

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

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

**MEMORANDUM AND ORDER: (1) HOLDING RULING  
ON DEFENDANT LEONARD SCHRAGE’S RULE 12.02(2)  
MOTION IN ABEYANCE AND (2) DENYING RULE 12.02(6) MOTION**

This matter is presently before the Court on *Defendant Leonard Schrage’s Motion To Dismiss* filed on January 22, 2018 for lack of personal jurisdiction, pursuant to Tenn. R. Civ. P. 12.02(2), and failure to state a claim, pursuant to Tenn. R. Civ. P. 12.02(6).

After studying the pleadings, arguments of Counsel and the applicable law, it is ORDERED that:

1. A ruling on the Rule 12.02(2) motion to dismiss Defendant Leonard Schrage for lack of 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; and

2. The 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted is denied.

In addition to the foregoing rulings, it is ORDERED that for clarity the word “Conspiracy” is stricken from the heading of Count VI in the *Supplement To First Amended Complaint*. This order is based upon the Plaintiff’s assertion that the Count VI – Conspiracy Or Aiding & Abetting (Against Leonard Schrage) in the *Supplement To First Amended Complaint* is not a claim for tortious civil conspiracy against Defendant Leonard Schrage, but rather is only a claim for aiding and abetting.

The law and analysis on which these rulings are based are as follows.

### **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.<sup>1</sup> 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.

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<sup>1</sup> On October 25, 2017, the Court granted the Plaintiff’s *Motion To Increase Ad Damnum* to increase the actual, compensatory and consequential damages being sought against the defendants to One Hundred Million Dollars (\$100,000,000.00).

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. Also, 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.

In addition, on July 20, 2017, Defendant West Covina Nissan, LLC filed a Third-Party Complaint against Third-Party Defendant Keith Jacobs for fraudulent intentional misrepresentation; fraudulent misrepresentation by concealment; breach of fiduciary duty; negligent misrepresentation; unjust enrichment; conversion; breach of contract and implied indemnification and contribution. On August 14, 2017, the Third-Party Defendant filed an answer and counterclaimed against Third-Party Plaintiff West Covina Nissan, LLC for indemnity and abuse of process.

On November 9, 2017, the Plaintiff filed a *Supplement To First Amended Complaint* and added claims against, Defendant Leonard Schrage, individually. He is a citizen and resident of California and is the brother of Defendants Joseph and Michael Schrage. The Plaintiff asserts claims against Defendant Leonard Schrage of aiding and abetting; fraudulent transfer of assets, and unjust enrichment. The Plaintiff alleges that Defendant Leonard Schrage “is, indirectly, an owner of West Covina Nissan” and “is also an owner, officer, and director of Universal City Nissan Inc. and Glendale Nissan/Infiniti Inc.” *Supplement To First Amended Complaint*, p. 2 ¶ 155 (Nov. 9, 2017). The Plaintiff claims that Defendant Leonard Schrage “knew that his two brothers (Michael and Joseph) were robbing the bank (Nissan), knowingly pocketed one-third of the loot from the heist,

and concealed the unlawful theft from Nissan. *Supplement To First Amended Complaint*, p. 5 ¶ 169 (Nov. 9, 2017).

### **Analysis and Authorities**

Defendant Leonard Schrage's motion to dismiss the claims asserted against him in the *Supplement To First Amended Complaint* is based on two grounds: (1) lack of personal jurisdiction pursuant to TENN. R. CIV. P. 12.02(2) and (2) failure to state a claim upon which relief can be granted pursuant to TENN. R. CIV. P. 1202(6). In that sequence, the grounds for dismissal are analyzed below.

#### 1. Lack of Personal Jurisdiction Pursuant To TENN. R. CIV. P. 12.02(2)

In examining whether personal jurisdiction can be asserted over Defendant Leonard Schrage, 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.

The Plaintiff's theory is based upon Defendant Schrage's continuing business relationship to the alleged fraudulent scheme and his fiduciary duty related to that business relationship. The undisputed facts are that Defendant Leonard Schrage, as an owner of the Defendant corporate entities, was a signatory to the Nissan dealership

agreements. That, according to the Plaintiff, created a fiduciary duty on his part in that Nissan was reposing confidence and trust in him in their business dealings.

On June 15, 2015, Leonard Schrage signed a Nissan Dealer Sales & Service Agreement for Universal City Nissan Inc. as its “Principal Owner.” (2d Walker Dec. Ex. 3.) The Agreement expressly recites that it was “executed ... in triplicate ... at Franklin, Tennessee.” (*Id.*) It sets forth an expiration date of February 1, 2021, and gives rise to a comprehensive franchise relationship between Nissan and Universal City. (*Id.*) Leonard’s involvement in that relationship is not merely incidental; to the contrary, the Agreement specifies, “In entering into this Agreement and appointing [Universal as a Dealer], [Nissan] is relying upon the personal qualifications, expertise, reputation, integrity, experience, ability and representations of the individual(s) named herein as Principal Owner(s) ...” (*Id.*) Leonard’s death, felony conviction, or divestiture are grounds for the Agreement’s termination. (*See* Standard Provisions §§ 12.A.2, 12.A.9, 12.C.8)

Nor has Leonard been merely a paper participant in the Nissan retail business. To the contrary, he has worked daily in that field for over a quarter-century. (*See* Leonard Dec. ¶¶ 2–5, 10–12.) In fact, up till now Leonard has had an “excellent and long-standing relationship[] with Nissan,” to the extent that he believed Nissan would have authorized him to acquire additional Nissan dealerships. (Leonard Dec. ¶ 60.) And the parties to the Agreement acknowledged that, notwithstanding the complexities of the Sage Motor Group organizational chart, “Leonard Schrage has the complete authority to make all ordinary and customary operational decisions and to run the day-to-day business of [Universal City] in all respects.” (2d Walker Dec. Ex. 3 at 5.)

Thus, Leonard is no passive owner of the Defendant entities. To the contrary, he has taken an active, engaged role in them, working hand-in-hand with Nissan long after its relocation to middle Tennessee.

*Response To Defendant Leonard Schrage’s Motion To Dismiss*, pp. 20-22 (Feb. 26, 2018)  
(footnote omitted).

Asserted in the *Supplement To First Amended Complaint* is that Defendant Leonard Schrage failed to act in a manner consistent with his fiduciary duty when he, with full knowledge of his brothers’ alleged fraudulent warranty scheme and conspiracy,

remained silent and did not inform Nissan of any wrongdoing. This silence, while normally not incriminating on its own, became incriminating because of Defendant Leonard Schrage's business fiduciary duty. Even further incriminating, according to the *Supplement To First Amended Complaint*, is that with full knowledge of the alleged wrongdoing being orchestrated by his Defendant brothers and his businesses, Defendant Leonard Schrage accepted the alleged fruits of the fraud in the form of multi-million dollar annual distributions/compensation. These allegations and their location in the pleading is summarized as follows.

- Defendant Leonard Schrage knew of the conspiracy and acts of warranty fraud (¶165);
- Defendant Leonard Schrage knowingly benefited from the conspiracy and the acts of warranty fraud (¶ 165);
- Defendant Leonard Schrage intentionally concealed the existence of the conspiracy and the acts of warranty fraud (¶ 165);
- Defendant Leonard Schrage, in his capacity as an officer of various entities within the Sage Automotive Group, made material and necessary contributions to the overall operation of those entities, at a time at which he was aware that those entities were participating and their operations being utilized in a conspiracy to defraud Nissan (¶ 166);
- Defendant Leonard Schrage opposed defendant West Covina Nissan LLC's rehiring of Keith Jacobs in early 2014 because Leonard Schrage was aware that Jacobs, while service manager at West Covina Nissan LLC had submitted thousands of fraudulent warranty claims to Nissan (¶ 167);
- Defendant Leonard Schrage failed to disclose, and indeed concealed, the ongoing conspiracy and fraud (¶ 168);
- Defendant Leonard Schrage knowingly accepted the proceeds generated by the conspiracy and concealed the conspiracy (¶ 172);

- Defendant Leonard Schrage received Five Million Dollars (\$5,000,000.00) annually in distributions/compensation from the Sage Dealerships from at least January 2010 through December 2016 (¶¶ 175-178; 188-192);

While the Plaintiff admits that these acts independently may be insufficient to satisfy the minimum contacts analysis, the Plaintiff asserts that collectively and in the context of the entire lawsuit, these facts are more than sufficient to exercise specific personal jurisdiction over Defendant Leonard Schrage.

In opposition, Defendant Schrage argues that the allegations in *Supplement To First Amended Complaint* fail to establish sufficient jurisdictional facts to support a finding of specific personal jurisdiction over Defendant Leonard Schrage because (1) the mere existence of a contract between an out-of-state defendant and a forum resident does not amount to sufficient minimum contacts; (2) even if a defendant has minimum contacts with the forum state, specific jurisdiction exists only if the cause of action arises out of those contacts; and (3) specific jurisdiction exists in tort cases where the out-of-state tortfeasor is the primary participant of the tortious conduct directed at the forum state.

In determining whether the foregoing conduct/actions alleged in *Supplement To First Amended Complaint* provides the requisite minimum contacts to exercise specific personal jurisdiction over Defendant Leonard Schrage, the Court applies its previous decision on February 15, 2018 addressing the issue of personal jurisdiction of Defendant Leonard Schrage's brothers – Michael and Joseph Schrage.

In the February 15, 2018 *Memorandum And Order Ruling* on the motion to dismiss Michael and Joseph Schrage for lack of personal jurisdiction, the Court held in

abeyance ruling on the brothers' Rule 12.02(2) motion to dismiss for lack of personal jurisdiction until a final decision on the merits of the lawsuit because of the complexity of the case and that the jurisdictional issues are closely intertwined with a determination on the merits. The authority for this ruling was that in three separate opinions addressing Rule 12.02(2) motions, the Tennessee Supreme Court has 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 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 by the Tennessee Supreme Court, this broad discretionary authority provided to trial courts under Tennessee law is in line with the federal courts.

The February 15, 2018 *Memorandum* also contained an inexhaustive list of factors leading to the Court’s conclusion regarding the “particular complexity” of this lawsuit.

- 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.

The Court then applied the following rationale of the Tennessee Supreme Court:

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).

*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*, pp. 25-27; 29-31 (Feb. 15, 2018) (certain footnotes omitted).

While the factual allegations against Defendant Leonard Schrage are different than those alleged against his brothers, the reasons for holding in abeyance ruling on the motion to dismiss for lack of personal jurisdiction are the same.

First, the "particular complexity" of this case has not changed since February 15, 2018 when the Court ruled on the Defendant Brothers motion to dismiss for lack of personal jurisdiction. Rather, the allegations raised against Defendant Leonard Schrage in conjunction with his familial and business relationship with his brothers present even more legal and factual complexity.<sup>2</sup>

As to the specific conduct/allegations asserted against Defendant Leonard Schrage and their dependence upon and/or intertwined nature with a decision on the merits of this lawsuit, those hinge in large part on (1) his knowledge of his brothers' alleged wrongdoing, (2) the timing of that knowledge, and (3) his response/conduct/actions to

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<sup>2</sup> For example, it is undisputed in the record that Defendant Leonard Schrage is currently involved in his own litigation against his brothers concerning the operation and control of the Sage Motor Group. It is unclear at this time, what, if any, impact that litigation and ultimate determinations in that case could have on the allegations in this case.

that knowledge given his role as an owner and signatory to the Nissan dealership agreements. These allegations and the inferences to be drawn from them are disputed and may require credibility determinations that can not be performed on a motion to dismiss.

Further, as admitted by the Plaintiff, each of the foregoing allegations, when viewed independently of each other, may be insufficient to establish specific personal jurisdiction. It is only when all of the allegations against Defendant Leonard Schrage are combined and viewed within the totality of the factual allegations of the lawsuit that these allegations could be sufficient to establish the requisite minimum contacts for personal jurisdiction.

Thus, at this stage of the proceedings, the extent of Defendant Leonard Schrage's involvement or lack of involvement in the alleged fraudulent warranty scheme and conspiracy has not been developed. The record is disputed as to whether Defendant Leonard Schrage was an active participant with full knowledge of the alleged fraudulent scheme and conspiracy or simply a passive bystander who was tangentially involved only because of his ownership interest in the companies. This determination not only goes to the heart of the minimum contacts analysis, but also goes to the heart of the merits of the allegations against Defendant Leonard Schrage. When the undeveloped status of the record is considered along with the complexity of this case and what is at stake – over a hundred million dollars in compensatory damages—the prudent approach of the procedural leeway afforded by Tennessee law is to hold in abeyance ruling on Defendant Leonard Schrage's motion to dismiss for lack of personal jurisdiction under Tennessee Civil Procedure Rule 12.02(2) until there is a ruling on the merits of the lawsuit.

2. Failure To State A Claim Pursuant to TENN. R. CIV. P. 12.02(6)

As an alternative theory for dismissal, Defendant Leonard Schrage challenges the three causes of action alleged against him for failure to state a claim upon which relief can be granted under Rule 12.02(6) of the Tennessee Rules of Civil Procedure. In support of his motion to dismiss for failure to state a claim, Defendant Leonard Schrage argues, as follows, that the aiding and abetting and fraud claims have not been pled with the particularity required by Rule 9.02, and that exhaustion of remedies is a prerequisite for unjust enrichment and this prerequisite must be pled.

- To assert a claim for aiding and abetting the Plaintiff must allege that Defendant Leonard Schrage's assistance or encouragement was a substantial factor in causing the underlying tort of the alleged fraudulent warranty scheme and conspiracy. The Plaintiff has failed to plead this claim with particularity as required by Rule 9.02 of the Tennessee Rules of Civil Procedure.
- The Plaintiff fails to sufficiently state a claim for fraudulent transfer of assets because the claim is not pled with particularity pursuant to Rule 9.02 of the Tennessee Rules of Civil Procedure.
- To bring an unjust enrichment claim, the Plaintiff must allege that it has exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract. Here, the Plaintiff admits it is in privity of contract with Defendant Dealerships and therefore because the Plaintiff fails to make any allegations alleging it exhausted all remedies against Defendant Dealerships, its unjust enrichment claim against Defendant Leonard Schrage fails as a matter of law.

In opposition to these challenges, the Plaintiff argues (1) that the claims of aiding and abetting and fraudulent transfer satisfy Tennessee's pleading standard under Rules 12.02(6) and 9.02 of the Tennessee Rules of Civil Procedure and (2) that the claim for

unjust enrichment is an adequately pled alternative claim for relief that is permitted under Tennessee law.

Applying Tennessee's standard for Rule 12 motions to each of the causes of action alleged against Defendant Leonard Schrage, the Court concludes that the motion to dismiss should be denied.

### Aiding and Abetting

In challenging the Plaintiff's aiding and abetting claim, Defendant Leonard Schrage argues that the Plaintiff would have to allege that Defendant Leonard Schrage's assistance or encouragement in the alleged fraudulent scheme and conspiracy was a substantial factor in causing the tort. Furthermore, because the underlying tort involves fraud, the allegations of aiding and abetting fraud must be plead with particularity pursuant to Rule 9.02 of the Tennessee Rules of Civil Procedure.

Under Tennessee law, the elements for the common law civil liability theory of aiding and abetting a tortfeasor require that “the defendant knew that his companions' conduct constituted a breach of duty, and that he gave substantial assistance or encouragement to them in their acts.” *PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 552 (Tenn. Ct. App. 2012) (quoting *Carr v. United Parcel Service*, 955 S.W.2d 832, 836 (Tenn.1997) (quoting *Cecil v. Hardin*, 575 S.W.2d 268 (Tenn.1978))). Furthermore, in *Carr v. United Parcel Service*, the Tennessee Supreme Court stated that “civil liability for aiding and abetting requires affirmative conduct. Failure to act or mere presence during the commission of a tort is

insufficient for tort accomplice liability.” 955 S.W.2d 832, 836 (Tenn. 1997), *overruled on other grounds by Parker v. Warren Cty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999)).

Additionally, as recognized in the parties’ briefing, the Court of Appeals of Tennessee has quoted with authority the Restatement of Torts outlining the legal elements for aiding and abetting.

According to the Restatement (First) of Torts § 876 (1939 & June 2016 Supp.):

For harm resulting to a third person from the tortious conduct of another, a person is liable if he:

(a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

*Ram Tool & Supply Co., Inc. v. HD Supply Constr. Supply Ltd.*, No. M201302264COAR3CV, 2016 WL 4008718, at \*8–9 (Tenn. Ct. App. July 21, 2016), *appeal denied* (Dec. 14, 2016); see also *PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 552 (Tenn. Ct. App. 2012).

Applying this legal framework, Defendant Leonard Schrage argues that the allegations in the *Supplement To First Amended Complaint* fail to plead with particularity that he “substantially assisted or encouraged” the alleged fraudulent warranty scheme or

conspiracy. 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).

Filtering the allegations of aiding and abetting in the *Supplement To First Amended Complaint* through the foregoing legal standards, the Court concludes that the claim for aiding and abetting states a claim for which relief can be granted.

While the Court is mindful of the particularity requirement for allegations of fraud, this standard must not be viewed in too narrow a lens to prevent consideration of the Plaintiff’s allegations within the broader scope of the lawsuit. *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.”).

The allegations in the *Supplement To First Amended Complaint* provide the required notice to Defendant Schrage of the context and circumstances surrounding the alleged fraudulent conduct. Moreover, that much of the alleged fraud involves the Defendant’s scienter and knowledge which is only known by Defendant Leonard Schrage himself, it is sufficient that the Plaintiff’s allegations do not speak to every motivation behind Defendant Schrage’s conduct.

- We reject any such narrow formulation of the pleading requirements for fraud. A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. This Court has stated that actual knowledge need only be pleaded generally, cognizant, particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind. Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud. The Court of Appeals has stated that an intent to commit fraud is to be divined from surrounding circumstances[.]

*Oster v. Kirschner*, 905 N.Y.S.2d 69, 72 (App. Div. 2010).

- An aiding and abetting claim requires proof that the defendant “ ‘knowingly’ provided ‘substantial assistance’ ” to the fiduciary. *Id.* at \*42. SoftBank contends that there must be *direct evidence* that an alleged aider and abettor *subjectively believed* that the principal was breaching its fiduciary duties and nevertheless consciously assisted him. Delaware law does not require the equivalent of a confession. Knowledge may be established through circumstantial evidence. *See Turner v. State*, 137 A.2d 395, 397 (Del. 1958) (noting, in criminal aiding-and-abetting case, that “[k]nowledge is, of course, subjective; whether a person knows a thing or not usually is determined by the circumstances”). Proving knowledge “does not require a figurative smoking gun.” *Matthew v. Laudamiel*, 2015 WL 5723985, at \*13 (Del. Ch. Sept. 28, 2015).

*Acp Master, Ltd. v. Sprint Corp.*, 2016 WL 3566366 (Del.Ch.), 1.

Whether Defendant Leonard Schrage provided “substantial assistance” to the other Defendants necessarily involves more than just assessing his conduct in a vacuum. It must be considered in light of and in the context of the allegations against the other Defendants. The claims against Defendant Leonard Schrage rely, in part, on inferences and credibility determinations which involve building a circumstantial case based on the entire context of the lawsuit coupled with Defendant Schrage’s knowledge and conduct during this time. This type of information necessarily can not be known in full detail at the pleading stage.

Thus it is sufficient that the *Supplement To First Amended Complaint* alleges Defendant Leonard Schrage, with full knowledge of the alleged fraudulent scheme and conspiracy, failed to act and inform the Plaintiff of the alleged fraud when he had a contractual/fiduciary duty to the Plaintiff. When taken as true as required at the pleading stage, one inference that could be drawn from the pleadings is that Defendant Leonard Schrage’s inaction in disclosing the alleged fraudulent scheme and conspiracy when combined with his contractual/fiduciary duty to the Plaintiff satisfies the element of “substantial assistance” in aiding and abetting the alleged fraudulent scheme and conspiracy.

- Substantial assistance exists “where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated” (*UniCredito Italiano*, 288 F.Supp.2d at 502 [internal quotation marks omitted], quoting *McDaniel v. Bear Stearns & Co., Inc.*, 196 F.Supp.2d 343, 352 [S.D.N.Y.2002] ).

*Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 883 N.Y.S.2d 486, 489 (App. Div. 2009) (emphasis added).

- Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur (see *Kolbeck v. LIT America, Inc.*, 939 F.Supp. at 247). However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff (see *Sharp Int'l Corp. v. State Street Bank & Trust Co.*, 281 B.R. at 516).

*Kaufman v. Cohen*, 760 N.Y.S.2d 157, 170 (App. Div. 2003) (emphasis added).

The totality of the allegations of the 193 paragraphs *First Amended Complaint* and *Supplement To First Amended Complaint* satisfy rule 9.02 of the Tennessee Rules of Civil Procedure.

The Rule 12.02(6) challenge as it relates to the Plaintiff's claim for aiding and abetting is denied.

#### Fraudulent Transfer of Assets

Similar to the challenges to the claim for aiding and abetting, Defendant Leonard Schrage argues that the Plaintiff has failed to plead the claim for fraudulent transfer of assets with particularity as required by Rule 9.02. In opposition, the Plaintiff argues that Rule 9.02 does not apply to claims of fraudulent transfer, but even if it did, the allegations meet that standard.

The Court agrees with the Plaintiff that the *Supplement To First Amended Complaint* states a claim for which relief may be granted pursuant to Rule 12.02(6), even if considered under the more stringent 9.02 standard. In reaching this conclusion, the Court adopts the reasoning provided by the Plaintiff in its *Sur-Reply*.

But even if Rule 9.02 did apply, the Supplemented First Amended Complaint easily clears the bar: it describes why the Dealership Defendants are insolvent (because they owe Nissan tens of millions of dollars in fraudulent warranty reimbursements); makes sensible and consistent allegations of their intent in making actually, rather than merely constructively, fraudulent transfers (to go along with the fraudulent warranty scheme); it describes the nature and extent of the transfers to Leonard and his brothers (*see* Suppl. Am. Compl. ¶¶ 175–77). The allegations comport with those approved by the courts in the past under Rule 9. *See Sullivant v. Americana Homes Inc.*, 605 S.W.2d 246, 247–48 (Tenn. Ct. App. 1980).

*Sur-Reply In Further Response To Motion To Dismiss By Defendant Leonard Schrage*, p. 5 (Mar. 9, 2018).

### Unjust Enrichment

Defendant Leonard Schrage seeks to dismiss the Plaintiff’s claim for unjust enrichment asserting that the Plaintiff must first exhaust all remedies against the Defendant dealerships, to which the Plaintiff has privity of contract through the Dealership Agreements, prior to seeking unjust enrichment. Because, according to Defendant Schrage, the *Supplement To First Amended Complaint* fails to allege an exhaustion of remedies, the claim for unjust enrichment fails as a matter of law. In support of this argument, the Defendant cites to the following cases: *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005); *Forrest Const. Co., LLC v. Laughlin*, 337 S.W.3d 211 (Tenn. Ct. App. 2009); *Spahr v. Leegin Creative Leather Products, Inc.*, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008).

After reviewing these cases cited by Defendant Schrage, it is unclear whether the circumstances requiring an allegation of exhaustion of remedies would even apply to this

case. Given the limited information in the record at this stage of the proceedings, it is unclear whether and to what extent, if any, Defendant Leonard Schrage's signature on the dealership agreements will pertain to any potential liability. Because these facts of the legal effect of the dealership agreements have not been developed yet, it is unclear whether the exhaustion of remedies element of unjust enrichment would even come into play. It is, then, premature to dismiss the Plaintiff's claim for unjust enrichment based on an element that may or may not apply to this case once further discovery is developed.

Furthermore, at the pleadings' stage of a lawsuit the Court must provide the Plaintiff with wide latitude in pleading claims for relief. This latitude includes permitting a plaintiff to set forth two or more alternative claims for relief, even if the claims on the merits may ultimately be inconsistent. "Tenn. R. Civ. P. 8 is the general rule regarding pleadings, and states that a party may set forth two or more alternative claims, regardless of consistency." *Rolen v. Wood Presbyterian Home, Inc.*, 174 S.W.3d 158, 161 (Tenn. Ct. App. 2005); *see also Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 906 (Tenn. 1999) ("Tenn. R. Civ. P. 8.01, which grants a plaintiff wide latitude in pleading alternative claims for relief and pursuing an array of theories of recovery in a single action."). In this case, there is no reason at this stage of the proceeding to dismiss the unjust enrichment claim because it is simply an alternative equitable remedy, which is permissible under Tennessee law.

Accordingly, the Rule 12.02(6) motion to dismiss on the Plaintiff's claim for unjust enrichment against Defendant Leonard Schrage is denied.

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

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