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Feds Can't Seize Luxury Cars From Accused Fraudster: Jury

By **Natalie Olivo**

Law360, New York (February 24, 2017, 5:04 PM EST) -- A New York federal jury has sided with a company accused of exporting luxury cars overseas in a scheme to defraud dealerships, finding that Manhattan attorneys haven't provided enough evidence to warrant a seizure of the company's cars and $3.5 million from its bank accounts.

According to the jury's verdict, publicly filed on Thursday, the government hadn't shown that 47 high-end cars — including BMWs, Mercedes Benzes and Land Rovers — and a little more than $3.5 million were subject to civil forfeiture. The cars belong to an auto-export business called Efans Trading Corp., which Manhattan federal attorneys had accused of using straw buyers to snap up cars from dealers and then immediately exporting them overseas for double or triple their domestic value.

The verdict, which was issued after a seven-day trial, came after U.S. District Judge Katherine Polk Failla in late August denied the government's summary judgment bid in what she called “an exceptionally close call.” Noting that the government “may well have the better of the legal arguments,” Judge Failla concluded that Efans might ultimately be able to persuade a jury that it acted without fraudulent intent.

“Justice took a long time here, but it was finally done,” Bruce Baird, a Covington & Burling LLP attorney representing Efans, told Law360 on Friday. “The government should never have brought a case like this and the jury essentially told them so.”

Memphis-based Efans is operated by married Chinese couple Yifan Kong and Erxin Zhou, who also run a tire importing business, according to court documents. Government attorneys lodged their complaint in November 2013, seeking the forfeiture of four bank accounts and 47 luxury cars tied to the alleged fraud scheme.

In moving for summary judgment last February, the government argued that the dealerships were harmed, in part because BMW and other manufacturers have “no-export” policies that could penalize dealerships for selling new vehicles to exporters. Yet the dealerships in this case were tricked into thinking that they were selling to local buyers, the government said.

But in her August order, Judge Failla noted that “[u]nfortunately for the government, there are some ambiguities in the record that prevent the court from concluding as a matter of law that the dealerships received more liabilities than they 'reasonably anticipate[d].'”

The judge noted that, at least in some instances, Efans' straw buyers contractually agreed to cover the cost of chargebacks or other penalties that might be imposed by the manufacturers.

As far as expected benefits that the government said dealerships were denied, such as local buyers returning for car maintenance, Judge Failla was also unswayed. She said she agreed with Efans' "common-sense observations that genuine local buyers may decide to sell their cars after driving them for a few years" and that not all car owners bring their cars to dealerships for repairs.

Judge Failla also noted that there is "ample evidence in the record" for a jury to conclude that dealerships involved in the case were working with Efans to sell cars to Chinese customers through straw buyers to help move inventory they could not otherwise sell.

"If dealerships were deliberately using straw buyers to fill orders for Efans customers, then there is no reason to believe that this practice was believed to be, or was in fact, harmful to their business," Judge Failla said.

Judge Failla noted that the government's "most persuasive claim" is that Efans' purportedly deceptive conduct harmed manufacturers because it prompted them to pay bonuses to dealerships that sold cars to Efans' straw buyers, bonuses the manufacturers would not have paid had they known the cars were sold to an exporter.

Noting that Efans appears to be "a knowing participant" in the conduct, Judge Failla found that the government's argument might have been dispositive, had there not been record evidence that Efans personnel consulted with several attorneys regarding their business practices.

Baird, who tried the case with fellow Covington & Burling attorney Benjamin John Razi, noted that at the end of his summation, he told the jury "that they 'should be offended that your government stepped on these new Americans.'"

"I think the jury agreed with me," he said.

A representative for the government declined to comment Friday.

Efans isrepresented by Bruce Baird, Benjamin John Razi, Andrew Leff and Jon-Michael Dougherty of Covington & Burling LLP.

The government is represented by Daniel Marc Tracer, Edward B. Diskant, Jaimie Leeser Nawaday and Sarah Elizabeth Paul of the U.S. Attorney's Office for the Southern District of New York.

The case is United States of America v. Any and All Funds on Deposit in Account Number 0139874788, at Regions Bank, held in the name of Efans Trading Corporation et al, case number 1:13-cv-07983, in the U.S. District Court for the Southern District of New York.

--Editing by Kelly Duncan.

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