NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 9, 2016

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Re: *Virginia Automobile Dealer's Association v. Tesla Motors, Inc. and Richard D. Holcomb, Commissioner, Department of Motor Vehicles for the Commonwealth of Virginia*, Case No. CL-2016-03672

Dear Counsel:

This case is before the Court on Defendant Tesla Motors, Inc.'s ("Tesla") demurrer, as well as Defendant Department of Motor Vehicles Commissioner Richard D. Holcomb's ("DMV") demurrer and Motion to Dismiss. Plaintiff Virginia Automobile Dealers Association ("VADA") brought this action against Tesla and the DMV for Breach of Contract and Declaratory Judgment under the terms of a Settlement Agreement ("Agreement") entered into on September 18, 2013.

OPINION LETTER

The Defendants, in separate motions, demurred on a variety of grounds which raise the following questions:

A. Whether or not sovereign immunity bars a suit in equity against the DMV?

B. Whether or not the factual allegations in VADA's complaint state a cause of action upon which relief may be granted?

C. Whether or not VADA can pursue a cause of action under § 46.2-1566?

After considering the pleadings and exhibits, authorities, and oral arguments presented by Counsel, the Court finds that the DMV is protected by sovereign immunity, and that the factual allegations fail to state a cause of action as to Counts I, II, and III. As a result, the Court sustains the demurrers as to all counts, and dismisses this action with prejudice.

I. BACKGROUND

A. Factual Background

On March 16, 2012, Tesla requested a hearing before the DMV for approval to own and operate a car dealership in Virginia. After Tesla had been granted approval, VADA intervened in the proceedings. The proceedings were then remanded for the taking of additional evidence. On remand, Tesla's application was rejected.

Tesla appealed to the Fairfax County Circuit Court on June 21, 2013, for judicial review of the administrative decision. Prior to a decision on the appeal, Tesla, the DMV and VADA entered into a Settlement Agreement. The appeal was dismissed, as settled, and the Agreement was finalized on September 18, 2013.

This Agreement is central to the present dispute. Under the Agreement, Tesla agreed to seek and obtain a license from the Virginia Motor Vehicle Dealer Board ("MVDB") within 18 months. Thereafter, Tesla could be authorized to own, operate and control a single dealership for a period of thirty months from the date it received such licensure.

The Agreement also contained several significant and express provisions. It clarified that (1) there is nothing within the Agreement that should have "any effect on any future application that Tesla may file," that (2) "Nothing in this Agreement shall limit, restrict or enlarge the operation of Virginia law or the authority granted to the Commissioner or the MVDB," and furthermore, that (3) "nothing in this

Agreement shall affect, one way or the other, any further proceeding in which the propriety of a Tesla operation is disputed or where Tesla seeks authority from the Commissioner to own, operate or control a manufacturer-owned new motor vehicle dealership in the Commonwealth of Virginia." *See* Ex. B to Compl.

Tesla received its license from MVDB in accordance with the Agreement on February 25, 2015, commencing the agreed upon thirty month period. Pursuant to the license, it then opened a single dealership in Tysons Corner, Virginia, that same day. Almost a year later, on January 13, 2016, Tesla filed a request for a hearing before the DMV to operate a second dealership in Richmond, Virginia. This new request sparked the present dispute between the parties.

B. Procedural Background

VADA brought the present action on March 29, 2016, for (I) Breach of Contract against Tesla and the DMV, and two counts (II-III) for Declaratory Judgment against both Tesla and the DMV. Counts II and III for Declaratory Judgment sought to establish both that (1) the DMV generally lacks subject matter jurisdiction under the Agreement to hold a hearing on Tesla's request for a second dealership, and, furthermore, (2) lacks subject matter jurisdiction to hear Tesla's application on account of Tesla's failure to file a franchise agreement as required by § 46.2-1566.

The DMV demurred and moved to dismiss all counts for (1) lack of jurisdiction due to sovereign immunity, and (2) failure to state a cause of action. Tesla demurred for failure to state a cause of action in Counts I, II and III. After oral argument on the demurrer, the Court took this matter under advisement.

II. STANDARD OF REVIEW

Two separate standards are to be applied to the Defendants' responsive pleadings.

First, when determining if the Commonwealth has waived its sovereign immunity, the Court must find an express and applicable waiver. *Commonwealth ex. rel. Fair Housing Bd. V. Windsor Plaza Condo. Ass'n.*, 289 Va. 34, 56 (2014); *Afzall v. Commonwealth*, 273 Va. 226, 230 (2007).

Second, in ruling on a demurrer, the Court must determine whether the complaint "states a cause of action upon which the requested relief may be granted." *Kurpiel v. Hicks*, 284 Va. 347, 353 (2012).When outside agreements and contracts are properly part of the pleadings, a Court "considering a demurrer may ignore

party's factual allegations contradicted by the terms of authentic, unambiguous documents." *Schaecher v. Bouffault*, 290 Va. 83, __ (2015).

III. ARGUMENTS

A. Defendants' Demurrers and Pleas in Bar

The DMV asserts sovereign immunity as a ground for dismissal, contending that the Commonwealth cannot be enjoined or ordered to specifically perform under the Settlement Agreement without an express waiver.

Although the Virginia Administrative Procedure Act (the "APA") waives sovereign immunity in specified circumstances, the DMV argues the APA does not apply. The APA only vests the Court with appellate jurisdiction over final administrative decisions, and an action to challenge the possible, future award of a second dealership license to Tesla cannot serve as the basis for an appeal. Other grounds argued by the DMV are unnecessary to review for the purposes of this Opinion Letter.

The Agreement authorizes Tesla to own and operate one dealership in a designated trade area of Virginia for thirty months. However, Tesla contends that the Settlement Agreement expressly disclaims any effect on Tesla's ability to *apply* to own or operate additional dealerships. As a result, the Complaint contradicts the Agreement's unambiguous terms, and therefore fails to state a cause of action.

Tesla contends that the requirements under Virginia Code § 46.2-1566 do not apply to them. The provision requires a car manufacturer to file a prospective franchise agreement with the DMV "no later than 60 days prior to the date the franchise or sales agreement is offered." Tesla, as a dealer-manufacturer, claims to have no franchise agreements.

Additionally, Tesla argues that VADA lacks standing to privately enforce Virginia Code § 46.2-1566 anyway. The *MVDB* may bring an action to enjoin noncompliance with the provisions of Title 46.2, but the statute does not create a private right of action.

B. Plaintiff's Response

VADA contends that this case arises under the APA, which acts as a waiver of the Commonwealth's sovereign immunity. Referencing the original dispute, the rejection of Tesla's application and subsequent appeal prior to the agreement, VADA argues this falls under the APA for its direct relation to a case decision.

VADA contends that the language of the Settlement Agreement prevents any *application*, ownership, or operation of a second dealership by Tesla during the thirty months following the opening of the Tyson's Corner dealership. As a result, the DMV has breached the Settlement Agreement by approving a hearing on a second dealership. VADA thus argues that this Court has the authority to, and should, issue a declaratory judgment.

VADA counters Tesla's demurrer as to Count I and Count II by pointing to the following language of the Settlement Agreement:

> This Agreement allows Tesla *to obtain a dealer license* and to own, open and operate *only one such dealership* . . . During the application process and Tesla's ownership and operation of said dealership, it shall be bound by *all of the requirements regarding licensure put in place by statute/applicable regulation*" . . . [S]uch dealership *shall be effective for a period of 30 months from the date that Tesla receives its dealer's license* . . . .

Under these provisions, VADA argues that "Tesla may not even seek to obtain a license to own a second dealership in the Commonwealth during the thirty (30) month period from the date that it received its dealer's license . . . ." Thus, VADA contends that the factual allegations of Count I and Count II, when considered along with the plain language of the Settlement Agreement, are sufficient to survive a demurrer.

VADA argues it has standing to sue for failure to comply with § 46.2-1566 as a signatory to a contract incorporating § 46.2. With respect to Count III, this code provision then requires Tesla to "file a franchise agreement to be offered to *prospective dealers* with the Commissioner." VADA contends that such a filing would fulfill the purpose of the statute and Settlement Agreement because it would serve as a prospectus for dealers interested in owning and operating a Tesla franchise.[1] Moreover, VADA argues that it has associational standing to bring Count III on behalf of its members.

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[1] VADA also argues that Tesla misrepresented to the Court that it has no franchise agreements because Tesla has a "Dealer Agreement" with its Virginia arm. An issue unaddressed by VADA is whether Tesla's agreement with itself meets the statutory definition of "Franchise," which is described as "a written contract or agreement *between two or more persons* whereby one person, the franchisee, is granted the right to engage in the business of offering and selling, servicing, or offering, selling, and servicing new motor vehicles . . . ." Va. Code Ann. § 46.2-1500 (emphasis added).

IV. ANALYSIS

A. Sovereign Immunity

The DMV waived sovereign immunity by entering into the Settlement Agreement only as to *legal* claims for *pecuniary* relief, but not for claims seeking equitable relief. The Commonwealth has no sovereign immunity "in actions based upon valid contracts entered into by duly authorized agents of the government" and is "as liable for its contractual debts as any citizen would be." *Wiecking v. Allied Medical Supply Corp.*, 239 Va. 548, 553 (1990). However, the Virginia Code indicates that these claims are limited to "*pecuniary* claim[s]" resting "upon any *legal* ground." Va. Code § 2.2-814(A) (emphasis added). The Commonwealth is generally immune from suits in equity, unless brought under the Virginia Constitution or federal law, *Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011), and remains so even in the event of a contractual breach.

Additionally, this Court lacks jurisdiction under the APA's judicial review provision. VADA seeks to establish jurisdiction under the APA by alleging the suit is "directly related" to a case decision under Virginia Code § 2.2-4026. This is in reference to Tesla's appeal in the original suit with the DMV, and the resulting Agreement. There are multiple defects with this argument.

First, the statute grants judicial review of "case decisions," not of agreements *directly related* to case decisions. Va. Code § 2.2-4026. Secondly, even if the Agreement were a case decision, or if "case decision" under the statute also included agreements directly related to case decisions, VADA is not *appealing*. The statute authorizes judicial review of case decisions by parties allegedly "aggrieved by and claiming the unlawfulness of a case decision." *Id.* VADA does not contend that it is aggrieved in any way by a case decision or an agreement directly related to a case decision. Rather, VADA is seeking to *enforce* the Agreement based on conduct arising years later.

Furthermore, even if VADA was claiming it was aggrieved, VADA's appeal would not have been timely. The statute requires that the aggrieved party proceed in accordance with the Rules of the Supreme Court. *Id.* Rule 2A:2(a) provides that "Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision..." The Agreement was made in September of 2013. The current complaint was filed in 2016, more than three years later.

B. Breach of Contract and Declaratory Judgment

The clear and unambiguous terms of the September 18, 2013, Settlement Agreement contradict and undermine the factual allegations made by VADA in the complaint. As a result, the complaint fails to state a cause of action for both Breach of Contract and Declaratory Judgment.

VADA suggests that the Settlement Agreement forbids Tesla from even "seek[ing] to own a second dealership in the Commonwealth during the thirty (30) month period from opening its first dealership." As a result, VADA argues that Tesla breached the agreement in requesting a hearing with the Commissioner on January 13, 2016. Compl. ¶ 35. The complaint repeats a similar allegation in Count II for Declaratory Judgment when arguing the Commissioner "lacks subject matter jurisdiction to hear Tesla's request" and that he "may not even consider allowing Tesla to open a second dealership." Compl. ¶¶ 45-46.

This allegation directly contradicts express terms of the Settlement Agreement. The Agreement states that "nothing in this Agreement...shall have any effect on any future application that Tesla may file," Compl. Ex. B., at ¶ 1, and furthermore, that "Nothing in this Agreement shall limit, restrict or enlarge the operation of Virginia law or the authority granted to the Commissioner or the MVDB." Compl. Ex. B, at ¶ 5. The Agreement does prohibit Tesla from *owning and operating* a second dealership during the thirty month period after receiving its dealer's license, and it does prohibit Tesla from owning and operating a dealership outside of specified northern Virginia locations. However, nothing in the agreement prohibits a *request* for a hearing, nor an *application* for a second dealership, during that same thirty month timeframe. Rather, the Agreement expressly acknowledges the continued scope of the Commissioner's authority with regard to Tesla, and directly preserves Tesla's continuing ability to file applications. The contractual restraint is on ownership, not application. Compl. Ex. B., at ¶ 9.

C. Stating a Cause of Action Under § 46.2-1566

In Virginia, a private right of action to enforce a statute must be expressly created by that statute. *See First Am. Title Ins. Co. v. W. Sur. Co.*, 283 Va. 389, 397 (2012); *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 361 (1993); *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 577 (1977). This is particularly so when the statute does provide an alternate mechanism for enforcement. *See, e.g., Riverside Hosp., Inc. v. Optima Health Plan*, 82 Va. Cir. 250, 255 (Va. Cir. 2011) (relying in part on *Vansant & Gusler*, and concluding that the specifically statutorily created "remedy of suspending an HMO's license must be interpreted as the exclusive remedy for the rights created" by Virginia HMO regulations). There is

no private cause of action in § 46.2; rather, a procedure for the MVDB to bring an action in the event of a violation or suspected violation is specifically provided: "The [MVDB], whenever it believes from evidence submitted to the Board that any person has been violating, is violating, or is about to violate any provision of this chapter...may bring an action...to enjoin any violation." Va. Code § 46.2-1505. As a result, VADA cannot pursue a cause of action under the statute.

V. CONCLUSION

The Court concludes that the defendant DMV does have sovereign immunity and that the APA does not waive this immunity in the present case. Additionally, the Court concludes that the complaint, given its contradiction with unambiguous terms of the contract, fails to state a cause of action upon which relief may be granted. Finally, the Court further concludes that there is no private cause of action in § 46.2-1566, and thus VADA cannot proceed with Count III.

For the foregoing reasons, the Court SUSTAINS the DMV's demurrer and GRANTS the Motion to Dismiss all counts, and SUSTAINS Tesla's demurrer to Counts I, II and III for failure to state a cause of action. Thus, this case is dismissed with prejudice. The enclosed Order is consistent with the ruling of the Court and incorporates this Opinion Letter.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

Enclosure

OPINION LETTER

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGINIA AUTOMOBILE DEALER'S ASSOCIATION,	)	
Plaintiff,	)	
v.	)	CL-2016-03672
TESLA MOTORS, INC., ET AL.	)	
Defendants.	)	

ORDER

THIS CASE came before the Court upon Defendant Tesla Motors, Inc.'s Demurrer and Defendant Richard D. Holcomb's, as Commissioner for the Department of Motor Vehicles for the Commonwealth of Virginia, Demurrer and Motion to Dismiss. For the reasons set forth in the Court's Opinion Letter; it is therefore,

ORDERED that both Demurrers are SUSTAINED, and the case is dismissed.

This Order is Final.

ENTERED this 9 day of September, 2016.

[redacted]

Judge Daniel E. Ortiz

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.