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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

NISSAN NORTH AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 16-0883-BC**
	)	
WEST COVINA NISSAN, LLC; UNIVERSAL CITY NISSAN, INC.; GLENDALE NISSAN/INFINITI, INC.; MICHAEL SCHRAGE; JOSEPH SCHRAGE; STACY STEPHENS; JEFF HESS and EMIL MOSHABAD,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER DENYING DEFENDANT JEFF HESS'S MOTION TO DISMISS

This lawsuit was filed by an importer of Nissan vehicles against three of its dealerships located in California, their owners and employees. The lawsuit seeks to recover millions of dollars for an alleged massive scheme of submitting thousands of fraudulent claims to the Plaintiff for warranty and service contract mechanical labor, and for purchase of parts to be used in connection with the repairs. The lawsuit asserts that each of the Defendants participated individually and performed a separate deceptive function in concert with the other Defendants in the scheme.

The causes of action common to all Defendants alleged in the *First Amended Complaint* are violation of the Tennessee Consumer Protection Act ("TCPA"); fraud; negligent misrepresentation; and conspiracy. As to these claims, the *First Amended*

Complaint alleges the global facts of the operation and components of the total scheme, and then alleges the role and particular conduct each Defendant performed in the scheme.

One of the Defendants, Jeff Hess, the parts manager at the Defendant dealership West Covina Nissan, is alleged in the *First Amended Complaint* to have performed the role in the scheme of mutilating and soiling brand new Nissan parts to make those parts appear defective, as if removed from a vehicle on which a warranty repair was purported, but actually had not, been performed. Additionally it is alleged that Defendant Hess' role included obtaining parts from local junk yards, as if the parts had been removed from a Defendant dealership warranty repair, when the Plaintiff requested return of a defective part. It is these allegations against him which are presently before the Court on *Jeff Hess's Motion To Dismiss First Amended Complaint For Failure To Comply With Rule 9.02, Tennessee Rules Of Civil Procedure And/Or Failure To State A Claim Upon Which Relief Can Be Granted*.

After studying the pleadings, arguments of Counsel and the applicable law, the Court denies the motion to dismiss based upon these conclusions of law.

— Under Tennessee law, circumstantial evidence is equally as admissible and probative as direct evidence. *See Young v. Reliance Electric Co.*, 584 S.W.2d 663 (Tenn. App. 1979); *Stinson v. Daniel*, 220 Tenn. 70, 414 S.W.3d 7 (1967), *Moon v. SCOA Indus.*, 764 S.W.2d 550 (Tenn. App. 1988); *Martin v. Washmaster Auto Center*, 946 S.W.2d 314 (Tenn. App. 1996). Accordingly, allegations in a complaint of circumstantial evidence and inferences to be drawn therefrom are sufficient to state a claim. Allegations of direct evidence do not have to be pled.

— With respect to tortious claims of a deceptive scheme consisting of multiple parties, such as the fraud, TCPA and negligent misrepresentation alleged in this case, the law requires particularity

in pleading the individual's role but does not require that each individual have performed each separate element of the torts.

— As to the conspiracy claim in the *First Amended Complaint,* the intracorporation immunity doctrine does not apply.

It is therefore ORDERED that Defendant *Jeff Hess's Motion To Dismiss First Amended Complaint For Failure To Comply With Rule 9.02, Tennessee Rules Of Civil Procedure And/Or Failure To State A Claim Upon Which Relief Can Be Granted* is denied.

The averments of the *First Amended Complaint* and the law on which this ruling is based are as follows.

The *First Amended Complaint*

Paragraphs 29-59 of the *First Amended Complaint* allege the global facts of the alleged fraudulent warranty scheme. Defendant Hess' role and conduct in the scheme are alleged in paragraphs 60-66, quoted as follows.

> 60. The fraudulent warranty scheme directed at NNA by West Covina Nissan was carried out with the knowledge and participation of West Covina Nissan's parts manager, Hess, and its general manager, Moshabad. The fraudulent warranty scheme directed at NNA by Universal City Nissan was carried out with the knowledge and participation of its service manager, Stephens.
>
> 61. Soon after Jacobs became the service director at West Covina Nissan in 2010, he instituted policies that curtailed the submission of fraudulent warranty claims. As a result, the Parts Department sales volume noticeably decreased and Hess attempted to discourage continuation of those policies. Indeed, Hess said: "The Schrages want you to steal from Nissan."
>
> 62. Defendants not only submitted thousands of fraudulent claims to NNA for warranty and service contract mechanical labor, but also submitted

thousands of fraudulent claims to NNA for the purchase of Nissan parts to be used in connection with the alleged repairs. Because the majority of the bogus warranty and service contract repairs were never actually made, the parts were never used. Instead, the technicians at West Covina Nissan, along with members of the parts department at West Covina Nissan, acting under the direction of Hess, simply took the brand-new parts and mutilated or soiled them to make it appear as though they were defective and removed from the vehicles upon which Defendants had allegedly provided service. As part of this process, technicians would pour old engine oil on the brand-new parts, scuff them, and throw dirt upon them, so that an allegedly defective and used part could be returned to NNA should NNA request Defendants to return the used part.

63. As part of performing a "bogey," the technicians at West Covina Nissan used chemicals and other cleaning solutions on the parts that were involved in the repair to give the appearance that work had actually been done. Technicians would also routinely steam clean the engine compartment of a vehicle on which a bogus repair had been performed.

64. When all else failed, Hess and his associate Alphonse Rodriguez called local junk yards to procure used parts that, when sent back to NNA, Hess and West Covina Nissan represented as being from a warranty repair.

65. As part of its fraudulent scheme, Defendants returned such intentionally damaged, or misrepresented, parts to NNA in Franklin, Tennessee.

66. The submission of false, fictitious, or fabricated claims were made with the intent to induce NNA to believe the identified warranty and service warranty work had been performed as represented, to have NNA rely on the claim and representations made, and to pay West Covina Nissan compensation for completing the purported repair, which had not been performed or had been performed unnecessarily.

First Amended Complaint, pp. 23-24, ¶¶ 60-66 (June 29, 2017).

Defendant Hess' Challenges

In support of his motion to dismiss all the counts against Defendant Hess, both the conspiracy, and TCPA claims, fraud and negligent misrepresentation, he asserts these grounds.

(1) The *First Amended Complaint* does not allege essential facts that the conduct of Defendant Hess was relied upon by the Plaintiff and caused the Plaintiff damage.

(2) The *First Amended Complaint* does not identify particular claims involving falsified parts or the parts purportedly falsified such as by part or invoice number as required by Tennessee Civil Procedure Rule 9.02.

With respect to the conspiracy claims against Defendant Hess, he asserts (3) it is barred by the intracorporate conspiracy doctrine. It applies when there is a compete unity of interest, and there are no separate economic actors pursuing separate economic interests.

Quoted as follows are samples excerpts of Defendant Hess' contentions.

> Paragraphs 62-65 of the First Amended Complaint attempt to allege a specific *type* of conduct by Mr. Hess, the dealership's parts manager, but as discussed in more detail below, no specific representations or other acts of fraud by Mr. Hess upon which Plaintiff relied and which caused it damage are alleged.
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> * * *
>
> NNA failed in its original complaint to identify a single instance of fraud involving Mr. Hess with any particularity. With the benefit of Mr. Hess's motion filed on June 13, NNA has still not identified any particular claims involving falsified parts, or the parts purportedly falsified, by Mr. Hess, and has not otherwise identified a representation, false or otherwise, by Mr. Hess to NNA. The transactions identified in the First Amended Complaint (¶¶ 37-56) where NNA provides at least some specifics as to particular

claims do not identify Hess as an actor or as a person making representations relative to those claims.

* * *

Taking the allegations of the First Amended Complaint as true, NNA has alleged a "complete unity of interest" between Joseph and Michael Schrage and the dealerships they control. . . .

Paragraph 129 speaks in terms of translating their "consortium of dealerships and related entities into a [single] criminal enterprise" which alleges, in essence, a "complete unity of interest," *Copperweld* at 467 U.S. 771; *Cambio* at 788. It is a single enterprise "under the direction of" Joseph and Michael Schrage which used "Defendant Dealerships and their respective employees" to run "a [single] warranty fraud business out of the back of the Defendant Dealerships." The Schrages and the Dealerships are not alleged to be "separate economic actors pursuing separate economic interests," *Am. Needle,* 560 U. S. at 195; but are in fact, "guided and determined by one consciousness." *Cambio* at 788. The employees of the Dealerships (such as Mr. Hess) are alleged to have no separate role, indeed, no other role than "to assist Joseph Schrage and Michael Schrage in executing" this warranty fraud business. First Amended Complaint, ¶130.

For the foregoing reasons, NNA is barred by the doctrine of intracorporate or intraenterprise conspiracy from alleging that Mr. Hess, a mere employee of one of the dealerships, is liable for the alleged conspiracy, and has failed to state a claim upon which relief can be granted in that regard.

* * *

A civil conspiracy claim requires the existence of an underlying tort or wrongful act committed by one or more of the conspirators in furtherance of the conspiracy. *Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994); *Tenn. Publ'g Co. v. Fitzhugh*, 165 Tenn. 1, 5-6, 52 S.W.2d 157, 158 (1932). Sixteen specific underlying acts of fraud are alleged in the First Amended Complaint, whereby a false claim premised upon a specific numbered repair order is alleged to have been submitted to NNA. See ¶¶ 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 52, 54 and 56 (the last of which alleges two repair orders). Four of these are defective on their face. Paragraph 40 alleges a specific claim relative to RO 240847, but does not identify the "actors" (speaking in terms of the "West Covina Defendants" and "those Defendants" without defining the term "West Covina Defendants"). Paragraph 54 states "Defendants added this bogus claim to

> RO 270762, submitted the claim to NNA for payment and received payment from NNA." Again, the specific actor (out of now 9 defendants) is not identified. Paragraph 56 likewise speaks in terms of air conditioner claims pertaining to RO 248147 and 266766, claiming "Defendants submitted a fraudulent claim. . .". A general claim of "defendants" committing a fraud is insufficient. *Strategic Capital* at 611 ("no particular defendant is identified as the one making the false and misleading statements. At a minimum the actors should be identified and the substance of each statement should be pled").
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> Of those 16 predicate acts of fraud (or the surviving 12, as the four identified above are *prima facie* invalid), Mr. Hess is not identified as *particularly* having agreed, participated, encouraged or facilitated any of them. Even though there is a general allegation of falsifying parts against Mr. Hess (which, as discussed above, is fatally deficient for the purposes of Rule 9.02), there is not the slightest hint that falsified parts were part of the particular false submissions NNA has been able to allege.
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> * * *
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> [T]he allegations relating to Mr. Hess, while they "sound in fraud" or make "averments of fraud," are quite general in nature. Not a single allegation links Mr. Hess with particularity to the 12 (ostensibly) valid claims of fraud alleged in the First Amended Complaint against West Covina Nissan alone. The conspiracy claims against Mr. Hess therefore do not meet the requirements of Rule 9.02.

Jeff Hess's Memorandum Of Law In Support Of Motion To Dismiss First Amended Complaint For Failure To Comply With Rule 9.02, Tennessee Rules Of Civil Procedure And/Or Failure To State A Claim Upon Which Relief Can Be Granted (July 24, 2017) (footnotes omitted).

Analysis

Fraud, TCPA And Negligent Misrepresentation Pled Particularly Under Rule 9.02

As to the specificity required by Rule 9.02, Tennessee case law provides that the pleading should (1) identify the actors and (2) the substance of each allegation should be pled.

> Allegations of fraud must be plead with particularity. Tenn. R. Civ. P. 9.02; *Strategic Capital Resource, Inc. v. Dylan Tire Industries, LLC*, 102 S.W.3d 603, 611 (Tenn. Ct. App. 2002). A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact. *See Dobbs*, 846 S.W.2d at 274. Plaintiffs allege, "each one of the Defendants did the acts herein alleged with the intent to deceive and defraud ..." and "herein" refers generally to one hundred paragraphs. To pass the particularity test, the actors should be identified and the substance of each allegation should be pled. *Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC,* 102 S.W.3d 603, 611 (Tenn.Ct.App.2002).

Kincaid v. SouthTrust Bank, 221 S.W.3d 32, 41 (Tenn. Ct. App. 2006).

Applying this standard to the *First Amended Complaint*, the Court finds that paragraphs 60-66 are sufficient to establish identification of Hess as an actor. With respect to the second prong—whether the substance of each allegation or statement of fraud has been pled—Defendant Hess presents a narrow analysis of the case, viewing his conduct solely and not in relation to the allegations of a scheme. *See, e.g. Kuczma v. MacDermid, Inc.*, No. 01A01-9305-CH-00201, 1993 WL 432512, at *1 (Tenn. Ct. App. Oct. 27, 1993) (reversing the trial court's dismissal under Rule 9.02 concluding that the trial court had applied Rule 9.02 "too narrow" and that "the trend in the cases in this state interpreting Rule 9.02 is decidedly toward a more liberal reading of the rule rather than a narrow one" and that under the circumstances of that case Rule 9.02 did not require the

plaintiff to "allege who made the allegedly false statements or when the statements were made.")

As stated by the Plaintiff, Defendant Hess was one actor with a specific role in an alleged multiparty, multifaceted, fraudulent scheme. According to the *First Amended Complaint*, as parts manager, it was Defendant Hess's role in the fraudulent scheme to mutilate and/or soil brand new parts to make it look like the parts had been removed from the vehicles upon which Defendants had allegedly provided service. In addition to mutilating and/or soiling, the *First Amended Complaint* also details that Defendant Hess would even call "local junk yards to procure used parts that, when sent back to NNA, Hess and West Covina Nissan represented as being from a warranty repair."

Defendant Hess's specific role in the alleged fraudulent scheme was necessary because, as alleged in the *First Amended Complaint*, the submission of these intentionally damaged or misrepresented parts "were made with the intent to induce NNA to believe the identified warranty and service warranty work had been performed as represented, to have NNA rely on the claim and representations made, and to pay West Covina Nissan compensation for completing the purported repair, which had not been performed or had been performed unnecessarily."

Because Defendant Hess played the role as parts manager in the elaborate scheme, the absence of specific statements made by Defendant Hess to Nissan is not reason for dismissal. That was not his role in the fraudulent scheme. Rather, his alleged fraudulent conduct was his assertive deceptive conduct of mutilating and/or soiling parts or

providing junkyard parts to ensure that the warranty claims submitted to Nissan appeared legitimate.

Identifying and detailing the specific role of one defendant in an alleged fraudulent scheme involving multiple defendants has been held sufficient under Rule 9 of the Federal Rules of Civil Procedure.[1]

> Swartz's original complaint included several allegations detailing the time, place, and content of representations made by KPMG and B & W to Swartz. No one disputes that Swartz satisfied his pleading burden with respect to those defendants. Rather, Presidio and DB claim that because the complaint failed to specify any false representations *made by them*, it failed the Rule 9(b) standard. Swartz argues that since DB and Presidio would be liable for the misrepresentations of their co-conspirators, and since he pled a conspiracy, the allegations concerning the KPMG and B & W misrepresentations are sufficient. *See e.g., Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir.1980).
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> **First, there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify *false statements* made by each and every defendant.** "Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result." *Beltz Travel Service, Inc.*, 620 F.2d at 1367. On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple defendants together but "require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding *765 his alleged participation in the fraud." *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D.Fla.1998) (citation, quotation omitted). **In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, "identif[y] the role of [each] defendant[ ] in the alleged fraudulent**

[1] "It has long been recognized by the courts of this state that the T.R.C.P. were patterned in large measure after the Federal Rules of Civil Procedure, and therefore federal case law interpreting the federal rules has been accepted as persuasive authority for the intent and application of these rules." *Bradhurst v. Pearson*, No. 01-A-9106-CV-00226, 1992 WL 41701, at *3 (Tenn. Ct. App. Mar. 6, 1992).

> **scheme."** *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989).

Swartz v. KPMG LLP, 476 F.3d 756, 764–65 (9th Cir. 2007) (emphasis added); *see also Merritt v. Yavone, LLC*, No. 6:15-CV-0269-TC, 2015 WL 9256682, at *2 (D. Or. Nov. 5, 2015), *report and recommendation adopted*, No. 6:15-CV-0269-TC, 2015 WL 9165898 (D. Or. Dec. 15, 2015) ("In cases like this one, where the intricacies of each defendant's role in the fraudulent scheme can only be determined through discovery, the standard merely requires plaintiffs to identity, but not describe in exacting detail, "the role of each defendant in the alleged fraudulent scheme." *Fields v. Wise Media, LLC,* No. C 12–05160, 2013 WL 3187414 at *4 (N.D. Cal. June 21, 2013) (*quoting Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir.2007)) (finding that plaintiffs met Rule 9(b) pleading requirements when the complaint described generally each defendant's role in the alleged fraudulent scheme)."); *Orlowski v. Bates*, No. 2:11-CV-01396-JPM, 2015 WL 1485980, at *8 (W.D. Tenn. Mar. 31, 2015) ("Statements attributed to groups of people without identifying any particular one—or the role that each individual played in the generation of the statement—fail to satisfy the heightened pleading requirements of Rule 9(b).").

Particularized pleading of each defendant's role in a multi-defendant fraudulent scheme is also consistent with Rule 9 of the Tennessee Rules of Civil Procedure and Tennessee Court's interpretation that an allegation of fraud must "identify the actors and the substance of each statement as required."

In *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, in reversing a trial court's dismissal of a fraud claim based on failure to allege with particularity pursuant to Rule 9 of the Tennessee Rules of Civil Procedure, the Court of Appeals explained that the allegations in the plaintiff's complaint were sufficient because the identity and role each defendant played in the fraudulent scheme were alleged.

> The remaining defendants argue that dismissal was appropriate pursuant to Rule 12.02(6). They assert that Plaintiff failed to state its claims with particularity and merely resorted to a group pleading tactic without identifying a misrepresentation made by each defendant. They further assert that the facts as alleged were not capable of warranting relief.
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> ***
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> Citing *Strategic Capital Resources, Inc. v. Dylan Tire Industries, LLC*, 102 S.W.3d 603, 611 (Tenn.Ct.App.2002), the remaining defendants claim that Plaintiff was required to identify "each alleged misrepresentation and [tie] it to a particular defendant, at a particular place, and at a particular time." In affirming the trial court's dismissal of the complaint for failure to plead fraud claims with particularity, the court in *Strategic* stated,
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> > The chancellor dismissed the fraud claim because of the failure to comply with the requirements of Rule 9.02, Tenn. R. Civ. P., that "the circumstances constituting fraud or mistake shall be stated with particularity." There is a companion rule set forth in Rule 8 .06 that all pleadings shall be construed so as to do substantial justice. *See Ezell v. Graves*, 807 S.W.2d 700 (Tenn.Ct.App.1990); *cf. Sullivant v. Americana Homes, Inc.*, 605 S.W.2d 246 (Tenn.Ct.App.1980). In *City State Bank v. Dean Witter Reynolds*, 948 S.W.2d 729 (Tenn.Ct.App.1996), the court found the complaint sufficient where it "specifically identifies the time and place of each alleged false representation, and identifies the manner in which each representation was deemed to have been fraudulent." 948 S.W.2d at 738.
> >
> > We think that the complaint does fail the particularity test. An inspection of the complaint shows that the allegations are only general and that no particular defendant is identified as

> the one making the false and misleading statements. *At a minimum the actors should be identified and the substance of each statement should be pled.* We think the fraud claims were properly dismissed.

102 S.W.3d at 611 (emphasis added). While the court referenced a decision in which the complaint was upheld because it identified the time and place of each representation, the court stopped short of issuing any new particularity requirements and merely held that the plaintiff failed to identify the actors and the substance of each statement as required. This standard is in keeping with the particularity requirement and cases construing the requirement. The Committee Comments to Tenn. R. Civ. P. 9.02 explain that:

> The [particularity] requirement ... is not intended to require lengthy recital of detail. Rather, the Rule means only that general allegations of fraud and mistake are insufficient; the pleader is required to particularize but by the 'short and plain' statement required by Rule 8.01.

This court has previously held that "[t]he particularity requirement means that any averments sounding in fraud (and the circumstances constituting that fraud) must relat[e] to or designat[e] one thing singled out among many." *Diggs v. Lasalle Nat'l Bank Ass'n*, 387 S.W.3d 559, 564 (Tenn.Ct.App.2012) (internal quotation and citation omitted). "[P]articularity in pleadings requires singularity—of or pertaining to a single or specific person, thing, group, class, occasion, etc., rather than to others or all." *Id.* (citing *PNC Multifamily Capital Inst. Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525 (Tenn.Ct.App.2012)).

Here, the complaint contains a general accounting of each purchase and the role each defendant played in securing the purchases over the course of several years. The transactions at issue and the alleged misrepresentations were remarkably similar in nature. The similarity of each claim was not surprising given the companies involved and the economic climate at the time of the transactions. A review of the complaint reveals that Plaintiff identified the actors and the substance of each admittedly similar statement. With these considerations in mind, we hold that the complaint was sufficient to survive a motion to dismiss for failure to state its fraud-based claims with particularity pursuant to Rule 9.02. Likewise, a review of the remainder of the complaint reveals that the complaint was sufficient to survive a motion to dismiss for failure to state the remaining claims with

> particularity pursuant to Rule 8.01 and the corresponding notice pleading standard.

No. E2012-01422-COA-R3CV, 2014 WL 4102365, at *8, 9–10 (Tenn. Ct. App. Aug. 20, 2014), *aff'd in part, vacated in part,* 489 S.W.3d 369 (Tenn. 2015) (emphasis added).[2]

Based on the foregoing legal authority applied to the allegations in the *First Amended Complaint,* the Court concludes as a matter of law that the *First Amended Complaint* satisfies Rule 9 of the Tennessee Rules of Civil Procedure as it relates to the claims of fraud, TCPA and negligent misrepresentation against Defendant Hess.

Conspiracy Claim (1) Pled With Particularity And (2) Not Barred By Doctrine Of Intracorporate or Intraenterprise Conspiracy

For the same reasons that the Court concluded the Plaintiff had satisfied the particularity requirement under Rule 9.02 of the Tennessee Rules of Civil Procedure as to the claims of fraud, TCPA and negligent misrepresentation, the Court also concludes that the Plaintiff has pled its claim for conspiracy against Defendant Hess with sufficient particularity. As before, the Defendant's view of the Plaintiff's allegations with regard to

[2] The decision by the Tennessee Supreme Court affirming in part and vacating in part the Court of Appeals decision did not involve the Court of Appeals decision reversing the trial court's dismissal of the complaint for failure to state a claim based on Rule 9 of the Tennessee Rules of Civil Procedure. This ruling was upheld because the Tennessee Supreme Court denied the Defendant Placement Agents Rule 11 application challenging the Court of Appeals' reversal of the trial court's dismissal of the complaint for failure to state a claim. The Rule 11 application granted by the Tennessee Supreme Court was with regard to "(1) whether the trial court erred in dismissing the complaint for lack of general, specific, and conspiracy jurisdiction over the Ratings Agencies; and (2) whether the trial court erred in declining to permit the Plaintiff to seek additional discovery with regard to personal jurisdiction." *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 381–82 (Tenn. 2015), *cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A.*, 136 S. Ct. 2511, 195 L. Ed. 2d 841 (2016).

the conspiracy claim is singular as to Defendant Hess. Yet, under Tennessee law, a claim for civil conspiracy can be maintained if the underlying torts, i.e. the deception based claims, are committed by one or more of the conspirators in furtherance of the conspiracy. Once the underlying tort is proven as to at least one of the defendants alleged in the conspiracy, it can serve as a derivative claim that can establish vicarious liability and extend liability beyond the active wrongdoer to those who planned, assisted, or encouraged the wrongdoer's acts.

> A civil conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way. *Trau-Med of Am., Inc. v. Allstate Ins. Co.,* 71 S.W.3d 691, 703 (Tenn.2002); *Chenault v. Walker,* 36 S.W.3d 45, 52 (Tenn.2001). Participating in a civil conspiracy is not an independent tort. *Watson's Carpet & Floor Covering, Inc. v. McCormick,* No. M2004-02750-COA-R3-CV, 2007 WL 134132, at *8 (Tenn.Ct.App. Jan. 18, 2007) *perm. app. denied* (Tenn. May 14, 2007). Rather, it is a derivative claim that requires the existence of an underlying tort or wrongful act committed by one or more of the conspirators in furtherance of the conspiracy. *Forrester v. Stockstill,* 869 S.W .2d 328, 330 (Tenn.1994); *Tenn. Publ'g Co. v. Fitzhugh,* 165 Tenn. 1, 5-6, 52 S.W.2d 157, 158 (1932); *Levy v. Franks,* 159 S.W.3d 66, 82 (Tenn.Ct.App.2004).
>
> A civil conspiracy claim is a means for establishing vicarious liability. *Watson's Carpet & Floor Covering, Inc. v. McCormick,* 2007 WL 134132, at *8. Its function is to extend liability in tort beyond the active wrongdoer to those who planned, assisted, or encouraged the wrongdoer's acts. *Adcock v. Brakegate Ltd.,* 645 N.E.2d 888, 894 (Ill.1994). Thus, the acts of one conspirator are attributable to the other conspirators. *See* W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 46, at 323 (5th ed. 1984) ("*Prosser & Keeton* "). Once the evidence establishes the existence of a civil conspiracy, the members of the conspiracy are jointly and severally liable for all the damages caused by the other conspirators, even if they did not commit tortious or wrongful acts themselves. *Trau-Med of Am., Inc v. Allstate Ins. Co.,* 71 S.W.3d at 703; *Chenault v. Walker,* 36 S.W.3d at 52; *Dale v. Thomas H. Temple Co.,* 186 Tenn. 69, 90-91, 208 S.W.2d 344, 354 (1948); Restatement (Second) of Torts § 876 cmt. a (1979); *Prosser & Keeton,* § 46, at 323.

The elements of a civil conspiracy claim are: (1) an agreement between two or more persons, (2) to engage in some concerted action either for an unlawful purpose or for a lawful purpose by unlawful means, (3) the commission of a tortious or wrongful act by one or more of the conspirators, and (4) resulting injury or damage to person or property. *Kincaid v. Southtrust Bank,* 221 S.W.3d 32, 38 (Tenn.Ct.App.2006); *Kirksey v. Overton Pub, Inc.,* 739 S.W.2d 230, 236-37 (Tenn.Ct.App.1987).

The conspirators' agreement need not be explicit or formal. A tacit agreement will suffice. *Chenault v. Walker,* 36 S.W.3d at 52; *Dale v. Thomas H. Temple Co.,* 186 Tenn. at 90, 208 S.W.2d at 354. The agreement may be implied from the conspirators' conduct itself. Restatement (Second) of Torts § 876 cmt. a. While each conspirator must share an intent to accomplish the common purpose, *Chenault v. Walker,* 36 S.W.3d at 52, it is not necessary for each conspirator to have knowledge of the details of the conspiracy. *Dale v. Thomas H. Temple Co.,* 186 Tenn. at 90, 208 S.W.2d at 353. A conspirator may be found liable if he or she understands the general objectives of the scheme, accepts them, and agrees, either explicitly or implicitly, to do his or her part to further them. *Banco Popular N. Am. v. Gandi,* 876 A.2d 253, 263 (N.J.2005).

Conspiracies, by their very nature, are formed in secret. *Am. Diamond Exchange, Inc. v. Aplert,* 920 A.2d 357, 369 (Conn.App.Ct.2007). In the absence of testimony of one of the conspirators, it is unlikely that direct evidence of a conspiratorial agreement will exist. *Hampton v. Hanrahan,* 600 F .2d 600, 620-21 (7th Cir.1979) *rev'd in part on other grounds,* 446 U.S. 754, 100 S.Ct. 1987 (1980); *Bd. of Educ. of Asbury Park v. Hoek,* 183 A.2d 633, 646-47 (N.J.1962). It follows that civil conspiracies are rarely proven directly. They are more often established using circumstantial evidence and inferences drawn from the evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances. *See Int'l Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 581-82 (Tex.1963). Thus, fact-finders may consider the nature of the acts themselves, the relationship of the parties, the interests of the conspirators, and other circumstances. *Mohave Elec. Coop., Inc. v. Byers,* 942 P.2d 451, 465 (Ariz.Ct.App.1997). However, circumstantial evidence regarding the existence of a civil conspiracy must create more than a suspicion or conjecture that a conspiracy exists. It must enable reasonable persons to infer that two or more persons jointly assented to accomplish an unlawful purpose or to accomplish a lawful purpose using unlawful means. *Dove v. Harvey,* 608 S.E.2d 798, 801 (N.C.Ct.App.2005); *Moore v. Weinberg,* 644

> S.E.2d 740, 750 (S .C.Ct.App.2007); *Alford v. Thornburg*, 113 S.W.3d 575, 588 (Tex.App.2003).
>
> Civil conspiracy claims must be pleaded with some degree of specificity. *Kincaid v. Southtrust Bank*, 221 S.W.3d at 38; *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn.Ct.App.2002). The party seeking to establish the existence of a civil conspiracy must do so by a preponderance of the evidence. *Dale v. Thomas H. Temple Co.*, 186 Tenn. at 90, 208 S.W.2d at 354; *Chilhowee Trailer Sales, Inc. v. Int'l Christian Church*, No. E2002-00901-COA-R3-CV, 2003 WL 2010741, at *4 (Tenn.Ct.App. Apr. 29, 2003) *perm. app. denied* (Tenn. Oct. 6, 2003).

Stanfill v. Hardney, No. M200402768COAR3CV, 2007 WL 2827498, at *7–8 (Tenn. Ct. App. Sept. 27, 2007).

As stated above, the allegations in the *First Amended Complaint* detail Defendant Hess's specific role as parts manager and the significance of that role in relation to the overall alleged fraudulent warranty scheme. These allegations, taken as true as required on a motion to dismiss, sufficiently allege assertive conduct by Defendant Hess that would implicate him as not only an active wrongdoer, but at a minimum as a person who planned, assisted, or encouraged the wrongdoer's acts.

Defendant Hess's argument that he "is not identified as particularly having agreed, participate, encouraged or facilitated any" of the "16 predicate acts of fraud" identified in the *First Amended Complaint* again, takes a narrow view of the pleading standard in Tennessee. This view does not account for the nature of a civil conspiracy, as stated by Judge Koch in *Stanfill v. Hardney*, that civil conspiracy is rarely proven directly, but rather is established by circumstantial evidence and inferences.

> Conspiracies, by their very nature, are formed in secret. In the absence of testimony of one of the conspirators, it is unlikely that direct evidence of a conspiratorial agreement will exist. It follows that civil conspiracies are

> rarely proven directly. They are more often established using circumstantial evidence and inferences drawn from the evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances. Thus, fact-finders may consider the nature of the acts themselves, the relationship of the parties, the interests of the conspirators, and other circumstances. However, circumstantial evidence regarding the existence of a civil conspiracy must create more than a suspicion or conjecture that a conspiracy exists. It must enable reasonable persons to infer that two or more persons jointly assented to accomplish an unlawful purpose or to accomplish a lawful purpose using unlawful means.

Id. at *8 (citations omitted).

The allegations in paragraphs 60-66 of the *First Amended Complaint* are the very sort of circumstantial evidence from which a reasonable person could infer that Defendant Hess was involved in a civil conspiracy. The assertive and unusual conduct of (1) mutilating and/or soiling brand new parts links to facts alleged that this was done to make it look like the parts had been removed from vehicles upon which Defendants had allegedly provided service and (2) procuring junkyard parts links to facts alleged that these were available to send to Nissan. These allegations are more than sufficient when considered in light of the entire *First Amended Complaint* for a reasonable person to conclude that Defendant Hess was involved in a civil conspiracy to defraud Nissan.

In addition to concluding that the civil conspiracy claim is pled with sufficient particularity as required by Rule 9.02 of the Tennessee Rules of Civil Procedure, the Court also rejects Defendant Hess's alternative argument that the civil conspiracy claim is barred by the doctrine of intracorporate or intraenterprise conspiracy. In rejecting this argument, the Court adopts the following argument and authorities from the Plaintiff's *Response In Opposition To Defendant Jeff Hess's Motion To Dismiss*.

Hess seeks dismissal of Count V (conspiracy) of the Complaint on the basis that it impermissibly alleges an "intra-corporate "conspiracy. Memo at 9. The Complaint does no such thing. The Complaint alleges that two individuals, Michael Schrage and Joseph Schrage "agreed, tacitly or expressly, to [use] their dealerships—including West Covina Nissan, Universal City Nissan, Glendale Infiniti, and Glendale Nissan—as a means to obtain money by fraudulent, dishonest, and unlawful means. Compl. ¶ 127. There is nothing "intra-corporate" about the conspiracy alleged in the Complaint. The Complaint alleges a conspiracy between and among individuals and three separate and distinct corporate entities.

"An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means." *Trau Med of America, Inc. v. Allstate Insurance Company* 71 F.3d 691,703 (Tenn. 2002). This perfectly describes the conspiracy alleged here. Michael Schrage and Joseph Schrage combined together and with others, including Hess, to defraud Nissan out of tens of millions of dollars through the submission of fraudulent warranty claims across four automobile dealerships. The fact that the fraud was accomplished, in part, through three corporate entities—not one of which is wholly owned by any person or entity—provides no defense to Hess and the other conspirators. If A and B agree to engage in conduct to harm C, A and B are part of an actionable conspiracy. If A and B form one or more corporate entities to assist them in causing harm C, A and B are no less liable.

To the extent that three separate corporate entities were involved in the conspiracy, the conspiracy constitutes an "extra-corporate" conspiracy, not an intra-corporate one. "It has long been accepted in Tennessee that a corporation is capable of extra-corporate conspiracy; that is, a corporation becomes vicariously liable for the conduct of its agents who conspire with other corporations or with outside third persons." *Trau Med*, 71 F.3d at 703. Here, each of the corporate defendants, through their respective agents, conspired with other corporate entities to harm Nissan. This is the essence of an "extra-corporate" conspiracy.

By contrast, the intra-corporate conspiracy immunity doctrine holds "that wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim." *Id*. In *Trau-Med*, the Supreme Court held that "there can be no actionable claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and

> other agents…" *Id*. at 903- 904. Here, the Complaint does not simply allege "a single act by a single corporation acting through its officers, directors, employees, and other agents." Rather, the Complaint alleges a conspiracy between two individuals, and others, including Hess, who used three separate corporate entities, West Covina Nissan, LLC, Universal City Nissan, Inc., and Glendale Infiniti/ Nissan, Inc., to defraud Nissan of tens of millions of dollars. The intra-corporate immunity doctrine does not even arguably apply to the facts alleged in the Complaint.

Response In Opposition To Defendant Jeff Hess's Motion To Dismiss, pp. 5-7 (Sept. 29, 2017).

For all these reasons, Defendant *Jeff Hess's Motion To Dismiss First Amended Complaint For Failure To Comply With Rule 9.02, Tennessee Rules Of Civil Procedure And/Or Failure To State A Claim Upon Which Relief Can Be Granted* is denied.

s/ Ellen Hobbs Lyle
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