

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005112

02/06/2017

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

STATE OF ARIZONA, et al.

EVAN GUY DANIELS

v.

VOLKSWAGEN A G, et al.

KEITH BEAUCHAMP

WILLIAM J MALEDON
MELISSA A MEISTER
TROY D ROBERTS

UNDER ADVISEMENT RULING

Under advisement following argument are: (1) the October 14, 2016 Motion for Judgment on the Pleadings filed by Defendants Volkswagen Group of America, Inc., Volkswagen AG, Audi of America, LLC and Audi AG (“Volkswagen”); and (2) the October 19, 2016 Joinder filed by Defendants Dr. Ing. h.c. F. Porsche AG and Porsche Cars of North America, Inc. (“Porsche”), which the court construes as a separate motion for judgment on the pleadings because it raises an additional issue. Both motions are denied.

I. Background.

In September 2015, the Environmental Protection Agency (“EPA”) issued a Notice of Violation to Volkswagen for violations of the Clean Air Act. *See* 42 U.S.C. §§ 7401 et seq. The EPA found that many Volkswagen diesel cars were equipped with a “defeat device” that could detect when the vehicle was undergoing emissions testing and change performance to improve results. There is an ongoing EPA investigation regarding whether and to what extent Volkswagen and Porsche violated the Clean Air Act.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005112

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The instant action is for consumer fraud. The State of Arizona alleges that Volkswagen and Porsche deceptively marketed how clean or environmentally friendly their vehicles were.

A defendant's motion for judgment on the pleadings – like a motion to dismiss, though filed after the answer – assumes the truth of the complaint's well-pled allegations. *Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO, Council 97 v. Lewis*, 165 Ariz. 149, 151, 797 P.2d 6, 8 (App. 1990). The Motions can be granted only if, on the State's allegations, Defendants are entitled to judgment as a matter of law. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, 988 P.2d 143, 144 (App. 1999).

II. Preemption.

Defendants argue the State's claim is preempted by federal law. The federal preemption doctrine "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In interpreting an express preemption clause, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc v. Easterwood*, 507 U.S. 658, 664 (1993). In an implied preemption analysis, the court must determine whether the state law stands as an obstacle to a "significant federal regulatory objective." *Williamson v. Mazda Motor of Am. Inc.*, 562 U.S. 323, 330 (2011).

The Clean Air Act's preemption clause states: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a). This reflects a clear intent "comprehensively to regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution." *Bunker Hill Co. Lead & Zinc Smelter v. U.S. Env'tl. Prot. Agency*, 658 F.2d 1280, 1284 (9th Cir. 1981).

This consumer fraud action, however, does not attempt to enforce an emission or other environmental standard. The issue is not whether Defendants' vehicles met Clean Air Act or EPA requirements, or whether other emissions standards should apply. It is whether Defendants' vehicles were falsely advertised. It is true that the alleged misrepresentations concerned emissions. But the Clean Air Act does not preempt all lawsuits relating to emissions; it preempts lawsuits that "enforce any standard relating to the control of emissions." Congress did not clearly manifest a purpose to preempt state law fraud claims merely because the subject of the fraud concerns emissions.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005112

02/06/2017

Nor does implied preemption apply. Neither the court nor the trier of fact in this case will decide whether Defendants complied with the Clean Air Act, so this consumer fraud action will not interfere with any “significant federal regulatory objective.”

III. Primary Jurisdiction.

Defendants next argue that this case should be dismissed or stayed based on the primary jurisdiction doctrine. “The doctrine of primary jurisdiction is a discretionary rule created by the courts to effectuate the efficient handling of cases in specialized areas where agency expertise may be useful.” *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 430, 586 P.2d 987, 991 (App. 1978). The doctrine allows the court to defer “its initial consideration of the disputed issue to the agency when such initial consideration is contemplated by the legislature and particularly when the agency has specialized expertise in the subject matter.” *Coconino Cty. v. Antco, Inc.*, 214 Ariz. 82, 87, 148 P.3d 1155, 1160 (App. 2006).

This case would implicate the primary jurisdiction doctrine if the court or the jury had to decide whether Volkswagen and Porsche violated the Clean Air Act. But that question is not at issue here. This case is fundamentally about whether Volkswagen and Porsche made false or misleading statements in connection with the sale of merchandise, a claim that may or may not depend on whether the EPA finds Clean Air Act violations. The court therefore declines to dismiss or stay this action.

IV. Personal Jurisdiction.

Porsche makes the additional argument that Porsche AG should be dismissed for lack of personal jurisdiction. Porsche Cars North America, Inc. does not seek dismissal on this ground.

Arizona lacks general jurisdiction over Porsche AG. *See Williams v. Lakeview Co.*, 199 Ariz. 1, 3, 13 P.3d 280, 282 (2000) (personal jurisdiction may be general or specific). It has specific jurisdiction over Porsche AG if it engaged in purposeful conduct for which it could reasonably expect to be brought into court here with respect to the conduct giving rise to the lawsuit. *Planning Grp. of Scottsdale, L.L.C. v. Lake Mathews Mineral Prop., Ltd.*, 226 Ariz. 262, 268, 246 P.3d 343, 349 (2011). In making this determination, the court must decide whether (1) Porsche AG’s conduct and contacts with Arizona were purposeful, (2) there is a nexus between the contacts and the asserted claims, and (3) exercise of jurisdiction would be reasonable. *Beverage v. Pullman & Comley, LLC*, 232 Ariz. 414, 417, 306 P.3d 71, 74 (App. 2013).

The actionable wrong alleged in this case is deception in connection with the sale and advertisement of vehicles. Thus, the relevant conduct for jurisdictional purposes is the sale and

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005112

02/06/2017

advertisement of vehicles. If, as the State alleges, Porsche AG “developed, reviewed, and approved marketing and advertising campaigns designed to sell” its vehicles in Arizona, then Arizona has personal jurisdiction over it. *See* Complaint ¶ 26. By contrast, if Porsche AG had no involvement in the marketing and sale of its vehicles, Arizona lacks personal jurisdiction, even if Porsche AG was responsible for the alleged Clean Air Act violations.

The fact that Porsche AG sold its vehicles through a distributor is not dispositive. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) (state lacked personal jurisdiction over manufacturer that sold its product to a distributor); *Van Heeswyk v. Jabiru Aircraft Pty., Ltd.*, 229 Ariz. 412, 420, 276 P.3d 46, 54 (App. 2012) (Arizona had personal jurisdiction over manufacturer that sold its product through a distributor). The important point is whether Porsche AG itself participated in the allegedly deceptive marketing and advertising campaigns in Arizona.

The court does, however, reject the suggestion that a nationwide marketing campaign is, by definition, not directed at Arizona so as to give rise to personal jurisdiction here. A company that advertises with the purpose of selling its products to Arizona consumers has made purposeful contacts with Arizona, even if it also made purposeful contacts with the other 49 states. To hold otherwise would mean no state has jurisdiction over deceptive nationwide marketing campaigns. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 573-74, 892 P.2d 1354, 1362-63 (1995).

Based on the complaint’s allegations, Arizona has personal jurisdiction over Porsche AG. Depending on what the evidence reveals about the extent of Porsche AG’s involvement in marketing and advertising, personal jurisdiction can be revisited after discovery.

V. Order.

Based on the foregoing,

IT IS ORDERED denying both Motions.

IT IS FURTHER ORDERED setting this matter for an **in-person** initial case management conference on **May 9, 2017 at 8:45 a.m.** (time allotted: **30 minutes**) in this division for the purpose of discussing the matters set forth in Rule 16.3, Ariz. R. Civ. P. and establishing pretrial deadlines in this case. The parties shall have their calendars available for this proceeding.

The Honorable Randall H. Warner
Maricopa County Superior Court
East Court Building

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005112

02/06/2017

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All counsel are directed to meet personally before the case management conference to discuss all of the matters set forth in Rule 16.3, Ariz. R. Civ. P. The parties shall prepare and file with the court **seven (7) days** before the initial case management conference a joint report and proposed scheduling order.

The court prefers that lodged orders be in a word processing format that will permit it to make modifications.

NOTE: All court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

The parties are encouraged to view Judge Warner's online profile of the Superior Court's website for additional information on appearing before Judge Warner.