils down to whether this case fits into *Neal v. Janssen*, 270 F.3d 328 (6th Cir. 2001) or *Rice v. Karsch*, 154 Fed. Appx. 454 (6th Cir. 2005).

In both *Neal* and *Rice*, as in this case, the defendants had no physical presence in Tennessee.

The contacts which the *Neal* Court found sufficient to assert personal jurisdiction were by means of telephone calls and facsimiles placed by the defendant located outside of Tennessee to Tennessee plaintiffs. The factual context was that the defendant had tricked

and defrauded the plaintiffs to accept a lower wire payment for the their horse with the defendant pocketing the excess.

In *Rice* there were also telephone calls as well as emails and mail directed by the defendant to Tennessee, but these were directed to Tennessee not primarily due to fraud or negligence but because of a contract the defendant had with plaintiffs who had chosen to have their offices in Tennessee.

In *Neal*, the Court emphasized that the telephone and fax communications to Tennessee were alleged to have been fraudulent. The communications formed the “heart of plaintiffs’ claims.” *Neal*, 270 F.3d at 333. Whereas in *Rice* the “heart of the action was a breach of contract. The *Rice* plaintiffs only alleged that a small part of the defendants’ ‘wrongdoing’ consisted of directing fraudulent and negligent communications.” *Sledge v. Indico*, 68 F. Supp. 3d 834, 843 (W.D. Tenn. 2014). The distinction is important because, as explained by the *Sledge* Court, alleged misrepresentations in telephone calls and emails into the forum state over a period of months obtaining payments from plaintiffs located in the forum, “furthered” the defendant’s “personal business while creating continuous consequences in Tennessee. The alleged misrepresentations, as in *Neal*, ‘are the elements of the cause of action itself,’ and the quality of these contacts are sufficient for a finding of purposeful availment of Tennessee.” *Sledge*, 68 F. Supp. 3d at 844.

Of additional guidance is that in applying *Neal* and not *Rice*, the *Sledge* analysis was that the Plaintiff’s claim sounded primarily in fraud and that the performance of any alleged

contract was secondary to the fraud. *Id.* at 845. The *Sledge* Court also rejected applying the circumstances of *Rice* that there was no purposeful availment when the defendants did not know they were communicating into Tennessee. Determinative of the purposeful aspect, the *Sledge* Court found, was that the defendant in that case made numerous communications into Tennessee and, therefore, should have known of the Tennessee connection. *Id.* at 845.

Application of Tennessee Law to the Defendant LLC

The Plaintiff's position is that the Defendant LLC targeted thousands of fraudulent communications to Williamson County, Tennessee.

The Defendant LLC's position is that because it was not given an option on where to submit its warranty claims, and had no control and did not direct its electronic submission of allegedly fraudulent claims to a Tennessee claim center sited and administered in the Plaintiff's headquarters in Tennessee, the Defendant LLC did not target/purposefully avail itself of Tennessee. The Defendant LLC asserts that because it was contractually required to submit its claims to the Plaintiff undercuts that Defendant's alleged fraudulent and deceptive acts targeted Tennessee. The Defendant LLC asserts that mere injury sustained by a Tennessee plaintiff does not establish personal jurisdiction over the defendant.

The Court's reasoning is that the same circumstances present in *Sledge* are present with respect to the Defendant LLC and, therefore, the *Neal v. Janssen*, 270 F.3d 328 (6th Cir. 2001) analysis and outcome applies. In this case there are numerous contacts with the forum

state: over 7,000 warranty claims were electronically submitted by the Defendant LLC to Tennessee and for these over \$3 million was paid by the Plaintiff to the Defendant LLC. The purposeful direction of fraudulent communications into Tennessee and to further the Defendant's gains are the bases for the tort claims and for the "heart" of this action. The contract aspect is secondary. The alleged deception, misleading and fraudulent submission of warranty claims for a period of months with the Defendant LLC obtaining payments from Tennessee furthered the business of the LLC, while creating continuous consequences in Tennessee. These misrepresentations are the elements of the cause of action itself, and the quality of these contacts is sufficient for finding purposeful availment in Tennessee. The first step of specific personal jurisdiction as to Defendant LLC is present in this case.

With respect to the second step the Defendant must demonstrate that, despite minimum contacts, the exercise of jurisdiction would be unreasonable or unfair. *NV Sumatra*, 403 S.W.3d 726, 759-60. "In determining reasonableness, a court should consider '(1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) other states' interest in securing the most efficient resolution of the [controversy].'" *Sledge*, 68 F. Supp. 3d at 845-46.

Additionally, the Plaintiff's brief informs the Court that if the first step of purposeful availment and a cause of action arising from the defendant's contacts with the forum state is established, then an inference arises that it is reasonable, fair and just to exercise jurisdiction. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996); see *Simplex*

Healthcare, Inc. v. Marketlinkx Direct, Inc., 761 F. Supp. 2d 726, 734 (M.D. Tenn. 2011) (Trauger, J.) (four fraudulent emails directed at Tennessee residents: “When [plaintiff has shown targeted communications from which his claims arise], the reasonableness prong is presumed to be satisfied, except in ‘unusual cases.’”). Thus, “where the defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Burger King*, 471 U.S. at 477. *Accord Air Products and Controls, Inc. v. Safetech Intern., Inc.*, 503 F.3d 544, 554 (6th Cir. 2007); *Wolff Ardis, P.C. v. Dailey*, W2013-01127-COA-R3-CV, 2013 WL 5613373, at *7 (Tenn. Ct. App. Oct. 11, 2013), *appeal app. denied* (Mar. 4, 2014) (quoting *Burger King*).

As explained in *NV Sumatra*, “a state has a ‘manifest interest’ in giving its residents ‘a convenient forum for redressing injuries inflicted by out-of-state actors’ . . . [and] when defendants have ‘purposefully derive[d] benefit’ from their interstate activities, ‘it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities.’” 403 S.W.3d at 745 (citations omitted; quoting *Burger King*, 471 U.S. at 473-74).

Further, because “‘modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,’ it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.” *Southland Exp., Inc. v. Scrap Metal Buyers*, 895

S.W.2d 335, 339 (Tenn. Ct. App. 1994) (quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957)). In this regard, the Court adopts Plaintiff's analysis:

So too, while arguing for the importance of California's interest in this case, TUSTIN mentions Tennessee only in passing—stating that “whatever minimal interest Tennessee might have” is far outweighed by California's interest. That argument, however, is simply contrary to the law. Both the United States Supreme Court (in *Burger King*) and the Tennessee Supreme Court (in *NV Sumatra*) have stated both that a state has a *manifest interest* in giving its residents a convenient forum against foreign defendants and that when such a defendant has purposefully targeted a known resident for harm it may well be unfair to the Plaintiff to deprive it of a forum in the targeted state. See 471 U.S. at 473-74; 403 S.W.3d at 745. Moreover, California's laws are readily accessible to this Court and the parties, and both California and Tennessee share an interest in punishing purveyors of fraud—punishment that is likely to be more readily available in this Court because of the differences between the statutory framework of California and Tennessee that are discussed more fully below. Thus, California's putative interest in this dispute does not outweigh, much less compellingly outweigh, NNA's choice of forum and Tennessee's manifest interest in protecting its residents against fraud.

Plaintiff's Memorandum in Opposition to Motion to Dismiss Filed by Defendant Tustin Import Auto Sales, LLC and to Joinder of Maria Villegas, April 20, 2016 at 20 (emphasis in original). The Court concludes that exercise of jurisdiction in this case in Tennessee is reasonable and fair.

The Court as well dismisses the *forum non conveniens* argument of the Defendant LLC adopting the Plaintiff's analysis and authorities at pages 24-31 of its April 20, 2016 *Memorandum* including the following.

Forum non conveniens is a “drastic remedy” to be exercised with caution and restraint.” *Iman v Iman*, M2012-02388-COA-R3-CV, 2013 WL 7343928, at *5 (Tenn. Ct. App. Nov. 19, 2013). “Unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Zurick v. Inman*, 426 S.W.2d 767, 772 (Tenn. 1968). A representative sampling of the reasons provided by Plaintiff that Tennessee does not constitute a *forum non conveniens* are as follows:

- Documents are easily copied and modern trial and discovery practice involve digitizing documents as a matter of court.
- Video presentation of witness testimony (which was unknown at the time of *Zurick*) lends itself to efficient presentation of evidence and is more convenient for witnesses than attending a trial even in one’s hometown.
- TUSTIN is in close proximity to three airports (LAX, Orange County/SNA, and Ontario) with a multitude of one-stop and non-stop flights to Nashville. As of April 17, 2016, Southwest Airlines alone advertises on its website 29 one-stop and two nonstop flights each weekday from those three airports to Nashville. With a 15-day or more advance purchase, such a flight can be purchased for under \$400 each way—with \$132 flights from LAX available for a flexible traveler or for someone booking well in advance.
- The majority of the Plaintiff’s seven or eight witnesses are located in Nashville.
- Most of the pertinent documents, including every single warranty claim, are in electronic format and equally available at any location.
- All paper records regarding the Plaintiff’s investigation of the fraud are located in Tennessee.

- Tennessee has a strong interest in protecting its residents from fraud and TCPA violations perpetrated by out-of-state actors who aim their fraud at Tennessee.

The Court therefore, as well, denies the Defendant LLC's motion to dismiss on the basis of *forum non conveniens*.

Application of Tennessee Law to Defendant Villegas

With respect to exercising personal jurisdiction over Defendant Villegas, the Court is unable to rule on this issue because the evidence provided by both sides on the tasks performed by Defendant Villegas and who had control over her work is unspecific and conclusory. These facts are important because as explained *supra* at 10-11, under the *Neal* analysis the misrepresentations of submitting fraudulent warranty claims into Tennessee for payment in this case are the elements of the predominant causes of action and provide the quality of contacts necessary to establish personal jurisdiction by targeting and purposeful availment.

Applying the *Neal* analysis to the record relative to Defendant Villegas, the Court finds that the record consists of the Complaint, Defendant Villegas' Answer, the May 4, 2016 Declaration of Maria Villegas and the April 20, 2016 Declarations of Plaintiff's employees: Robert Casaletta, Josh Clifton and Nick Reese.

Allegations in the Complaint explicitly against Defendant Villegas include

- Paragraph 5 of the Complaint alleges Defendant Villegas was an independent contractor employed at the Defendant LLC until 2015 as the Warranty Claims Administrator.
- Paragraph 23 alleges that Defendant Villegas was “responsible for submitting and processing warranty claims to” the Plaintiff for payment; that the claims were sent to and received in Tennessee; and that Defendant Villegas “used software programs to communicate with” the Plaintiff’s “warranty system to submit warranty claims.”
- Paragraphs 36 and 39 allege Defendant Villegas “either directly submitted or directed others to submit numerous warranty repair claims to NNA that were either not performed, not requested to be performed, or not necessary to be performed” and that the alleged false and fraudulent information on these warranty claims was “either known or should have been known to be false” by Defendant Villegas.
- Paragraph 50 alleges the Defendants, including Defendant Villegas, knew the claims were false and fraudulent and were made to mislead the Plaintiff and paragraph 51 alleges intent for the Plaintiff to rely on the misrepresentations.

These allegations of intentional tortious conduct by Defendant Villegas fit within the cases, cited by Plaintiff, of use of computer/electronic means from one state to commit tortious activity in the forum state: *Premedics, Inc. v. Zoll Medical Group*, No. 3:06-0716, 2007 WL 3012968, *5 (M.D. Tenn. Oct. 9, 2007); *Facebook, Inc. v. ConnectU LLC*, No. C 07-01389 RS, 2007 WL 2326090, *2 (N.D. Cal. Aug. 13, 2007); and *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 616 (E.D. Va. 2002). Defendant Villegas’ Declaration only denies “specific knowledge that the warranty claims would be received in Tennessee.” Like the defendants in *Sledge* or *Premedics*, *Facebook* or *Verizon Online*, professed ignorance is

unavailing where circumstances of numerous fraudulent submissions, in this case over 7,000, are indicative that the sender should have known of the Tennessee connection. Defendant Villegas' Answer, however, must also be considered.

In her *pro se Answer*, Defendant Villegas denies the allegations that she had a duty to investigate or verify the truth of the warranty claims. Rather, Defendant Villegas states on numerous occasions in her Answer that her sole function was to input data into a Tustin computer without regard to their accuracy based on forms provided to her by Tustin:

Paragraph 23 - "The allegations of Paragraph 23 of the Complaint are denied except that the defendant does admit that she worked, as a contractor, inputting warranty claim information into computers located at Tustin Nissan in Orange County, California. Other than inputting information, she had no responsibility to follow up, or 'process' said warranty claims."

Paragraph 32 - "The defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 32 of the Complaint and therefore denies the same. By way of further answer, this defendant maintains that at no time was she ever aware of, or knowingly involved in, any fraudulent conduct or misrepresentations, as her sole function was to input information into a computer, which information was provided to her by others. At no time did she deal with customers, technicians, vendors, or have any actual knowledge where work on any form that she input was done properly, or not, or whether such work was even done. At no time did she ever falsify information on any Tustin Nissan form."

Paragraph 36 - "The defendant denies the allegations of Paragraph 36 of the Complaint as her sole function at Tustin Nissan was to input information given to her by the services manager. She had no responsibility to investigate or verify any information and relied on the accuracy of the forms as given to her by Tustin Nissan personnel. Specifically, she never had any responsibility to verify or investigate the time punches of the technicians."

Paragraph 39 - "The defendant lacks sufficient knowledge and information to admit or deny the allegations of Paragraph 39 of the Complaint and

therefore denies the same. By way of further answer, the defendant alleges that she never knowingly was involved in any fraudulent claims, as she relied on the paperwork given to her by others at Tustin Nissan and her sole job was to input the information into the computer system. She was a part time, outside contractor.”

Paragraph 50 - “The defendant denies the allegations of Paragraph 50 of the Complaint as she never knowingly engaged in any false or fraudulent actions as her sole function was to input information into a company computer located at Tustin Nissan.”

Paragraph 55 - “The defendant denies the allegations of Paragraph 55 of the Complaint. By way of further answer, this defendant relied on the accuracy of forms provided to her by employees of Tustin Nissan, which information she then input into a company computer in Orange County, California.”

Paragraph 66 - “By way of further answer, this defendant requests that the Complaint be dismissed as against her as the Tennessee court does not have jurisdiction over her person and, secondly, because she herself never engaged in any fraudulent conduct or misrepresentations as alleged in the Complaint. She did data input and nothing more, which should not subject her to any civil liability in this matter which is primarily a dispute between the Plaintiff and Tustin Nissan.”

Both sides have cited the applicable standard to apply in evaluating the factual record in the context of motion to dismiss for lack of personal jurisdiction:

- The defendant may, at its discretion, support the motion with affidavits or other evidentiary materials. The plaintiff then bears the burden of making a prima facie showing of personal jurisdiction, based on its own evidence.
- When weighing the evidence on a Tenn. R. Civ. P. 12.02(2) motion, the trial court must take all factual allegations in the plaintiff’s complaint and supporting papers as true.
- The court must resolve all factual disputes in the plaintiff’s favor.

State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 739 (Tenn. 2013).

Applying the foregoing standard to the record, the Court sees that there are conclusory allegations concerning the nature of Defendant Villegas' position with and work for the Defendant LLC and whether she knew or should have known the warranty claims she was submitting were fraudulent and misleading. On one hand, there are the allegations of the Plaintiff that Defendant Villegas was the Warranty Claims Administrator and an independent contractor. These titles are indicative of authority and control from which a reasonable inference can be drawn that it was Defendant Villegas' duty to make sure the content of the warranty claims submitted to Tennessee was accurate. These facts, under the *Neal* analysis, are sufficient for personal jurisdiction.

On the other hand, Defendant Villegas, while not denying the titles of independent contractor and Warranty Claims Administrator, asserts her job duties were data entry, indicative of no duty to assure accuracy of content.

There is a gap, then, in the record. Missing from the evidentiary record are facts of the scope and responsibility of Defendant Villegas' duties as the Warranty Claims Administrator, and facts detailing Defendant Villegas' job responsibilities and contract arrangement with Defendant Tustin.

Under these circumstances, Tennessee law requires the Court to take a cautious approach to ruling on the motion:

A trial court has considerable procedural leeway in addressing the motion. 5B *Federal Practice and Procedure* § 1351, at 305. The court should proceed carefully and cautiously, *Chenault v. Walker*, 36 S.W.3d at 54, to avoid improperly depriving the plaintiff of its right to have its claim adjudicated on


the merits. 5B *Federal Practice and Procedure* § 1349, at 58. Accordingly, in addition to considering the complaint and the supporting or opposing affidavits, the trial court may, in particularly complex cases, allow limited discovery, hold an evidentiary hearing, *Chenault v. Walker*, 36 S.W.3d at 56 n. 3, or even hold the motion in abeyance until a trial on the merits, Tenn. R. Civ. P. 12.04. 5B *Federal Practice and Procedure* § 1351, at 308-09.

Gordon v. Greenview Hosp., Inc., 300 S.W.3d 635, 644 (Tenn. 2009) (footnotes omitted).

Consistent with *Chenault's* careful and cautious approach, the Court has determined that it needs more facts about the source and extent of Defendant Villegas' duty, and control of her work with regard to her position as the Warranty Claims Administrator.

To avoid the delay and expense of proceeding with limited discovery or an evidentiary hearing, the Court has instead ordered above that all parties are provided an additional opportunity to submit supplemental verified facts, if any, specifically addressing the scope of Defendant Villegas' duty as the Warranty Claims Administrator and any supporting documentation, including but not limited to manuals, policies and procedures pertaining to warranty administration, and screenshots of certifications or other procedures related to warranty claims, etc. Providing an opportunity for submission of additional verified facts is consistent with the "procedural leeway" granted a trial court in determining motions to dismiss for lack of personal jurisdiction and is in keeping with the goal of the Business Court Pilot Project in utilizing a cost-effective, customized approach to decide a threshold issue.

It is therefore ORDERED that by June 24, 2016, all parties have the opportunity to file supplemental verified facts addressing the control, scope and source of Defendant Villegas' duty as the Warranty Claims Administrator and any supporting documentation to enable the Court to better analyze the issue of whether this Defendant engaged in purposeful conduct targeted to Tennessee.



ELLEN HOBBS LYLE
CHANCELLOR
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PILOT PROJECT

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