

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

FAMILY TRUST SERVICES, LLC;)
STEVEN REIGLE; REGAL HOMES)
CO.; BILLY GREGORY; and JOHN)
SHERROD, on behalf of themselves)
and those similarly situated,)
)
Plaintiffs,)
)
vs.) No. 15-780-BC
)
JULIE COONE; NATIONWIDE)
INVESTMENTS, LLC; and MERDAN)
IBRAHIM,)
)
Defendants.)

**MEMORANDUM AND ORDER DENYING MOTIONS OF DEFENDANTS
COONE, IBRAHIM AND NATIONWIDE INVESTMENTS, LLC TO DISMISS**

On May 17, 2016, this entire case was stayed due to the filing of bankruptcy. On February 7, 2018, the stay was dissolved, and the case was reopened against Defendants Julie Coone; Merdan Ibrahim; and Nationwide Investments, LLC. Three of the other original Defendants – REO Holdings LLC, Charles E. Walker, and Jon Paul Johnson – are no longer part of this lawsuit as claims against them were retained by the Bankruptcy Court.¹

¹ According to statements made in the Plaintiffs’ January 11, 2018 *Motion To Dissolve Stay And For Rule 16 Conference*, while this action was pending in Bankruptcy Court, the Plaintiffs settled their respective claims against defendants Charles E. Walker, Jon Paul Johnson, and REO Holdings, LLC.

Following a conference to address restarting the litigation, on March 29, 2018, the Plaintiffs filed a *Fourth Amended Class Action Complaint* against Defendants Julie Coone; Merdan Ibrahim and Nationwide Investments, LLC. The *Fourth Amended Complaint* is 85 pages long, contains 330 paragraphs and alleges ten (10) separate causes of action: Defamation of Title; Fraud; Liability Pursuant To Tennessee Code Annotated § 66-22-113; Unfair Competition; Unjust Enrichment; Intentional Interference With Advantageous Business Relations; Malicious Prosecution; Theft Of The Right Of Redemption; Violation Of The Racketeer Influenced And Corrupt Organizations Act; and Civil Conspiracy.

Following the filing of this *Fourth Amended Complaint*, all three Defendants have filed motions to dismiss based on lack of standing and failure to state a claim for which relief can be granted: (1) April 27, 2018 *Defendant Nationwide Investments, LLC's Motion To Dismiss Plaintiffs' Fourth Amended Complaint*; and (2) May 14, 2018² *Defendants Julie Coone And Merdan Ibrahim's Motion To Dismiss Claims Included In Plaintiff's Fourth Amended Complaint*.

After studying the *Fourth Amended Class Action Complaint*, the *Compromise And Settlement Agreement* to determine its scope and applicability to the remaining

² By *Agreed Order*, Defendants Coone and Ibrahim were given until May 14, 2018 to respond to the *Fourth Amended Class Action Complaint* filed on March 29, 2018.

Defendants in this case,³ the arguments of Counsel and the applicable law, it is ORDERED that both motions are denied.

The law and reasoning on which this ruling is based are provided below.

It is further ORDERED that by July 18, 2018, Counsel shall contact the Docket Clerk, Mrs. Smith (615-862-5719), on their availability for a scheduling conference on the following dates:

September 13, 2018 at 11:00 a.m.

September 18, 2018, at 9:00 a.m.

September 19, 2018, at 9:00 a.m.

At the conference deadlines on class certification, discovery and other pretrial matters will be set, and a trial date will be selected.

Motion To Dismiss Standard

In *Webb v. Nashville Area Habitat for Humanity, Inc.*, the Tennessee Supreme Court rejected the federal “plausibility standard” for pleadings and instead maintained that Courts are to apply the liberal notice pleading standard on Rule 12 motions to dismiss. In analyzing the motions to dismiss in this case, the Court has applied this standard.

³ Attached as *Exhibit A* to the Plaintiffs’ *Response To Motion To Dismiss Of Nationwide Investments LLC* is a copy of the *Compromise And Settlement Agreement* between the Plaintiffs and former Defendants Charles E. Walker, Jon Paul Johnson, and REO Holdings, LLC which provides in part that “Notwithstanding any other provision of this Agreement, the Parties understand and agree that Claimants do not intend to release, and do not release, any claims Claimants have or may have against any defendants in the Putative Class Action Litigation or the Removed Putative Class Action Litigation, or against any person or entity, other than REO Holdings, LLC, Charles E. Walker, and Jon Paul Johnson, all of which claims and rights are expressly reserved. Without limitation, Claimants reserve and do not release any claims against Nationwide Investments, LLC, Julie Coone, or Merdan Ibrahim.”

Tennessee Rule of Civil Procedure 8.01 requires that a pleading for relief “shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.” Rule 8.05(1) further provides:

Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.

When a complaint fails to comply with Rule 8, it is subject to dismissal by grant of a motion to dismiss for failure to state a claim upon which relief can be granted, as provided by Tennessee Rule of Civil Procedure 12.02(6). The standards by which our courts should assess and dispose of a Rule 12.02(6) motion to dismiss are well-established and have been clearly and consistently applied in Tennessee for nearly forty years, following the adoption of the Tennessee Rules of Civil Procedure in 1970.

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss ““admits the truth of all of the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action.””

In considering a motion to dismiss, courts ““must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.”” A trial court should grant a motion to dismiss “only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” We review the trial court's legal conclusions regarding the adequacy of the complaint de novo.

Under Tennessee Rule of Civil Procedure 8, Tennessee follows a liberal notice pleading standard, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court. Our state's notice pleading regime is firmly established and longstanding; this Court recognized well before the Tennessee Rules of Civil Procedure were adopted that “[t]he object and purpose of any pleading is to give notice of the nature of the wrongs and injuries complained of with reasonable certainty, and notice of the defenses that will be interposed, and to acquaint the court with the real issues to be tried.”

To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations. Tennessee courts have long interpreted Tennessee Rule of Civil Procedure 8.01 to require a plaintiff to state “the facts upon which a claim for relief is founded.” A complaint “need not contain detailed allegations of all the facts giving rise to the claim,” but it “must contain sufficient factual allegations to articulate a claim for relief.” “The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level.” *Id.* at 104. Thus, as we observed in *Leach*,

“While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, *it must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested ... by the pleader, *or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.*”

124 S.W.3d at 92 (quoting *Donaldson v. Donaldson*, 557 S.W.2d 60, 61 (Tenn.1977)) (alteration in original); *accord Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 399 (Tenn.2002). Moreover, courts are not required to accept as true assertions that are merely legal arguments or “legal conclusions” couched as facts.

346 S.W.3d 422, 425–27 (Tenn. 2011) (citations omitted).

Analysis

Parties' Positions

As to Defendants Coone and Ibrahim, the Defendants seek dismissal of the *Fourth Amended Complaint* “because none of the named Plaintiffs have adequately alleged standing to assert any claims” against them because the “Plaintiffs have not properly alleged ‘a distinct and palpable injury’; ‘a causal connection between the claimed injury and the challenged conduct’; and ‘that the alleged injury is capable of being redressed by a favorable decision of the court’ as required by *ACLU v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006).” *Defendants Julie Coone And Merdan Ibrahim’s Motion To Dismiss Claims Included In Plaintiff’s Fourth Amended Complaint*, p. 1 (14, 2018). In addition to standing, Defendants Coone and Ibrahim argue for various reasons that each cause of action should be dismissed as a matter of law for failure to state a claim upon which relief can be granted.

As to Defendant Nationwide Investments, LLC (hereinafter “Nationwide”), the motion seeks dismissal also based on lack of standing, asserting “Defendant Nationwide was involved in only one (1) property redemption out of a total of eleven (11) referred to as the Cleveland Property which took place in Hamilton County, Tennessee” and the “Plaintiffs do not allege an injury or even a remote interest with respect to the Cleveland Property.” *Defendant Nationwide Investments, LLC’s Motion To Dismiss Plaintiffs’ Fourth Amended Complaint*, pp. 1-2 (Apr. 27, 2018). Other grounds for dismissal in Defendant Nationwide’s motion are that the “Plaintiffs’ claims against Nationwide based

on it being the alter ego of Walker, Johnson and REO should be dismissed for lack of standing...because there are no allegations unrelated to the Cleveland Property, where Nationwide was allegedly used by Walker, Johnson or REO.” *Id.* at 2. In addition, “[t]o the extent that Plaintiffs’ seek to hold Nationwide liable as principal for the acts of Walker, Johnson and REO acting as agents for Nationwide, such claims should be dismissed because of the settlement of the claims against Walker, Johnson and REO. *See Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 107- 108 (Tenn. 2010); *Creech v. Addington*, 281 S.W.3d 363, 374 (Tenn. 2009).” *Id.* (footnote omitted). Finally, Defendant Nationwide argues that the case should be dismissed for improper venue⁴ because “[t]he alleged and attempted redemption of the Cleveland Property occurred in Hamilton County, Chattanooga, Tennessee.” *Id.* at 2-3.

In opposition to both *Motions*, the Plaintiffs argue that all three Defendants’ motions to dismiss based upon lack of standing misunderstand the premise of the *Fourth Amended Class Action Complaint*.

Nationwide devotes its memorandum primarily to arguing that the Plaintiffs lack any injury directly flowing from Nationwide’s acts with respect to the Cleveland Property. But the Plaintiffs do not contend that Nationwide is liable to them because its actions injured their interests in the Cleveland Property. To the contrary, they have always acknowledged that they lack a personal interest in that parcel. Rather, Nationwide is liable as a member of a wide-ranging conspiracy, in which it manifested its participation by engaging, inter alia, in the alleged acts visà-vis the Cleveland Property.

⁴ Despite arguing that the lawsuit should be dismissed for improper venue, Defendant Nationwide refers to Rule 12.02(1) of the Tennessee Rules of Civil Procedure as a basis for dismissal. Rule 12.02(1) refers to motions to dismiss for lack of jurisdiction over the subject matter. A motion to dismiss for improper venue is referred to in Rule 12.02(3). In ruling on the motion, the Court has considered the argument for improper venue pursuant to Rule 12.02(3) of the Tennessee Rules of Civil Procedure.

Two or more persons commit the tort of conspiracy when they “agree[] ... to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means.” *First Cmty. Bank N.A. v. First Tenn. Bank N.A.*, 489 S.W.3d 369, 395 (Tenn. 2015). “The agreement ... need not be formal [or express] ..., and it is not essential that each conspirator have knowledge of the details of the conspiracy.” *Id.* at 396 (internal quotation marks omitted). They must merely share “the intent to accomplish [the] common purpose, and each must know of the other’s intent.” *Id.* If proven, the conspiracy renders each conspirator “responsible for everything done by his confederate[s]” in the execution of their common design; i.e., conspirators are liable for the torts their coconspirators commit in the course of the conspiracy. *See, e.g., Brown v. Birman Managed Care Inc.*, 42 S.W.3d 62, 67 (Tenn. 2001).

Thus, while correctly noting that a predicate tort must underlie an allegation of conspiracy, *cf., e.g., Watson’s Carpet & Floor Coverings Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007), Nationwide misses the implication of this doctrine. (*See* Nationwide Memo. 9.) The Fourth Amended Complaint alleges numerous torts against Nationwide’s fellow conspirators, for each of which Nationwide will be liable if the Plaintiffs ultimately prove (a) the underlying tort itself and (b) the requisite conspiracy connection between the tort and Nationwide. The fact that Nationwide’s own most visible acts in furtherance of the conspiracy may not have, in and of themselves, directly harmed the Plaintiffs does not insulate it from liability for the torts committed by its coconspirators that did. *See, e.g., Brown*, 42 S.W.3d at 71–72 (“[It is a] basic principle of conspiracy law, that one conspirator is liable for the acts of his co-conspirator done in furtherance of the conspiracy. ... One cannot conspire with another to commit fraud, actually take steps to accomplish the unlawful plan, and then avoid liability by denying having made the fraudulent representation necessary to complete it.”); *Freeman Mgmt. Corp. v. Shurgard Storage Centers, LLC*, 461 F. Supp. 2d 629, 643 (M.D. Tenn. 2006) (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510, 869 P.2d 454, 457 (1994)) (“Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.”); *accord, e.g., First Cmty. Bank*, 489 at 394–95 (describing imputation of one coconspirator’s acts to other coconspirators who did not themselves engage in them).

Response to Motion to Dismiss of Nationwide Investments LLC, pp. 2-3 (June 18, 2018)

(emphasis in original).

Like Nationwide, the Defendants assert, in general, that the Fourth Amended Complaint fails to demonstrate standing because it lacks sufficient allegations that the Plaintiffs suffered injuries at the Defendants' hands alone. This argument, like Nationwide's analogous argument, misses the point of the Fourth Amended Complaint altogether.

The Fourth Amended Complaint rests upon the premise that the Defendants and their non-party confederates engaged in a wide-ranging criminal enterprise and that the enterprise harmed the Plaintiffs in various respects. The claims set forth in the numbered counts in the Fourth Amended Complaint represent—not exclusively, but in the main—descriptions of the legal wrongs engaged in by the enterprise, for which the Defendants may be held liable via their participation in the enterprise's conspiracy. Because each conspirator becomes “responsible for everything done by his confederate[s]” in the execution of their common design, *Brown v. Birman Managed Care Inc.*, 42 S.W.3d 62, 67 (Tenn. 2001), plaintiffs alleging a conspiracy need not plead a discrete harm at the individual hands of each coconspirator. *See, e.g., In re NASDAQ Market-Makers Antitrust Lit.*, 169 F.R.D. 493, 508 (S.D.N.Y. 1996) (holding a plaintiff injured by one member of conspiracy has standing as to all coconspirators, because latter are jointly and severally liable); *Brumley v. Chattanooga Speedway & Motordome Co.*, 198 S.W. 775, 777 (Tenn. 1917) (“[E]ach conspirator is ... liable for the entire damage.”). Thus, the Defendants' general argument that the Plaintiffs' lack standing because of a lack of a connection between themselves and the discrete acts of the remaining Defendants fails. The Defendants repeat the same argument as to most or all of the Plaintiffs individually, but mere repetition does not vest a meritless point with weight.

Response To Motion To Dismiss Of Julie Coone And Merdan Ibrahim, pp. 2-3 (June 18,

2018) (emphasis in original).

As to the individual Defendants' challenges that each cause of action fails to state a claim upon which relief can be granted, the Plaintiffs argue for a variety of reasons that

the *Fourth Amended Class Action Complaint* states a claim against each of the Defendants.

In *Reply*, Defendants Coone and Ibrahim⁵ maintain their previous legal arguments that the claims are subject to dismissal at this stage, but clarified and expanded their positions based on the Plaintiffs' response "that they primarily seek to hold Coone and Ibrahim responsible not for their own actions, but for the actions of alleged coconspirators."

Plaintiffs argue in their Response that Coone and Ibrahim ignore any potential vicarious liability for the actions of the alleged coconspirators. However, this does not take into account the arguments for standing contained in Defendants' Memorandum of Law. Those arguments demonstrate that there is no standing for Plaintiffs to assert claims against Ibrahim or Coone, whether direct or vicarious. There is no limitation to the direct claims asserted by Defendants, and the arguments are largely applicable to—and demonstrate the insufficiency of—the alleged actions of their supposed confederates as well as to the actions attributed directly to the Defendants.

Civil conspiracy claims must be pleaded with some degree of specificity. *Kincaid v. Southtrust Bank*, 221 S.W.3d at 38; *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). While knowledge can be pled generally, agreement and participation in a conspiracy are not allegations of knowledge. Yet, Plaintiffs pled no allegations with particularity that Ibrahim or Coone agreed to participate in the alleged conspiracy or developed and maintained a common design with the alleged confederates. As for vicarious liability, Plaintiffs quote *Brown v. Birman Managed Care Inc.*, 42 S.W. 3d 62, 67 (Tenn. 2001) for the principal that each conspirator is "responsible for everything done by his confederate[s]." Plaintiffs' Response at 2. However, Plaintiffs present the *Brown* case inaccurately. *Brown* actually states that "it is [a] basic principle that each conspirator is responsible for everything done by his confederate **which the execution of the common design makes probable as a consequence.**" *Brown*, 42 S.W.

⁵ Defendant Nationwide did not file a *Reply* brief.

3d at 67. “Each conspirator must have the intent to accomplish this common purpose, and each must know of the other's intent.” *Id.* (citing *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 90 (1948)).

Reply In Support Of Defendants Merdan Ibrahim And Julie Coone’s Motion To Dismiss, pp. 2-3 (June 20, 2018) (emphasis in original).

All three Defendants seek an award of attorneys fees pursuant to Tennessee Code Annotated section 20-12-119(c)(1) in the event their motion to dismiss is granted.

Claims Against Defendants Coone and Ibrahim

In denying the *Motion To Dismiss* as to the claims against Defendants Coone and Ibrahim, the Court concludes that the allegations in the *Fourth Amended Class Action Complaint*, when taken as true, state a claim for relief.

A sampling of the allegations in the *Fourth Amended Class Action Complaint*, concerning these two individual Defendants, asserts that their conduct in relation to the alleged criminal/tortious scheme was as agents, employees and/or individual confederates/co-conspirators. *See, e.g. Fourth Amended Class Action Complaint*, ¶¶ 15, 16, 24, 25, 42, 45, 54, 59, 64, 76, 77, 88, 89, 97, 103, 106, 115, 116, 124, 126, 128, 135, 137, 141, 161, 166, 167, 168, 169, 170, 173, 180, 216, 218, 223, 245, 248 249, 323, 324 (Mar. 29, 2018).

With respect to the Defendants as agents or employees, under Tennessee law Defendants Coone and Ibrahim can be held individually liable for wrongful acts they committed against third parties even if they were acting within the scope of the agency or

at the direction of their employer. As stated in the Court of Appeals decision in *Brungard v. Caprice Records, Inc.*, “[i]t is settled law 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. 608 S.W.2d 585, 590 (Tenn. Ct. App. 1980) (citing *Howard v. Haven*, 198 Tenn. 572, 281 S.W.2d 480 (1955); *Scott v. Burton*, 173 Tenn. 147, 114 S.W.2d 956 (1938)).⁶

Accordingly, when the Tennessee law just cited is coupled with the paragraphs of allegations identified above, and filtering them through the liberal notice pleading standard outlined in *Webb v. Nashville Area Habitat for Humanity, Inc.*, the Court concludes that the *Fourth Amended Class Action Complaint* states a claim for relief for individual liability of these Defendants as agents or employees as to the ten (10) causes

⁶ This bedrock principle of Tennessee law can be found and cited in numerous other Tennessee Court decisions. See, e.g., *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).”); *Allied Sound, Inc. v. Neely*, 909 S.W.2d 815, 821 (Tenn. Ct. App. 1995) (“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).”); *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).”).

of action: Defamation of Title; Fraud; Liability Pursuant To Tennessee Code Annotated § 66-22-113; Unfair Competition; Unjust Enrichment; Intentional Interference With Advantageous Business Relations; Malicious Prosecution; Theft Of The Right Of Redemption; Violation Of The Racketeer Influenced And Corrupt Organizations Act; and Civil Conspiracy.

As to confederates/co-conspirators, as alleged by the sampling of paragraphs from the *Fourth Amended Class Action Complaint* listed above, the Plaintiffs have sought individual liability against both Defendant Coone and Defendant Ibrahim as co-conspirators, jointly and severally based on their own independent participation in “systematic fraud in the use of the tax-sale and redemption process for real property” through “a criminal enterprise directed at obtaining title to real property and obtaining money in exchange for real property based upon forged and pretended muniments of title.” *Fourth Amended Class Action Complaint*, ¶¶ 1-2 (Mar. 29, 2018).⁷ In this regard, the *Fourth Amended Class Action Complaint* alleges that Defendant Coone actively participated in the creating, preparing, signing, forging, notarizing, filing and recording of the false documents at issue in this case with express knowledge of their falsity as part of a civil conspiracy with other co-conspirators/confederates to facilitate the criminal enterprise of acquiring property and money through the redemption process. As to

⁷ According to paragraph 6 of the *Fourth Amended Class Action Complaint* the modus operandi of the alleged enterprise consisted of “first identifying attractive properties from among those sold for taxes, especially ones with absentee owners or owners otherwise unlikely to investigate or assert their interests. The Defendant and their confederates, then, if necessary, created false muniments of title, such as affidavits of heirship, identifying a purported interest in the property. The Defendants and their confederates then created false deeds purporting to convey an interest in the property to themselves or another member of the enterprise.”

Defendant Ibrahim, the sampling of paragraphs alleges that he cooperated in the criminal enterprise by willfully and knowingly allowing other co-conspirators/confederates to utilize his name and signature to facilitate the operation of REO Holdings, LLC and Nationwide scheme of fraudulently obtaining properties through sham redemptions. In addition, the *Fourth Amended Class Action Complaint* alleges that Defendant Ibrahim helped fund the enterprise by providing renovation services for properties obtained by the other co-conspirators/confederates which were then leased or sold.

The motion to dismiss of Defendants Coone and Ibrahim concerning conspiracy is that certain causes of action should be dismissed for failure to plead specific conduct by them as to each essential element and/or that because they may not have actively participated in the alleges scheme as each and every one of the properties listed in the *Fourth Amended Class Action Complaint*. This analysis takes too narrow of a view of the pleadings of conspiracy at the motion to dismiss stage given the nature of the allegations of an elaborate criminal/tortious enterprise and scheme with each Defendant playing a specific role in the scheme.

As alleged in the *Fourth Amended Class Action Complaint*, Defendants Coone and Ibrahim were one of several actors who performed individual and specific roles in an elaborate multiparty, multifaceted criminal/tortious enterprise and/or fraudulent scheme. As detailed above, the allegations when taken as true, indicate that this criminal/tortious enterprise would not have been possible without the role and participation of Defendants Coone and Ibrahim. For example, Defendant Coone, as a notary, performed the function

of forgery documents and then filing/recording with the Clerks' office. Defendant Ibrahim served the role of serving as a knowing and willing pawn by signing documents he knew were false or forged.

Identifying and detailing the specific role of one defendant in an alleged fraudulent scheme involving multiple defendants has been held sufficient to state a claim under Tennessee law.⁸

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,**

⁸ "It has long been recognized by the courts of this state that the T.R.C.P. were patterned in large measure after the Federal Rules of Civil Procedure, and therefore federal case law interpreting the federal rules has been accepted as persuasive authority for the intent and application of these rules." *Bradhurst v. Pearson*, No. 01-A-9106-CV-00226, 1992 WL 41701, at *3 (Tenn. Ct. App. Mar. 6, 1992).

“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 identify, 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.”

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

The remaining defendants argue that dismissal was appropriate pursuant to Rule 12.02(6). They assert that Plaintiff failed to state its claims with particularity and merely resorted to a group pleading tactic without identifying a misrepresentation made by each defendant. They further assert that the facts as alleged were not capable of warranting relief.

Citing *Strategic Capital Resources, Inc. v. Dylan Tire Industries, LLC*, 102 S.W.3d 603, 611 (Tenn.Ct.App.2002), the remaining defendants claim that Plaintiff was required to identify "each alleged misrepresentation and [tie] it to a particular defendant, at a particular place, and at a particular time." In affirming the trial court's dismissal of the complaint for failure to plead fraud claims with particularity, the court in *Strategic* stated,

The chancellor dismissed the fraud claim because of the failure to comply with the requirements of Rule 9.02, Tenn. R. Civ. P., that "the circumstances constituting fraud or mistake shall be stated with particularity." There is a companion rule set forth in Rule 8 .06 that all pleadings shall be construed so as to do substantial justice. *See Ezell v. Graves*, 807 S.W.2d 700 (Tenn.Ct.App.1990); *cf. Sullivant v. Americana Homes, Inc.*, 605 S.W.2d 246 (Tenn.Ct.App.1980). In *City State Bank v. Dean Witter Reynolds*, 948 S.W.2d 729 (Tenn.Ct.App.1996), the court found the complaint sufficient where it "specifically identifies the time and place of each alleged false representation, and identifies the manner in which each representation was deemed to have been fraudulent." 948 S.W.2d at 738.

We think that the complaint does fail the particularity test. An inspection of the complaint shows that the allegations are

only general and that no particular defendant is identified as the one making the false and misleading statements. *At a minimum the actors should be identified and the substance of each statement should be pled.* We think the fraud claims were properly dismissed.

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

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

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

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

remainder of the complaint reveals that the complaint was sufficient to survive a motion to dismiss for failure to state the remaining claims with particularity pursuant to Rule 8.01 and the corresponding notice pleading standard.

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

In addition, the Defendants' motion to dismiss also takes too narrow of a view of their potential vicarious and derivative liability for their role as co-conspirators/confederates under the civil conspiracy claim.

As before, the Defendants' view of the Plaintiffs' allegations with regard to the conspiracy claim is singular only as to the conduct of Defendants Coone and Ibrahim individually. Yet, under Tennessee law, a claim for civil conspiracy can be maintained if the underlying torts, i.e. the deception based claims, are committed by one or more of the conspirators in furtherance of the conspiracy. Once the underlying tort is proven as to at least one of the co-conspirators/confederates alleged in the conspiracy, it can serve as a derivative claim that can establish vicarious liability and extend liability beyond the active wrongdoer to those who planned, assisted, or encouraged the wrongdoer's acts.

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

A civil conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn.2002); *Chenault v. Walker*, 36 S.W.3d 45, 52 (Tenn.2001). Participating in a civil conspiracy is not an independent tort. *Watson's Carpet & Floor Covering, Inc. v. McCormick*, No. M2004-02750-COA-R3-CV, 2007 WL 134132, at *8 (Tenn.Ct.App. Jan. 18, 2007) *perm. app. denied* (Tenn. May 14, 2007). Rather, it is a derivative claim that requires the existence of an underlying tort or wrongful act committed by one or more of the conspirators in furtherance of the conspiracy. *Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn.1994); *Tenn. Publ'g Co. v. Fitzhugh*, 165 Tenn. 1, 5-6, 52 S.W.2d 157, 158 (1932); *Levy v. Franks*, 159 S.W.3d 66, 82 (Tenn.Ct.App.2004).

A civil conspiracy claim is a means for establishing vicarious liability. *Watson's Carpet & Floor Covering, Inc. v. McCormick*, 2007 WL 134132, at *8. Its function is to extend liability in tort beyond the active wrongdoer to those who planned, assisted, or encouraged the wrongdoer's acts. *Adcock v. Brakegate Ltd.*, 645 N.E.2d 888, 894 (Ill.1994). Thus, the acts of one conspirator are attributable to the other conspirators. *See* W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 46, at 323 (5th ed. 1984) (“*Prosser & Keeton*”). Once the evidence establishes the existence of a civil conspiracy, the members of the conspiracy are jointly and severally liable for all the damages caused by the other conspirators, even if they did not commit tortious or wrongful acts themselves. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d at 703; *Chenault v. Walker*, 36 S.W.3d at 52; *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 90-91, 208 S.W.2d 344, 354 (1948); Restatement (Second) of Torts § 876 cmt. a (1979); *Prosser & Keeton*, § 46, at 323.

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

The conspirators' agreement need not be explicit or formal. A tacit agreement will suffice. *Chenault v. Walker*, 36 S.W.3d at 52; *Dale v. Thomas H. Temple Co.*, 186 Tenn. at 90, 208 S.W.2d at 354. The agreement may be implied from the conspirators' conduct itself.

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

Conspiracies, by their very nature, are formed in secret. *Am. Diamond Exchange, Inc. v. Aplert*, 920 A.2d 357, 369 (Conn.App.Ct.2007). In the absence of testimony of one of the conspirators, it is unlikely that direct evidence of a conspiratorial agreement will exist. *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir.1979) *rev'd in part on other grounds*, 446 U.S. 754, 100 S.Ct. 1987 (1980); *Bd. of Educ. of Asbury Park v. Hoek*, 183 A.2d 633, 646-47 (N.J.1962). It follows that civil conspiracies are rarely proven directly. They are more often established using circumstantial evidence and inferences drawn from the evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581-82 (Tex.1963). Thus, fact-finders may consider the nature of the acts themselves, the relationship of the parties, the interests of the conspirators, and other circumstances. *Mohave Elec. Coop., Inc. v. Byers*, 942 P.2d 451, 465 (Ariz.Ct.App.1997). However, circumstantial evidence regarding the existence of a civil conspiracy must create more than a suspicion or conjecture that a conspiracy exists. It must enable reasonable persons to infer that two or more persons jointly assented to accomplish an unlawful purpose or to accomplish a lawful purpose using unlawful means. *Dove v. Harvey*, 608 S.E.2d 798, 801 (N.C.Ct.App.2005); *Moore v. Weinberg*, 644 S.E.2d 740, 750 (S.C.Ct.App.2007); *Alford v. Thornburg*, 113 S.W.3d 575, 588 (Tex.App.2003).

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

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

Thus, the arguments of Defendant Coone and Ibrahim applying the essential elements of each tort to their specific conduct, take too narrow of a view of the pleadings under *Webb v. Nashville Area Habitat for Humanity, Inc.*, in light of the civil conspiracy claim. Defendants' view does not account for the nature of a civil conspiracy, as stated by Justice Koch, then Appellate Judge Koch, in *Stanfill v. Hardney*, that civil conspiracy is rarely proven directly, but rather is established by circumstantial evidence and inferences.

Conspiracies, by their very nature, are formed in secret. In the absence of testimony of one of the conspirators, it is unlikely that direct evidence of a conspiratorial agreement will exist. It follows that civil conspiracies are rarely proven directly. They are more often established using circumstantial evidence and inferences drawn from the evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances. Thus, fact-finders may consider the nature of the acts themselves, the relationship of the parties, the interests of the conspirators, and other circumstances. However, circumstantial evidence regarding the existence of a civil conspiracy must create more than a suspicion or conjecture that a conspiracy exists. It must enable reasonable persons to infer that two or more persons jointly assented to accomplish an unlawful purpose or to accomplish a lawful purpose using unlawful means.

Id. at *8 (citations omitted).

The sampling of allegations listed above against Defendants Coone and Ibrahim are the very sort of circumstantial evidence from which a reasonable person could infer that Defendants Coone and Ibrahim were involved in a civil conspiracy. The assertive conduct of (1) creating, preparing, signing, forging, notarizing, filing and recording of the false documents by Defendant Coone with the express knowledge of their falsity in order

to facilitate the criminal enterprise of acquiring property and money through the redemption process; and (2) willfully and knowingly allowing other co-conspirators/confederates to utilize Defendant Ibrahim's name and signature to facilitate the operation of REO Holdings, LLC and Nationwide scheme of fraudulently obtaining properties through sham redemptions and helping fund the enterprise by providing renovation services for properties obtained by the other co-conspirators/confederates which were then leased or sold are more than sufficient, when considered in light of the entire *Fourth Amended Class Action Complaint*, for a reasonable person to conclude that Defendants Coone and Ibrahim were involved in a civil conspiracy.

For all these reasons, the Court concludes as a matter of law that the *Fourth Amended Class Action Complaint* states a claim against Defendants Coone and Ibrahim at this stage of the proceedings concerning conspiracy.

Claims Against Defendant Nationwide Investments, LLC

As with Defendants Coone and Ibrahim, the Court concludes that the motion to dismiss the claims against Defendant Nationwide must also be denied because of the civil conspiracy claim alleged against Defendant Nationwide. As stated above, even though Defendant Nationwide is only alleged to have been involved with and participated in the Cleveland Property alleged in the *Fourth Amended Class Action Complaint*, it can still be held liable vicariously and derivatively as a member of the alleged wide-ranging conspiracy. As stated above, under Tennessee law, once an underlying tort is proven as to

at least one of the co-conspirators/confederates alleged in the conspiracy, it can serve as a derivative claim that can establish vicarious liability and extend liability beyond the active wrongdoer to those who planned, assisted, or encouraged the wrongdoer's acts.

As alleged in the *Fourth Amended Class Action Complaint*, Nationwide served as the attempted grantee on the redemption of the Cleveland Property (¶¶ 144-154). Nationwide's role in the alleged elaborate multiparty, multifaceted criminal/tortious enterprise and/or fraudulent scheme, however, was not limited to just the Cleveland Property. As alleged in ¶ 325, "Nationwide acted in all respects as the alter ego of Messrs. Johnson and Walker in the conduct of the aforementioned enterprise. To the extent it maintained any will of its own, it willfully and knowingly participated in a conspiracy with them and with REO despite having full and perfect knowledge of each aspect of the fraud described in the Complaint." Because civil conspiracies are typically claims that involve circumstantial evidence without the benefit of direct evidence, the alleged involvement of Nationwide within the broader context of the allegations and conduct of the other Defendants and co-conspirators/confederates establishes sufficient assertive conduct that would implicate it not only as an active wrongdoer, but at a minimum as an entity that helped facilitate, plan, assist and/or encourage the individual wrongdoer's acts.

As to Defendant Nationwide's argument that to "[t]he extent that it is alleged that Nationwide should be liable for the actions of its agents Walker, Johnson or REO, the vicarious liability claim should fail because of the settlement of the claims against

Walker, Johnson and REO” because “Tennessee courts have recognized that plaintiffs should not be permitted to pursue a vicarious liability claim against a principal when they have settled with the agent and have agreed not to pursue a claim against the agent,” the Court adopts the arguments and authorities at pages 4-6 of the *Response To Motion To Dismiss Of Nationwide Investments LLC* and the statement in the attached *Compromise And Settlement Agreement* between the Plaintiffs and former Defendants Charles E. Walker, Jon Paul Johnson, and REO Holdings, LLC which specifically carved out claims against the present Defendants, including Defendant Nationwide:

Notwithstanding any other provision of this Agreement, the Parties understand and agree that Claimants do not intend to release, and do not release, any claims Claimants have or may have against any defendants in the Putative Class Action Litigation or the Removed Putative Class Action Litigation, or against any person or entity, other than REO Holdings, LLC, Charles E. Walker, and Jon Paul Johnson, all of which claims and rights are expressly reserved. Without limitation, Claimants reserve and do not release any claims against **Nationwide Investments, LLC**, Julie Coone, or Merdan Ibrahim.

Plaintiffs’ *Response To Motion To Dismiss Of Nationwide Investments LLC, Exhibit A – Compromise And Settlement Agreement*, p. 7 (June 18, 2018) (emphasis added).

Given the alleged multiparty, multifaceted and complex nature of the alleged criminal/tortious enterprise in this case, under *Webb v. Nashville Area Habitat for Humanity, Inc.*, the Court concludes that the claims against Defendant Nationwide survive the motion to dismiss.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

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

Eugene N. Bulso, Jr.

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