

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

NISSAN NORTH AMERICA, INC.,            )  
  )  
                  **Plaintiff,**                                    )  
  )  
**VS.**    )  
  )  
  )  
**WEST COVINA NISSAN, LLC;**                    )  
**KEITH JACOBS; JEFF HESS; and**                )  
**EMIL MOSHABAD,**                                )  
  )  
                  **Defendants.**                                )

**NO. 16-883-BC**

**MEMORANDUM AND ORDER RULING**  
**ON SOME MATTERS ARGUED 6/30/17**

On June 30, 2017, oral argument was conducted on three motions:

- Keith Jacobs’ motion to strike crossclaim,
- Plaintiff’s Rule 37 motion for sanctions, and
- Plaintiff’s motion to revise Rule 16 Order.

Some of the rulings are documented below. In addition, contained below are rulings on the completion of Keith Jacobs’ deposition.

**Keith Jacobs Motion to Strike Crossclaim**

It is ORDERED that Keith Jacobs’ motion to strike the crossclaim, filed June 1, 2017, against him by Defendant West Covina Nissan, LLC, is granted. Leave of court to file the crossclaim was not obtained as required by Tennessee Civil Procedure Rule 15.

It is further ORDERED that leave of court is hereby granted, and Defendant West Covina may file a Third-Party Complaint against Keith Jacobs, issue the summons and serve

Mr. Jacobs. Attorney Todd Panther has agreed to accept service. In so ruling, the Court rejects Defendant West Covina's argument in footnote 1 of its June 19, 2017 *Response* that Tennessee Civil Procedure Rule 13.07 permitted a crossclaim because Keith Jacobs was a party to the original lawsuit. That was no longer present at the time of the filing of the June 1, 2017 crossclaim. Keith Jacobs was voluntarily dismissed as a party on January 26, 2017, pursuant to Tennessee Civil Procedure Rule 41.01. For this reason, a Third-Party Complaint is required.

#### Plaintiff's Rule 37 Motion for Sanctions

It is ORDERED that the Plaintiff's motion for Tennessee Civil Procedure Rule 37 sanctions to revoke the *pro hac vice* admission of Counsel for West Covina and for payment of expenses is denied. From the present record, competing inferences can be drawn on whether Attorney Danhi's actions in serving Keith Jacobs at his deposition in California with a crossclaim were deliberately intended to obstruct and halt the deposition, and obstruct Plaintiff's ability to obtain discovery damaging to West Covina; or, alternatively, whether the motivation was the concern of Attorney Danhi that he was jeopardizing West Covina's position in the lawsuit if he did not provide service and notice to Mr. Jacobs at the deposition for him to be informed of claims being made against him.

Additionally, part of the oral argument revealed that during the Keith Jacobs' deposition, Mr. Dolenac (Counsel affiliated with Mr. Danhi) laughed out loud at a question

of Plaintiff's Counsel to Deponent Keith Jacobs, and Mr. Dolenac referred to Plaintiff's Counsel as "You're a joke." Such unprofessional, loutish conduct is ORDERED not to be repeated. Further, this ruling denying Rule 37 sanctions is without prejudice to the Plaintiff to reassert in the future if there are ongoing incidents of misconduct by out-of-state Counsel.

#### Rule 16 Order

It is ORDERED that paragraphs 6-9 of the April 10, 2017 Rule 16 Order are vacated. Pretrial deadlines will be reset upon joinder of the pleadings with respect to the First Amended Complaint and newly added parties.

It is further ORDERED that July 25, 2017 is the deadline for Counsel for Defendant Jeff Hess to supplement his Rule 9.02 motion to dismiss to include the First Amended Complaint. Response to the supplemented Rule 9.02 motion is due August 4, 2017, and Defendant Hess' Reply, if any, is due August 9, 2017. The Court shall rule on the papers.

#### Completion of the Keith Jacobs Deposition

With respect to completion of the deposition of Keith Jacobs, it is ORDERED that the deposition shall resume on August 22 and 23, 2017. Counsel shall file a notice with the Court on the times.

It is further ORDERED that the restrictions stated in the June 29, 2017 Order that "[t]o obtain additional discovery related to the Documents, the Defendants will be required

to show why production of the Documents ordered herein is insufficient and that additional information related to the Documents is not merely cumulative” do not apply to the Jacobs deposition.

It is additionally ORDERED that the oral motion of Attorney Panther that Keith Jacobs be treated with civility is granted, and to assure that and to eliminate the unprofessional conduct which occurred previously, the Court shall preside at the deposition by telephone. Plaintiff’s Counsel shall call 615-862-5717 to connect the Court to the deposition.

The authority for this Court presiding at the deposition is that under Tennessee law “a court has broad discretion in which to regulate the discovery process.” *Bailey v. Williams*, No. 79430, 1986 WL 8274, at \*5 (Tenn. Ct. App. July 29, 1986) (citing *Payne v. Ramsey*, 591 S.W.2d 434 (Tenn. 1979)); *see also Murray v. Beard*, No. E2006-01661-COA-R3CV, 2007 WL 2437971, at \*4 (Tenn. Ct. App. Aug. 29, 2007) (“Trial courts have wide discretion with respect to discovery issues.”); *Kibbler v. Richards Med. Co.*, No. 02A01-9110CV00214, 1992 WL 233027, at \*4 (Tenn. Ct. App. Sept. 23, 1992) (“The course of pre-trial discovery is, in large measure, left to the sound discretion of the trial court.”); *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 356 (Tenn. Ct. App. 1985) (citations omitted) (“Tenn.R.Civ.P. 26.03, like the judicial decisions upon which it is based, also makes it clear that the course of pretrial discovery is, in large measure, left to the discretion of the trial judge and that the

exercise of this discretion is based upon the broad parameters of the rules and the fundamental notion of fairness.”).

Additional authority is the practice of other courts who have employed this procedure. *See, e.g., Vargas v. Florida Crystals Corp.*, No. 16-81399-CV, 2017 WL 1861775, at \*8 (S.D. Fla. May 5, 2017) (“The undersigned will be available in Chambers during the deposition. Either parties’ counsel may telephone the Chambers of the undersigned during the deposition at (561) 803-3440, speak to one of the undersigned’s law clerks, and request that the undersigned come to the deposition room and rule on any disputes or objections. The Court shall then rule on any objections or disputes-during the deposition-that are made by either side as to any issue that arises.”); *Condit v. Dunne*, 225 F.R.D. 100, 112 (S.D.N.Y. 2004) (“It is clear to this Court that the parties would benefit from on-hand Court supervision of their depositions. Therefore, this Court refers supervision to Magistrate Judge Ellis, and any issues arising therefrom are to be decided by Magistrate Judge Ellis in a manner consistent with this Opinion.”); *Mamman v. Chao*, No. CIV.A. 06-2688MLC, 2008 WL 1995127, at \*2 (D.N.J. May 7, 2008) (“The Court will take the unusual protective step of presiding over the deposition to ensure that there exists some rational basis for Plaintiff’s allegations and Ms. Thompson’s deposition. Because of the procedural safeguards fashioned by the Court, there is no fear that any party’s representational rights will be harmed.”); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 199 (E.D. Pa. 2008) (“[T]he deposition . . . shall take place at the U.S. Courthouse, 601 Market Street, Philadelphia, PA, before a

magistrate judge, within 30 days of the date of this order, at a date and time to be designated by the magistrate judge.”); *Alexander v. F.B.I.*, 186 F.R.D. 1, 5 (D.D.C. 1998) (“[T]his court will not utilize either magistrate judges or other judicial officers to act as a deposition referee or to supervise depositions. If it is determined that such a referee is needed with respect to future depositions, this court will fill this role and the deposition will be conducted in open court.”); *Matter of Subpoena, dated Oct. 2, 1987 issued to: Painwebber Inc.*, 117 F.R.D. 352, 353 (S.D.N.Y. 1987) (“[T]o put an end to this unenviable situation, the Court will preside over and supervise the conduct of any further examination of this nonparty witness and counsel are directed to advise the Court of a date and time on which they agree when it will be convenient for all concerned to appear at the Courthouse in the Courtroom of this Court for the completion of the deposition . . . .”); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1184, n. 1 (8th Cir. 1984) (“Judge Lord traveled to Richmond, Virginia to preside over depositions, appointed two Special Masters to supervise the production of documents, and ordered [Defendant] *sua sponte* to produce additional documents.”); *State v. Harriston*, 162 W. Va. 908, 913, 253 S.E.2d 685, 688 (1979) (“Before she testified on chain of custody of the marijuana, the trial judge who presided at the deposition summarized his recollection of what had happened in the case prior to the deposition date.”); *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 Yale L.J. 117, 132 (1949) (“Occasionally a judge himself may supervise the taking of the depositions. He can thus keep them in bounds and at the same time familiarize himself with the case.”).

Other Pending Motions

Separate memoranda and orders will be issued on: Plaintiff's Motion for Judgment on the Pleadings to dismiss Defendant West Covina's counterclaim, and Plaintiff's Motion for Prejudgment Attachment, Temporary Injunction, and Expedited Discovery.

Plaintiff's Counsel shall serve a copy of this Memorandum and Order on the new parties recently added in the First Amended Complaint.

/s/ Ellen Hobbs Lyle

ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

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