IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TERRESA ROBERTS, et al.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 01-2113-CM**
	)	
	)	
SHAWNEE MISSION FORD, et al.,	)	
Defendants.	)	
_____	)	

MEMORANDUM AND ORDER

Pending before the court is plaintiff Dowdall Engineering, Inc.'s Motion Pursuant to Fed. R. Civ. P. 12(b)(6) to Dismiss Defendant Shawnee Mission Ford, Inc.'s Counterclaim for Declaratory Judgment (Doc. 186). As set forth below, plaintiff's motion is granted.

I. Background

Plaintiff alleges that dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) because defendant's counterclaim, which seeks a declaratory judgment pursuant to the Kansas Consumer Protection Act (KCPA), fails to state a claim for which relief can be granted. In particular, plaintiff asserts defendant does not fall within the Act's definition of a "consumer."

In the document that defendant Shawnee Mission Ford (hereinafter "SM Ford") designates as a counterclaim (Doc. 3), defendant SM Ford states that defendant Art Korn sold a 1995 Ford F-250 pickup truck to defendant SM Ford. Defendant SM Ford alleges that this vehicle had an inaccurate odometer reading

at the time of the sale. Defendant SM Ford also states that it then sold the vehicle to plaintiff Dowdall Engineering, without any knowledge that the odometer had been rolled back or that the vehicle had prior undisclosed damage. Defendant SM Ford seeks a declaratory judgment that the sale by defendant Korn to defendant SM Ford violated the KCPA.

II. Legal Standard

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

III. Analysis

A. KCPA

The KCPA states that "[n]o supplier shall engage in any deceptive act or practice in connection with a consumer transaction," Kan. Stat. Ann. §§ 50-626, and that "[n]o supplier shall engage in any unconscionable act or practice in connection with a consumer transaction," *Id.* at § 50-627. Under the Act, a "consumer" is "an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes." *Id.* § 50-624(b). A "consumer

transaction"includes "a sale, lease, assignment or other disposition for value of property or services within [Kansas] ... to a consumer." *Id.* § 50-624(c).

In *Wayman v. Amoco Oil Co.*, this court noted that the Official Comments following § 50-624(b) provide that "[t]his definition of 'consumer' is intentionally broad. It covers not only individuals who seek or acquire goods, services or real estate for personal, family or household purposes, but also sole proprietors such as farmers and business people." 923 F. Supp. 1322, 1362 (1996). Nonetheless, the court held that the KCPA "recognizes an operative distinction between purchasing goods for resale and purchasing goods to be used or consumed in the course of one's business." *Id.* First, the court noted that there was no question that the defendant intended to resell the commodity in question, gasoline, to consumers for profit. *Id.* Second, the court noted an absence of case law applying the KCPA to the purchase of goods for resale. *Id.* This court's review revealed a similar lack of authority. *Id.* Third, the court recognized that "a distinction between consuming goods in the course of conducting business and purchasing goods for the purpose of reselling them has been recognized" in other consumer protection statutes, such as the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3). Fourth, the court analyzed the legislative history of the KCPA, arriving at the conclusion that the legislature did not intend the term "business purposes" to expand the original scope of the act. After an extensive review, the court held that, "to the extent plaintiffs' KCPA claims are based on purchases for resale, they are not predicated on a 'consumer transaction' and are not cognizable under the KCPA." *Id.* at 1365.

B. Application

Accepting the allegations set forth in the counterclaim as true and without examining facts outside the pleadings, the court finds that the vehicle in question was purchased for resale, given the nature of the transaction and of defendant's business as an automobile dealer. Accordingly, in light of *Wayman*, the purchase of the

vehicle by defendant SM Ford from defendant Korn was not a "consumer transaction" within the meaning of the KCPA. As a result, defendant SM Ford cannot state a claim upon which relief can be granted. Plaintiff's motion to dismiss is granted.

IV. Order

IT IS THEREFORE ORDERED that plaintiff Dowdall Engineering, Inc.'s Motion Pursuant to Fed. R. Civ. P. 12(b)(6) to Dismiss Defendant Shawnee Mission Ford, Inc.'s Counterclaim for Declaratory Judgment (Doc. 186) is granted.

Dated this 20th day of August 2003, at Kansas City, Kansas.

S/ Carlos Murguia
CARLOS MURGUIA
United States District Judge