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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, and LEONARD SCHRAGE,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER RULING ON: (1) 11/9/17 MOTION TO DISMISS OF MICHAEL AND JOSEPH SCHRAGE; (2) 11/9/17 MOTION TO DISMISS OF TWO CORPORATE DEFENDANTS; AND (3) MOTION FOR MORE DEFINITE STATEMENT OF STACY STEPHENS

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Background

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 scheme of submitting 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 also asserts the Defendants 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. In addition, the Plaintiff has brought, against all of the Corporate Defendants and the Individual Defendant Schrage Brothers, claims for breach of contract and fraudulent transfer of assets. Claims for aiding and abetting, and unjust enrichment have been asserted against Individual Defendant Leonard Schrage.

The case is presently before the Court on motions to dismiss of four of the Defendants: Michael Schrage, Joseph Schrage, Universal City Nissan, Inc., Glendale Nissan/Infiniti, Inc.; and the motion of Defendant Stephens for a more definite statement.

Rulings

After studying the pleadings, arguments of Counsel and the applicable law, the following is ORDERED on the pending motions.

1. As to the November 9, 2017 *Michael Schrage and Joseph Schrage Motion To Dismiss*

   — The Rule 12.02(2) motion to dismiss related to conspiracy theory specific personal jurisdiction is granted. Plaintiff's claims of conspiracy theory jurisdiction against Michael and Joseph Schrage are that even if Michael and Joseph Schrage do not have sufficient minimum contacts themselves, nevertheless assertion of personal jurisdiction is appropriate because of the minimum contacts of their co-conspirators, the other Defendants. The Court, however, has now determined herein that the intracorporate conspiracy immunity doctrine (referred to herein as the "intra-corporate doctrine") does apply to preclude Plaintiff's conspiracy claims as to all Defendants except for Joseph and Michael Schrage. Thus, in the absence of a pending conspiracy cause of action as to the co-Defendants, there is no premise on which to assert conspiracy theory specific personal jurisdiction as to Michael and Joseph Schrage.

   — A ruling on the Rule 12.02(2) motion to dismiss related to primary participant specific personal jurisdiction is held in abeyance until a final decision on the merits of the lawsuit because the jurisdictional issues are closely intertwined with a determination on the merits.

   — The Rule 12.02(2) motion to dismiss based upon *forum non conveniens* is denied.

2. As to the November 9, 2017 *Universal City Nissan, Inc.'s and Glendale Nissan/Infiniti, Inc.'s Omnibus Motion To Dismiss*

   — The Rule 12.02(2) motion to dismiss for lack of specific personal jurisdiction is denied under the "*Calder* effects" test.

   — The motion to convert to a summary judgment is denied.

   — The Rule 12.02(6) motion to dismiss the TCPA claim is denied, and

— The Rule 12.02(6) motion to dismiss the Count V civil conspiracy claim has been granted based upon the intra-corporate doctrine.

3. The November 9, 2017 *Defendant Stacy Stephens' Motion For More Definite Statement Pursuant to Tenn. R. Civ. P. 12.05* is denied.

In addition, case law and analysis concerning conspiracy theory specific personal jurisdiction, reflected in the above rulings, has caused the Court to alter its previous legal conclusion in prior motions to dismiss filed by the other Defendants. The Court determines herein that the intra-corporate doctrine does apply to preclude Plaintiff's conspiracy claims except with respect to Joseph and Michael Schrage. Thus, consistent with the rulings above, the Court alters some of its previous rulings as follows.

It is ORDERED that pages 14-20 of the December 1, 2017 *Memorandum And Order Denying Defendant Jeff Hess's Motion To Dismiss* is vacated as it pertains to the Court's legal conclusion that the "intracorporation doctrine does not apply." That, in turn, requires that with respect to the *First Amended Complaint*, Count V – Civil Conspiracy, it is dismissed as a matter of law against (1) the Corporate Defendants: West Covina Nissan, LLC; Universal City Nissan, Inc.; Glendale Nissan/Infiniti, Inc.; (2) Defendant Jeff Hess; (3) Defendant Stacy Stephens; and (4) Defendant Emil Moshabad.

It is additionally ORDERED that Count V – Civil Conspiracy shall remain pending against the Defendants Joseph and Michael Schrage.

The analysis and legal authorities for these orders are as follows.

Parties' Positions

1. Motions to Dismiss

Defendants Michael Schrage and Joseph Schrage (the "Schrage Defendants")[1] seek dismissal of the *First Amended Complaint* for lack of personal jurisdiction and, in the alternative, *forum non conveniens*. In summary, the Schrage Defendants' argue the following legal grounds for dismissal.

- The Plaintiff cannot impute other Defendants' alleged jurisdictional contacts to Joseph Schrage or Michael Schrage.

- The Plaintiff does not plead particular facts showing either Michael Schrage or Joseph Schrage engaged in an intentional act as part of the alleged warranty scheme.

- The Court cannot exercise conspiracy jurisdiction over Michael Schrage or Joseph Schrage because the Plaintiff's allegations do not support a claim for conspiracy and as a matter of law a corporation cannot conspire with its employees, officer or directors.

- It would be both unreasonable and unfair to subject either Michael Schrage or Joseph Schrage to jurisdiction in Tennessee.

- Dismissal is warranted on *forum non conveniens* grounds.

Defendants Universal City Nissan, Inc. and Glendale Nissan/Infiniti, Inc. (the "Corporate Dealers")[2] seek dismissal of the *First Amended Complaint* based on the following legal arguments.

[1] The reference to "Schrage Defendants" in this *Memorandum And Order* is to Michael Schrage and Joseph Schrage, not their brother, Leonard Schrage, who was also recently added as a Defendant to this lawsuit, and has filed a separate motion to dismiss which is presently being briefed.

[2] The other corporate Defendant, West Covina Nissan, LLC previously filed and had ruled upon a motion to dismiss. Accordingly the reference to "Corporate Defendants" herein is only to the other two Corporate Defendants.

- The Court lacks general personal jurisdiction over the Corporate Dealers because they were not incorporated, nor maintained their principal place of business in Tennessee.

- The Court lacks specific personal jurisdiction over the Corporate Dealers because

    - The Corporate Dealers contacts with Nissan in Tennessee was random, fortuitous or attenuated because they did not purposefully avail themselves to acting or causing a consequence in Tennessee. The submission of warranty claims to Tennessee was incidental and in response to Nissan's need and request for the Corporate Dealers' services in California; and

    - The purportedly fraudulent warranty repairs constituting the alleged wrongful acts did not arise in Tennessee. Because the Corporate Dealers' connection with Tennessee is not substantial, the supposed injury to Nissan in Tennessee alone does not justify asserting personal jurisdiction.

- The *First Amended Complaint* fails to state a claim as to any of the causes of action against the Corporate Defendants because the allegations have been proven to be untrue based upon testimony from service managers who worked there and Nissan's primary reliance in the allegations is based on the testimony of Keith Jacobs who did not work at the Defendant Corporate Dealers at issue and admitted that he never personally witnessed any fraudulent warranty activity at these Corporate Dealers.

- As a separate ground, the Court should dismiss Count I of the *First Amended Complaint* for violation of the Tennessee Consumer Protection Act ("TCPA") because Nissan is seeking relief only for itself as the sole customer of the Corporate Dealers and not for unfair or deceptive practices that affect the conduct of "trade or commerce" as required by the TCPA.

- As an additional separate ground, the Court should dismiss Count V of the *First Amended Complaint* for conspiracy because the Corporate Dealers never cooperated with Defendant West Covina or Mr. Keith Jacobs who was the alleged "mastermind" of the fraudulent scheme to submit fraudulent warranty claims to Nissan.

In opposition to the motions to dismiss, the Plaintiff argues that exercising personal jurisdiction over the Corporate Dealers and Schrage Defendants is appropriate in this case because of the following.

- The Plaintiff has made a *prima facie* showing that personal jurisdiction exists under the *Calder* effects test based on the Corporate Dealers fraudulent communications targeted at Tennessee and the exercise of personal jurisdiction comports with principles of fairness and reason.

- In addition to establishing personal jurisdiction under the *Calder* effects test, the Court possesses conspiracy jurisdiction over the Corporate Dealers.

- The Court has already held in an earlier ruling that the TCPA claim alleged in the *First Amended Complaint* falls within the scope of the TCPA.

- The Court should decline to convert the Rule 12 motion to dismiss to a motion for summary judgment because of the complexity of this case and the failure to provide statements of facts under Rule 56.03.

- The allegations of the *First Amended Complaint* and Plaintiff's evidence make out a *prima facie* case that Joseph and Michael Schrage are subject to conspiracy personal jurisdiction and the record shows an extra-corporate, not an intra-corporate conspiracy.

- In addition to being subject to conspiracy personal jurisdiction, both Joseph and Michael Schrage are subject to personal jurisdiction as primary participants in the fraudulent warranty scheme.

- This action is not subject to dismissal under the doctrine of *forum non conveniens*.

2. Defendant Stephens' Motion For More Definite Statement

In support of his motion, Defendant Stephens argues that the Plaintiff should be required "to submit a more definite statement concerning the averments of the Plaintiff's Amended Complaint" and "would request that Plaintiff provide a more definite statement as to the date, time, and specific actions taken by Defendant Stephens which constitute the alleged fraud so that she may reasonably frame a responsive pleading." *Defendant*

Stacy Stephens' Motion For More Definite Statement Pursuant To Tenn. R. Civ. P. 12.05, pp. 1, 4 (Nov. 9, 2017).

In opposition, the Plaintiff argues that the motion is "simply as a device for delaying joinder of issue" and that Paragraph 68 of the *First Amended Complaint*, of which Defendant Stephens' motion is based, is not so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. *Response In Opposition To Defendant Stacy Stephens' Motion For More Definite Statement*, p. 2 (Nov. 27, 2017).

Analysis and Authorities

1. Motions to Dismiss of the Schrage Defendants

A. Specific Personal Jurisdiction

In analyzing whether there exists personal jurisdiction over the Schrage Defendants, the Court has performed the two-part analysis provided by the Tennessee Supreme Court in *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369 (Tenn. 2015), of (1) analyzing first whether a defendant's activities in the state that gave rise to the cause of action constitute sufficient minimum contacts with the forum state to support specific jurisdiction and, if so, (2) whether the exercise of jurisdiction over a nonresident defendant is fair. In deciding whether the Defendants are subject to specific personal jurisdiction, the Court has applied this two-part test and analyzed each Defendant separately as required by law, including addressing jurisdiction relating to the Corporate Defendants, Universal City Nissan, Inc. and Glendale Nissan/Infiniti, Inc., separately from the Individual Defendants, Michael Schrage and Joseph Schrage.

In support of its argument that this Court has specific personal jurisdiction[3] over the Schrage Defendants, the Plaintiff has asserted two separate and independent legal theories – (1) Conspiracy Theory Specific Personal Jurisdiction and (2) "Primary Participant" Specific Personal Jurisdiction.

(1) Conspiracy Theory Jurisdiction

(a) Barred by Intra-Corporate Doctrine

The first species of specific personal jurisdiction the Plaintiff asserts as to the Schrage Defendants is that they are subject to personal jurisdiction and have sufficient minimum contacts with the forum state because of the contacts of the other Defendant corporations and individuals alleged by Plaintiff to be co-conspirators with the Schrage Defendants. The Plaintiff's argument is that even if the out-of-state Schrage Defendants lack sufficient minimum contacts they may nevertheless be subject to jurisdiction because of the contacts of the co-conspirators (other Defendants) with the forum. *See First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 394-95 (Tenn. 2015).

The Schrage Defendants' opposition to conspiracy theory specific personal jurisdiction is twofold: (1) the Plaintiff has failed to meet its burden to establish conspiracy theory jurisdiction[4], and (2) even if the Court concludes that the Plaintiff has

[3] It is undisputed that the Plaintiff is asserting specific personal jurisdiction over the Schrage Defendants. For this reason, the Court shall not analyze whether the Plaintiff has established general personal jurisdiction over the Schrage Defendants.

[4] In arguing that the Plaintiff has failed to meet its evidentiary burden to establish conspiracy jurisdiction, the Schrage Defendants cite to both Tennessee and California law, but argue that California law applies, and under California law "conspiracy jurisdiction is not consistent with constitutional due process." In the

met its burden, the theory of conspiracy theory jurisdiction must fail as a matter of law in this case because "a corporation cannot conspire with its employees, officers or directors." *Memorandum Of Law In Support Of Defendants Michael Schrage And Joseph Schrage Motion To Dismiss For Lack Of Personal Jurisdiction And Forum Non Conveniens*, p. 17 (Nov. 9, 2017).

For the reasons stated below, the Court concludes as a matter of law that the Plaintiff has alleged an intra-corporate conspiracy which is not actionable in Tennessee, and, thus, the Plaintiff's claim that the Schrage Defendants are subject to jurisdiction based upon the minimum contacts of their co-conspirators/co-Defendants is not a basis for exercising personal jurisdiction over the Schrage Defendants.

The legal argument of the Schrage Defendants that a corporation cannot conspire with its employees, officer or directors derives from the Tennessee Supreme Court case of *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, where the Court, approving of law from other jurisdictions, held that "there can be no actionable claim of conspiracy where the

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briefing on the motions to dismiss for personal jurisdiction, both parties have cited Tennessee law in support of their arguments. The Defendants have also cited to some California law as well. With regard to the merits of the lawsuit, the Court has not ruled on the choice of law issue. However, the Court has applied Tennessee law to the procedural issue of personal jurisdiction as required under Tennessee law. While a choice of law provision may well govern which state's law governs the substantive dispute, the forum state's law will nonetheless govern questions of jurisdiction and procedure. *Boswell v. RFD-TV The Theater, LLC*, M2015-00637-COA-R3-CV, 2016 WL 1091296, at *4 (Tenn. Ct. App. Mar. 18, 2016) ("Matters of procedure are governed by the law of the forum….In other words, we apply our own procedural rules even if the law of another state governs the substantive issues."). *See Restatement (Second) of Conflict of Laws* § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."); *see also Cole v. Mileti*, 133 F.3d 433 (6th Cir. 1998) (California choice of law provision; trial court properly applied Ohio long-arm statute and limitations period); *Invisible Fence, Inc. v. Fido's Fences, Inc.*, 687 F. Supp. 2d 726 (E.D. Tenn. 2009) (applying Tennessee and Sixth Circuit law to jurisdiction and venue issues while recognizing Connecticut choice of law provision governed substantive issues); *cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.9 (1984) (distinguishing between questions of substantive law and issues of personal jurisdiction)."

conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, *each acting within the scope of his or her employment.*" 71 S.W.3d 691, 703–04 (Tenn. 2002) (footnotes omitted) (emphasis in original).

> 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. *See, e.g.*, *Standard Oil Co. v. State*, 117 Tenn. 618, 665, 100 S.W. 705, 716–17 (1907). However, where each alleged co-conspirator is an agent or employee of the same corporate entity and is acting on the corporation's behalf, the conspiratorial liability of that corporation becomes less clear.
>
> Courts in other jurisdictions—both federal and state—that have addressed issues involving civil intracorporate conspiracy allegations have adopted the "intracorporate conspiracy immunity doctrine" to hold that wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim. This single entity view of intracorporate conduct derives from traditional principles of agency law. A basic principle of agency is that a corporation can act only through the authorized acts of its corporate directors, officers, and other employees and agents. Thus, the acts of the corporation's agents are attributed to the corporation itself. "The two are not one and another. So merged are their identities, when the agent is acting for the corporation (the only way it can act at all)[ ], that the one may not be an accessory of the other." *Haverty Furniture Co. v. Foust*, 174 Tenn. 203, 212, 124 S.W.2d 694, 698 (1939) (citations omitted). Because the law requires two or more persons or entities to have a conspiracy, a civil conspiracy is not legally possible where a corporation and its alleged co-conspirators are not separate entities, but instead stand in a principal-agent relationship. *See* 16 Am.Jur.2d *Conspiracy* § 56 (1998).
>
> We recognize the rule expressed by this doctrine as a sound one, and consequently, we hold 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, *each acting within the scope of his or her employment.* The acts of these representatives, if performed within their representative, agency, or employment capacities on behalf of the corporation, are

> attributed to the corporation. *See Forrester v. Stockstill,* 869 S.W.2d 328, 334–35 (Tenn.1994). As long as the agent is acting within the scope of his or her authority, the agent and the corporation are not separate entities and cannot be the sole parties to a conspiracy. *See, e.g., Day v. General Elec. Credit Corp.,* 15 Conn. App. 677, 546 A.2d 315, 318–19 (1988). Indeed, it is this "scope of employment" exception that prevents the intracorporate conspiracy immunity doctrine from being applied too broadly and thereby immunizing all private conspiracies from redress where the actors coincidentally were employees of the same company. *See Johnson v. Hills & Dales Gen. Hosp.,* 40 F.3d 837, 840 (6th Cir.1994). Therefore, for a claim of intracorporate conspiracy to be actionable, the complaint must allege that corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation. *See, e.g., Renner v. Wurdeman,* 231 Neb. 8, 434 N.W.2d 536, 542 (1989).

Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 703–04 (Tenn. 2002) (footnotes omitted).

In opposition, the Plaintiff argues that the *First Amended Complaint* does not allege an intra-corporate conspiracy as stated in *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, but rather the allegations present an extra-corporate conspiracy, which is actionable and could support exercising personal jurisdiction over the Schrage Defendants under conspiracy theory personal jurisdiction.

> Contrary to the position JOSEPH and MICHAEL advance on page 18 of their Memorandum, the conspiracy established is not an "intra-corporate conspiracy." It is true that in *Trau-Med of America Inc. v. Allstate Ins. Co*., 71 S.W.3d 691 (2002), 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 703–04. But here the First Amended Complaint does not simply allege, and the evidence does not simply demonstrate, "a single act by a single corporation acting through its officers, directors, employees, and other agents." Rather, the Complaint alleges and the proof shows a conspiracy between two individuals, JOSEPH and MICHAEL, and others, 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.

Response In Opposition To Defendant Michael Schrage And Joseph Schrage's Motion To Dismiss For Lack Of Personal Jurisdiction, p. 16 (Nov. 27, 2018).

In this case, the Plaintiff attempts to distinguish the allegations in the *First Amended Complaint* from *Trau-Med of Am., Inc. v. Allstate Ins. Co.* by arguing that the alleged conspiracy is between and among three separate entities and not a "conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents."

In determining whether the *First Amended Complaint* alleges facts that present an intra-corporate conspiracy or an extra-corporate conspiracy, the Court, like the Tennessee Supreme Court in *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, has researched cases from other jurisdictions. Numerous other jurisdictions have recognized that the intra-corporate doctrine applies not only to situations involving wholly owned subsidiaries, but also situations like the one in this case where there is an alleged conspiracy between and among sibling corporations that share a common ownership.

- Under the intra-corporate doctrine, a company and its sole owner are not considered separate parties for purposes of conspiracy, and federal district courts applying this doctrine in cases governed by Florida law therefore have held that an individual defendant cannot, as a matter of law, conspire with a company that he wholly owns. *See Vivid Entm't, LLC v. J & B PB, LLC*, No. 2:13–cv–524, 2015 WL 144352, at *4 (M.D. Fla. Jan. 12, 2015) ("Pursuant to the intracorporate conspiracy doctrine, McCarty cannot conspire with Vivid as McCarty is the sole owner of [Vivid]."); *Bryant Heating & Air Conditioning Corp. v. Carrier Corp.*, 597 F. Supp. 1045, 1054 (S.D. Fla. 1984) ("Florida case law holds that members of a single economic unit, such as [a corporation and] its wholly owned subsidiary...cannot constitute the requisite combination of 'separate economic groups or forces' necessary to establish the Florida tort

of conspiracy." (citing *Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So.2d 1025, 1029 (Fla. Dist. Ct. App. 1981))); *see also Copperweld Corp. v. Indep. Tube Corp*., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984) (holding that parent corporation and its wholly owned subsidiary are not legally capable of conspiring with each other under § 1 of the Sherman Act because "a parent and subsidiary have not ... two separate corporate consciousnesses, but one").

The intra-corporate doctrine also has been extended to companies with common ownership. *See Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co*., 833 F.2d 606, 611 (6th Cir. 1987) ("Here we have two subsidiaries which are wholly-owned by the same parent and are likewise not separate enterprises. We agree... that *Copperweld* precludes a finding that two wholly-owned sibling corporations can combine for the purposes of section 1 [of the Sherman Act]."); *Perry v. Patriot Mfg, Inc*., No. 1:05CV153LMB, 2006 WL 2707361, at *3 (E.D. Mo. Sept. 19, 2006) ("Two subsidiaries of the same parent corporation cannot conspire." (citations omitted)).

In re Bavelis, 571 B.R. 278, 317–18 (Bankr. S.D. Ohio 2017) (emphasis added).

- **Individuation of conspirators turns on an inquiry into who controls the action and whether there is a unity of interests.** A wholly owned subsidiary of a corporation cannot conspire with its parent corporation. *834 *Copperweld,* 467 U.S. 752, 771–772, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984). Two subsidiaries wholly owned by the same parent corporation cannot conspire with their parent or with each other. *See, e.g., Hood v. Tenneco Texas Life Ins. Co.,* 739 F.2d 1012, 1015 (5th Cir.1984); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.,* 833 F.2d 606, 611 (6th Cir.1987). The officers, directors, employees, representatives, and agents of a corporation cannot conspire with their corporate employer. *Nelson Radio & Supply Co. v. Motorola,* 200 F.2d 911, 914 (5th Cir.1952); *see also, Schwimmer v. Sony Corp. of America,* 677 F.2d 946, 953 (2d Cir.1982), *cert. denied,* 459 U.S. 1007, 103 S. Ct. 362, 74 L.Ed.2d 398. **Two corporations that are wholly owned by the same group of individuals cannot conspire with each other.** *Century Oil Tool, Inc. v. Production Specialties, Inc.,* 737 F.2d 1316 (5th Cir.1984); *see also, Guzowski v. Hartman,* 969 F.2d 211, 214 (6th Cir.1992).

Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 257 F. Supp. 2d 819, 833–34 (M.D. La. 2002) (emphasis added).

- Here we have two subsidiaries which are wholly-owned by the same parent and are likewise not separate enterprises. **We agree with the Fifth Circuit**

that *Copperweld* precludes a finding that two wholly-owned sibling corporations can combine for the purposes of section 1. *See, e.g., Hood v. Tenneco Texas Life Ins. Co.,* 739 F.2d 1012, 1015 (5th Cir.1984) (reasoning that if two siblings cannot conspire with their parent in violation of section 1, they cannot conspire with each other); *Century Oil Tool, Inc. v. Production Specialties, Inc.,* 737 F.2d 1316, 1317 (5th Cir.1984). DSM's claim under the second count fails because it has failed to allege a contract, combination or conspiracy.

Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611 (6th Cir. 1987) (emphasis added).

- Century Oil sued Production Specialties, Inc. and Gas Lift Supply, Inc. under the Clayton Act for violations of Section 1 of the Sherman Act arising out of an alleged breach of an agency agreement between Production Specialties and Century Oil. The relevant facts are undisputed. Production Specialties and Gas Lift were separately incorporated and commonly owned by three men, two of whom owned 30 percent of each corporation and one of whom owned the remaining 40 percent of each corporation. All three men served as directors and officers of each corporation. One drew his compensation from Production Specialties and the other two drew their compensation from Gas Lift, but the compensation of each was based on his percentage of ownership of both corporations.

  Both corporations were under the common ownership and control of these three men. Gas Lift manufactured most of the products, wireline tools and gas lift valves, and Production Specialties made most of the retail sales. Both corporations operated from the same physical plant. The dual corporate structure existed because Production Specialties had been wholly owned by one of the men and Gas Lift had been wholly owned by the other two. When the three joined forces they considered but for tax reasons rejected a formal merger of the two corporations.

  Given *Copperweld*, we see no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations. A contract between them does not join formerly distinct economic units. In reality, they have always had "a unity of purpose or a common design." 467 U.S. at ----, 104 S. Ct. at 2742 *quoting American Tobacco Co. v. United States,* 328 U.S. 781, 810, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1948).

> *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) (footnote omitted) (emphasis added).

In this case, it is undisputed that the three Corporate Defendants – West Covina Nissan, LLC, Universal City Nissan, Inc., and Glendale Nissan/Infiniti, Inc. – are all wholly owned either directly or indirectly by the three Defendant brothers: Michael Schrage, Joseph Schrage, and Leonard Schrage. *First Amended Complaint*, ¶¶ 4, 7-9, 85 (June 29, 2017); *Supplement To First Amended Complaint*, ¶¶ 152-155 (Nov. 9, 2017). As a result, the common ownership requirement among the three Corporate Defendants addressed in the above cases is present.

As to the allegations of the fraudulent warranty scheme which form the basis of the Plaintiff's conspiracy claim, the Court concludes based on the inexhaustive list of allegations below that the alleged actors in the conspiracy claim were (1) either agents and/or employees of the Defendant Dealerships and (2) were either recruited by or acting at the direction of the Schrage Defendants.

> 3. The Jacobs Declaration also confirms that West Covina Nissan's sister Nissan and Infiniti dealerships, Universal City Nissan, Inc. ("Universal City Nissan") and Glendale Nissan/Infiniti, Inc. (referred to herein as "Glendale Nissan" and "Glendale Infiniti") (collectively West Covina Nissan, Universal City Nissan, Glendale Nissan, and Glendale Infiniti are referred to herein as the "Defendant Dealerships") engaged in the same fraudulent warranty practices against NNA. **The Defendant Dealerships engaged in such fraud with the knowledge of—and at the direction of—the owners of the dealerships, Michael and Joseph Schrage.** Indeed, soon after Jacobs became the service director at West Covina Nissan, defendant Hess, the parts manager, explicitly said to Jacobs, "The Schrages want you to steal from Nissan."
>
> ****

76. As shown below, the warranty practices at West Covina Nissan were not out of the ordinary for **dealerships that Michael and Joseph Schrage owned and controlled.** Rather, they were an integral part of the operations of all dealerships in the Schrage Group. **Moreover, Michael and Joseph Schrage were well aware of the particular activities at West Covina Nissan.**

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80. Subsequently, in periodic meetings with Jacobs, Michael Schrage would generally say that the revenue numbers looked good, but that Jacobs needed to be careful with respect to the warranty work.

81. Joseph Schrage, Michael Schrage, and their senior managers discussed with Keith Jacobs the ramifications of West Covina Nissan's having been flagged as having anomalous warranty numbers. In those discussions, no one ever told Jacobs to clamp down on fraudulent warranty work. Rather, the discussions focused on circumventing NNA's oversight and on West Covina Nissan's need for the revenue from those fraudulent claims.

82. When Jacobs resigned from West Covina Nissan or on about December 31, 2012, service department revenues declined. In response, West Covina Nissan began efforts to have him return to his position as service director. Those efforts culminated with a meeting in which Michael Schrage and Moshabad told Jacobs "that their profits in the service department were lower, and they wanted [him] back in there so [he] could build the numbers back up again." Upon Jacobs' return and the resumption of the fraudulent warranty schemes Jacobs had perfected, service department revenues returned to a more palatable level.

83. **At all relevant times, Michael Schrage was the person responsible for hiring, firing, and jointly overseeing (with Moshabad) the work of so-called "director level personnel" at West Covina Nissan, including the service director.**

84. On December 2, 2015, believing that it had remedied, at least prospectively, the anomalies presented by West Covina Nissan's warranty claims, NNA notified Jacobs by email that NNA had decided to increase West Covina Nissan's DCAL to $1,000. Upon receipt of that email, Jacobs forwarded it to, *inter alia*, Moshabad and Joseph Schrage, with the comment "We're back in business."

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89. **The inflated rate of warranty claims at the Defendant Dealerships and the details set forth in the Jacobs Declaration indicate that Michael Schrage and Joseph Schrage are dedicated to defrauding NNA.**

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94. In early 2010, after Jacobs became the service director at West Covina Nissan, NNA announced its plans to conduct a warranty audit of that dealership. **In response, Sage Holding Company, Inc. ("Sage Holding Company"), a California corporation that Michael and Joseph Schrage own and control, arranged for staff from Universal City Nissan to create a paper trail to substantiate warranty claims that had been made during the warranty period. Under the supervision of the Universal City Nissan staff, each technician at West Covina Nissan went through all warranty-related repair orders previously submitted on behalf of that technician to alter or recreate those orders to ensure facial compliance with NNA's policies and procedures.**

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127. **Joseph Schrage and Michael Schrage agreed, tacitly or expressly, to utilize 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. Joseph Schrage's and Michael Schrage's joint undertaking to enrich themselves using their dealerships has been both far-reaching and lucrative, diverting substantial sums properly belonging to entities with whom the dealerships do business to or for the benefit of Joseph and Michael, entities under their control, and their friends and relatives.**

128. **But Joseph Schrage's and Michael Schrage's undertaking also included the goal of implementing the fraudulent scheme detailed in this complaint: milking NNA out of millions of dollars via its warranty-repair programs by causing the Defendant Dealerships to submit fraudulent warranty claims.**

129. **To that end, Joseph Schrage and Michael Schrage transformed their consortium of dealerships and related entities into a criminal enterprise directed at developing, honing, disseminating, and implementing techniques for submitting and obtaining payment on fraudulent warranty claims. This conspiratorial enterprise operated using the Defendant Dealerships and their respective employees under**

the direction of Joseph Schrage, Michael Schrage, and various strata of subordinate conspirators. In short, Joseph Schrage and Michael Schrage ran a warranty fraud business out of the back of the Defendant Dealerships.

130. **To facilitate this undertaking and effectuate its aims, Joseph Schrage and Michael Schrage collaborated with employees of the Defendant Dealerships and their affiliates. These individuals were apprised of the goals of the warranty-fraud conspiracy, agreed to assist Joseph Schrage and Michael Schrage in executing it, and proceeded to do so.**

131. Such other members of the conspiracy included nonparty Billie Jo Haynes, nonparty Alphonse Rodriguez, nonparty Manny Arguello, former Defendant Keith Jacobs, Defendant Stacy Stephens, Defendant Jeff Hess, Defendant Emil Moshabad, and the other persons identified herein as participating in the various aspects of the warranty-fraud scheme at the heart of this Complaint.

132. **Some of the individual conspirators were recruited and directed in their execution of the conspiracy by Joseph Schrage and Michael Schrage (or one of them acting with the other's knowledge and consent) themselves.** Other individual conspirators were recruited and directed by other conspirators at the implied or express direction of Joseph Schrage and Michael Schrage.

133. **The Defendant Dealerships, moreover, participated in the conspiracy through the acts of their own respective agents, including those expressly named herein and their management and service-center staff who are not identified in this Complaint by name. The Defendant Dealerships lent employees to each other, and willingly accepted assistance from the other Defendant Dealerships and other entities effectively controlled by Joseph Schrage and Michael Schrage, for the purposes of furthering and effecting the warranty-fraud scheme.** This conduct is exemplified by, but not limited to, Universal City Nissan's employment of its personnel, and West Covina Nissan's acceptance of those personnel, to create and train West Covina Nissan employees in creating dummy paper trails supporting West Covina Nissan's fraudulent warranty claims.

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157. **Joseph Schrage and Michael 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. Joseph Schrage's and Michael Schrage's joint undertaking to enrich themselves using their dealerships has been both far-reaching and lucrative, diverting substantial sums properly belonging to entities with whom the dealerships do business to or for the benefit of Joseph, Michael, and Leonard, entities under their control, and their friends and relatives.**

158. **Joseph Schrage's and Michael Schrage's undertaking also included the goal of implementing the fraudulent scheme detailed in this complaint: milking NNA out of millions of dollars via its warranty-repair programs by causing the Defendant Dealerships to submit fraudulent warranty claims.**

159. **To that end, Joseph Schrage and Michael Schrage transformed their consortium of dealerships and related entities into a criminal enterprise directed at developing, honing, disseminating, and implementing techniques for submitting and obtaining payment on fraudulent warranty claims. This conspiratorial enterprise operated using the Defendant Dealerships and their respective employees under the direction of Joseph Schrage, Michael Schrage, and various strata of subordinate conspirators.**

160. **To facilitate this undertaking and effectuate its aims, Joseph Schrage and Michael Schrage collaborated with employees of the Defendant Dealerships and their affiliates. These individuals were apprised of the goals of the warranty-fraud conspiracy, agreed to assist Joseph Schrage and Michael Schrage in executing it, and proceeded to do so.**

161. Such other members of the conspiracy included nonparty Billie Jo Haynes, nonparty Alphonse Rodriguez, nonparty Manny Arguello, former Defendant Keith Jacobs, Defendant Stacey Stephens, Defendant Jeff Hess, Defendant Emil Moshabad, and the other persons identified herein as participating in the various aspects of the warranty-fraud scheme at the heart of this Complaint.

162. **Some of the individual conspirators were recruited and directed in their execution of the conspiracy by Joseph Schrage and Michael Schrage (or one of them acting with the other's knowledge and consent) themselves. Other individual conspirators were recruited and**

> **directed by other conspirators at the implied or express direction of Joseph Schrage and Michael Schrage.**
>
> 163. **The Defendant Dealerships, moreover, participated in the conspiracy through the acts of their own respective agents, including those expressly named herein and their management and service-center staff who are not identified in this Complaint by name. The Defendant Dealerships lent employees to each other, and willingly accepted assistance from the other Defendant Dealerships and other entities effectively controlled by Joseph Schrage and Michael Schrage, for the purposes of furthering and effecting the warranty-fraud scheme.** This conduct is exemplified by, but not limited to, Universal City Nissan's employment of its personnel, and West Covina Nissan's acceptance of those personnel, to create and train West Covina Nissan employees in creating dummy paper trails supporting West Covina Nissan's fraudulent warranty claims.

First Amended Complaint, ¶¶ 3, 76, 80-84, 89, 94, 127-133 (June 29, 2017) (emphasis added); *Supplement To First Amended Complaint*, ¶¶ 157-163 (Nov. 9, 2017) (emphasis added).

Based on the foregoing law and allegations in the *First Amended Complaint*, the Court concludes as a matter of law that the Plaintiff has alleged an intra-corporate conspiracy which is not actionable in Tennessee. For this reason, the Court dismisses the Plaintiff's argument that the Schrage Defendants are subject to conspiracy theory specific personal jurisdiction based upon the minimum contacts of their co-conspirators because the above authorities dictate that the intra-corporate doctrine applies to dismiss the Count V conspiracy claim in the *First Amended Complaint* against the other Defendants. Without a cause of action for conspiracy as to these co-Defendants, the Court cannot exercise personal jurisdiction over the Schrage Defendants based upon conspiracy theory specific personal jurisdiction.

(b) Alteration of Previous Ruling: Count V – Conspiracy Claim Dismissed Against Corporate Defendants and Defendants Hess, Stephens and Moshabad

Based on the foregoing ruling that the *First Amended Complaint* alleges an intra-corporate conspiracy which is not actionable under Tennessee law, previous rulings must be altered as follows. The Count V – Conspiracy of the *First Amended Complaint* must also be dismissed as a matter of law against (1) the Corporate Defendants – West Covina Nissan, LLC; Universal City Nissan, Inc.; Glendale Nissan/Infiniti, Inc.; (2) Defendant Jeff Hess; (3) Defendant Stacy Stephens; and (4) Defendant Emil Moshabad.

Further, as a result of this ruling, the Court has vacated in part its previous ruling on pages 14-20 of the December 1, 2017 *Memorandum And Order Denying Defendant Jeff Hess's Motion To Dismiss* that the "intracorporation doctrine does not apply."

Moreover, consistent with the foregoing, the Court alters its previous denial and has now granted Defendant Jeff Hess's July 24, 2017 *Motion To Dismiss* Count V – Conspiracy of the *First Amended Complaint* against him individually for failure to state a claim pursuant to Rule 12.02(6).

(c) Previous Ruling Not Altered as to Other Torts of Individual and Corporate Co-Defendants

The ruling dismissing the civil conspiracy claim against Defendants Jeff Hess, Stacy Stephens, Emil Moshabad individually and against the Corporate Defendants, however, does not implicate the Plaintiff's separate claims of TCPA (Count I), fraud (Count II), and negligent misrepresentation (Count III) against these Defendants.

With respect to these causes of action against the individual Defendants, they state a claim even though the Defendants were agents/employees of the Defendant Corporations.

> A corporation acts through its agents. An agent is one who undertakes to transact some business or to manage some affair, for another by authority and on account of the latter, and to render an account of it. *Security Federal Sav. and Loan Ass'n v. Riviera, Ltd.*, 856 S.W.2d 709, 715 (Tenn. App. 1992). We note that 'an agent cannot escape liability for tortious acts, including fraud or misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer.' *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590 (Tenn. App. 1980).

Allied Sound, Inc. v. Neely, 909 S.W.2d 815, 821 (Tenn. Ct. App. 1995); *Gross v. McKenna*, No. E2005-02488-COA-R3CV, 2007 WL 3171155, at *4 (Tenn. Ct. App. Oct. 30, 2007) ("Agency status is not a shield against personal liability for one's own acts. Indeed, the Tennessee Limited Liability Act specifically provides that, '[n]otwithstanding the provisions [of this section limiting individual liability in other ways], a member, holder of financial interest, governor, manager, employee or other agent may become personally liable in contract, tort or otherwise by reason of *such person's own acts or conduct.'* Tenn. Code Ann. § 48-217-101(a)(3) (emphasis added)."); *Ctr. for Digestive Disorders & Clinical Research, P.C. v. Calisher*, No. E2004-02309-COA-R3CV, 2005 WL 2086035, at *2 (Tenn. Ct. App. Aug. 30, 2005) ("Under Tennessee law, an agent of a corporation may be personally liable to another party for the agent's tortious conduct which injures another, despite the lack of privity. *See, John Martin Co., v, Morse/Diesel, Inc.*, 819 S.W.2d 428 (Tenn.1991)."); *Wilson v. Wayne Cty.*, 856 F. Supp. 1254, 1264, 1994 WL 317720 (M.D. Tenn. 1994) ("The *Restatement* provides:

'Principal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent ..., and a judgment can be rendered against each.' *Restatement (Second) of Agency* § 359C(1) (1957).").

Likewise, the dismissal of the civil conspiracy claim against the Corporate Defendants does not implicate the Plaintiff's separate claims of TCPA (Count I), fraud (Count II), and negligent misrepresentation (Count III) against the Corporate Defendants. Under Tennessee law, a corporation can be held liable for the tortious conduct of their agents.

- Although Mr. Reagan's actions were allegedly deceptive and unknown to the SecurAmerica Board, that is not sufficient to defeat the trial court's finding that Mr. Reagan had authority to act in this case. As explained in a treatise on the subject:

  > The fraud and deceit of the officers and agents of a corporation, performed in the course of their employment, and for the benefit of the corporation, is imputable to the corporation, although it may have been unauthorized. This is true not only when the fraud or deceit is set up by the other party as ground for rescission of a contract [ ] that party was induced to enter, but also where it is relied upon as ground for an action of deceit against the corporation. Any deceit practiced by the corporation's officers or agents acting on behalf of the corporation, even though ultra vires, binds the corporation.

  10 *Fletcher Cyc. Corp.* § 4886 (footnotes omitted). Thus, the evidence does not preponderate against the trial court's finding that Mr. Reagan's actions were imputed to SecurAmerica.

  SecurAmerica Bus. Credit v. Schledwitz, No. W2012-02605-COA-R3CV, 2014 WL 1266121, at *19 (Tenn. Ct. App. Mar. 28, 2014).

- Indeed, a principal may be held liable for an agent's tortious act, even if that act occurs outside of the scope of the agency, if the act was commanded or

directed by the principal. *See Kinnard v.. Rock City Const. Co.*, 39 Tenn. App. 547, 551, 286 S.W.2d 352, 354 (1955). As the *Kinnard* Court stated the rule:

> A master is liable for the tort of his servant where the tortious act is done in obedience to his express orders or directions, even though the service is not *724 within the line of the servant's usual duties, and provided the injury to the third person occurs as the natural, direct, and proximate result of the directed or authorized act.

Id. at 551–52, 286 S.W.2d at 354–55. The court also noted that the law did not strictly require that "the principal or master should expressly direct or have knowledge of the act done; it is enough that the servant or agent was acting in the business of his superior." *Id.* at 551, 286 S.W.2d at 354 (citing *Luttrell v. Hazen*, 35 Tenn. (3 Sneed) 20, 25 (1855)).

White v. Revco Disc. Drug Centers, Inc., 33 S.W.3d 713, 723–24 (Tenn. 2000).

- It has long been recognized in Tennessee that a principal may be held vicariously liable for the negligent acts of its agent when the acts are within the actual or apparent scope of the agent's authority. It is also generally recognized that a plaintiff may sue a principal based on its vicarious liability for the tortious conduct of its agents without suing the agent. Even where the agent's conduct is the sole basis for the principal's liability, the agent remains a "proper, but not a necessary" party. Thus, a plaintiff is free to sue the agent, the principal, or both. This common-law framework is well-established in Tennessee law.

  Abshure v. Methodist Healthcare-Memphis Hosps., 325 S.W.3d 98, 105–06 (Tenn. 2010) (footnotes omitted).

For these reasons, the ruling on the intra-corporate doctrine does not alter any of the previous rulings denying dismissal of the TCPA, fraud, and negligent misrepresentation claims against the Corporate Defendants, Defendant Jeff Hess, Defendant Stacy Stephens or Defendant Emil Moshabad.

(d) Rule 12.02(2) Dismissal of Conspiracy Theory Specific Personal Jurisdiction Does Not Dismiss Count V Conspiracy Claim Against Schrage Defendants

Also for clarification is that in dismissing Count V – Conspiracy against the Corporate Defendants, Defendant Jeff Hess, Defendant Stacy Stephens, and Defendant Emil Moshabad, the Court segregates out and does not dismiss the Count V – Conspiracy claim against the Schrage Defendants. The reasoning for not dismissing this claim against the Schrage Defendants is that, as the sole owners of the Defendant Corporations, they are the individuals who are globally alleged to have had knowledge of and directed the alleged fraudulent warranty scheme between and among the three dealerships with the coordination of their employees. Taken as true, this alleged conduct, if proven, could support a claim against the Schrage Defendants to which they could be held individually liable for civil conspiracy, even though their wholly owned corporations and individual employees could not be held individually liable for civil conspiracy because of the intra-corporate nature of the alleged conspiracy.

(2) Rule 12.02(2) Primary Participant Theory Inextricably Intertwined With Merits Of The Lawsuit – Held in Abeyance

Turning now to the second and independent ground presented by the Plaintiff for asserting specific personal jurisdiction over the Schrage Defendants, that they were primary participants in the alleged fraudulent warranty scheme, the Court has performed the same two-part analysis stated above and has studied in detail the allegations against

the Schrage Defendants in the *First Amended Complaint* in conjunction with the testimony from the declarations and depositions submitted by both parties. Filtering all of the allegations and evidence through the legal standard for motions to dismiss for lack of personal jurisdiction, the Court concludes that because of the particular complexity[5] of this case as it relates to the Schrage Defendants, a determination on whether this Court has personal jurisdiction over the Schrage Defendants as "primary participants" in the alleged fraudulent warranty scheme can not be determined at this time because it is dependent upon and/or intertwined with a decision on the merits of this lawsuit.

For this reason, pursuant to the "procedural leeway" provided to trial courts in resolving Rule 12.02(2) motions, the Court shall hold in abeyance the Schrage

[5] An inexhaustive list of factors leading to the Court's conclusion regarding the "particular complexity" of this lawsuit are:

- This lawsuit involves 22 attorneys representing 9 Total Parties that include corporations, LLCs and individuals;
- The *First Amended Complaint* is 53 pages (excluding exhibits), contains 193 separate paragraphs and alleges 9 separate causes of action – Violation of the Tennessee Consumer Protection Act (TENN. CODE ANN. § 47-18-101, *et. seq.*), Fraud, Negligent Misrepresentation, Breach of Contract, Conspiracy, Fraudulent Transfer of Assets, Conspiracy or Aiding & Abetting, and Unjust Enrichment;
- The lawsuit seeks compensatory damages in excess of $100,000,000.00, as well as treble damages and punitive damages, pre-judgment and post-judgment interest, attorneys' fees and costs, prejudgment attachment and a temporary injunction;
- Since the inception of the lawsuit on August 9, 2016, there have been a total of approximately 325 docket entries for this case;
- The alleged fraudulent warranty scheme at issue in the case spanned at least 8 years and involved the submission of thousands of electronic warranty claims;
- The lawsuit was assigned by the Chief Justice of the Tennessee Supreme Court to the Business Court Pilot Project.

Defendants' *Motion To Dismiss For Lack Of Personal Jurisdiction* until after a decision on the merits of this lawsuit.[6]

In reaching this conclusion, the Court has considered the legal arguments of Counsel regarding the evidence submitted in support and opposition of the Schrage Defendants' *Motion To Dismiss For Lack Of Personal Jurisdiction* in conjunction with the particular complexity of this case.

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[6] In three separate opinions addressing Rule 12.02(2) motions, the Tennessee Supreme Court stated that under Tennessee law trial courts are authorized in complex cases to hold in abeyance ruling on a motion to dismiss for lack of personal jurisdiction until after the trial. *See, e.g.*, *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 403 (Tenn. 2015) ("In *Sumatra,* we explained that trial courts have considerable procedural leeway in resolving a Rule 12.02(2) motion, noting that a trial court 'may allow limited discovery,' 'hold an evidentiary hearing,' or even 'hold the motion in abeyance until after a trial.' 403 S.W.3d at 739; *see also Gordon,* 300 S.W.3d at 644 (noting a trial court's "considerable procedural leeway in addressing" Rule. 12.02(2) motions)."); *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 739 (Tenn. 2013) ("When weighing the evidence on a Tenn. R. Civ. P. 12.02(2) motion, the trial court must take all factual allegations in the plaintiff's complaint and supporting papers as true. The court must resolve all factual disputes in the plaintiff's favor. In complex cases, the court may allow limited discovery and hold an evidentiary hearing. The court may even hold the motion in abeyance until after a trial. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 644."); *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 644 (Tenn. 2009) (footnote omitted) ("Accordingly, in addition to considering the complaint and the supporting or opposing affidavits, the trial court may, in particularly complex cases, allow limited discovery, hold an evidentiary hearing, *Chenault v. Walker,* 36 S.W.3d at 56 n. 3, or even hold the motion in abeyance until a trial on the merits, Tenn. R. Civ. P. 12.04. 5B *Federal Practice and Procedure* § 1351, at 308–09."). As cited to by the Tennessee Supreme Court, this broad discretionary authority provided to trial courts under Tennessee law is in line with the federal courts.

> When a federal court is considering a challenge to its jurisdiction over a defendant or over some form of property, the district judge has considerable procedural leeway in choosing a methodology for deciding the motion. The court may receive and weigh the contents of affidavits and any other relevant matter submitted by the parties to assist it in determining the jurisdictional facts. In particularly complex cases, it may be desirable to hold rendering a decision on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction in abeyance, or even order a hearing and resort to oral testimony. Under certain circumstances, the ruling also may await the trial on the merits with the fact issues being left to the jury for determination if the district judge believes that is desirable. Deferring the ruling will enable the parties to employ discovery on the jurisdictional issue and might lead to a more accurate judgment on the subject than one made solely on the basis of affidavits. Rule 12(d) gives the district court discretion to delay its determination of the Rule 12(b)(2) motion.

§ 1351*Motions to Dismiss—Lack of Jurisdiction Over the Person*, 5B FED. PRAC. & PROC. CIV. § 1351 (3d ed.) (footnotes omitted).

As a preliminary matter, the Corporate Dealer's *Objection to Evidence Supporting Plaintiff's Response to Universal City Nissan, Inc. and Glendale Nissan/Infinity Inc.'s Motion to Dismiss* is denied.

Returning, then, to the Plaintiff's assertion of primary participant theory of personal jurisdiction, the Court sees that the Plaintiff relies primarily on the testimony of former consultant and service director for the Defendants, Keith Jacobs. He testified to the Schrage Defendants' alleged involvement in the warranty scheme.

In opposition, the Schrage Defendants argue that the Plaintiff has failed to demonstrate "with credible or admissible evidence that either Joe Sage or Mike Sage" were primary participants in the alleged fraudulent scheme because "Nissan relies entirely on one witness – Keith Jacobs – to support their contention that either Mike or Joe Sage engaged in purposeful conduct in furtherance of Jacobs' warranty scheme." *Reply Memorandum Of Law In Support Of Defendants Michael Schrage And Joseph Schrage Motion To Dismiss For Lack Of Personal Jurisdiction And Forum Non Conveniens*, pp. 1 & 2 (Dec. 4, 2017). Relying on statements from *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 382 (Tenn. 2015) ("[T]he trial court is "not obligated to accept as true factual allegations ... that are controverted by more reliable evidence and plainly lack credibility.") and *Chenault v. Walker*, 36 S.W.3d 45, 56 (Tenn. 2001) ("A court will take as true the allegations of the nonmoving party and resolve all factual disputes in its favor, but it should not credit conclusory allegations or draw farfetched inferences."), the Schrage Defendants argue that there is no credible

evidence showing that either Schrage Defendants actively participated in, or directed the fraudulent warranty scheme.

Specifically, the Schrage Defendants argue that Keith Jacobs' testimony is not credible, contradictory, largely inadmissible speculation and assumptions, and outweighed by more reliable evidence submitted by the Schrage Defendants. In support of their motion to dismiss, the Schrage Defendants submitted the following evidence in support of their contention that Schrage Defendants were not involved in any fraudulent scheme and do not have sufficient minimum contacts with Tennessee to establish a *prima facie* showing of personal jurisdiction.

- Declaration of Michael Schrage;
- Declaration of Joseph Schrage;
- April 12, 2017, Deposition Excerpts of Steve Coreas;
- April 12, 2017, Deposition Excerpts of Raul Cruces;
- April 13, Deposition Excerpts of Stacy Stephens;
- May 12, 2017, Deposition Excerpts of Bryan Hernandez;
- May 12, 2017, Deposition Excerpts of Dacenia "Yessi" Perez;
- May 15, 2017, Deposition Excerpts of Hubert Jow;
- October 12, 2017, Deposition Excerpts of Emil Moshabad.

This evidence, according to the Schrage Defendants, establishes that the Plaintiff's evidence in opposition to the *Motion To Dismiss* should not be accepted by the Court as true factual allegations because it is "controverted by more reliable evidence and plainly lacks credibility." *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 735 (Tenn. 2013).

After studying in detail the *First Amended Complaint* and other declarations and depositions submitted by the parties, the Court concludes that the allegations and evidence submitted are neither farfetched nor conclusory as it relates to the Schrage

Defendants alleged involvement in the fraudulent warranty scheme. The factual allegations contained, for example, at paragraphs 76-100 coupled with the testimony of Keith Jacobs provides a contradictory version of events from the evidence submitted by the Schrage Defendants. The differing version of events and jurisdictional facts go to the core of the ultimate determination in this lawsuit as to whether the Schrage Defendants were "primary participants" in the alleged fraudulent scheme. Necessarily at play in these disputed facts are varying credibility determinations. These credibility determinations[7]

[7] The Court is aware that in *Wilson v. Sentence Info. Servs.*, a case involving a motion to dismiss for lack of *subject* matter jurisdiction, the Court of Appeals stated that:

> In deciding jurisdictional facts, trial courts may consider the pleadings and affidavits or other evidence purporting to show the material facts. They may also weigh written evidence, including evidence presented by affidavit.
>
> As part of weighing the evidence regarding jurisdictional facts, trial courts in non-jury cases may 'make a determination that in many cases will entail believing one party over another.' Therefore, when the affidavits pertinent to jurisdictional facts contradict each other, the court has the power to choose to rely on one affidavit over the other.

No. M1998-00939-COA-R3CV, 2001 WL 422966, at *6–7 (Tenn. Ct. App. Apr. 26, 2001) (citations omitted).

The Court has declined to weigh the conflicting testimony in this case in order to not predetermine the final outcome of the lawsuit. As stated below, the credibility determinations and conflicting testimony are at the heart of the merits of this lawsuit and therefore waiting to make a determination on Schrage Defendant's personal jurisdiction until a ruling on the merits is appropriate. In addition to the credibility determinations going to the heart of the merits of the case, the Court has also taken into consideration the decision by the Sixth Circuit Court of Appeals in *Theunissen v. Matthews*, cited by this Court's in its February 23, 2018 *Memorandum And Order*, where the Sixth Circuit said that a Court should not weigh the conflicting testimony of the party seeking dismissal.

> The court's treatment of a motion under Rule 12(b)(2) mirrors in some respects the procedural treatment given to a motion for summary judgment under Rule 56. For example, the pleadings and affidavits submitted on a 12(b)(2) motion are received in a light most favorable to the plaintiff. *Serras*, 875 F.2d at 1214; *Welsh*, 631 F.2d at 439. In sharp contrast to summary judgment procedure, however, the court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal. *Serras*, 875 F.2d at 1214; *accord Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir.1981). We adopted this rule in *Serras* in order to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an

and the disputed issues of fact that bear upon personal jurisdiction may ultimately be dependent upon and/or are intertwined with a decision on the merits. In this case, the ultimate determination of the differing versions of events will be for a jury to decide if the case goes to trial.[8]

Under these circumstances, where the disputed jurisdictional facts are intertwined with credibility determinations and ultimately depend on the merits of the Plaintiff's case, postponing a decision on the motion to dismiss until trial is an appropriate approach and in line with the Court's responsibility to "proceed carefully and cautiously" on motions to dismiss for lack of personal jurisdiction "to avoid improperly depriving the plaintiff of its right to have its claim adjudicated on the merits." *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 644 (Tenn. 2009).

This cautious approach is in line with other jurisdictions faced with similar jurisdictional disputes that are intertwined with the merits of the lawsuit.

> - Turning now to appellants' contentions, Rule 12(d) of the Federal Rules of Civil Procedure clearly contemplates a preliminary hearing and determination of jurisdictional issues in advance of trial unless the court defers such action until the time of trial. Furthermore, as there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court. Certainly the trial court may gather evidence on the question of

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> affidavit denying all jurisdictional facts, as the Appellee has done in the case before us. *Id.; accord Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir.1977). In *Serras*, we stated that the defendant who alleges facts to defeat jurisdiction has recourse to the court's discretionary authority to hold an evidentiary hearing if he disputes the plaintiff's factual assertions. *Serras*, 875 F.2d at 1214.

935 F.2d 1454, 1459 (6th Cir. 1991).

[8] Holding in abeyance ruling on the Schrage Defendants' *Motion To Dismiss For Lack Of Personal Jurisdiction* until after a decision on the merits of this lawsuit does not eliminate the parties' right to file a Rule 56 motion for summary judgment in part or in whole.

> jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist, and based upon the evidence so obtained, decide the jurisdictional dispute before trial. One deviation from this procedure is in the case where the issue of jurisdiction is dependent upon a decision on the merits. In that circumstance, the trial court should determine jurisdiction by proceeding to a decision on the merits. The purpose of postponing a determination upon a jurisdictional question when it is tied to the actual merits of the case is to prevent a summary decision on the merits without the ordinary incidents of a trial including the right to jury.

Schramm v. Oakes, 352 F.2d 143, 149 (10th Cir. 1965) (citations omitted).

- The court's solicitude for defendants who object to its personal jurisdiction is always tempered, however, by its concern that the door to a federal courtroom not be slammed in the face of a plaintiff seeking to invoke its powers where there is, in fact, no defect in personal jurisdiction. Particularly where the disputed jurisdictional facts are intimately intertwined with the parties' dispute on the merits, a trial court should not require plaintiffs to mount "proof which would, in effect, establish the validity of their claims and their right to the relief sought." *Milligan v. Anderson,* 522 F.2d 1202, 1207 (10th Cir. 1975); *Montreal Trust Co.,* 358 F.2d at 242. Judicial resources may be more efficiently deployed if the court holds but one hearing on the contested facts. *Bialek v. Racal–Milgo, Inc.,* 545 F. Supp. 25, 33–34 (S.D.N.Y.1982). And more fundamentally, as the Second Circuit has noted, postponing proof till trial allows a plaintiff to present all her proof "in a coherent, orderly fashion and without the risk of prejudicing his case on the merits." *Data Disc,* 557 F.2d at 1285–86 n. 2. In many cases, then, a district court may find sound reasons to rule, on the basis of written submissions, that the plaintiff has made her *prima facie* showing that the court has personal jurisdiction over a defendant, and to reserve all factual determinations on the issue for trial.

Serras v. First Tennessee Bank Nat. Ass'n, 875 F.2d 1212, 1215 (6th Cir. 1989).

- Our recent decision in *Archangel Diamond Corp. v. Lukoil,* 123 P.3d 1187 (Colo.2005), articulates the principles that govern the type of jurisdictional challenge that presents itself here. *Id.* at 1191–95. In its discretion, a court may address a motion to dismiss for lack of personal jurisdiction on documentary evidence alone or by holding an evidentiary hearing. *Id.* at 1192. When making this determination, a court should consider whether, in the circumstances of the case, "it is unfair to force an out-of-state defendant

to incur the expense and burden of a trial on the merits in the local forum without first requiring" an evidentiary hearing on the issue of personal jurisdiction. *Id.* at 1193 (internal quotation omitted). A court may properly invoke an evidentiary hearing when, for example, "the proffered evidence is conflicting and the record is rife with contradictions, or when a plaintiff's affidavits are patently incredible." *Id.* However, courts should be wary of adjudicating the jurisdictional issue with an evidentiary hearing "where the jurisdictional facts are inextricably intertwined with the merits of the case, because doing so could endanger the plaintiff's substantive right to a jury trial." *Id.* (citing *Foster–Miller, Inc. v. Babcock & Wilcox Can.,* 46 F.3d 138, 149 (1st Cir.1995), which states: "This method [of holding an evidentiary hearing] must be used discreetly," *id.* at 146). Evidentiary hearings contemplate binding adjudication and the court's factual findings on the jurisdictional issue could later have a preclusive effect against a party. *Archangel,* 123 P.3d at 1193.

Goettman v. N. Fork Valley Rest., 176 P.3d 60, 65–66 (Colo. 2007).

- Defenses including the lack of personal jurisdictional "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." *Fed. R. Civ. P.* 12(d). "[W]here the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of *71 factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. United States,* 704 *F.*2d 1074, 1077 (9th Cir.1983). Awaiting trial to decide jurisdiction should be the exception, not the rule.

Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 557 (N.J. 2000).

Accordingly, the Court shall hold in abeyance ruling on *Defendants Michael Schrage And Joseph Schrage Motion To Dismiss For Lack Of Personal Jurisdiction* under Tennessee Civil Procedure Rule 12.02(2) after a ruling on the merits of the lawsuit.

B. *Forum Non Conveniens*

With respect to the Schrage Defendants' *Motion to Dismiss* based upon *forum non conveniens*, the motion is denied. The public and private factors present in this case do not support such a drastic remedy. *See Iman v. Iman*, No. M2012-02388-COA-R3 CV, 2013 WL 7343928 at *5 (Tenn. Ct. App. Nov. 19, 2013 (citing 20 AM. JUR. 2D *Courts* § 116)).

2. Motions to Dismiss of Corporate Defendants

A. Specific Personal Jurisdiction Over Corporate Defendants

The Court concludes as a matter of law that it has specific personal jurisdiction over Defendants Universal City Nissan, Inc. and Glendale Nissan/Infiniti, Inc. based on the United States Supreme Court's "*Calder* effects" test.[9]

In reaching this conclusion, the Court maintains and incorporates by reference its prior December 6, 2016 *Memorandum And Order: (1) Denying Motions To Dismiss Defendant west Covina Nissan, LLC And Defendant Keith Jacobs; And (2) Holding In Abeyance, For Discovery, Ruling On Motions To Dismiss Defendants Jeff Hess And Defendant Emil Moshabad* which provides the basis and legal rationale for exercising specific personal jurisdiction over Corporate Defendant West Covina pursuant to the United States Supreme Court's *Calder* "effects" test. The allegations in the *First*

[9] General personal jurisdiction is not an issue. It is undisputed that the Plaintiff is asserting specific personal jurisdiction over the Corporate Defendants Universal City Nissan, Inc. and Glendale Nissan/Infiniti, Inc. *Response To Universal City Nissan Inc. And Glendale Nissan/Infiniti Inc.'s Motion To Dismiss*, p. 3 (Nov. 28, 2017) ("Nissan indisputably asserts specific personal jurisdiction in this case…").

Amended Complaint against the Corporate Defendants mirror and/or are identical to the allegations made against Corporate Defendant West Covina Nissan, LLC.

With respect to the additional case law and arguments cited in support of the Corporate Defendants' argument that the Court lacks specific personal jurisdiction, respectfully, the Court disagrees that the additional case law and/or legal arguments provide a basis to dismiss the Corporate Defendants for lack of personal jurisdiction.

For example, in paragraphs 22, 23, 25, 30, 32, 33, 35, 37-48, 50, 52, 54, 56, 58, 59, 62, 65, 68, and 90-95 of the *First Amended Complaint*, the Plaintiff alleges fraudulent conduct by the Corporate Defendants of preparing and submitting false warranty claims that was aimed at the Plaintiff's business in Tennessee with knowledge that Plaintiff's injury, the payment of fraudulent warranty claims, would be suffered in its home state. These allegations are sufficient to show that the Corporate Defendants knew or should have known that the brunt of the injury, payment of the alleged fraudulent claims, would necessarily be suffered in Tennessee where NNA is headquartered. The effects of the Corporate Defendants' alleged fraudulent conduct connects the Corporate Defendants to Tennessee, not just the Plaintiff.

The Court therefore concludes that (1) the Plaintiff has made a *prima facie* showing that the Corporate Defendants Universal City Nissan, Inc. and Glendale Nissan/Infiniti, Inc. have sufficient minimum contacts with Tennessee to support specific personal jurisdiction and (2) that exercising jurisdiction over the Corporate Defendants would not be unreasonable or unfair.

B. Court Declines To Convert Motion To Dismiss To Summary Judgment

In addition to challenging whether the Court has personal jurisdiction, the Corporate Defendants also seek to dismiss all counts in the *First Amended Complaint* under Tennessee Civil Procedure Rule 12.02(6) for failure to state a claim by seeking to convert the current motion to dismiss to a motion for summary judgment in order to consider matters outside of the pleadings.

In support of converting the motion to dismiss to a Rule 56 motion for summary judgment, the Corporate Defendants argue that the specific circumstances of this case warrant conversion.

> Motions to dismiss for failure to state a claim typically are decided on the legal basis of the plaintiff's claims, and not the strength of its evidence. *See West v. Schofield*, 468 S.W.3d 482, 489 (Tenn.2015). But the Rules permit the Court, in its discretion, to consider matters outside of the pleading "with meticulous care" and treat the motion as one for summary judgment under Rule 56. *Thomas v. Transport Ins. Co.*, 532 S.W.2d 263, 266 (Tenn.1976); *see* Tenn. R. Civ. Proc. 12.02.
>
> The circumstances of this case present a situation where this Court should exercise its discretion to consider the evidence. This case has been pending for well over a year, and NNA has undertaken significant discovery and numerous depositions. And the allegations against the Dealers arise solely from the declaration of Mr. Jacobs, albeit based almost entirely on inadmissible hearsay. The parties have had the opportunity to depose Mr. Jacobs as well as the Dealers' service managers, Ms. Stephens and Mr. Arguello, who have actual personal knowledge regarding NNA's allegations. The discovery conducted to date therefore is significant and substantial such that the evidence obtained from it should be considered here.
>
> That evidence does not support any of NNA's allegations that the Dealers performed fraudulent warranty work. Mr. Jacobs's dubious claims rest almost entirely on conversations that he had with Ms. Stephens and Mr. Arguello while he consulted for the Dealers. Those conversations are inadmissible, and Ms. Stephens and Mr. Arguello nevertheless vehemently

> denied that they ever occurred. Importantly, however, both Ms. Stephens and Mr. Arguello confirmed that, to their knowledge, no fraudulent warranty work ever occurred at the Dealers while on their watch. And as service managers, they would have been in the best position to testify about the warranty work at the Dealers. Consistent with Ms. Stephens and Mr. Arguello's testimony, Mr. Jacobs also confirmed he had no personal knowledge about any fraudulent warranty work being performed by the Dealers, despite his declaration insinuating the contrary. The evidence does not support NNA's allegations.

Memorandum Of Law In Support Of Universal City Nissan, Inc.'s And Glendale Nissan/Infiniti, Inc.'s Omnibus Motion To Dismiss, pp.19-20 (Nov. 9, 2017).

In opposition, the Plaintiff argues that based on the complexity of this lawsuit, the Court should exercise its discretion and decline to convert the motion to dismiss to a summary judgment motion.

> This is an enormously complex case in which the Plaintiff seeks $100 million in damages. Universal and Glendale's attempt to have it dismissed based on a handful of friendly depositions and a grand total of roughly a page of legal argument, without providing a statement of facts under Rule 56.03 is pure effrontery. Universal and Glendale do not even attempt to construct an actual argument under Rule 12.02(6), and the Court, consequently, should not even attempt to consider the motion as one attacking the legal sufficiency of the Amended Complaint.
>
> The present motion would justly fit into a Wright and Miller footnote on the conversion of Rule 12 motions to Rule 56 ones: "When the extrapleading material is comprehensive and will enable a rational determination of a summary judgment motion in accordance with the standard set forth in Rule 56, the district court is likely to accept it; when it is scanty, incomplete, or inconclusive, the district court probably will reject it." 5C Charles A. Wright et al., *Federal Practice & Procedure* § 1366 (3d ed.). Glendale and Universal have filed approximately one half-inch of evidentiary material in support of their motion to have dismissed a case contained in around nine feet of file, in which discovery is far from complete. The impropriety of converting the motion to one for summary judgment under the circumstances is self-evident.

> Accordingly, the Court should decline Universal and Glendale's invitation to convert their motion to one for summary judgment, expressly exclude and disregard materials outside the pleadings for purposes of the Rule 12.02(6) motion, *cf. Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1983) ("[O]n a motion under Rule 12(b)(6) extraneous matter may not be considered if the court excludes it, but if the court does not exclude such material the motion Shall be treated as a motion for summary judgment."), and—except for the portion on the TCPA, *see* Part 2, *supra*, deny that motion for its failure, qua Rule 12 motion, to comply with Tennessee Rule of Civil Procedure 7.02 and Local Rule 26.04.2.

Response To Universal City Nissan Inc. And Glendale Nissan/Infiniti Inc.'s Motion To Dismiss, pp. 22-24 (Nov. 28, 2017).

After considering the arguments of Counsel, the Court declines to convert the Corporate Defendant's motion to dismiss to a Rule 56 motion for summary judgment. *Meeks v. Gasaway*, No. M2012-02083-COA-R3CV, 2013 WL 6908942, at *4 (Tenn. Ct. App. Dec. 30, 2013) ("It lies within the discretion of the trial court to receive evidence outside the pleadings and convert a motion to dismiss into a motion for summary judgment.") (citations omitted).

As discussed above, this case is complex with many causes of action, parties and legal theories. *See infra* Footnote 5. Furthermore, given the egregious conduct alleged in the *First Amended Complaint* coupled with the amount at stake, proceeding to evaluate the strength of the evidence would not be prudent. If the Court were to proceed in the manner suggested by the Corporate Defendants, the Court and parties would not have the benefit of Rule 56.03 statements of material fact. These statements of material fact help provide organization to frame the dispute for both Counsel and the Court and, if

appealed, provide a fulsome record for the Court of Appeals. Not proceeding in this fashion increases the likelihood of more time and expense due to reversal or remand.

Given the complexity of this case and the lack of Rule 56 procedural safeguards, the Court declines to convert the motion to dismiss to a summary judgment motion and, on that basis, the Rule 12.02(6) motion is denied.

C. Other Rule 12.02(6) Grounds for Dismissal

In addition to the foregoing, the Corporate Defendants also raise two independent grounds for dismissal of Count I – Tennessee Consumer Protection Act ("TCPA") and Count V – Conspiracy.

First, with regard to Count I – TCPA, the Corporate Defendants argue that the Plaintiff is seeking relief only for itself as the sole customer of the Corporate Dealers and not for unfair or deceptive practices that affect the conduct of "trade or commerce" as required by the TCPA. For the reasons stated in the Court's December 6, 2016 *Memorandum And Order* at pages 58-60 which addressed this same legal challenge by Corporate Defendant West Covina Nissan, LLC, the Court denies dismissal of Count I – TCPA against the Corporate Defendants.

With regard to the Count V – Conspiracy claim against the Corporate Defendants, in the prior rulings on pages 8-25 of this *Memorandum And Order*, the Court has already analyzed and ruled upon this issue and has dismissed this cause of action against the Corporate Defendants based on the intra-corporate doctrine.

3. Defendant Stacy Stephens' Motion For More Definite Statement

After reviewing the arguments of counsel and the applicable law, the Court concludes that the *First Amended Complaint* is not so vague or ambiguous that Defendant Stephens cannot reasonably frame a responsive pleading. In reaching this conclusion, the Court relies on and incorporates the arguments on pages 2-6 of the Plaintiff's November 27, 2017 *Response In Opposition To Defendant Stacy Stephens' Motion For More Definite Statement*.

In addition, further guidance to deny *Defendant Stacy Stephens' Motion For More Definite Statement* is the Court's previous December 1, 2017 *Memorandum And Order Denying Defendant Jeff Hess's Motion To Dismiss*. The arguments raised by Defendant Stephens "requesting specific, detailed examples of her actions which constitute fraud committed against the Plaintiff" and "request dates in which these alleged frauds occurred" are similar to the arguments raised and rejected by the Court in Defendant Jeff Hess' July 24, 2017 *Motion To Dismiss First Amended Complaint For Failure To Comply With Rule 9.02*. In denying that *Motion* the Court cited to and relied upon law that identifying and detailing the specific role of one defendant in an alleged fraudulent scheme involving multiple defendants is sufficient.

> 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.
>
> > 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).
>
> **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 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.”

Motion To Dismiss First Amended Complaint For Failure To Comply With Rule 9.02, pp. 10-11 (July 24, 2017) (footnote omitted).

Based on the foregoing, the Court concludes that the allegations in the *First Amended Complaint* alleged against Defendant Stacy Stephens do not require a more definite statement pursuant to Rule 12.05 of the Tennessee Rules of Civil Procedure.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

Eugene N. Bulso, Jr.
Steven A. Nieters
Attorneys for Nissan North America, Inc.

James W. Cameron III
Patrick W. Merkel
Victor P. Danhi
Halbert Rasmussen
Franjo M. Dolenac
Attorneys for West Covina Nissan, LLC

Sam D. Elliott
Wade K. Cannon
Louis W. Pappas
Attorneys for Jeff Hess

Jonathan Michaels
Winston S. Evans
Attorney for Emil Moshabad

Todd E. Panther
Attorney for Keith Jacobs

Mark Freeman
Michael Wrenn
Attorneys for Stacy Stephens

Steven A. Riley
Milton S. McGee, III
David Thomas Bartels
Attorneys for Michael Schrage and Joseph Schrage

Byron R. Trauger
Paul W. Ambrosius
Kathryn A. Stephenson
Steven M. Goldberg
Kishan H. Barot
Attorneys for Leonard Schrage