IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,	
Plaintiff,	**Civil Action No. 3:10-cv-00743**
v.	
SMALL SMILES HOLDING CO., LLC,	
Defendant.	

APPENDIX OF UNPUBLISHED AUTHORITIES ACCOMPANYING PLAINTIFF/COUNTER-DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION TO DISMISS

Plaintiff/Counter-Defendant, National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), respectfully submits the attached appendix containing a copy of each of the unpublished authorities listed below that are cited to and relied on in the accompanying memorandum of law in support of National Union's motion to dismiss in its entirety the Counterclaim asserted by Defendant/Counter-Plaintiff, Small Smiles Holding Company, LLC ("SSHC"), for failure to state a claim upon which relief may be granted pursuant to FED. R. CIV. P. 12(b)(6).

1. *Birmingham-Jefferson County Transit Auth. v. Boatright*,
   2009 WL 2601926 (M.D. Tenn. Aug. 20, 2009)

2. *Ferrell v. Addington Oil Corp.*,
   2010 WL 3283029 (E.D. Tenn. Aug. 18, 2010)

3. *Life Ins. Co. of N. Am. v. Simpson*,
   2009 WL 2163498 (W.D. Tenn. July 16, 2009)

4. *McKee Foods Corp. v. Pitney Bowes*,
   2007 WL 896153 (E.D. Tenn. Mar. 22, 2007)

5. *Metro. Prop. & Cas. Ins. Co. v. Bell*,
   2005 WL 1993446 (6th Cir. Aug. 17, 2005)

6. *Nature Conservancy v. Browder*,
   2008 WL 336744 (E.D. Tenn. Feb. 5, 2008)

7. *Nautilus v. The In Crowd*,
   2005 WL 2671252 (M.D. Tenn. Oct. 19, 2005)

8. *Rhodes v. Bombardier Capital, Inc.*,
   2010 WL 3861074 (E.D. Tenn. Sep. 24, 2010)

9. *Scraggs v. La Petite Acad., Inc.*,
   2006 WL 2711689 (E.D. Tenn. Sep. 21, 2006)

10. *Taylor v. Standard Ins. Co.*,
    2009 WL 113457 (W.D. Tenn. Jan. 13, 2009)

11. *Waggin' Train, LLC v. Normerica, Inc.*,
    2010 WL 145776 (W.D. Tenn. Jan. 8, 2010)

12. *Williams v. State Farm Fire & Cas., Co.*,
    2008 WL 2421702 (W.D. Tenn. June 12, 2008)

13. *Williamson v. Ocwen Loan Servicing, LLC*,
    2009 WL 5205405 (M.D. Tenn. Dec. 23, 2009)

Dated: Nashville, Tennessee
December 2, 2010

Yours, etc.

/s/ W. Brantley Phillips, Jr.

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EXHIBIT “1”

Slip Copy, 2009 WL 2601926 (M.D.Tenn.)
(Cite as: 2009 WL 2601926 (M.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee,
Nashville Division.
BIRMINGHAM-JEFFERSON COUNTY TRANSIT AUTHORITY, et al.
v.
David J. BOATRIGHT.
No. 3:09-0304.

Aug. 20, 2009.

Randall Chadwell Ferguson, Robert Jan Jennings, Branstetter, Stranch & Jennings, Nashville, TN, for Plaintiffs.

James M. Wooten, Robert T. Keeton, III, Keeton Law Offices, Huntingdon, TN, for Defendants.

MEMORANDUM

TODD J. CAMPBELL, District Judge.

I. *Introduction*

***1** Pending before the Court is the Plaintiffs' Motion To Dismiss Portions Of Defendant's Counterclaim For Failure To State A Claim (Docket No. 22). The Defendant has not filed a response to the Motion even though the deadline for filing a response has expired. (Docket No. 19, at p. 4). For the reasons set forth below, the Motion is GRANTED in part, and DENIED in part. The Motion is granted as to Defendant's counterclaims for fraud, intentional infliction of emotional distress, estoppel, abuse of process, and civil conspiracy. The Motion is denied as to Defendant's counterclaim for quantum meruit.

II. *Factual and Procedural Background*

The Plaintiffs, who are residents of Alabama, brought this diversity action seeking damages for breach of contract and misrepresentation arising out of their relationship with the Defendant, a Tennessee resident who allegedly performed actuarial services for the Plaintiff Retirement Plan over several years. (Complaint (Docket No. 1)). The Defendant has filed an Answer to the Complaint that contains counterclaims for breach of contract/quantum meruit, fraud, intentional infliction of emotional distress, estoppel, abuse of process, civil conspiracy, and declaratory judgment. (Answer (Docket No. 12)). Plaintiffs' Motion To Dismiss seeks dismissal of all counterclaims except breach of contract and declaratory judgment.

III. *Analysis*

A. *The Standards Governing Motions To Dismiss*

Under the *Erie* doctrine, federal courts sitting in diversity apply the substantive law of the forum state and federal procedural law. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Biegas v. Quickway Carriers, Inc.,* 573 F.3d 365 (6th Cir.2009). The federal procedural rule governing Plaintiffs' Motion To Dismiss is Rule 12(b)(6) of the Federal Rules of Civil Procedure. For purposes of a motion to dismiss under Rule 12(b)(6), the Court must take all of the factual allegations in the complaint as true. *Ashcroft v. Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 1.

As stated above, the Defendant has not filed a response to the pending motion to dismiss. Local Rule 7.01(b) provides that failure to file a timely response to a motion shall indicate that there is no opposition to the motion. The Sixth Circuit has held, however, that a court may not rely on such a local rule in dismissing a case, but must examine the movant's motion on the merits to determine whether it is entitled to relief under Fed.R.Civ.P. 12(b)(6). *See, e.g., Carver v.*

Bunch, 946 F.2d 451, 454-55 (6th Cir.1991); *Bangura v. Hansen,* 434 F.3d 487, 498 (6th Cir.2006). On the other hand, it is not the duty of the court to "abandon its position of neutrality in favor of a role equivalent to champion for the non-moving party: seeking out facts, developing legal theories, and finding ways to defeat the motion." *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 406 (6th Cir.1992). The trial court's task, under these circumstances, is to "intelligently and carefully review the legitimacy of such an unresponded-to motion, even as it refrains from actively pursuing advocacy or inventing the *riposte* for a silent party." *Id.,* at 407.

B. *Quantum Meruit*

***2** Plaintiffs first address the issue of the choice of substantive law to use in analyzing Defendant's counterclaims. Plaintiffs argue that the claims at issue are tort claims, and that Tennessee law applies in analyzing those claims. Under Tennessee conflicts of law doctrine, the state with the most significant relationship to the litigation governs tort claims. *Hataway v. McKinley,* 830 S.W.2d 53, 59 (Tenn.1992); *Lemons v. Cloer,* 206 S.W.3d 60, 65-68 (Tenn.Ct.App.2006).

According to the Plaintiffs, the Defendant is a Tennessee resident who maintained an office in Tennessee during the relevant time period and any injury would have been suffered here. As stated above, the Defendant has not responded to the Motion, but the Court has seen nothing in his Answer to the Complaint (Docket No. 12) suggesting that the law of a state other than Tennessee should apply. Therefore, the Court will apply the substantive law of Tennessee in analyzing Defendant's counterclaims.

Addressing the first counterclaim, Plaintiffs argue that the quantum meruit cause of action should be dismissed because both parties agree that a contract existed, but disagree about whether the contract was breached. Under Tennessee law, a plaintiff may not recover under a quantum meruit theory if there is an existing, enforceable contract covering the same subject matter. *Mitch Grissom & Associates v. Blue Cross & Blue Shield of Tennessee,* 114 S.W.2d 531, 537 (Tenn.Ct.App.2002). On the other hand, " '[a] party who had a contract at one time may pursue a quantum meruit recovery if the contract is no longer enforceable.' " *Id.*

The counterclaim at issue alleges that the Plaintiffs' "representation and promise to pay the Defendant for his unbilled time and service in compiling and producing the Actuary's Report to the Plaintiffs for the year ending 2008 constituted an implied promise and contract on which the Defendant's (sic) relied to his detriment." (Answer/Counterclaim, at ¶ 54 (Docket No. 12)). Viewed in the light most favorable to the non-movant, it is not clear from the pleadings that the services described by the Defendant in the counterclaim were performed during the time period covered by the alleged contract or were the type of services covered by the alleged contract. In addition, the quantum meruit counterclaim is titled "Breach of Contract/Quantum Meruit," and therefore, appears to be pled as an alternative theory in the event the alleged contract is found not to cover the described services. Thus, the Court concludes that Defendant's quantum meruit counterclaim adequately states a claim, and denies the Plaintiffs' motion to dismiss the counterclaim.

C. *Fraud*

Plaintiffs argue that the Defendant's counterclaim for fraud should be dismissed because it has not been pled with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) requires that a party alleging fraud "must state with particularity the circumstances constituting fraud." To satisfy Rule 9(b), a complaint of fraud must allege: (1) the time, place, and content of the alleged misrepresentation on which the plaintiff relied; (2) the fraudulent scheme; (3) the fraudulent intent of the defendants; and (4) the injury resulting from the fraud. *United States v. BWXT Y-12, LLC,* 525 F.3d 439, 444 (6th Cir.2008).

***3** The counterclaim alleges as follows:

> 57. The Plaintiffs willfully misrepresented to the Defendant that in exchange for the Defendant's labor and services in preparing the Actuary's Report to the Plaintiffs for the year ending 2008, the Plaintiffs would pay the Defendant a reasonable and customary amount for such labor and services and for additional unbilled labor and services previously performed.
>
> 58. Such willful misrepresentations were made by the Plaintiffs to the Defendant with the intent to

> induce the Defendant to act thereon, which he did to his detriment, without knowledge of the falsity of said willfully (sic) misrepresentations.

(Docket No. 12, at ¶¶ 57, 58).

Under Tennessee law, a promise of future conduct with the present intention not to perform the conduct constitutes promissory fraud. *See, e.g., Sanders v. First National Bank & Trust Co.,* 936 F.2d 273, 278 (6th Cir.1991); *Styles v. Blackwood,* 2008 WL 5396804, at * 5-7 (Tenn.Ct.App. Dec.29, 2008). In order to prove a claim of promissory fraud, a plaintiff must prove: (1) a promise of future conduct; (2) that was material; (3) made with the intent not to perform; (4) that plaintiff reasonably relied upon; (5) to plaintiff's injury. *Styles, Id.,* at *7. The mere fact that the promisor failed to perform the promised act is insufficient by itself to prove fraudulent conduct. *Id.*

Although the Defendant has generally alleged that the Plaintiffs induced him to perform certain services and "willfully misrepresented" that they would pay him for those services, he has provided no specifics regarding the alleged promise, such as the identity of the promisor(s), the specific statements made by the promisor, or the date, time or circumstances when the alleged promise was made. Under these circumstances, the Court concludes that the Defendant has not pled fraud with particularity, and Plaintiffs' motion to dismiss the fraud counterclaim for failure to state a claim is granted.

D. *Intentional Infliction Of Emotional Distress*

Plaintiffs argue that Defendant's counterclaim for intentional infliction of emotional distress should be dismissed because it fails to sufficiently allege facts stating a claim for this tort. The Tennessee Supreme Court has explained that in order to state a claim for intentional infliction of emotion distress, a plaintiff must establish that: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff. *Lourcey v. Estate of Scarlett,* 146 S.W.3d 48, 51 (Tenn.2004). It is not sufficient that the alleged conduct was tortious or even criminal. *Id.* The plaintiff must show that the alleged conduct was " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* (quoting *Miller v. Willbanks,* 8 S.W.3d 607, 614 (Tenn.1999)).

***4** Defendant's counterclaim incorporates factual allegations essentially describing mismanagement and misconduct regarding the operation of the Plaintiff Retirement Plan over the course of several years, as well as the Plaintiffs' failure to pay him for his services. (Docket No. 12, at ¶¶ 1-58).

The allegations of the counterclaim do not rise to the level of outrageous conduct as described by the Tennessee courts. At most, the allegations describe white-collar criminal conduct, not directly aimed at the Defendant, and a failure to pay for services rendered. Plaintiffs' motion to dismiss this counterclaim is granted.

E. *Estoppel*

Plaintiffs argue that Defendant's counterclaim for estoppel should be dismissed because Tennessee does not recognize estoppel as an independent tort. The Tennessee courts have held that the doctrine of estoppel "is available to protect a right but not to create one." *Franklin v. St. Paul Fire & Marine Ins. Co.,* 534 S.W.2d 661, 666 (Tenn.Ct.App.1975). It cannot be invoked offensively to create a right to compensation. *Sexton v. Sevier County,* 948 S.W.2d 747, 751 (Tenn.Ct.App.1997).

Defendant's counterclaim essentially alleges that Plaintiffs' conduct in extreme mismanagement of the pension fund and retaliatory acts taken against the Defendant after he refused to cover up the mismanagement entitle him to compensatory and punitive damages, lost wages, costs and interest. (Docket No. 12, at ¶¶ 62-68).

The Court agrees with the Plaintiffs that the Defendant is seeking to rely on a theory of estoppel as a basis for recovering damages against the Plaintiffs. Such a basis for recovery is not recognized by Tennessee law. Therefore, Plaintiffs' motion to dismiss this counterclaim is granted.

F. *Abuse of Process*

Plaintiffs argue that Defendant's counterclaim for abuse of process should be dismissed because the Defendant has not alleged that the Plaintiffs have engaged in an improper act after filing the instant lawsuit that would constitute an abuse of process under Tennessee law.

The Tennessee courts have explained that there are two actions that may be brought to redress the alleged misuse of the legal process by another: malicious prosecution and abuse of process. *Bell v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg,,* 986 S.W.2d 550, 555 (Tenn.1999). To establish a claim of malicious prosecution, the plaintiff must show that the defendant maliciously brought a prior suit against him without probable cause, and that the prior suit terminated in favor of the plaintiff. *Id.* To establish a claim for abuse of process, the plaintiff must show: (1) the existence of an ulterior motive; and (2) an act in the use of process other than one that would be proper in the regular prosecution of the charge. *Id.* A plaintiff must show some "additional abuse of process after the *original* processes of the court, *i.e.,* the complaint, summons, and responsive pleadings, have been issued." *Givens v. Mullikin,* 75 S.W.3d 383, 403 (Tenn.2002). "[I]t is this requirement alone that distinguishes this tort from that of malicious prosecution, which arises solely upon the filing of a complaint without probable cause." *Id.*

***5** In this case, Defendant has titled his counterclaim "abuse of process" and alleges that the Plaintiffs had an ulterior purpose in filing the instant action, and that the "filing of this action" was done wrongfully and to maliciously abuse the process. (Docket No. 12, at ¶¶ 69-72).

The Defendant has not sufficiently alleged the tort of abuse of process because he has not alleged that the Plaintiffs have engaged in an additional abuse of process beyond the filing of the complaint as required under Tennessee law. Therefore, Plaintiffs' motion to dismiss this counterclaim is granted.

G. *Civil Conspiracy*

Plaintiffs argue that the Defendant has not sufficiently alleged a counterclaim for civil conspiracy because the claim lacks specificity.

In Tennessee, a civil conspiracy is defined as a " 'combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means,' " which results in damage to the plaintiff. *Chenault v. Walker,* 36 S.W.3d 45, 52 (Tenn.2001) (*quoting Dale v. Thomas H. Temple Co.,* 186 Tenn. 69, 90, 208 S.W.2d 344, 353 (1948)); *Trau-Med of Am., Inc. v. Allstate Ins. Co.,* 71 S.W.3d 691, 703 (Tenn.2002). Participating in a civil conspiracy is not an independent tort. *Stanfill v. Hardney,* 2007 WL 2827498, at *7 (Tenn.Ct.App. Sept.27, 2007). 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. *Id.*

A civil conspiracy claim is a means of extending liability beyond the active wrongdoer to those who planned, assisted or encouraged the wrongdoer's acts. *Id.* Thus, the members of the civil 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. *Id.*

In order to establish a civil conspiracy, the plaintiff must show: (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. *Id.*

In this case, Defendant's civil conspiracy counterclaim provides, in pertinent part, as follows:

> 73. Paragraphs One (1) through Seventy-Two (72) are re-alleged and incorporated herein by reference and made Paragraph Seventy-Three (73).
>
> 74. The Plaintiffs acted and conspired together to falsely accuse the Defendant as described above; to withhold payment of the Defendant's legitimate itemized bill as presented in January, 2008 and to bring this frivolous action to discredit the Defendant and as retribution for the Defendant's refusal to misrepresent and mislead the local union membership as to the mismanagement of the pension plan and the resulting injury to the fund.
>
> ***6** 75. As a result of the Plaintiffs'

> above-described conduct, the Defendant was caused to suffer and continues to suffer financial loss and damages, mental and emotional anguish and damage to his personal and professional reputation.

(Docket No. 12, at ¶¶ 73-75).

Although the Defendant alleges that he was damaged by certain conduct on the part of the Plaintiffs, he does not identify the underlying tort alleged to have been committed by one or more of them. Defendant does not allege that one or more of the Plaintiffs engaged in libel or slander in their alleged efforts to discredit him, nor does he allege that he has been maliciously prosecuted. The torts allegedly committed by the Plaintiffs as identified by the Defendant in separate counterclaims, such as abuse of process, are not viable claims for the reasons described above. Thus, Defendant has failed to sufficiently allege the commission of a tortious or wrongful act by one or more of the conspirators as required by Tennessee law. Accordingly, the motion to dismiss Defendant's counterclaim for civil conspiracy is granted.[FN1]

> FN1. Plaintiffs also seek dismissal of Paragraphs 2 through 47 of the counterclaim based on their contention that Defendant lacks standing to bring the claims. The cited paragraphs are factual allegations preceding the specific counterclaims that follow, and are incorporated in the counterclaims by reference. As the factual allegations do not purport to state a claim separate and apart from the counterclaims that follow, the Court finds it unnecessary to address Plaintiffs' argument.

IV. *Conclusion*

For the reasons set forth herein, the Plaintiffs' motion to dismiss is granted in part, and denied in part.

It is so ORDERED.

M.D.Tenn.,2009.
Birmingham-Jefferson County Transit Authority v. Boatright
Slip Copy, 2009 WL 2601926 (M.D.Tenn.)

END OF DOCUMENT

EXHIBIT “2”

Slip Copy, 2010 WL 3283029 (E.D.Tenn.)
(Cite as: 2010 WL 3283029 (E.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Tennessee.
Mike FERRELL, d/b/a Ole-Timerz Gas & Grill,
Plaintiff,
v.
ADDINGTON OIL CORP. d/b/a Addco, Defendant.
No. 2:08-CV-74.

Aug. 18, 2010.

D. Bruce Shine, Donald F. Mason, Jr., Shine & Mason, Shelburne Ferguson, Jr., Law Office of Shelburne Ferguson, Jr., Kingsport, TN, for Plaintiff.

James N. Humphreys, Hunter, Smith & Davis, Kingsport, TN, for Defendant.

MEMORANDUM OPINION AND ORDER

J. RONNIE GREER, District Judge.

***1** This matter is before the Court on the defendant's "Motion To Dismiss Consolidated [Third] Amended Complaint," [Doc. 37]. The plaintiff has responded to defendant's motion, [Doc. 39], and the defendant has replied, [Doc. 40]. The matter is now ripe for disposition. For the reasons which follow, the motion will be **GRANTED IN PART** and **DENIED IN PART.**

I. Procedural history

This case has a somewhat tortured procedural history. Plaintiff's complaint was originally filed on March 3, 2008, [Doc. 1]. The defendant responded to the complaint with a motion to dismiss, [Doc. 5]. In response to defendant's motion to dismiss, plaintiff moved to amend/revise his complaint, [Doc. 10], and an amended complaint was filed on May 8, 2008, [Doc. 12]. The defendant responded to the amended complaint with a motion to dismiss the amended complaint, [Doc. 13]. After response, [Doc. 16], and reply, [Doc. 17], the Court ordered the plaintiff to file a second amended complaint which complied with Federal Rules of Civil Procedure 8, [Doc. 18]. After extensions of time, the second amended complaint was filed on January 7, 2009, [Doc. 25]. Defendant responded to the second amended complaint on January 30, 2009, with a motion to dismiss the second amended complaint, [Doc. 26]. The plaintiff responded to this motion on March 4, 2009, [Doc. 33].

On March 11, 2009, the parties filed a joint "notice" that the parties had "resolved defendant's pending motion to dismiss," [Doc. 35]. The parties agreed that the plaintiff would file, on or before April 15, 2009, "a single, consolidated complaint which shall contain all legal and equitable theories of recovery." They acknowledged that the agreement of the parties had rendered the pending motion to dismiss moot. On February 15, 2009, plaintiff filed his third amended complaint pursuant to the agreement of the parties, [Doc. 36], "supplanting the Complaint, Amended Complaint, Second Amended Complaint, and Plaintiff's Alternative Motion to Amend Complaint ..." Defendant responded to the third amended complaint with the pending motion to dismiss.

II. The complaint's allegations

According to the complaint, the plaintiff was a retailer of motor fuel who operated a business known as Old Timerz Gas & Grill, a convenience store and grill, in Jonesborough, Tennessee. Plaintiff was supplied gasoline/motor fuel for retail sale to the public by the defendant, with the first delivery taking place on or about March 5, 2007. Shortly thereafter, plaintiff began to suspect that he was being "shorted" on the quantity of gasoline/motor fuel the defendant claimed to be delivering to plaintiff and for which the defendant was charging plaintiff. During May and June, 2007, the plaintiff "initiated a standard, acceptable method of measuring and determining the amount of fuel remaining in each tank immediately prior and after to [sic] the delivery of fuel from defendant." Plaintiff determined through these measurements that the deliveries of fuel were indeed short and he confronted the defendant. The defendant responded by threatening to remove the fuel pumps from plaintiff's business and the threat was carried out on June 29, 2007.

***2** The complaint further alleges that the actions of defendant were "calculated to punish Ferrell for questioning the accuracy of motor fuel delivery and

the legitimacy of measurement calculations" and the effect was to prevent the plaintiff from selling fuel to his customers. The termination of delivery of motor fuel and the removal of the fuel tanks "was done in disregard for the clear provisions of defendant's contractual agreement with plaintiff ..." The plaintiff seeks damages for his lost profits, incidental and consequential damages to his business, punitive damages, and attorney's fees. In addition, he seeks equitable injunctive relief in that he seeks an order of the court requiring the defendant "to return and install the pumps in good working order on plaintiff's former premises at defendant's expense."

III. Applicable legal standard

In plaintiff's complaint, he alleges causes of action for breach of contract, unjust enrichment, conversion, fraud, negligent misrepresentation, interference with business relationships and violation of the Tennessee Consumer Protection Act. Defendant's motion is a partial motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant seeks dismissal of all alleged causes of action except for plaintiff's claim of unjust enrichment.

The court may dismiss a claim for failure to state a claim upon which relief can be granted under Federal Rules of Civil Procedure 12(b)(6). The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the complaint-not to decide the merits of the case. It is well established that a complaint need not set forth in detail all of the particularities of the plaintiff's claim. Instead, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 does not, however, "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). While legal conclusions can provide the framework for a complaint, all claims must be supported by factual allegations. *Id.* The Supreme Court has indicated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949; *see also Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("[A] formulaic recitation of the elements of a cause of action" is insufficient).

To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must plead facts sufficient "to state a claim for relief that is plausible on its face." *Twombly,* 550 U.S. at 570. The requisite facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. The plausibility requirement is not the same as a "probability requirement" but instead "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Examining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

***3** A district court considering a motion to dismiss must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded allegations in the complaint as true. *See Grindstaff v. Green,* 133 F.3d 416, 421 (6th Cir.1998); *see also Iqbal,* 129 S.Ct. at 1950 ("when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibility give rise to an entitlement to relief."). Where the well-pleaded facts "do not permit the court to infer more than the mere possibility of misconduct," the complaint fails to state a claim. *Iqbal,* 129 S.Ct. at 1950.

IV. Analysis

As an initial matter, the Court will, as it must in deciding this Rule 12(b)(6) motion, accept all of the factual allegations of the complaint, such as they are, as true. The complaint before the Court is, however, the ***fourth*** complaint now filed by the plaintiff and plaintiff's counsel have, for whatever reason, shown an extreme reticence not only to set out their claims in a straightforward and forthright manner but also to allege further facts in support of their claims. Such tactics on the part of plaintiff are admittedly a source of frustration to the Court, as they have been to the defendant in this case. Nevertheless, it is obvious that plaintiff is either unwilling or unable to plead additional facts in support of his claims and the Court will decide the motion based on the facts set forth above.

A. Breach of contract

Plaintiff sets forth his breach of contract claim in ¶¶ 15-18 of his consolidated amended complaint. Plaintiff alleges that on or about March 5, 2007, he entered

into an "exclusive supply contract" with the defendant for the wholesale purchase of gasoline/motor fuel for retail sale. By reference to Tennessee Code Annotated §§ 47-1-205(1) and (2) [FN1], plaintiff apparently asserts that the contract and its terms are to be inferred from "the course of dealing and usage of trade" established with the previous owner of plaintiff's retail establishment. Plaintiff further alleges that the agreement between the plaintiff and defendant required the defendant to provide the pumps utilized by plaintiff's retail customers when buying fuel. Thus, reading the allegations of the complaint in the light most favorable to plaintiff, it appears to the Court that the plaintiff is alleging a contract between plaintiff and defendant based upon the course of dealing established between defendant and the previous owner of plaintiff's retail establishment and that the terms of such agreement included, at a minimum, an agreement that plaintiff would purchase gasoline/motor fuel exclusively from defendant and that defendant would supply motor fuel to plaintiff, using pumps provided by the defendant to be used by retail customers to fuel their vehicles.

> FN1. Tennessee Code Annotated §§ 47-1-205(1) and (2) provide:
>
> > **47-1-205. Course of dealing and usage of trade.** (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
> >
> > (2) A usage of trade is any practice or method of dealing having such regularity of observance at a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
> >
> > T.C.A. §§ 47-1-205(1) and (2).

Defendant argues that this claim is "too vague and ambiguous" to state a claim for relief. More specifically, defendant argues that it cannot reasonably prepare a response because the consolidated amended complaint does not state whether the "exclusive supply contract" is in writing or oral and the consolidated amended complaint does not state clearly the terms of the contractual agreement, does not state whether the requirement to provide gasoline pumps is express or implied and does not contain specific allegations as to how the plaintiff contends the defendant breached the contract. The defendant further complains that the contract, if written, should be attached to the complaint pursuant to Federal Rules of Civil Procedure 10(c).

***4** The elements of a breach of contract action under Tennessee law [FN2] include: (1) existence of an enforceable contract (either oral or written), (2) non-performance amounting to a breach of the contract, and (3) damages caused by the breach. *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.,* 183 S.W.3d 1, 26 (Tenn.Ct.App.2005); *Lifecare Cntrs. of Amer., Inc. v. Charles Town Assoc's., Ltd. Partnership,* 79 F.3d 496, 514 (6th Cir.1996). While the Court is somewhat dismayed at plaintiff's refusal to supply further factual allegations in support of his breach of contract claim, the Court cannot say, as a matter of law, that the complaint does not sufficiently plead the elements of a breach of contract claim under Tennessee law and the defendant's motion as to this claim will be denied. While it is true that many of the evidentiary details noted by defendant are not addressed in the complaint, these may be adequately addressed through appropriate discovery in the case and, if the plaintiff cannot prove a set of facts which would entitle him to relief on this theory, defendant may be entitled to summary judgment on the claim.

> FN2. This United States District Court, sitting in Tennessee, applies the substantive of the state in which it sits, *i.e.,* Tennessee. *See Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (holding that a federal district court is required to apply the law of the state in which it sits in resolving questions of substantive law). Neither party has suggested that the substantive law of any other state applies in this case.

As noted above, the defendant also complains that the contract, if written, should be attached as an exhibit to plaintiff's complaint, pursuant to Rule 10(c). A fair

reading of the complaint, however, suggests that the alleged contract, based on a course of conduct and usage of trade, is oral and/or implied. Once again, however, this is an evidentiary matter which should be addressed in discovery. Furthermore, while it is certainly good practice to attach a written contract to a plaintiff's complaint for breach of contract where one exists, the explicit terms of Rule 10(c) do not require that. Rule 10(c) *authorizes* the incorporation of "any written instrument which is an exhibit" attached to a pleading and makes the material thus incorporated a part of that pleading for all purposes. Fed.R.Civ.P. 10(c); 5A Wright & Miller, *Federal Practice and Procedure: Civil* 3d § 1327.

B. Conversion

Plaintiff sets forth his claim for conversion in paragraph 21 of the consolidated amended complaint. That paragraph reads as follows:

> 21. Defendant, by the conduct heretofore described, has retained gasolined and funds that rightfully belonged to Plaintiff, Defendant having acquired same by trick and artifice and thereafter converting these to its own use while depriving Plaintiff of their use and benefit. Plaintiff is therefore entitled to the value of the gasoline, a dollar amount equal to the funds wrongfully acquired by Defendant, plus interest, and also punitive damages in an amount sufficient to punish Defendant for "civil theft".

[Doc. 36, ¶ 21].

Conversion is the appropriation of tangible property to a party's own use in exclusion or defiance of the owner's rights. *Marks, Shell & Maness v. Mann,* 2004 WL 1434318 (Tenn.Ct.App.2004) (unpublished) (citing *Barger v. Webb,* 216 Tenn. 275, 278, 391 S.W.2d 664, 665 (1965)); *Lance Prods., Inc. v. Commerce Union Bank,* 764 S.W.2d 207, 211 (Tenn.Ct.App.1988)). Conversion is an intentional tort, and a party seeking to make out a *prima facie* case of conversion must prove (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights. *Id.* (citing *Kinnard v. Shoney's, Inc.,* 100 F.Supp.2d 781, 797 (M.D.Tenn.2000); *Mammoth Cave Prod. Credit Ass'n v. Oldham,* 569 S.W.2d 833, 836 (Tenn.Ct.App.1977)).

***5** The defendant argues that plaintiff has failed to sufficiently plead a claim for conversion. More specifically, the defendant claims that the plaintiff has failed to plead that defendant deprived plaintiff of anything. According to defendant, plaintiff has simply alleged a failure on the part of the defendant to deliver gasoline but has not alleged the appropriation of something that belongs to plaintiff to defendant's use and benefit by the exercise of dominion over it in defiance of plaintiff's right. The plaintiff responds that he has alleged that "defendant committed conversion by having acquired funds that rightfully belong to plaintiff by trick and artifice, and thereafter converting these to its own use while depriving plaintiff of the use and benefit of its funds." Thus, plaintiff contends that defendant appropriated to his own use money and/or gasoline, in defiance of plaintiff's right to possess it.

As set forth above, conversion is an intentional tort. Although plaintiff alleges that defendant appropriated money and/or gasoline belonging to him "by trick and artifice and thereafter converting these to its own use," the plaintiff pleads no facts which would support such a conclusory allegation. The essence of plaintiff's complaint is that the defendant billed him for more gasoline than was delivered. Such an allegation does not state a claim for conversion under Tennessee law. Defendant's motion in this regard will be granted and the claim for conversion will be dismissed.

C. Fraud

Plaintiff's claims for fraud and negligent misrepresentation are set forth in paragraph 22 of his consolidated amended complaint, which reads as follow:

> 22. Defendant, by the conduct heretofore described, did commit the tort of fraud and negligent misrepresentation by falsely and/or negligently misrepresenting the amounts of gasoline/motor fuel being delivered to Plaintiff to be greater than the amounts actually delivered, thereby deceiving Plaintiff and upon which Plaintiff relied to his detriment by overpaying Defendant for gasoline/motor fuel that was not delivered. Plaintiff here alleges that the false and/or negligent misrepresentation perpetrated by Defendant upon Plaintiff as heretofore described was knowingly and/or intentionally done. Plaintiff is therefore entitled to

> damages in the amount of the overpayment for undelivered gasoline, lost profits, interest, and punitive damages due to the egregious nature of Defendant's conduct.

[Doc. 36, ¶ 22].

Defendant alleges, in short, that plaintiff has not pled his fraud claim with the particularity required by the rules of civil procedure. Further, citing *Hodges v. S.C. Toff & Co.,* 833 S.W.2d 896, 901 (Tenn.1992), the defendant alleges that the plaintiff's complaint does not sufficiently plead the "reasonable reliance" element of fraud and that the allegations of paragraphs 9 and 10 of the consolidated amended complaint preclude plaintiff from establishing such reliance. Paragraphs 9 and 10 of the amended complaint state:

> ***6** 9. Plaintiff on May 7, 2007, initiated a standard, acceptable method of measuring and determining the amount of fuel remaining in each tank immediately prior and after to [sic] the delivery of fuel from Defendant.
>
> 10. Plaintiff continued the measuring method upon each delivery of fuel by Defendant through June 20, 2007, when Defendant again showed a fifth consecutive measured shortage in the fuel claimed to be delivered and the amount of fuel actually deposited in the tanks following delivery. Plaintiff determined through actual measurement the shortage in fuel delivered and confronted the Defendant.

[Doc. 36, ¶¶ 9-10].

The plaintiff responds only that the specificity of the time and place of the fraud is set forth in the complaint and claims that his allegation that the defendant invoiced gasoline which the plaintiff did not receive constitutes fraud. Defendant further suggests that "plaintiff has alleged he paid the false invoices relying on defendant's representations of the amounts of fuel being delivered," and such allegation "should" be sufficient on the reasonable reliance element.

Rule 9(b) provides:

> (b) **Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed.R.Civ.P. 9(b). To satisfy Rule 9(b), a complaint of fraud, "at a minimum, must 'allege the time, place, and content of the alleged misrepresentation on which [the plaintiff] relied; the fraudulent scheme; the fraudulent intent of the defendant[ ]; and the injury resulting from the fraud.' " *United States, ex rel. Bledsoe v. Cmty. Health Sys., Inc.,* 342 F.3d 634, 643 (6th Cir.2003) (quoting *Coffey v. Foamex L.P.,* 2 F.3d 157, 161-62 (6th Cir.1993) (internal quotation marks and citations omitted)). The reason for the heightened pleading requirement of Rule 9(b) is that claims of fraud "raise a high risk of abusive litigation." *See Twombly,* 550 U.S. at 544. Rule 9(b) is intended to provide defendants with "notice of the specific conduct with which they were charged," so the defendants can prepare responsive pleadings. *United States, ex rel. Bledsoe v. Cmty Health Sys., Inc.,* 501 F.3d 493, 510 (6th Cir.2007).

Under Tennessee law, the elements of an action for fraud are: (1) an intentional misrepresentation with regard to a material fact; (2) knowledge of the misrepresentation's falsity-that the representation was made knowingly or without belief in its truth, or recklessly without regard to its truth or falsity; (3) that the plaintiff reasonably relied on the misrepresentation and suffered damage; and (4) that the misrepresentation relates to an existing or past fact, or if the claim is based on promissory fraud, then the misrepresentation must embody a promise of future action without the present intention to carry out the promise. *Kelly v. International Capital Resources, Inc.,* 231 F.R.D. 502, 517 (M.D.Tenn.2005) (citing *Shah v. RaceTrac Petroleum Co.,* 338 F.3d 557, 566-67 (6th Cir.2003)).

***7** The defendant attacks plaintiff's fraud claim in several respects. First of all, the defendant alleges that plaintiff has not met the particularity requirement of Federal Rule of Civil Procedure 9(b) and that plaintiff's allegation that defendant committed fraud by "falsely representing" the amounts of gasoline delivered is not sufficient to satisfy the particularity pleading requirements. More specifically, defendant alleges that plaintiff states only that he noticed shortages of gasoline between March and June of 2007 but does not allege the content of any representations or misrepresentations at all. The defendant specifically argues that plaintiff should allege, at a minimum,

the quantity of gasoline defendant invoiced and the quantity of gasoline defendant actually delivered. Lastly, defendant argues that plaintiff has not plead allegations to support the element of reasonable reliance, arguing that because plaintiff measured the gasoline, he did not rely on any representations by defendant.

The plaintiff responds only by claiming that he has specifically alleged the time and place of the fraud and argues that since plaintiff paid false invoices, "this should be sufficient" to allege the reliance element of the claim of fraud.

This Court is constrained to agree with defendant that, after four attempts, the plaintiff has not plead his claim of fraud with the particularity required by Rule 9. There is no allegation in the complaint that can be construed as an allegation that the misrepresentation (*i.e.,* that the quantity of gasoline specified on the invoices was in fact delivered) was made with knowledge of its falsity and the complaint raises only the possibility otherwise. Under the precedent discussed above, this is not sufficient for the plaintiff to state a claim for relief on his claim of fraud.

D. Negligent misrepresentation

As set forth by defendant, the elements of a claim of negligent misrepresentation under Tennessee law are: (1) defendant acts in the course of his business, profession, or employment, or in a transaction which he has a pecuniary interest, (2) defendant supplies faulty information meant to guide others in their business transactions, (3) defendant fails to exercise reasonable care in obtaining or communicating the information, and (4) plaintiff justifiably relies upon the information. *Robinson v. Omer,* 952 S.W.2d 423, 427 (Tenn.1997).

Defendant's only claim here is that "plaintiff specifically alleges that he did not rely upon defendant for the amount of gasoline delivered." Citing ¶¶ 9 and 10 of the consolidated amended complaint, defendant argues that plaintiff, rather than relying on defendant's representations, measured the quantities of gasoline delivered himself. The Court agrees with plaintiff that a reading of ¶ ¶ 9 and 10 of the consolidated amended complaint do not support such a conclusion. Plaintiff's reliance, and the reasonableness thereof, is a question of fact to be decided after appropriate discovery in the case. Defendant's motion as to the negligent misrepresentation claim is denied.

E. Interference with business relationships

***8** In 2002, the Tennessee Supreme Court recognized the tort of intentional interference with existing or prospective business relationships. *See Trau-Med of America, Inc. v. Allstate Insurance Co.,* 71 S.W.3d 691 (Tenn.2002). In order to prevail in Tennessee on the tort of intentional interference with existing or prospective business relationships, a plaintiff must be able to prove five (5) elements: (1) Plaintiff must prove an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant must know of the relationship, and this element is not met by "mere awareness" of plaintiff's general business dealings; (3) the defendant must intend to cause the breach or termination of the business relationship; (4) a defendant must have an "improper motive" or use "improper means;" and (5) the plaintiff must suffer injury from the tortuous interference. *Watson's Carpet v. McCormick,* 247 S.W.3d 169 (Tenn.Ct.App.2007).

Defendant makes two claims here. First, the plaintiff argues that the consolidated amended complaint "does not allege anything other than that a general awareness of plaintiff's business dealings with others." Secondly, defendant argues that plaintiff does not allege that defendant took steps to prevent plaintiff from having business dealings with others. Specifically, defendant argues that plaintiff simply alleges that defendant terminated its business dealings with the plaintiff, which had a consequential effect on plaintiff's business dealings with others. Plaintiff responds that a reasonable inference to be drawn from the factual allegations of the amended complaint is that defendant, a wholesale supplier of gasoline, "was certainly aware of plaintiff's business and the existence of retail customers to whom he could no longer sell gasoline after the removal of the pumps by the defendant."

Given the limited nature of the defendant's motion to dismiss this claim, the Court is constrained to agree with plaintiff. The factual allegations of the complaint are sufficient to allow the factfinder to infer that plaintiff had an existing relationship or a prospective relationship with an identifiable class of retail customers, that defendant, a wholesale supplier of gaso-

line, knew of the relationship beyond a mere awareness of plaintiff's general business dealings, that defendant intended to cause the termination of the prospective business relationships by removal of the gasoline pumps, that defendant had an improper motive or used improper means and that plaintiff suffered injury from the interference. Defendant's motion to dismiss the claim for interference with business relationships is DENIED.

F. Violation of Tennessee Consumer Protection Act

Tennessee has enacted a "Tennessee Consumer Protection Act ("TCPA")." *See* T.C.A. § 47-18-101, et seq. The Act prohibits unfair or deceptive acts or practices effecting the conduct of any trade or commerce, T.C.A. § 47-18-104(a), and sets forth numerous examples of unfair or deceptive acts or practices which are declared to be unlawful. T.C.A. § 47-18-104(b).

***9** Defendant makes two arguments with respect to the claim for violation of the TCPA made by the plaintiff: (1) that plaintiff has not stated his allegations with particularity; and (2) that plaintiff has not alleged that he reasonably relied to his detriment on the unfair or deceptive acts in question. Plaintiff, of course, disagrees.

The TCPA is explicitly remedial, and courts are therefore required to construe it liberally to protect consumers in Tennessee and elsewhere. *Tucker v. Sierra Builders,* 180 S.W.3d 109, 115 (Tenn.Ct.App.2005) (citing T.C.A. § 47-18-115; *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 925 (Tenn.1988); *Morris v. Mack's Used Cars,* 824 S.W.2d 538, 540 (Tenn.1992)). "The scope of the TCPA is much broader than that of common-law fraud. Under the TCPA, a consumer can obtain recovery without having to meet the burden of proof that is require in common-law fraud cases, and the numerous defenses that are available to the defendant in a common-law fraud case are simply not available to the defendant in a TCPA case." *Tucker,* 180 S.W.3d at 115, (citing *Smith v. Baldwin,* 611 S.W.2d 611, 616 (Tex.1980)). "Misrepresentations that would not be actionable as common-law fraud may nevertheless be actionable under ... the TCPA." *Id.* (citing *Stutman v. Chemical Bank,* 95 N.Y.2d 24, 709 N.Y.S.2d 892, 731 N.E.2d 608, 611-12 (2000); *Eagle Props., Ltd. v. Scharbauer,* 807 S.W.2d 714, 724 (Tex.1990)). "Claims under the TCPA are not limited to misrepresentations that are fraudulent or willful." *Id.* (citing *Smith v. Scott Lewis Chevrolet, Inc.,* 843 S.W.2d 9, 12-13 (Tenn.Ct.App.1992)).

In order to recover under the TCPA, a plaintiff must prove: (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA, and (2) that the defendant's conduct caused an "ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity or thing of value wherever situated...." *Id.* (citing T.C.A. § 47-18-109(a)(1)).

Given the remedial nature of the TCPA and the requirement that courts construe the Act liberally in favor of plaintiffs, the court is unwilling to dismiss the TCPA claim absent factual development, especially in view of the limited nature of the defendant's motion to dismiss. The motion to dismiss the TCPA claim is DENIED.

G. Equitable relief

In paragraph 23 of his consolidated amended complaint, plaintiff seeks an injunction requiring the defendant "to return and install the pumps in good working order on plaintiff's former premises at defendant's expense or pay the cost of retrofitting plaintiff's former tanks with modern pumps that have the appearance of the by-gone era the removed pumps represent." [Doc. 36, ¶ 23]. The defendant seeks dismissal of the claim for equitable relief on the grounds that the plaintiff's allegations demonstrate that the case is simply a money damages case and that equitable relief would be improper. Plaintiff responds by arguing that his remedy at law is inadequate and that the wrongful removal of the gasoline pumps "would ***best*** be rectified by their restoration to the premises through court directive ***or*** money damages sufficient to pay the cost of retrofitting plaintiff's tanks with modern pumps having the appearance of the by-gone era the removed pumps represent ." [Doc. 33, p. 7] (emphasis added).

***10** The defendant correctly argues that before equitable relief is proper, it must be shown that an adequate remedy at law does not exist. *See Taylor v. Unumprovident Corp.,* 2005 WL 3448052 at *6 (E.D.Tenn.2005). The Court agrees with the defendant

that plaintiff's complaint, on its face, shows that there is an adequate remedy at law and that plaintiff has not set forth a proper claim for equitable relief in this case. The motion of defendant will be GRANTED as to the claim for equitable relief.

V. Conclusion

For the reasons set forth above, defendant's motion to dismiss the consolidate amended complaint in part is **GRANTED IN PART** and **DENIED IN PART.** More specifically, the plaintiff's claims for conversion, fraud and for equitable relief are **DISMISSED.** The case will proceed with respect to plaintiff's breach of contract, negligent misrepresentation, interference with business relationships and violation of the Tennessee Consumer Protection Act claims.

So ordered.

E.D.Tenn.,2010.
Ferrell v. Addington Oil Corp.
Slip Copy, 2010 WL 3283029 (E.D.Tenn.)

END OF DOCUMENT

EXHIBIT “3”

Slip Copy, 2009 WL 2163498 (W.D.Tenn.)
(Cite as: 2009 WL 2163498 (W.D.Tenn.))

United States District Court,
W.D. Tennessee,
Western Division.
LIFE INSURANCE COMPANY OF NORTH AMERICA, Plaintiff,
v.
Larry SIMPSON, as natural parent and next of friend of Valewis Simpson, a minor, Ruby Wharton, in her capacity as Court appointed Guardian of Valewis Simpson, Barbara Carr, Jodie Ingram, Linda Fowler, Sheila Lancaster, Esther Lamar Fowler-Glenn, and The Estate of Valerie Carr, Defendants.
No. 08-2446.

July 16, 2009.

West KeySummary
Insurance 217 3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad Faith in General. Most Cited Cases
A bad faith counterclaim brought by an estate against an interpleading life insurance company was dismissed for failure to state a claim. The estate claimed that the insurer had acted in bad faith when it failed to appear at a probate court hearing and for failed to be forthcoming in providing documents related to the policy. The insurer contended that from the face of the counterclaims it was unclear what documents the estate requested, when they were requested, or how the insurer's response was inadequate; the insurer also claimed to have already produced to the estate the documents it possessed. The estate failed to provide the facts upon which it based the claim, and did not cite to any statute or common law doctrine that would entitle it to relief.

Brent E. Siler, Baker Donelson Bearman Caldwell & Berkowitz, Memphis, TN, Cameron S. Hill, Baker Donelson Bearman Caldwell & Berkowitz, Chattanooga, TN, for Plaintiff.

Thelma J. Copeland, Thelma J. Copeland Attorney, Christina Burdette, Hanover Walsh Jalenak & Blair, Memphis, TN, for Defendants.

ORDER GRANTING LIFE INSURANCE COMPANY OF NORTH AMERICA'S MOTION FOR ORDER OF DISCHARGE, DISMISSAL AND PERMANENT INJUNCTION AND TO DISMISS COUNTERCLAIMS

S. THOMAS ANDERSON, District Judge.

***1** Before the Court is Interpleader-Plaintiff Life Insurance Company of North America's ("LINA") Motion for Order of Discharge, Dismissal and Permanent Injunction and to Dismiss Counterclaims as filed on February 13, 2009 (D.E. # 32). The Defendants have failed to timely respond to LINA's motion, making the underlying motion now ripe for adjudication. For the reasons set forth below, Interpleader-Plaintiff's Motion is hereby **GRANTED.**

BACKGROUND

This interpleader action arises out of a dispute regarding the proceeds of a life insurance Policy (the "Policy") issued by LINA to Ms. Valerie Carr's employer on behalf of Ms. Carr. (Amend.Compl.¶ 17.) On November 8, 2007, Ms. Carr passed away. (*Id.* at ¶ 15.) At the time of her death, Ms. Carr's death benefit under the Policy was $55,000 in basic coverage and $165,000 in supplemental coverage. (*Id.* at ¶ 19.) During the administration of Ms. Carr's estate, a dispute has arisen over who the proper beneficiary to the Policy is. (*Id.* at ¶ 17.) At this juncture, the potential claimants to the proceeds of the Policy appear to be Jodie Ingram, Linda Fowler, Sheila Lancaster, Barbara Carr, Larry Simpson, as the natural father and custodial parent of Valewis Simpson (Ms. Carr's son), Ruby Wharton, as the court-appointed guardian of Valewis Simpson, and Esther Lamar Fowler-Glenn. (*Id.* at ¶ 18.)

LINA expressly disavows any interest in the death benefit and acknowledges the benefit should be paid according to the findings, conclusions, and instructions of the Court. (Pl's Mot. for Discharge 2.) LINA

filed its Complaint for Interpleader on July 11, 2008. (D.E.# 1.) LINA subsequently filed an Amended Complaint for Interpleader on January 6, 2009. (D.E.# 27.) Pursuant to Court Order, LINA has paid and the Clerk of Court has accepted for deposit the sum of $220,000.00. (D.E.# 21.) According to LINA, this sum represents the total amount due under Ms. Carr's life insurance policy. (Pl.'s Mot. for Discharge 2.)

On September 9, 2008 the Estate of Valerie Carr (the "Estate") filed its Answer and Counterclaim to LINA's Complaint. (D.E.# 19.) In the Estate's Counterclaim, it alleges that on numerous occasions it has requested the complete claims file and other documentation directly from the attorney for the agent of LINA, or from LINA, itself (among other individuals and entities). (Def. Estate's Countercl. ¶ 1.) Further, the Estate contends that neither LINA nor its agents have been forthcoming in providing documents to which the Estate has an absolute right. (*Id.* at ¶ 2.) According to the Estate, the beneficiary designation documents possess glaring inconsistencies that would result in the alienation of Ms. Carr's minor son from funds that were to be designated for his support in the event of his mother's death. (*Id.* at ¶ 3.) The Estate alleges that the Probate Court of Shelby County conducted a hearing requesting these documents; however, neither LINA nor its agents appeared. (*Id.* at ¶ 4.) As a result of these allegations, the Estate asserts that LINA has acted in bad faith, which could now jeopardize the appropriate and equitable settlement of the life insurance claim. (*Id.* at ¶ 5.) However, the Estate has not identified what relief it seeks as a result of their allegations.

***2** On February 12, 2009, Ruby Wharton, the court-appointed guardian for Valewis Simpson, filed her Answer and Counterclaim to LINA's Amended Complaint. (D.E.# 31.) In Mrs. Wharton's counterclaim she states that "the representative and attorney of the Estate of Valerie Carr has advised the Counter-Plaintiff of their efforts to obtain a verified copy of the beneficiary form and the Plaintiff and its representatives have not been forthcoming in producing the beneficiary documentation." (Def. Ruby Wharton's Countercl. ¶ 2.) Like the Estate, Ms. Wharton does not identify what relief she seeks as a result of this allegation.

LINA then filed the underlying motion, asserting they should be dismissed from this case pursuant to Federal Rule of Civil Procedure 12(b)(6) and 54(b). In so doing, LINA seeks (1) discharge from all liability arising from or payable as a result of the death of Valerie Carr by dismissing LINA from this action with prejudice; (2) an order permanently enjoining Defendants Larry Simpson, Barabara Carr, Jodie Ingram, Linda Fowler, Sheila Lancaster, Esther Lamar Fowler-Cleenn, the Estate, Ruby Wharton, and any other unidentified person who has made a claim or who may make a claim to the interpleaded funds from taking any action or commencing any proceeding against LINA, in relation to the interpleaded funds; (3) dismissal of the Estate's counterclaim against LINA for failure to state a claim upon which relief may be granted; and (4) dismissal of Mrs. Wharton's counterclaim against LINA for failure to state a claim upon which relief may be granted. (LINA's Memo. in Support of Mot. to Dismiss 7-8.)

STANDARD OF REVIEW

A defendant may move to dismiss a claim "for failure to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure 12(b)(6). When considering a Rule 12(b)(6) motion, the Court must treat all of the well-pleaded allegations of the complaint as true and construe all of the allegations in the light most favorable to the non-moving party.[FN1] However, legal conclusions or unwarranted factual inferences need not be accepted as true.[FN2] "To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all material elements of the claim." [FN3] "The Federal Rules of Civil Procedure do not require a claimant to set out in detail all the facts upon which he bases his claim." [FN4]

FN1. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Saylor v. Parker Seal Co.,* 975 F.2d 252, 254 (6th Cir.1992).

FN2. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987).

FN3. *Wittstock v. Mark a Van Sile, Inc.,* 330 F.3d 889, 902 (6th Cir.2003).

FN4. *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The Supreme Court has more recently stated that the Federal Rules "do not require a heightened fact pleading of specifics, but only enough facts to state a claim that is plausible on its face." [FN5] The Sixth Circuit has subsequently acknowledged "[s]ignificant uncertainty" as to the intended scope of *Twombly*.[FN6] Consequently, the Sixth Circuit has articulated the following as the standard of review for 12(b)(6) motions: on a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." [FN7] Thus, although the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." [FN8]

FN5. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007) ("retiring" the "no set of facts" standard first announced in *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

FN6. *Weisbarth v. Geauga Park Dist.,* 499 F.3d 538, 541 (6th Cir.2007); *see also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.,* 508 F.3d 327, 337 (6th Cir.2007) ("We have noted some uncertainty concerning the scope of *Bell Atlantic Corp. v. Twombly,* ... in which the Supreme Court 'retired' the 'no set of facts' formulation of the Rule 12(b)(6) standard....").

FN7. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.,* 501 F.3d 493, 502 (6th Cir.2007) (quoting *Twombly,* 127 S.Ct. at 1974 (2007)).

FN8. *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir.2007) (emphasis in original) (citing *Twombly,* 127 S.Ct. at 1964-65).

ANALYSIS

I. The Counterclaims

***3** Beginning with the Estate and Mrs. Wharton's counterclaims as to whether LINA has acted in bad faith for failing to appear at a probate court hearing and for failing to be forthcoming in providing documents related to Ms. Carr's policy, LINA raises three arguments in support of their dismissal. First, LINA contends that from the face of the counterclaims it is unclear what documents the Estate and Ms. Wharton requested, when they were requested, or how LINA's response was inadequate, and to that end, LINA claims to have already produced to the Estate the documents LINA had in its possession. Furthermore, LINA asserts that it is under no duty to be "forthcoming" with the documents or to appear at a Probate Court hearing, and as such, according to LINA the fact that it did not respond to the Estate's informal request for documents does not give rise to a cause of action.

Second, LINA argues there is no general claim for "bad faith." Although Tennessee law does provide a statutory cause of action for bad faith *denial* of an insurance claim, LINA claims that it has at all times specifically denied any interest in the proceeds of Ms. Carr's Policy and stood ready to pay the proceeds to the proper beneficiary. As such, LINA asserts that it is undisputed that it has not denied any claim for the benefits to Ms. Carr's policy, and as such, a bad faith claim cannot be asserted against them.

Last, LINA argues the Estate does not have standing to assert a claim against LINA, because the Estate cannot show that LINA's actions caused it "injury-in-fact." LINA seeks to demonstrate the Estate's lack of standing by showing that the Estate has not alleged that LINA has improperly delayed payment of the proceeds or somehow breached the agreement made by virtue of the Policy, and that the Estate is not a beneficiary, and thus, has no right to the proceeds of the Policy.

A careful reading of both the Estate and Mrs. Wharton's counterclaims reveals that neither party has provided any facts to support their claims that LINA has acted in bad faith, nor have they provided any information regarding what kind of damages they have suffered as a result of LINA's actions. Not only have Defendants' failed to provide the facts upon which they base their claim, but neither party has cited to any statute or common law doctrine that would entitle them to relief based on these actions. Although the factual allegations in a complaint need not be detailed,

they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." [FN9] The facts and allegations laid out in Defendants' counterclaim does just this. It creates a mere speculation or suspicion of a legally cognizable claim, if that, and this is not enough. Furthermore, the Defendants' have completely failed to respond to or dispute LINA's motion.

FN9. *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir.2007) (emphasis in original) (citing *Twombly,* 127 S.Ct. at 1964-65).

Additionally, LINA is correct in its contention that Tennessee law will not support a general "bad faith" claim, as Tennessee does not recognize a general common law tort for bad faith by an insurer against an insured.[FN10] Instead, the exclusive remedy for such conduct is statutory.[FN11] And although under Tenn.Code Ann. § 56-7-105 a cause of action may be premised on an insurance company's bad faith denial of an insurance claim,[FN12] this is not the set of circumstances in this case. Neither party has asserted that LINA denied the insurance claim, and LINA has at all times denied any interest in the policy's proceeds. (*See* LINA's Compl. for Interpleader ¶ 21.) Instead, LINA has been unable to pay the proceeds, because the remaining parties dispute who the proper beneficiary is.

FN10. *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co. .,* 590 F.Supp.2d 970, 973 (M.D.Tenn.2008).

FN11. Tenn.Code Ann. § 56-7-105.

FN12. Tenn.Code Ann. § 56-7-105; *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.,* 277 S.W.3d 381 (Tenn.2009).

***4** If instead the Defendants are suggesting that LINA has conducted itself in the underlying litigation in such a way that evidences bad faith, and as such, bars the application of the equitable remedies available by virtue of filing an interpleader complaint, Defendants have completely failed to allege any facts that would sufficiently support such a contention.[FN13] As such, accepting all of the counterclaimants' factual allegations as true, the Estate and Mrs. Wharton's claims must be dismissed for failure to state a claim upon which relief may be granted, and thus, Plaintiff's Motion to Dismiss the Defendants Counterclaims is hereby **GRANTED.**[FN14]

FN13. *See, e.g., Prudential Ins. Co. of Am. v. Hovis,* 553 F.3d 258, 262 (3d Cir.2009) (holding that "where a stakeholder is blameless with respect to the existence of the ownership controversy, the bringing of an interpleader action protects it from liability to the claimants both for further claims to the stake and for any claims directly relating to its failure to resolve that controversy"); *Abstract & Title Guar. Co. v. Chi. Ins. Co.,* 489 F.3d 808, 813 (7th Cir.2007) (holding that a finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will); *William Penn Life Ins. Co. of New York v. Viscuso,* 569 F.Supp.2d 355, 361 (S.D.N.Y.2008).

FN14. Because the Court finds that the counterclaims should be dismissed for failure to plead facts which could support a cause of action for bad faith, the Court need not specifically reach the issue of standing.

II. Discharge

LINA next requests that the Court enter an order dismissing Plaintiff from this action and enjoining all Defendants from bringing or maintaining further action against Plaintiff in connection with this matter. In LINA's Complaint for Interpleader, it states the Court has federal question jurisdiction, because this suit relates to a group life insurance policy that is governed by the Employment Retirement Income Security Act of 1974 ("E.R.I.S.A."). As such, Interpleader is a form of equitable relief available to Plaintiff pursuant to Federal Rule of Civil Procedure 22.

Under Rule 22, "[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability." [FN15] Interpleader is an equitable proceeding that "affords a party who fears being exposed to the vexation of defending multiple claims to a limited fund or property that is under his control a procedure to settle the controversy and satisfy his obligation in a single proceeding." [FN16]

FN15. Fed.R.Civ.P. 22.

FN16. *U.S. v. High Tech. Prods., Inc.,* 497 F.3d 637, 642 (6th Cir.2007); *see also Prudential Ins. Co. of Am.,* 553 F.3d at 262 ("[I]nterpleader allows a stakeholder who 'admits it is liable to one of the claimants, but fears the prospect of multiple liability[,] ... to file suit, deposit the property with the court, and withdraw from the proceedings.' " (citations omitted)).

An interpleader action typically proceeds in two stages.[FN17] During the first stage, the court determines whether the stakeholder has properly invoked interpleader, including whether the court has jurisdiction over the suit, whether the stakeholder is actually threatened with double or multiple liability, and whether any equitable concerns prevent the use of interpleader. [FN18] During the second stage, the court determines the respective rights of the claimants to the fund or property at stake via normal litigation processes, including pleading, discovery, motions, and trial.[FN19] "When the court decides that interpleader is available ... it may issue an order discharging the stakeholder, if the stakeholder is disinterested, enjoining the parties from prosecuting any other proceeding related to the same subject matter, and directing the claimants to interplead...." [FN20] Absent the presence of bad faith on the part of the stakeholder or the possibility that the stakeholder is independently liable, and after the interpleaded funds have been paid into the registry of the Court, discharge should be readily granted. [FN21]

FN17. *High Tech. Prods., Inc.,* 497 F.3d at 642.

FN18. *Id.; see also Aon Corp. v. Hohlweck,* 223 F.Supp.2d 510, 514 (S.D.N.Y.2002).

FN19. *High Tech. Prods., Inc.,* 497 F.3d at 642.

FN20. *Id.; see also Prudential Ins. Co. of Am.,* 553 F.3d at 262 (The result of an interpleader action is that " '[t]he competing claimants are left to litigate between themselves," while the stakeholder is discharged from further liability with respect to the subject of the dispute." (quoting *Metro. Life Ins., Co. v. Price,* 501 F.3d 271, 275 (3d Cir.2007)); *Aon Corp.,* 223 F.Supp.2d at 514 ("A discharge in interpleader 'permits the neutral stake holder having no claim to the subject matter of the action, to retire from the action and requires competing claimant to interplead their claims.' " (citations omitted)); *Sun Life Assurance Co. of Canada v. Thomas,* 735 F.Supp. 730, 732 (W.D.Mich.1990).

FN21. *Kurland v. U.S.,* 919 F.Supp. 419, 421 (M.D.Fla.1996); *Sun Life Assur. Co. of Canada,* 735 F.Supp. at 732 ("A neutral stakeholder asserting no claim to the disputed funds and having surrendered the disputed funds to the custody of the Court should be discharged from the action." (citing *New York Life Ins. Co. v. Conn. Dev. Auth.,* 700 F.2d 91, 94 (2d Cir.1983)).

In the case at bar, LINA does not contest its liability under the Policy, nor does it claim any entitlement to the proceeds. Instead, LINA was unable to determine the identity of the beneficiary or beneficiaries without potentially subjecting itself to multiple liability, and thus, LINA paid the full amount of benefits due under the policy into the Court. Accordingly, LINA is entitled to an order enjoining Defendants from bringing separate proceedings against LINA for the Policy proceeds and discharging Plaintiff from further liability to Defendants for the Policy proceeds.[FN22] LINA's Complaint for Interpleader additionally requests recovery of all costs and expenses incurred in bringing this action, including reasonable attorney's fees. (Compl.¶ (e).) However, LINA does not address this issue in its underlying motion, and thus, the Court does not reach it at this time. As such, LINA's Motion for Discharge **GRANTED,** and LINA is hereby dismissed from the underlying action, except for the limited issue of determining entitlement to attorney's fees and costs.

FN22. *See, e.g., Prudential Ins. Co. of Am. v. Goodiron,* No.1965, 2008 WL 545006, *3 (D.N.J. Feb.27, 2008); *Conn. Gen. Life Ins. Co. v. Thomas,* 910 F.Supp. 297, 300 (S.D.Tex.1995); *Sun Life Assurance Co. of Canada,* 735 F.Supp. 730.

III. Entry of Final Judgment

***5** LINA's final request is that judgment pursuant to Rule 54(b) be entered in their favor, as it asserts that its continued participation in this matter would cause it to expend time and resources without good cause. Federal Rule of Civil Procedure 54(b) states:

> When an action presents more than one claim for relief-whether as a claim, counterclaim, crossclaim, or third-party claim-or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

An entry of final judgment is available pursuant to Rule 54(b) based on two independent findings.[FN23] First, the court must determine whether the judgment is final.[FN24] A judgment is considered final when " 'an ultimate disposition of an individual claim has been entered in the course of a multiple claims action.' " [FN25] Second, the court must expressly determine that there is no just reason for delay.[FN26]

> FN23. *Gen. Acquisition, Inc. v. GenCorp Inc.,* 23 F.3d 1022, 1026 (6th Cir.1994).
>
> FN24. *Id.*
>
> FN25. *Id.* (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.,* 466 U.S. 1, 7, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1980)) (internal citation and quotation marks omitted).
>
> FN26. *Id.*

The Sixth Circuit has provided "[a] nonexhaustive list of factors which a district court should consider when making a Rule 54(b) determination." [FN27] These factors include:

> FN27. *Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc.,* 807 F.2d 1279, 1283 (6th Cir.1986).

> (1) the relationship between the adjudicated claim and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obligated to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.[FN28]
>
> FN28. *Id.*

"[S]ound judicial administration does not require that Rule 54(b) requests be granted routinely." [FN29] Instead, it is within the Court's sound discretion to grant an entry of final judgment.[FN30] LINA has already deposited the proceeds of the insurance Policy with the Court, and the counter-claims against LINA have now been dismissed. There being no other claims against LINA, it no longer has any role in this litigation. LINA's continued participation in this litigation for an indefinite period would cause it to expend additional resources and time for no good reason. Therefore, the Court finds that there is no just reason for delaying entry of judgment. As such, LINA's Rule 54(b) Motion is hereby **GRANTED.**

> FN29. *Curtiss-Wright,* 446 U.S. at 10.
>
> FN30. *Id.*

CONCLUSION

Because Defendants' Counterclaims fail to state a claim upon which relief could be granted, they are hereby **DISMISSED** pursuant to Federal Rule of Civil Procedure 12(b). Because Interpleader-Plaintiff LINA has properly invoked interpleader and paid the full amount due under the Policy into the Court's registry, its Motion for Discharge and Dismissal is hereby **GRANTED.** And because there is no just reason for delaying entry of judgment, LINA's Rule 54(b) Motion is hereby **GRANTED.**

***6 IT IS SO ORDERED.**

W.D.Tenn.,2009.
Life Ins. Co. of North America v. Simpson
Slip Copy, 2009 WL 2163498 (W.D.Tenn.)

END OF DOCUMENT

EXHIBIT “4”

Not Reported in F.Supp.2d, 2007 WL 896153 (E.D.Tenn.), 62 UCC Rep.Serv.2d 305
(Cite as: 2007 WL 896153 (E.D.Tenn.))

United States District Court,
E.D. Tennessee,
Southern Division,
McKEE FOODS CORPORATION, Plaintiff,
v.
PITNEY BOWES, INC. and Pitney Bowes Credit Corporation, Defendants.
No. 1:06-CV-80.

March 22, 2007.

Anthony A. Jackson, Chambliss, Bahner & Stophel, PC, Chattanooga, TN, for Plaintiff.

Stephen S. Duggins, Husch & Eppenberger, LLC, Chattanooga, TN, for Defendants.

MEMORANDUM AND ORDER

HARRY S. MATTICE, JR., United States District Judge.

***1** This is a dispute over the performance, or lack thereof, of an automated mailing system which was manufactured by one of the Defendants and leased by the Plaintiff from the other Defendant. Before the Court is Defendants' Pitney Bowes, Inc. and Pitney Bowes Credit Corporation (PBCC) Motion to Dismiss (Court Doc. No. 11). Defendants have attached a copy of the written agreement at issue to their motion. (*See* Court Doc. No. 11-2, Lease Authorization & Document Describing Equipment.) In response, Plaintiff has filed affidavits in opposition to Defendants' motion. (*See* Aff. of Dee Ann Price, Court Doc. No. 17; Aff. of Odessa Owen, Court Doc. No. 18.) Plaintiff argues that, in light of this extrinsic evidence, the Court must treat Defendant's motion as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

When one or both parties present matters outside the pleadings in conjunction with a Rule 12(b)(6) motion, the Court may, at its discretion, either consider these matters and convert the motion to one for summary judgment or exclude the extra-pleading materials and apply the standard set forth in Rule 12(b)(6). *See* Fed.R.Civ.P. 12(b); *Shelby County Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust Fund,* 203 F.3d 926, 931 (6th Cir.2000); *Aamot v. Kassel,* 1 F.3d 441, 443 (6th Cir.1993); *Batt v. United States,* 976 F.Supp. 1095, 1096-97 (N.D.Ohio 1997) ("The decision to exclude material outside the pleadings is entirely within the discretion of the trial court.").

In this case, the Court will exclude the extra-pleading matters and treat the instant motion as one under Rule 12(b)(6) for two reasons. First, given the current status of the litigation, converting Defendant's Rule 12(b)(6) motion into a motion for summary judgment would be premature. Little or no discovery has taken place so as to allow the parties to argue, and the Court to determine, whether a genuine issue of material fact exists. *See Equal Justice Found. v. Deutsche Bank Trust Co. Ams.,* 412 F.Supp.2d 790, 799-800 (S.D.Ohio 2005); *Black v. Franklin County,* No. Civ.A. 3:05-18-JMH, 2005 WL 1993445, at *3 (E.D.Ky. Aug. 16, 2005). Second, it is Plaintiff who attempts to use materials outside of the pleadings to convert Defendants' motion to one for summary judgment. If Defendants had wished to file a motion for summary judgment under Rule 56 they would have done so. Instead, Defendants opted to proceed under Rule 12(b)(6), and have objected to Plaintiff's extra-pleading evidence. The Court will give effect to Defendants' decision to move under Rule 12(b)(6). Accordingly, the Court **EXCLUDES** the affidavits Plaintiff offers in opposition of Defendants' Motion to Dismiss (Court Doc. No. 17-18.). [FN1]

FN1. Even were the Court to convert Defendants' Rule 12(b)(6) motion to a motion for summary judgment, the result would be the same. As explained below, Plaintiff is barred by substantive Tennessee law from introducing any evidence of PBCC's alleged representations of warranty, whether they were made before, during, or after the formation of the lease agreement. *See infra* II.A. As also discussed below, *see infra II.B.-C.,* according to Rule 9(b), Plaintiff's allegations of fraud are insufficient as currently plead regardless of whether they are challenged under Rule 12(b)(6) or Rule 56. *See Jude v. Inez Deposit Bank,* 968 F.2d 1215, 1992 WL

> 158877, at *4 (6th Cir1992) (upholding a grant of summary judgment based on a failure to plead in accordance with Rule 9(b)).

The Court will not, however, exclude the copy of the document attached to Defendants' Motion to Dismiss. In its complaint, Plaintiff repeatedly refers to the "lease" between it and PBCC, but does not attach, or explicitly refer to, the Lease Authorization & Document Describing Equipment which the Defendants attach as Exhibit A to their Motion to Dismiss. The Court is persuaded, however, that this document was intended by the parties to govern the terms of their "lease." Under these circumstances, the Court will treat the Lease Authorization & Document Describing Equipment (this document will hereinafter sometimes be referred to as the "Lease Agreement") as having been incorporated into Plaintiff's complaint by reference, and will consider it as part of the pleadings pursuant to Rule 10(c). Accordingly, this document is appropriate for consideration for purpose of Defendants' instant Rule 12(b)(6) motion. *See Weiner v. Klais & Co.,* 108 F.3d 86, 89 (6th Cir.1997).

I. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) STANDARD

***2** Rule 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is to permit a defendant to test whether, as a matter of law, the plaintiff is entitled to relief even if everything alleged in the complaint is true. *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir.1993). A complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Arrow v. Fed. Reserve Bank,* 358 F.3d 392, 393 (6th Cir.2004). The complaint must contain either "direct or inferential allegations respecting all the material elements to sustain a recovery ...." *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988) (internal quotations and citations omitted). The Court must determine not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). In making this determination, the Court must construe the complaint in the light most favorable to plaintiff and accept as true all well-pleaded factual allegations. *Arrow,* 358 F.3d at 393; *Mixon v. Ohio,* 193 F.3d 389, 400 (6th Cir.1999). The Court need not accept as true mere legal conclusions or unwarranted factual inferences. *Id.*

II. ANALYSIS

Plaintiff concedes that some of its causes of action will not survive Defendants' Motion to Dismiss. Plaintiff offers to strike its claims of negligence and negligent misrepresentation against both Defendants and its claim for breach of (implied) warranty against Defendant PBCC. The Court will treat Plaintiff's offer as a motion pursuant to Rule 41(a)(2), and will **GRANT** the same. The remaining portions of Plaintiff's Complaint challenged by Defendants' Motion to Dismiss are as follows: Plaintiff's breach of contract claim against PBCC, Plaintiff's Tennessee Consumer Protection Act claims against both Defendants, and Plaintiff's fraudulent misrepresentation against both Defendants. The Court will address each in turn.

A. Breach of Contract

Plaintiff's breach of contract claim against PBCC turns on whether PBCC expressly warranted the performance of the equipment which is the subject of the Lease Agreement.

In cases such as this, which arise under the Court's diversity jurisdiction under 28 U.S.C. § 1332, the Court must apply the choice of law rules of the state in which the Court sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941); *Andersons, Inc. v. Consol, Inc.,* 348 F.3d 496, 501 (6th Cir.2003). In Tennessee, in the absence of a choice of law provision in a contract, the law of the place where a contract is made governs the construction and validity of the contract. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.,* 493 S.W.2d 465, 466 (Tenn.1973). In a situation where the contract was negotiated by correspondence sent through the mail, as appears to be case with respect to the Lease Agreement, "the contract is consummated the moment the letter of acceptance is deposited in the mail ...." *College Mill Co. v. Fidler,* 58 S.W. 382, 384 (Tenn.Ct. Ch.App.1899); *see also* 16 Am.Jur.2d Conflict of Laws § 99 ("[T]he offer is accepted when the acceptance is properly placed in the mail .... Hence, ... the place of contracting is where the letter of acceptance is mailed ...."). Because the Lease Agreement appears to have been executed by Plain-

tiff's representative in Tennessee, Tennessee contract law applies.

***3** Under Tennessee law, "[t]he central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co.,* 78 S.W.3d 885, 890 (Tenn.2002). The Court's role in resolving disputes regarding contract interpretation is to glean the intention of the parties based upon the usual, natural, and ordinary meaning of the language used in the written agreement. *Guiliano v. Cleo, Inc.,* 995 S.W.2d 88, 95 (Tenn.1999). Where the language of the contract is clear and unambiguous, its literal meaning controls the outcome of contract disputes. *Planters Gin Co.,* 78 S.W.3d at 890. In such a situation, contractual interpretation is a matter of law, *Petty v. Sloan,* 197 Tenn. 630, 277 S.W.2d 355 (1955), and may be addressed on a motion under Rule 12. When a contract's terms are ambiguous, however, interpretation is a question of fact, *Hendrix v. City of Maryville,* 431 S.W.2d 292 (Tenn.Ct.App.1968), and is not appropriately decided in the context of Rule 12. A contract's terms are ambiguous only when they are susceptible to more than one reasonable interpretation. *Planters Gin Co.,* 78 S.W.3d at 890.

Thus, the Court must first determine whether the Lease Agreement contains ambiguous terms. Plaintiff argues that certain representations PBCC made amount to an express warranty, that this express warranty contradicts the Lease Agreement's various provisions disclaiming a warranty of performance of the leased equipment, and that, therefore, the Lease Agreement is at least ambiguous as to whether PBCC warrants the performance of the leased equipment. In light of this ambiguity, Plaintiff reasons, dismissal of its breach of contract cause of action against PBCC would be improper.

Plaintiff correctly argues that certain representations made by a lessor pertaining to the quality of the leased goods may create an express warranty. According to the Tennessee General Assembly:

(1) Express warranties by the lessor are created as follows:

> (a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

Tenn.Code Ann. § 47-2A-210. The analysis does not end there, however. In order to demonstrate that PBCC's alleged representations create an ambiguity within the Lease Agreement, Plaintiff must be able to show that these representations-which the Court will assume suffice for the purposes of section 47-2A-210-can be subsumed into the Lease Agreement. In other words, Plaintiff must be able to show that PBCC's alleged representations create additional terms not found within the written embodiment of the Lease Agreement. Plaintiff's argument implicates Tennessee's parol evidence rule.

***4** As applied to contracts for the lease of goods, the parol evidence rule states that when presented with a writing that contains no ambiguous terms and is a complete and final expression of the agreement between the parties, the Court may not look beyond the writing to any extrinsic evidence to either contradict or supplement the meaning of its terms. Tenn.Code Ann. § 47-2A-202; *see also Stamp v. Honest Abe Log Homes, Inc.,* 804 S.W.2d 455, 457 (Tenn.Ct.App.1990). Thus, in order to avoid application of the parol evidence rule so that the Court may consider PBCC's alleged representations, Plaintiff must show that either the Lease Agreement contains ambiguous terms or that it does not embody the entire agreement between the parties.

Plaintiff contends that the Lease Agreement's warranty disclaimers are at least rendered ambiguous by PBCC's alleged representations. Plaintiff's argument fails because it does not establish an ambiguity on the face of the Lease Agreement. Importantly, Plaintiff does not argue that the Lease Agreement contains ambiguous terms other than the warranty disclaimers. Plaintiff's argument-that: (1) the warranty disclaimers are ambiguous, so (2) the parol evidence rule does not apply; therefore (3) PBCC's alleged statements can become part of the Lease Agreement so as to render it ambiguous-employs circular reasoning. Plaintiff does not argue that the Lease Agreement contains an *internal* ambiguity that would render the parol evidence rule inapplicable.

Further, the Lease Agreement recites that "[t]his Lease constitutes the entire agreement between the Parties as to the subjects addressed in this Lease, and representations or statements not included herein are not part of this Lease and are not binding on the parties." (Lease Agreement ¶ 27.) Absent special circumstances, Tennessee courts regularly uphold integration clauses such as this. *See Tipton v. Quinn,* No. M 1998-00951-COA-R3-CV, 2001 WL 329530, at *5 (Tenn.Ct.App. Mar. 28, 2001); *Brookside Mills, Inc. v. Specialty Retail Concepts, Inc.,* 1987 WL 26206, at *4 (Tenn.Ct.App. Dec. 8, 1987) ("This clause is not meaningless. By signing this contract both parties agreed that the written lease would set forth their final agreement."). Plaintiff has offered no reason why the Court should not enforce the Lease Agreement's integration clause as written.

The Court concludes that the Lease Agreement is internally unambiguous and fully integrated, in that it is a complete and final expression of the agreement between the parties. Accordingly, Tennessee's parol evidence rule applies to the Lease Agreement, and prohibits Plaintiff from offering representations by PBCC made prior to or during the formation of the Lease Agreement that may otherwise create warranties under section 47-2A-210 in contradiction of the Lease Agreement's warranty disclaimers. *See* Tenn.Code Ann. § 47-2A-202; *Perryman v. Peterbilt of Knoxville, Inc.,* 708 S.W.2d 403, 405 (Tenn.Ct.App.1985) (holding that the parol evidence rule excluded statements that would have created an express warranty under Tenn.Code Ann. § 47-2-313, the sale-of-goods version of section 47-2A-210); *see also Airline Constr. Inc. v. Barr,* 807 S .W.2d 247, 259 (Tenn.Ct.App.1990) (holding that even " 'collateral agreements' to the written contract must be limited to subject matter which does not contradict or vary terms which are plainly expressed in the writing").

***5** Further, Plaintiff cannot introduce evidence of PBCC's representations made after the parties entered into the Lease Agreement to support its argument for an express warranty under section 47-2A-210. Section 47-2A-210 converts representations to express warranties only when they become a "basis for the bargain." Tenn.Code Ann. § 47-2A-210(1). To comprise a basis for the bargain, a plaintiff must show that it relied on the defendant's representation. *Fletcher v. Coffee County Farmers Co-op.,* 618 S .W.2d 490, 493 (Tenn.Ct.App.1981). Under the facts of this case as set forth in Plaintiff's Complaint, there are no circumstances by which Plaintiff can show that it relied on PBCC's post-contractual representation as an inducement to enter into the Lease Agreement.

Accordingly, as a matter of law, the Court concludes that Plaintiff can prove no set of facts to support his argument that the Lease Agreement warrants the performance of the leased equipment, and will **GRANT** PBCC's motion to dismiss as to Plaintiff's breach of contract claim.

B. Fraudulent Misrepresentation

Plaintiff also brings a cause of action against both Defendants for fraudulent misrepresentation. A cause of action for fraud in Tennessee requires four elements:

> (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform.

Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn.Ct.App.1992). Rule 9(b) requires that averments of fraud be stated with particularity. At a minimum, a plaintiff must "allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.,* 2 F.3d 157, 161-62 (6th Cir.1993) (internal quotations omitted). Further, "failure to plead an essential element of a claim of fraud warrants dismissal of the claim under Rule 9(b)." *Bender v. Southland Corp.,* 749 F.2d 1205, 1216 (6th Cir.1984).

Although Plaintiff alleges that both Defendants are liable for fraudulent misrepresentation, it does not specify the time and place of the alleged misrepresentations. Accordingly, Plaintiff's claims of fraudulent misrepresentation fail to meet the pleading standards set out in Rule 9(b), and the Court will **GRANT** Defendant's Motion to Dismiss as to Plaintiff's claims of fraudulent misrepresentation.

C. Tennessee Consumer Protection Act

To establish a prima facie cause of action under the Tennessee Consumer Protection Act (TCPA), Tenn.Code Ann. §§ 47-18-101 to 128, Plaintiff must prove that Defendants engaged in an act or practice that is unfair or deceptive as defined under the TCPA, and that Plaintiff suffered a loss of money, property, or a thing of value as a result of the unfair or deceptive act of defendant. Tenn.Code Ann. § 47-18-109. Plaintiff's claims under the TCPA are subject to Rule 9(b)'s specific pleading requirements. *Metro. Property & Cas. Ins. Co. v. Bell,* No. 04-5965, 2005 WL 1993446, at *5 (6th Cir. Aug. 17, 2005) (citing *Harvey v. Ford Motor Credit Co.,* 8 S.W.3d 274, 275 (Tenn.Ct.App.1999)). As Plaintiff's Complaint fails to specify the time and place of the Defendants' alleged TCPA violations, it does not comport with the pleading standards of Rule 9(b). Accordingly, the Court will **GRANT** Defendant's Motion to Dismiss as to Plaintiff's claims under the TCPA.

III. CONCLUSION

***6** For the reasons set forth above, the Court **GRANTS** Defendant's Motion to Dismiss (Court Doc. No. 11) as to Plaintiff's claims of breach of contract against Defendant PBCC, which is **DISMISSED WITH PREJUDICE.** The Court also **GRANTS** Defendant's Motion to Dismiss as to Plaintiff's claims of fraudulent misrepresentation and violation of the Tennessee Consumer Protection Act against both Defendants, which are **DISMISSED WITHOUT PREJUDICE.**

On its motion to amend its Complaint, the Court **GRANTS** Plaintiff leave to amend and re-file its claims of fraudulent misrepresentation and violation of the Tennessee Consumer Protection Act in a manner that complies with Rule 9(b). *See United States ex rel. Bledsoe v. Cmty Health Sys., Inc.,* 342 F.3d 634, 644-45 (6th Cir.2003).

Further, the Court will treat Plaintiff's offer to strike certain of its claims against Defendants as a motion pursuant to Rule 41(a)(2), and will **GRANT** the same. Accordingly, Plaintiff's claims of negligence and negligent misrepresentation against both Defendants, and its claim for breach of (implied) warranty against Defendant PBCC are **DISMISSED WITHOUT PREJUDICE.**

The claims which remain pending before the Court are as follows: Plaintiff's claim of breach of contract and Plaintiff's claim of breach of (implied) warranty against Defendant Pitney Bowes, Inc. No claims remain pending against Defendant Pitney Bowes Credit Corporation.

SO ORDERED.

E.D.Tenn.,2007.
McKee Foods Corp. v. Pitney Bowes, Inc.
Not Reported in F.Supp.2d, 2007 WL 896153 (E.D.Tenn.), 62 UCC Rep.Serv.2d 305

END OF DOCUMENT

EXHIBIT “5”

Slip Copy, 2005 WL 1993446 (C.A.6 (Tenn.)), 2005 Fed.App. 0720N
(Not Selected for publication in the Federal Reporter)
(Cite as: 2005 WL 1993446 (C.A.6 (Tenn.)))

United States Court of Appeals,
Sixth Circuit.
METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiff / Counter-Defendant-Appellee,
v.
Tommye BELL, Defendant / Counter-Plaintiff / Third-Party-Plaintiff-Appellant,
v.
William Cantrell, d/b/a Republic Insurance Company, Third-Party Defendant-Appellee.
No. 04-5965.

Aug. 17, 2005.

On Appeal from the United States District Court for the Middle District of Tennessee.
Michael P. Mills, Mills & Cooper, Nashville, TN, for Plaintiff/Counter-Defendant-Appellee.

William Kennerly Burger, Burger, Siskin, Scott & McFarlin, Murfreesboro, TN, for Defendant/Counter-Plaintiff/Third-Party-Plaintiff-Appellant.

Marcia M. Eason, William A. Hullender, Miller & Martin, Chattanooga, TN, for Third-Party Defendant-Appellee.

Before ROGERS and SUTTON, Circuit Judges; FORESTER, District Judge. [FN*]

FN* The Honorable Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

SUTTON, Circuit Judge.

***1** Tommye Bell appeals the district court's grant of summary judgment to Metropolitan Property and Casualty Insurance Company (Metropolitan) and its agent, William Cantrell, a judgment that had the effect of permitting Metropolitan to void Bell's homeowner's insurance policy due to material misrepresentations on her insurance application. Because Bell admittedly signed an application with false answers to two questions and because nothing suggests that Metropolitan or its agent told Bell that those false answers were irrelevant, we affirm.

I.

In 1995, Tommye Bell purchased a house at 607 Hodges Road in Smithville, Tennessee, and acquired homeowner's insurance for her residence from the Farm Bureau. Between 1999 and 2001, Bell filed three insurance claims-two claims arising out of fires relating to lightning strikes and one arising out of a theft-with the Farm Bureau. After Bell filed her second lightning-related claim for damages (and her third claim overall), the Farm Bureau informed her in August of 2001 that it would terminate her policy effective September 1, 2001.

After receiving the Farm Bureau's cancellation notice, Bell contacted several local insurance agents to obtain new homeowner's insurance coverage. One of the insurance agents that she contacted, William Cantrell, gave Bell a quote for homeowner's insurance through Metropolitan. Bell found the quote acceptable and arranged a meeting.

On August 29, 2001, Bell and Cantrell met at Cantrell's office, where Cantrell either completed an insurance application for Bell as she gave him the appropriate information or provided her with a completed application filled out with information she had previously given him over the telephone. The application contained questions about Bell's loss history and insurance cancellation history for the prior three years. *See* JA 59 (copy of the application form with the following question: “Any coverage declined, cancelled or non-renewed during the last 3 years?”); *id.* (listing as another question: “Any losses, whether or

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not paid by insurance, during the last 3 years at this or at any other location?"). Responding for Bell, Cantrell checked the "No" box beside each of these questions. He left many of the questions-such as whether the property had been inspected, whether it was occupied and other similar questions, none of which are specifically relevant to this case-unanswered.

Bell then read and signed the form, declaring "that the information provided in [it] is true, complete and correct to the best of [her] knowledge and belief," JA 59, and made an initial payment toward her policy premium. *See also* JA 43 (text of the general conditions of the contract, noting that "[t]his policy is void ... if [the insured] intentionally conceals or misrepresents any material fact or circumstance or makes false statements or engages in fraudulent conduct relating to this insurance, either before or after a loss").

***2** The responses to the loss-history and insurance-cancellation questions, the parties agree, were incorrect, but the parties disagree over how those errors made their way into the application. According to Bell, she told Cantrell about the cancellation of her Farm Bureau insurance and her lightning-related losses at some point during their interactions, and she did not notice the incorrect responses when she signed the application. Cantrell, by contrast, cannot remember any conversation about the Farm Bureau cancellation.

After the application had been completed, Cantrell may have transmitted the information in the application to Metropolitan via computer. (He cannot remember whether he also sent a signed application to Metropolitan.) At Metropolitan, Mary Liggio, a senior underwriter, reviewed the application, did not object to the fact that it was only partially completed and approved it. Metropolitan, through MetLife, issued an insurance policy that became effective on September 1, 2001.

The MetLife policy was in effect on January 6, 2002, when a fire broke out in and damaged Bell's home. Bell submitted a claim in the amount of $455,118.36. While investigating the loss, Metropolitan took a sworn statement from Bell, during which it learned of Bell's prior claims and insurance history. Concluding that Bell had failed to complete her insurance application truthfully, Metropolitan terminated the policy and returned Bell's premiums.

On May 23, 2002, Metropolitan filed this declaratory-judgment action, asserting that Bell's insurance application materially misrepresented her loss and insurance-cancellation history and that Metropolitan would not have issued an insurance policy had it known the truth about Bell's claim history. Bell responded by asserting her right to recover under the terms of the policy for the total fire loss and by filing a third-party complaint against Cantrell. The parties agreed to allow a magistrate judge to preside over the merits of the case. On February 3, 2004, the magistrate judge granted summary judgment for Metropolitan and Cantrell.

II.

Under Tennessee law:

> No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefore, by the insured or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, [1] unless such misrepresentation or warranty was made with actual intent to deceive, or [2] unless the matter represented increases the risk of loss.

Tenn.Code Ann. § 56-7-103; *see also id.* § 56-6-147 ("[E]very insurance agent ... [shall] be regarded as the agent of the insurer and not the insured or the insured's beneficiary."); *State Farm General Ins. Co. v. Wood,* 1 S.W.3d 658, 661 (Tenn.Ct.App.1999) (noting that an insurer may show *either* that the misrepresentation was made with the intent to deceive *or* that the misrepresentation increased the risk of loss). "Whether a misrepresentation increased the risk of loss ... is a question of law for the court." *Id.* at 661 n. 5; *Loyd v. Farmers Mut. Ins. Co.,* 838 S.W.2d 542, 545 (Tenn.Ct.App.1992); *Womack v. Blue Cross & Blue Shield of Tennessee,* 593 S.W.2d 294, 295 (Tenn.1980). Under Tennessee law, prior loss history and cancellation of other insurance count as factors that affect the risk of loss. *See Wood,* 1 S.W.3d at 662; *Medley v. Cimmaron Ins. Co.,* 514 S.W.2d 426, 428 (Tenn.1974).

***3** By signing an insurance application and attesting to its truthfulness, an insured is generally bound to everything the application contains. *See Beasley v. Metro.*

Life Ins. Co., 190 Tenn. 227, 229 S.W.2d 146, 147 (Tenn.1950) (holding that an insured's beneficiary was bound by the application when "the agent read out the questions and [the insured] answered them truthfully, but that without her knowledge the agent changed the answers to the questions" and the insured "signed the false application but did not read it"); *id.* at 148 ("The foregoing authorities deal with the phase of the law of contracts where one who has negligently signed a contract without reading it, seeks to avoid his obligation, but clearly the converse would be even more unjust and unreasonable,-that the Courts should impose an obligation, on an innocent Defendant who was led to make the contract on the careless misrepresentation of the [insured]."); *McPherson v. Fortis Ins. Co.,* No. M2003-00485-COA-R3-CV, 2004 Tenn.App. LEXIS 18, at *18-19 (Tenn.Ct.App. Jan.12, 2004) ("An insurer is entitled to rescind coverage for misrepresentations that increase its risk of loss regardless of whether the agent played a role in the misrepresentation.... There can be no recovery on the policy where the insured, failing to read the application, affirms the accuracy of the statements therein contained."); *Giles v. Allstate Ins. Co.,* 871 S.W.2d 154, 156 (Tenn.Ct.App.1993) ("[I]f, without being the victim of fraud [the insured] fails to read the contract or otherwise to learn its contents, he signs the same at his peril and is estopped to deny his obligation, will be conclusively presumed to know the contents of the contract, and must suffer the consequences of his own negligence.") (quoting *Beasley,* 229 S.W.2d at 148); *Hardin v. Combined Ins. Co.,* 528 S.W.2d 31, 37 (Tenn.Ct.App.1975) (same); *compare Cook v. Life Investors Ins. Co. of Am.,* No. 04-5161, 2005 U.S.App. LEXIS 5251, at *12 (6th Cir. Mar. 30, 2005) (noting that, under Kentucky law, "an insurance applicant who had not read her application before signing it was not responsible for the false answers inserted by an agent").

Bell admits that her application contained a misrepresentation that increased Metropolitan's risk of loss, but nevertheless argues that Metropolitan could not void her policy under § 56-7-103 in this instance.

Bell first argues that Metropolitan could not reasonably rely on the partially completed application form prior to issuing the policy because (1) the omissions of answers to some of the questions on the application form placed Metropolitan on notice that the entire application form was inaccurate, (2) Metropolitan never established that Cantrell sent it a signed version of Bell's application and (3) Metropolitan should have discovered Bell's insurance history from a "prior claims" database. As to the last argument, Bell adds that Cantrell indicated that Metropolitan could have received information about her prior claims from a database called "CLUE," and thus must have known about her Farm Bureau claims prior to approving and issuing the policy.

***4** As an initial matter, it is far from clear under Tennessee law that an insurer must show that it relied on an individual's answers in her application. *See Loyd,* 838 S.W.2d at 545 ("Any misrepresentation which naturally and reasonably influenced the judgment of the insurer in making the contract is within the statutory words, 'increases the risk of loss.' ... It is not necessary to find that the policy would not have been issued if the truth had been disclosed.") (citations omitted). But even if one assumes that a reliance requirement exists, the fact that the application does not record Bell's answers to all of the stated questions does not mean that Metropolitan could not reasonably rely on the questions that Bell did answer. Nor does the fact that Metropolitan did not receive a signed version of Bell's application mean that it could not rely on the computer-transmitted answers that Bell gave on that application and Cantrell's assurances that Bell had signed the application. *Cf. Griffith Motors, Inc. v. Parker,* 633 S.W.2d 319, 322 (Tenn.Ct.App.1982) (information known to an agent is imputable to the principal). Neither does Bell's speculation that Metropolitan could have discovered her prior claims through a database before granting her policy excuse her failure to tell the truth on her application.

Bell next argues that the questions on the insurance application were in fine print that is so obscure in form and structure as to be nonbinding. In *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.,* 730 S.W.2d 634 (Tenn.Ct.App.1987), the Tennessee Court of Appeals invalidated a "fine-print" exculpatory clause that purported to release a repair shop from any liability if the shop left the plaintiff's vehicle in an unattended area and the car was stolen. In finding the clause nonbinding, the court stated that "[t]here is no indication in the record that the provision contained in the fine print was pointed out to the appellee or that a person of ordinary intelligence and experience would expect that the signed writing relieved the appellant of all liability for damages which might occur while the

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automobile was in its possession." *Id.* at 638. A cursory review of the application in this case reveals that the script is of a readable size and the questions are prominently placed. Here, unlike in *Parton,* a "person of ordinary intelligence and experience" would recognize that the questions about claim and cancellation history were material.

In the same section of her brief, Bell also relies on *Griffin v. Shelter Mutual Insurance Co.,* 18 S.W.3d 195 (Tenn.2000), and *Osborne v. Mountain Life Insurance Co.,* 130 S.W.3d 769 (Tenn.2004). But the familiar principle that these cases follow-that courts should construe an ambiguous insurance contract against its drafter-is inapplicable here, as Bell herself concedes that the relevant questions were unambiguous.

In a variation on these themes, Bell argues that her failure to initial the policy beside the loss-history question rendered the answer to the question incomplete and thus nonbinding. Under *Provident Life & Accident Insurance Co. v. Rimmer,* 157 Tenn. 597, 12 S.W.2d 365 (Tenn.1928), and *Phoenix Mutual Life Insurance Co. v. Raddin,* 120 U.S. 183, 7 S.Ct. 500, 30 L.Ed. 644 (1887), Bell notes, "where upon the face of [an insurance] application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial," *id.* at 190. But here Bell's answers to the material questions were complete and false, and her signature at the bottom of the application ratified the error. Under these circumstances, Bell cannot claim that Metropolitan relied on an incomplete answer in voiding the policy simply because the loss-history question lacked her initials. Nor, at any rate, could this argument (even if successful) tenably affect the judgment in this case given that the other false answer (concerning Bell's cancellation-of-insurance history) did not have an "initials" requirement.

***5** Bell next argues that Cantrell's mishandling of the processing of the form precludes Metropolitan from avoiding the policy. Under Tennessee law, a principal may be estopped in some circumstances from relying on errors or misrepresentations in an application that its agent completed. In *Bland v. Allstate Insurance Co.,* 944 S.W.2d 372 (Tenn.Ct.App.1996), an insurance agent presented a blank application to the insured, who signed the form and returned it to the agent for completion. The court held that "an applicant who innocently signs an application in blank, trusting the agent to fill in the correct information, is not responsible for misrepresentations made by the agent, even if those misrepresentations increase the risk of loss on the policy for the insurance company." *Id.* at 375; *see also Ray v. Tenn. Farmers Mut. Ins. Co.,* No. W1999-00698-COA-R3-CV, 2001 Tenn.App. LEXIS 70, at *14 (Tenn.Ct.App. Feb.1, 2001) (holding that policy could not be voided when applicant told the truth to the agent, the agent assured him that he did not need to disclose previous fire losses and the agent filled out the application with false answers). But *Bland* also recognized that an applicant would be responsible if "the applicant told the truth to the agent, the agent then filled out the application with false answers, and the applicant signed the application containing the misrepresentations without reading it." 944 S.W.2d at 378. And in finding that an insurance company could not void a policy, *Ray* specifically distinguished cases in which "the applicant told the truth to the agent; the agent filled out the application with false answers; and the applicant signed the application without reading it," 2001 Tenn.App. LEXIS 70, at *15, circumstances that are present here. Bell has alleged neither that she signed a blank form that Cantrell later completed, nor that Cantrell assured her that she could submit incorrect answers to the relevant questions. *See Osborne,* 130 S.W.3d at 774. Her claim thus falls within Tennessee's general rule that an insurance applicant is bound by a signature on a completed application that attests to the accuracy of the contents of the application. *See Beasley,* 229 S.W.2d at 147; *McPherson,* 2004 Tenn.App. LEXIS 18, at *18-19; *Giles,* 871 S.W.2d at 156; *Hardin,* 528 S.W.2d at 37. And, for similar reasons, Bell cannot bring a negligence claim directly against Cantrell. *See McPherson,* 2004 Tenn.App. LEXIS 18, at *13-14.

Bell, lastly, argues that Cantrell's handling of the partially completed application raises a claim under the Tennessee Consumer Protection Act as an "unfair or deceptive act or practice." *See* Tenn.Code Ann. § 47-18-109. But Bell has at most suggested in her pleadings and on appeal that Cantrell acted negligently in completing her application and that Metropolitan wrongly rejected her claim. Because allegations of fraud must be pleaded with specificity, *see, e.g.,* Fed.R.Civ.P. 9(b), because that requirement applies to allegations of unfair and deceptive acts under § 47-18-109, *see Harvey v. Ford Motor Credit Co.,* 8

S.W.3d 274, 275 (Tenn.Ct.App.1999), and because Bell has not satisfied this pleading requirement, this claim also fails as a matter of law.

III.

***6** For these reasons, we affirm.

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EXHIBIT “6”

Not Reported in F.Supp.2d, 2008 WL 336744 (E.D.Tenn.)
(Cite as: 2008 WL 336744 (E.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Tennessee.
THE NATURE CONSERVANCY
v.
Don BROWDER, et al.
No. 2:07-CV-122.

Feb. 5, 2008.

Michael K. Stagg, William K. Koska, Thomas H. Lee, Waller Lansden Dortch & Davis, Nashville, TN, William C. Bovender, Hunter, Smith & Davis, Kingsport, TN, for The Nature Conservancy.

Arthur M. Fowler, Fowler & Fowler, PLLC, John B. Mckinnon, III, John S. Taylor, Mckinnon & Taylor, Johnson City, TN, Don Browder, et al.

MEMORANDUM OPINION AND ORDER

J. RONNIE GREER, District Judge.

***1** On May 30, 2007, the Plaintiff, The Nature Conservancy ("TNC"), filed a complaint, [Doc. 1], in this Court against the Shady Valley Watershed District ("District"), Unformed Watershed District ("Unformed District"), Don Browder, Vance Gentry, Earl B. Howard, Jr., Gerald Buckles, Wayne Duncan, Garry Dunn, Earl B. Howard, Sr., and Randy McQueen, seeking first a declaratory judgment that District has been dissolved by operation of law, that TNC's property in Johnson County, Tennessee, is free from any and all easements held by the Defendants, and that the Unformed District does not hold any property rights once held by the dissolved District. Second, TNC seeks to quiet the title to its property and for the Johnson County Register of Deeds to reform all deeds and remove any and all easements once held by the District. Third, the Plaintiff alleges that the Defendants violated the Tennessee Consumer Protection Act ("TCPA"), *see* T.C.A. § 47-18-104(27) (2008), and fourth, the Plaintiff asserts a negligence per se claim against the individual Defendants. The basis for subject matter jurisdiction is diversity, *see* 28 U.S.C. § 1332(a) (2008).

On June 7, 2007, the parties agreed to a preliminary injunction, [Doc. 27], enjoining the Defendants and their agents from coming onto TNC's land and from causing damage to TNC's property. Before filing an answer, the Defendants filed two motions to dismiss, [Docs. 32 and 34]. In the first motion, [Doc. 32], the subject of this opinion, the Defendants moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(1), lack of subject matter jurisdiction, and (b)(6), failure to state a claim upon which relief can be granted, regarding all four claims.

The Defendants first argue that this Court lacks subject matter jurisdiction because: 1) the Plaintiff lacks standing to sue, contending that the declaratory judgment and quiet title actions can only be brought as *quo warranto* claims; 2) "the Declaratory Judgment Act, 28 U.S.C. § 2201, does not create an independent basis for subject matter jurisdiction"; [FN1] and 3) the amount in controversy is not met.[FN2] Secondly, the Defendants argue that the complaint should be dismissed because 1) the "Plaintiff cannot prove that the District is no longer in existence," and 2) the TCPA and negligence per se claims should be dismissed, "thereby destroying any basis for a damage claim exceeding the amount of $75,000."

FN1. In TNC's Response to Defendants' motion to dismiss [Doc. 40], the Plaintiff states, "The Conservancy does not contend that 28 U.S .C. § 2201 creates an independent basis for the Court's exercise of its subject matter jurisdiction."

FN2. The Defendants do not challenge the diversity of citizenship.

I. FACTS

The complaint states that in September 1958, the directors of a proposed Shady Valley Watershed District filed organizing papers to form a watershed district under the Tennessee Watershed District Act of 1955, *see* T.C.A. § 69-6-101, *et seq.,* and received its charter in 1960. The District issued a work plan for "improvements" to Beaverdam Creek and its tributaries. In June 1964, property owners along Beaverdam

Creek and its tributaries granted the District easements to execute the work plan. The complaint further outlines the District's purpose according to statute. Its statutory powers include the power to:

> ***2** construct any drainage works or improvements; to construct any works or improvements for the control, retention, diversion, or utilization of water; retard runoff of water and soil erosion; construct ditches, channel improvements, dikes, levees, flood prevention reservoirs, water conservation reservoirs, or irrigation reservoirs or facilities, parks, and other recreational facilities.

Each easement granted stated that the purpose of the easement was

> for or in connection with the construction, operation, maintenance and inspection of the following described works of improvement: Channel Improvement of Beaverdam Creek and its tributaries, as described in the Watershed Work Plan for the Shady Valley Watershed Project, consisting of clearing, enlargement, excavation, placing of waste excavation material, and installation of mitigation (fish and wildlife conservation) measures, either or all.

The complaint alleges that the District completed its work plan prior to 1980, and further alleges that because the District has failed to exercise its corporate powers for a period of ten years, it is dissolved by operation of law.

The complaint further states that TNC "has been actively involved with land conservation [in Johnson County, where the work plan was executed by the District] since 1978 and "actively acquiring land [in the same area] since 1994" for the purpose of preserving "existing bogs and to restore bogs that have been drained, which in turn provide habitat for rare and threatened species." [FN3] Moreover, the complaint alleges that TNC has established wetland mitigation banks at its bogs, and the banks allow TNC to "sell wetland mitigation credits." In addition, the complaint states that TNC received a letter dated March 12, 2007, from Defendant Gentry, writing for "The Shady Valley Watershed District board of directors," which requested TNC to

> immediately unblock all Shady Valley Watershed laterals located on Shady Valley Nature Conservancy properties. The Shady Valley Watershed Board will inspect the laterals located on Shady Valley Nature Conservancy properties no later than May 12, 2007 to ensure that blockages to the laterals have been removed.

The complaint alleges four causes of action: 1) declaratory judgment that the District has been dissolved by operation of law, that the District's easements are, thus, extinguished, and that the Unformed District does not hold any property rights in the easements; 2) quiet title action declaring TNC's property free and clear of any clouds and for the Johnson County Register of Deeds to reform the deeds; 3) violation of the TCPA, stating that TNC is a "consumer of real property" and that the Defendants "engaged in acts and practices deceptive to Plaintiff"; and 4) that the individual Defendants committed criminal impersonation, "as defined by Tenn.Code Ann. § 39-16-30," thus, "giving rise to a finding of negligence *per se,* in this instance, tortious impersonation."

***3** The complaint also states, "This action involves an amount in controversy exceeding $75,000.00, exclusive of interest and costs, and between citizens of different States. This Court's subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1332(a)...." Elsewhere, it states that TNC paid $1.7 million for ten parcels of land, the subject of this litigation. Damages are mentioned only two other times in the complaint. Under the TCPA claim, the complaint states, "As a consequence of Defendants' deceptive acts and practices, Plaintiffs have been damaged by such fraud in an amount to be shown at trial," and under the negligence per se claim, it states, "Defendants' negligence per se has proximately caused Plaintiff harm for which Defendants are liable in an amount to be proven at trial."

II. AMOUNT IN CONTROVERSY

A. Standard of Review

A challenge to the amount in controversy attacks subject matter jurisdiction on the face of the complaint; thus, this Court must consider the complaint's

FN3. Much, if not all, of the property acquired by TNC was purchased subject to the easements in favor of the District, which had been granted by previous property owners.

allegations as true, *see RMI Titanium Co. v. Westinghouse Elec. Corp.,* 78 F.3d 1125, 1134 (6th Cir.1996). In addition, to determine whether the amount in controversy has been satisfied, the Court must examine the complaint at the time it was filed. *St. Paul Mercury Indemnity Co. v. Redcap Co.,* 303 U.S. 283, 291 (1938). "[T]he amount alleged in the complaint will suffice unless it appears to a legal certainty that the plaintiff in good faith cannot claim the jurisdictional amount." *Id.* at 294.

"In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 347 (1977). Furthermore, the Sixth Circuit has further elaborated on this rule in an unpublished opinion in *LoDal, Inc., v. Home Insurance Company of Illinois,* 1998 WL 393766, * 2 (6th Cir. June 12, 1998) (citing *Beacon Constr. Co. v. Matco Elec. Co.,* 521 F.2d 392, 299 (2d Cir.1975), and referencing *Hunt,* 432 U.S. at 347). The Sixth Circuit stated that, "[w]here a party seeks a declaratory judgment, 'the amount in controversy is not necessarily the money judgment sought or recovered, but rather the value of the consequences which may result from the litigation.' " *Id.*

B. Analysis

The Defendants argue that the complaint does not specify damages that exceed $75,000.00. They state that the complaint only alleges "damages" under the TCPA claim, and they argue that under the TCPA the Plaintiff must suffer " 'an ascertainable loss of money or property' for a private action to lie. T.C.A. § 47-18-109(a)(a)." Further, the Defendants contend that the negligence per se action only alleges "unspecified 'harm,' " and finally, the Defendants claim that the complaint does not allege any damage to TNC's property, arguing, in essence, that the lawsuit is "solely" about whether the District exists so TNC can claim title free of any clouds.

***4** TNC argues that because the amount in controversy is determined " 'from the perspective of the plaintiff, with a focus on the economic value of the rights [the plaintiff] seeks to protect,' " *see Williamson v. Aetna Life Ins. Co.,* 481 F.3d 369, 376 (6th Cir.2007), and because TNC paid $1.7 million for the property for the purpose of "restoring, constructing, and maintaining the historic bogs and springs on its property," expending $100,000 to do so, and because the Defendants have demanded that TNC drain and destroy the bogs, which would deprive TNC of the $100,000 and in essence the value of its property considering the purpose of purchase, these amounts should be included in the amount in controversy. In addition, TNC contends that because the TCPA allows a plaintiff to recover attorney's fees and because the Sixth Circuit has held that attorney's fees under state statutes are to be considered in determining the amount in controversy, the Plaintiff has met the required amount in controversy.

As set out earlier in more detail, the complaint states that the amount in controversy exceeds $75,000.00, that TNC paid $1.7 million for ten parcels of land, that Plaintiffs have been damaged by a violation of the TCPA "in an amount to be shown at trial," and that "Defendants' negligence per se has proximately caused Plaintiff harm for which Defendants are liable in an amount to be proven at trial." The complaint further alleges that in the March 12, 2007 letter the "District board of directors" demanded that TNC "immediately unblock" all laterals and stated that the District would inspect the TNC's property for compliance by May 12, 2007.

Regarding the declaratory judgment action's amount in controversy, the complaint states the price paid for the property and that the Plaintiff knew of the easements before purchasing the property. The Plaintiff argues that it has spent $100,000.00 in restoring bogs on the property, that this restoration is the purpose for purchasing the property, and that the defendants have demanded that the plaintiff destroy the bogs. This specific amount is outside of the pleadings; however, it is clear from the complaint that the reason for purchasing the property was to restore and maintain bogs and wetlands on its property, which apparently it has done, and that Defendant Gentry, writing the March 12, 2007 letter on behalf of the District's "board of directors," demanded TNC unblock laterals, which would allegedly destroy TNC's bogs and wetlands.

TNC is seeking a declaratory judgment that the District has been dissolved and that the District's easements are extinguished in an effort to protect its property's bogs and wetlands from destruction. Although the entire value of TNC's property would not be lost from the destruction of the bogs and wetlands,

its $1.7 million value would be greatly diminished from Plaintiff's perspective. Moreover, because the amount in controversy is determined from "the value of the consequences which may result from the litigation," *LoDal,* 1998 WL 393766, at *2, that is, destruction of the bogs and wetlands, this Court FINDS that the Plaintiff has demonstrated by a preponderance of the evidence that the amount in controversy is met.[FN4]

FN4. The Defendants' arguments regarding the damages alleged in the TCPA and negligence per se claims is addressed below.

III. STANDING

***5** Citing *City of Fairview v. Spears,* 359 S.W.2d 824 (Tenn.1962), the Defendants assert that the District is a "quasi-governmental" corporation and that TNC, as a "private citizen," cannot attack its corporate existence. They further contend that the corporate existence of a quasi-governmental corporation may only be challenged by the state in a *quo warranto* action. *See id.; see also,* T.C.A. § 29-35-101 (2008). Thus, the Defendants claim that the Plaintiff lacks standing to sue on the declaratory judgment and quiet title claims.

First, the Plaintiff claims, *"[q]uo warranto* is not the exclusive remedy when a challenge to corporate legality is merely a causal [FN5] issue in a case involving the enforcement solely of private rights which do not relate to questions of public interest." Plaintiff's Response, [Doc. 40], citing 74 C.J.S. *Quo Warranto* § 9. The Plaintiff states that the challenge to the District's corporate legality is casual because it is not "the ultimate issue in a lawsuit involving clouds on title to [TNC's] land." Second, the Plaintiff argues that *quo warranto* is not an adequate remedy because, in essence, it would not address the validity of the District's easements. Third, the Plaintiff reiterates that *quo warranto* cannot be invoked for the redress of private rights.

FN5. The Plaintiff misquotes the source. "Causal" is actually "casual." *See* 74 C.J.S. *Quo Warranto* § 9.

The Defendants' argument that the Plaintiff lacks standing because the suit must be brought in *quo warranto* presumes that *quo warranto* proceedings provide an adequate and exclusive remedy. The Defendants' claim ignores the insufficiency of *quo warranto* proceedings. *"[Q]uo warranto* is not an exclusive remedy unless it is adequate." *Lapides v. Doner,* 248 F.Supp. 883, 897 (E.D.Mich.1965); *see also, Earhart v. City of Bristol,* 970 S.W.2d 948, 952 (Tenn.1998) ("But if *quo warranto* is not an adequate remedy, it will not be a bar to alternative remedies."). The Plaintiff claims that the lawsuit seeks "to remove the cloud of the ... District's easements from title of land [it] currently owns." This Court notes that in reaching the merits of this claim, it must determine the corporate existence of the District. However, a *quo warranto* action by the state would not provide an adequate remedy for the Plaintiff's ultimate claims, the easement and quiet title claims, because if the state brought such action, then the suit would only decide the District's existence. *See Lapides,* 248 F.Supp. at 897. Such a suit by the state would not litigate the validity of any easements or quiet the title of TNC's property. Moreover, a *quo warranto* action would not address the successor rights of the unformed District, if any, in the easements.

Furthermore, the issue of standing is a procedural matter and not a matter of state substantive law binding on this Court. *See id.* Thus, this question is governed by Federal Rule of Civil Procedure 17(a), not state substantive law. *See id.* Here, the Plaintiff, as the aggrieved party, is the "real party in interest"; accordingly, this Court FINDS that TNC has standing to sue under Rule 17(a). *See* Fed.R.Civ.P. 17(a).

***6** Even if this Court looked to Tennessee substantive law to determine whether the Plaintiff had standing, this Court would reach the same conclusion. The Tennessee Supreme Court stated in *Earhart v. City of Bristol* that "if *quo warranto* is not an adequate remedy, it will not be a bar to alternative remedies." 970 S.W.2d at 952 (quoting 65 Am.Jur.2d *Quo Warranto* § 7 (1972)) (stating that the Tennessee Declaratory Judgment Act was another law that adequately addressed the plaintiffs' claims).

The Defendants rely on *City of Fairview v. Spears,* 359 S.W.2d 824 (Tenn.1962), and *Jordan v. Knox County,* 213 S.W.3d 751 (Tenn .2006), for the assertion that *quo warranto* is the only action available to challenge the existence of a quasi-governmental corporation. The Defendants further contend that *Earhart* does not apply because it involved an annexation statute which did not allow the plaintiffs to bring a *quo*

warranto action as they did not own the property that was annexed.[FN6] The Defendants state, "*Earhart* clearly applies to those very limited situations involving annexation that do not include people, private property, or commercial activity." However, *City of Fairview* and *Jordan* are distinguishable from the case at hand, and again, the Defendants presuppose that *quo warranto* is an adequate remedy, dismissing the fact that *quo warranto* would only resolve an incidental issue, not adjudicating the Plaintiff's ultimate claim, the validity of the easements and any successor rights.

> FN6. The Defendants also claim that the Plaintiff's reliance on *Summers v. Town of Walnut Grove,* 2001 WL 434867 (Tenn.Ct.App.2001), is misplaced. This Court agrees that *Summers* is not applicable because the statute that enabled the formation the city, whose corporate existence was being challenged by private citizens, was declared unconstitutional prior to the filing of the lawsuit. *Id.* at *2.

First, in *City of Fairview,* private citizens brought the action purely to void the city charter; this was the ultimate issue. 359 S.W.2d at 405. The basis of their claim was that statutory procedures were not followed during incorporation. *Id.* at 406. The Supreme Court stated, "In cases of *purely public concern* and in actions for *wrongs against the public,* whether actually committed or only apprehended, the remedy, ... is as general rule by a prosecution instituted by the state." *Id.* at 411-12 (citations omitted) (emphasis added). The court went on to say that this is the action for courts to take "to redress a public wrong." *Id.* at 412. Here, however, the action is a private concern to address an alleged wrong against a private individual. As such, *quo warranto* would not provide an adequate remedy.

Second, in *Jordan,* incumbent county commissioners brought suit seeking a declaratory judgment that the Knox County Charter was null and void because Knox County did not properly adopt a charter form of government in 1990, thus, rendering the term-limit provisions which amended the charter in 1995 ineffective, thereby allowing the incumbents to keep their elected positions. 213 S.W.3d at 760. The plaintiffs did not challenge the legal existence of Knox County. Had the state brought the action in *quo warranto* challenging the legal existence of Knox County, the remedy would have been inadequate. A *quo warranto* action would not have adjudicated the plaintiffs' ultimate issue, the right to avoid term limits and hold their elected positions. For the reasons stated above, this Court would FIND even under Tennessee substantive law that the Plaintiff has standing to bring the suit.

IV. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Standard of Review

***7** A motion to dismiss under Fed.R.Civ.P. 12(b)(6) requires the Court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle him to relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.), *cert. denied,* 498 U.S. 867 (1990). The Court may not grant such a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990). The Court must liberally construe the complaint in favor of the party opposing the motion. *Miller v. Currie,* 50 F.3d 373, 377 (6th Cir.1995). However, the complaint must articulate more than a bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988). "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted).

B. Tennessee Consumer Protection Act Claim

The Defendants argue that Plaintiff fails to allege in its complaint any fact that it is a consumer who purchased its property from the District, that it sought to acquire the District services, or that the District was involved in "trade or commerce" in that it advertised, offered for sale, or distributed any goods, services, or property. Furthermore, the Defendants contend that the Plaintiff is required by T.C.A. § 47-18-109(a)(1) to allege "an ascertainable loss of money or property." Finally, the defendants claim that this Court should award them reasonable attorney's fees and costs because of T.C.A. § 47-18-109(e)'s cost shifting clause.

The Plaintiff argues that the Defendants attempt to

place a stricter pleading burden upon it, that it is a consumer of real property, that the engagement in " 'unfair or deceptive' " acts is a question of fact not appropriate for adjudication on a motion to dismiss, and that the "ascertainable loss" is attorney's fees. For the reasons set forth below, even under the Plaintiff's claimed pleading burden, the Plaintiff has failed to state a claim pursuant to the TCPA upon which relief can be granted; thus, this count is hereby **DISMISSED.**

The TCPA promotes certain policies which among other things protect "consumers" "from those who engage in unfair or deceptive acts or practices in the conduct of trade or commerce." T.C.A. § 47-18-102(2) (2008). The Act defines consumer and trade, commerce or consumer transaction as follows:

> ....
>
> (2) "Consumer" means any natural person who seeks or acquires by purchase, rent, lease, assignment, award by chance, or other disposition, any goods, services, or property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated or any person who purchases or to whom is offered for sale a franchise or distributorship agreement or any similar type of business opportunity; [and]
>
> ***8** ....
>
> (11) "Trade," "commerce," or "consumer transaction" means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.

Id. § 47-18-103(2), (11). Moreover, the TCPA refers to unfair or deceptive acts or practices which "affect[ ] the conduct of any trade or commerce" in T.C.A. § 47-18-104. *Id.* § 47-18-104. Although the acts are not limited to those enumerated in section 104, they are limited to trade or commerce. In addition, the act requires "an ascertainable loss of money or property, ... or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part." *See id.* § 47-18-109(a)(1).

The Plaintiff does plead that it is a consumer of "real property"; however, it fails to plead that it is a consumer with respect to the Defendants. Similarly, the complain fails to allege that the Defendants were or are engaged in trade or commerce. Further, the complaint fails to allege what act or acts committed by the defendants were unfair and deceptive under the TCPA. Although it is generally a question of fact for the trier of fact to determine whether the act of the defendant is unfair or deceptive, the Plaintiff must at least allege an act or acts falling under the TCPA. *See* T.P.I.-Civil 11.45 (7th ed., 2007).

Finally, the Plaintiff states that it has been damaged "in an amount to be shown at trial." This is clearly insufficient on its face. The Plaintiff does, however, argue in its Response to Defendants' Motion to Dismiss, which is outside the pleadings, that the actual loss is attorney's fees, allowed under the Act. *See* T .C.A. § 47-18-109(e)(1) (2008). The Act does allow attorney's fees "[u]pon a finding by the court that a provision of [the Act] has been violated. *Id.* Nevertheless, the Plaintiff failed to plead any actual damages, including attorney's fees.

In no scenario can this Court fathom, based on the facts alleged in the complaint, how the TCPA applies in this case, much less how the Defendants could have violated the TCPA. *See Wagner v. Fleming,* 139 S.W.3d 295, 300-01 (Tenn.Ct.App.2004) (holding that the TCPA does not apply to Defendants who were seeking to buy real property from the Plaintiff at auction). Because the complaint does not contain either direct or inferential allegations respecting all the necessary material elements of a claim pursuant to the TCPA, this count is hereby **DISMISSED.**[FN7]

> FN7. Because of this dismissal, this Court need not address Defendants' argument whether this count is barred by the Tennessee Governmental Tort Liability Act ("GTLA").

As stated earlier, the Defendants argue that they should be awarded reasonable attorney's fees and costs because this action in essence was "frivolous, without legal or factual merit, or brought for the purpose of harassment." T.C.A. § 47-18-109(e)(1). This Court FINDS also that this action was without legal merit, and as such, it is hereby **ORDERED** that the Plaintiff pay the Defendants' reasonable attorney's fees and

costs as to this cause only; however, this Court reserves its decision regarding the actual amount until the conclusion of the case.

C. Negligence Per Se Claim

***9** Defendants argue that 1) Plaintiff fails to cite a statute that was violated; 2) there is no intent to misrepresent because no judicial determination has been made as to the District's status; and 3) Plaintiff fails to allege any injury or damages. The Plaintiff argues that a violation of the criminal impersonation statute, T.C.A. § 39-16-301,[FN8] amounts to negligence *per se.* Moreover, it contends that if this Court determines that the District is dissolved, then the individual defendants violated the criminal impersonation statute, amounting to negligence *per se,* when they portrayed themselves as officers of the District, a quasi-governmental entity.

> FN8. Plaintiff admits that it made a typographical error in the complaint, and because of this error, it cited a statute not actually contained in the T.C.A.

In order to recover on a theory of negligence *per se,* a plaintiff must prove that a defendant violated a statute or ordinance and that this violation was the legal cause of the plaintiff's injury or damage. *See Bennett v. Putnam County,* 47 S.W.3d 438 (Tenn.App.2000). In the complaint regarding damages claimed in the negligence per se claim, the Plaintiff states, “Defendants' negligence per se has proximately caused Plaintiff harm for which Defendants are liable in an amount to be proven at trial.” This is insufficient, and again, because the Plaintiff failed to plead allegations respecting all the material elements of its claim, this count is likewise **DISMISSED.**[FN9]

> FN9. Again, because of this dismissal, this Court need not address Defendants' argument whether the this count is barred by the GTLA.

V. CONCLUSION

It is **ORDERED** that the Defendants' Motion to Dismiss, [Doc. 32], is **DENIED** in part and **GRANTED** in part. Because the amount in controversy is met, the Defendants' motion to dismiss on jurisdictional grounds is **DENIED.** Furthermore, this Court **FINDS** that the Plaintiff has standing to sue. Defendants' Motion to Dismiss the TCPA and negligence *per se* claims is **GRANTED.** It is also hereby **ORDERED** that the Plaintiff pay the Defendants' reasonable attorney's fees and costs as to the TCPA cause only, the amount of which to be determined at a later date.

E.D.Tenn.,2008.
The Nature Conservancy v. Browder
Not Reported in F.Supp.2d, 2008 WL 336744 (E.D.Tenn.)

END OF DOCUMENT

EXHIBIT “7”

Not Reported in F.Supp.2d, 2005 WL 2671252 (M.D.Tenn.)
(Cite as: 2005 WL 2671252 (M.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee, Nashville Division.
NAUTILUS INSURANCE COMPANY, Plaintiff/Counterdefendant,
v.
THE IN CROWD, INC., American Community Services, Inc., Rodney A. Rankins, Tolliny J. Rankins, LeVan P. Ellis, Edward W. Scott, Ronald F. Scott, Fe DePiero, and Anthony C. DePiero, Defendants/Counterplaintiffs.
No. 3:04-0083.

Oct. 19, 2005.

John C. Tollefson, Goins, Underkofler, Crawford & Langdon, Dallas, TX, Michael L. Mansfield, Rainey, Kizer, Reviere & Bell, P.L.C., Jackson, TN, Ronald G. Harris, Keltie L. Hays, Neal & Harwell, Nashville, TN, for Plainitff/Counterdefendant.

Raymond Graham Prince, Prince & Hellinger, Julie Murphy Burnstein, William Daniel Leader, Jr., Boult, Cummings, Conners & Berry, Nashville, TN, for Defendants/Counterplaintiffs.

MEMORANDUM OPINION

WISEMAN, Senior J.

I. INTRODUCTION

***1** Plaintiff-Counterdefendant Nautilus Insurance Company, Inc. ("Nautilus") has filed a combined Motion to Dismiss and Motion for Summary Judgment (Doc. No. 81), seeking dismissal of all counterclaims asserted against it by Defendants-Counterplaintiffs American Community Services, Inc., LeVan P. Ellis, the In Crowd, Inc., Rodney A. Rankins, and Tolliny J. Rankins. Nautilus has filed a Memorandum in support of its Motion (Doc. No. 82), with attached exhibits, and a Statement of Undisputed Material Facts. (Doc. No. 93.) American Community Services, Inc. and Ellis (collectively, the "ACS Defendants") have filed a Response in opposition to Nautilus' Motion (Doc. No. 94), a Response to Nautilus' Statement of Undisputed Facts and Statement of Additional Disputed Material Facts (Doc. No. 96), and various documents and exhibits in support of their positions (Doc. Nos.95). The In Crowd, Inc., Rodney Rankins and Tolliny Rankins (collectively, the "In Crowd Defendants") have filed a Response in which they adopt, *in toto,* the ACS Defendants' Response in opposition to Nautilus' Motion. (Doc. No. 97.) Nautilus has filed a Response to the ACS Defendants' Statement of Additional Disputed Material Facts (Doc. No. 101) and, with the Court's permission, a Reply brief (Doc. No. 103).

Also before the Court is the ACS Defendants' Motion to Strike certain materials filed with and relied upon in Nautilus' Reply Brief (Doc. No. 109), to which Nautilus has filed a Response (Doc. No. 112). The ACS Defendants have also filed a Motion to Compel production of certain documents they maintain are relevant to their counterclaims (Doc. No. 105). Nautilus has responded in opposition to the motion to compel (Doc. No. 111). Because this is a discovery-related motion, it was originally referred to the Magistrate Judge but will nonetheless be disposed of here.

Having considered the entire record in this matter, and for reasons explained more fully below, the Court will GRANT Nautilus' motion and will dismiss all counterclaims pending against it. Because the Court reaches its determination without consideration of the evidentiary materials submitted in conjunction with Nautilus' Reply, Defendants' Motion to Strike will be DENIED as MOOT. Finally, because the Defendants' counterclaims are dismissed, the pending Motion to Compel filed by the ACS Defendants will likewise be DENIED as MOOT, since the discovery sought is solely in support of the Defendants' dismissed counterclaims.

II. STANDARD OF REVIEW

A. The Present Motion

Nautilus styles its motion as a "combined" motion to dismiss and motion for summary judgment. Generally, a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted "shall be made

before pleading if a further pleading is permitted." Once an answer to a complaint or counterclaim has been served, a Rule 12(b)(6) motion is no longer timely. Notwithstanding, the Court may construe a motion styled as a Rule 12(b)(6) motion as a Rule 12(c) motion instead, which requires application of the same standard as that applied to a 12(b)(6) motion. *See* Fed.R.Civ.P. 12(h)(2); *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 11 (6th Cir.1987).

***2** Regardless, Nautilus, rather than the Defendants, submitted certain documents as exhibits to their original complaint in the declaratory judgment action that have been taken into consideration in resolution of the present motion. Although the exhibits were submitted with Nautilus' complaint, Nautilus stands in the position of counterdefendant in bringing its motion, so the Court finds that consideration of these materials requires consideration of the motion as one for summary judgment rather than as a Rule 12(b)(6) motion to dismiss.[FN1] Defendants do not dispute the authenticity of either of these documents, and the Court does not construe the allegations in the DePieros' Complaint as true and in fact does not consider them at all except insofar as they provide a basis for Nautilus to determine whether the claims asserted are covered under the Policy.

> FN1. Ordinarily, a 12(b)(6) motion to dismiss is directed to the complaint as well as to any exhibits attached to it, *see* Fed.R.Civ.P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

B. Rule 56 Motion for Summary Judgment

Summary judgment, of course, shall be granted when "there is no genuine issue as to any material fact and ... the non-moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When the evidence is such that no reasonable jury could return a verdict for the nonmoving party, there is no genuine issue of fact. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the nonmoving party has failed to produce evidence sufficient to establish an element of his claim, summary judgment is appropriate. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A summary judgment motion places on the non-movant the burden of producing enough evidence to allow a reasonable factfinder to rule in his favor; a mere "scintilla of evidence" will not suffice. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479-80 (6th Cir.1989).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The facts set forth below are either undisputed or else undisputed for purposes of Nautilus's motion.

Nautilus is an insurance company based in Arizona and licensed to do business in Tennessee. (Am. Compl. ¶ 2; ACS' Am. Ans. ¶ 2.) ACS is a corporation organized and existing under the laws of Indiana. (Am. Compl. ¶ 4; ACS' Am. Ans. ¶ 4.). In Crowd is likewise a corporation organized and existing under the laws of Indiana with its principle place of business in indiana. (Am. Compl. ¶ 3; In Crowds' Ans. ¶ 3.) On June 22, 2002, Nautilus issued a comprehensive commercial general liability insurance policy to In Crowd, Policy No. NC 188694 (the "Insurance Policy"), effective for a period of one year, and naming ACS as an additional insured. (Am. Compl. ¶ 11; Defs.' Am. Ans. ¶ 11; Doc. No. 82, Ex. 13.) The relationship between In Crowd and ACS is not altogether clear to the Court, but it is apparent that they are affiliated in some manner, and that they engage in the business of selling magazine subscriptions door to door. (*See* Doc. No. 82, Ex. 13 (Insurance Policy, containing the statement: "Business Description: Magazine Sales").)

***3** On August 4, 2003, Fe and Anthony DePiero [FN2] filed a lawsuit originally styled *Fe DePiero and Anthony C. DePiero v. American Community Services, Inc. et al.,* in Rutherford County Circuit Court, which was removed to the United States District Court for the Middle District of Tennessee, Nashville Division, Docket No. 3:03-0832 ("Underlying Lawsuit"). In the Underlying Lawsuit, the DePieros alleged that the ACS Defendants and the In Crowd Defendants, among others, had negligently hired and trained a salesman, Donnell Covington, and that Mr. Covington had raped, assaulted and robbed Ms. DePiero in her home while he was selling magazine subscriptions on behalf of In Crowd and/or ACS. (*See* Doc. No. 82, Ex. 1.)

> FN2. Fe and Anthony DePiero were origi-

> nally named as defendants in this action, but the claims against them have been dismissed without prejudice.

Even prior to the filing of the Underlying Lawsuit, ACS and/or In Crowd had put Nautilus on notice of the DePieros' potential claims against them arising from the alleged assault. On August 11, 2003, unaware that suit had been filed, Nautilus advised the In Crowd Defendants that Nautilus was conducting an investigation into the DePieros' claim under a full reservation of rights, and specifically gave notice that Nautilus reserved the right to bring an action to declare the obligations and responsibilities of the parties under the Insurance Policy. (Doc. No. 82, Ex. 2.) The next day, after receiving a copy of the DePiero Complaint, Nautilus sent another letter in which it agreed to provide a defense to the In Crowd Defendants, subject again to an express reservation of rights. (Doc. No. 82, Ex. 3.) Shortly thereafter, ACS sent Nautilus a demand for defense and indemnification for any and all losses, costs or damages incurred by ACS in connection with the Underlying Lawsuit. (Doc. No. 82, Ex. 4.) Upon receipt of this demand, Nautilus retained counsel for the ACS Defendants too and agreed to provide a defense, but again specifically reserved its right to bring an action to declare the parties' rights, obligations and responsibilities under the Insurance Policy. (Doc. No. 82, Ex. 5.)

In connection with the Underlying Lawsuit, Nautilus paid $136,512.95 in attorneys' fees and expenses in its defense of the ACS and In Crowd Defendants against the DePieros' claims. (Doc. No. 82, Exs.6, 7, 8.) Further, on or about October 14, 2004, Nautilus paid $626,000 of a total settlement amount of $800,000 to settle the DePieros' claims against the ACS and In Crowd Defendants, which payment was subject to its reservation of rights. (*See* Doc. No. 82, Exs. 12 and 14.)

B. Procedural Background

On January 29, 2004, while the Underlying Lawsuit was still pending, Nautilus filed a declaratory judgment action in this Court against the In Crowd and ACS Defendants, among others, seeking a determination of the parties' rights, obligations, and liabilities under the Insurance Policy. Specifically, Nautilus requests a declaration that no coverage is afforded by the Insurance Policy for the claims and demands made against the Defendants in the Underlying Lawsuit on the basis that (1) the acts of Donnell Covington, an employee or agent of the Defendants, were intentional acts of an "Insured," as that term is defined by the Policy, causing damages for which the Insurance Policy does not provide coverage; (2) the In Crowd Defendants fraudulently failed to disclose prior claims of sexual abuse and negligent hiring that had been asserted against them; and (3) the Insurance Policy does not provide coverage for punitive damages.

***4** In addition to filing their Answers, the In Crowd and ACS Defendants filed Counterclaims against Nautilus alleging that Nautilus, by virtue of the act of filing its declaratory judgment action in this Court, breached a duty of good faith and fair dealing and acted negligently and in bad faith (all as part of "Count I"), breached the insurance contract (Count II), and violated the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47-18-101 *et seq.* ("TCPA") (Count III). (*See* ACS Defs.' Am. Countercl. (Doc. No. 37); In Crowd Defs.' Countercl. (Doc. No. 48).)

Nautilus filed an Answer to ACS's Amended Counterclaim [FN3] but has now filed its combined 12(b)(6) Motion to Dismiss and Motion for Summary Judgment seeking dismissal of each of those claims. In support of its motion, Nautilus argues that Tennessee does not recognize a common-law tort of bad faith between an insurer and an insured and that the Defendants have not pleaded the necessary elements of a statutory bad-faith claim under Tenn.Code Ann. § 56-7-105; and that Defendants have simply failed to state a claim for negligence, breach of contract, or violation of the TCPA. In addressing the Defendants' claims, Nautilus assumed, for purposes of its motion, that Tennessee law applies.

> FN3. The docket reflects that no Answer was filed to the In Crowd Defendants' Counterclaim, but that Counterclaim is identical in all respects the ACS Defendants' Counterclaim, which has been answered.

In their response, Defendants expressly abandoned their claims for breach of contract, negligence, and bad faith, conceding that their cause of action is based solely upon the Tennessee Consumer Protection Act. (*See* Doc. No. 94, at 3 n. 2.) They maintain that they have stated a valid claim and that genuine issues of material fact preclude summary judgment of the

TCPA claim. More confusing is the fact that Defendants appear to be arguing that the question of whether Nautilus engaged in conduct that violated the TCPA should be determined under principles of Illinois insurance law. (*See* Doc. No. 94, at 12.)

In its Reply Brief, Nautilus contends that Indiana law rather than Illinois law should apply to the claims in its underlying Declaratory Judgment action. Nautilus includes as exhibits additional evidence in support of its arguments as to which state's law should apply and its claim that misrepresentations contained on the application for insurance void the contract of insurance as a whole. (*See* Doc. No. 103, Exs. 1-7.)

In response to Nautilus' Reply, the ACS Defendants have filed a Motion to Strike those new materials, including excerpts from a deposition of ACS employee Tina Green; a Memorandum Opinion from the United States District Court for the Eastern District of Tennessee involving ACS and a different insurer; an application signed by John Damiani that pertains to allegedly new legal arguments not made in the original Motion to Dismiss; and Articles of Incorporation for In Crowd. The ACS Defendants argue that it is "unfair for Nautilus to have a second bite at the apple particularly with respect to matters that it knew or should have known about when it filed the original Motion for Summary Judgment," because they do not have the opportunity to respond or to rebut these documents. (Doc. No. 109, at 2.)

***5** Nautilus, in response to the Motion to Strike, claims that the Defendants essentially changed the focus of their claims in their Response: Instead of arguing merely that the filing of a *meritless* declaratory judgment action constitutes a TCPA violation, they are now allegedly claiming that the filing of a *frivolous* declaratory judgment action constitutes a TCPA violation. (*See* Doc. No. 112, at 4-5.)

The Court will now address the merits of the parties' arguments.

IV. DISCUSSION

A. The Documents Defendants Seek To Strike Are Not Material To Nautilus' Motion.

The documents attached to Nautilus' Reply brief to which Defendants object were all produced in support of Nautilus' argument that Indiana law, rather than Illinois law, should apply to the interpretation of the Insurance Policy. As indicated above, however, the sole remaining issue before the Court at this time is whether dismissal of the Defendants' TCPA claim is warranted. Obviously, the TCPA is a Tennessee statute, and Tennessee law applies to any cause of action for an alleged violation thereof. The choice-of-law question, while obviously relevant to resolution of Nautilus's underlying declaratory judgment action, is not pertinent to a ruling on Nautilus' motion to dismiss. The Court has therefore reached its ruling on Nautilus' motion without reference to the documents attached to Nautilus' Reply Brief. The ACS Defendants' Motion to Strike will therefore be denied as moot.

B. Defendants' TCPA Claim Is Wholly Without Merit.

The stated purpose of the TCPA is to "protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." Tenn.Code Ann. § 47-18-102(2). The TCPA is remedial rather than regulatory in nature, and it specifically provides a private right of action for any "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn.Code Ann. § 47-18-104(a) & -(b). The TCPA includes a nonexclusive list of the unfair or deceptive acts or practices that are prohibited. This list does not specifically address the acts or practices of insurance companies, but it includes a general, "catch-all" provision which prohibits "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn.Code Ann. § 47-18-104(b)(27). Thus, the Tennessee Supreme Court has held that "the acts and practices of insurance companies" may fall within the purview of the TCPA. *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 925 (Tenn.1998).

This Court is not aware, however, of any case finding a TCPA violation under facts similar to those presented here-that is, where the insurance company provides a defense for the insured and pays a settlement while expressly reserving its rights to contest coverage, and then files a declaratory judgment action to have a court determine the issue of coverage. In *Myint,* for instance, plaintiffs brought suit against

Allstate Insurance Company based upon a denial of coverage. Even though the jury found Allstate liable for coverage under the policy, the Tennessee Supreme Court affirmed summary dismissal of the TCPA claim, noting, "The record reveals no evidence of an attempt by Allstate to violate the terms of the policy, deceive the Myints about the terms of the policy, or otherwise act unfairly. It is apparent that the denial of the Myints' claim was Allstate's reaction to circumstances which Allstate believed to be suspicious. Consequently, Allstate's conduct does not fall within the purview of the Tennessee Consumer Protection Act[.]" *Myint,* 970 S.W.2d at 926. *Cf. Stooksbury v. Am. Nat'l Prop. and Cas. Co.,* 126 S.W.3d 505, 519, 520 (Tenn.Ct.App.2003) (affirming jury verdict against the defendant insurance company on the issue of coverage, but reversing the jury finding of a TCPA violation where it was clear that the defendant had "substantial legal grounds supporting its position that Plaintiffs' insurance coverage had been cancelled prior to the date of loss," regardless of whether the defense was ultimately unsuccessful, and there was "no material evidence to support the jury's conclusion that Defendant engaged in deceptive or unfair acts"); *Newman v. Allstate Ins. Co.,* 42 S.W.3d 920 (Tenn.Ct.App.2000) (affirming trial court's dismissal of TCPA claim, despite damages award to insured, because there was no evidence the insurer engaged in an unfair or deceptive act or practice when attempting to resolve the insured's complaints about repairs to her car); *Parkway Assocs., LLC v. Harleysville Mut. Ins. Co.,* 129 Fed. Appx. 955, 960-61 (6th Cir. May 5, 2005) (applying Tennessee law) (affirming summary judgment for the defendant on the plaintiff's TCPA claim, finding the plaintiff failed to state such a claim because she did not explain how she was misled or deceived by the acts she complained about).

***6** Liberally construing their Response in opposition to summary judgment, the Court understands the Defendants' position to be that the TCPA applies in this case because Nautilus "wrongful[ly] fil[ed] a frivolous lawsuit in Tennessee" "when it knew it had absolutely no basis in law or fact to deny coverage under the Policy." (Doc. No. 94, at 9, 10.) Further, Defendants appear to argue that there is, at the very least, a jury question as to whether Nautilus, in filing its declaratory judgment action, violated the TCPA by "attempt[ing] to violate the terms of the Policy and otherwise act[ing] unfairly." (Doc. No. 94, at 11.) Rather than pointing to facts that might support an inference of an attempt to deceive on the part of Nautilus, Defendants' brief is devoted to an explanation of why Nautilus's declaratory judgment action should fail on the merits. Defendants do not explain how they were deceived or misled by any action taken by Nautilus. Likewise, in their respective Counterclaims, the Defendants set forth allegations that go to the merits of the underlying declaratory judgment action. None of these allegations remotely suggests how Nautilus acted to deceive or mislead Defendants when it provided a defense and paid a settlement all under a reservation of rights, and then filed suit to obtain a judicial declaration as to its obligations under the Policy. Quite simply, to paraphrase the Tennessee Supreme Court, Defendants point to "no evidence of an attempt by [Nautilus] to violate the terms of the policy, deceive the [Defendants] about the terms of the policy, or otherwise act unfairly." *See Myint,* 970 S.W.2d at 926.

Moreover, without going so far as to address the actual merits of Nautilus's declaratory judgment action, the Court finds that Nautilus has raised substantial legal grounds supporting its position that the Policy does not provide coverage for the damages asserted in this case, Defendants' blustering objections to the contrary notwithstanding. More specifically, there are apparently legitimate factual disputes regarding (1) whether Donnell Covington qualifies as an "insured" under the Policy; [FN4] (2) which state's laws govern interpretation of the insurance policy; [FN5] and (3) whether misrepresentations were made on the insurance application that may be attributed to any of the Defendants.[FN6]

> FN4. The DePieros' Complaint alleges that Donnell Covington was a "representative" or employee of both ACS and In Crowd. As set forth in both of Nautilus' "reservation of rights" letters, the Insurance Policy provides coverage for "sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Doc. 82, Ex. 2, at 1.) However, coverage will be provided only if the bodily injury or property damage "is caused by an 'occurrence' that takes place in the 'coverage territory." ' (*id.* at page 2.) "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.*) An exclusion provides that the insurance does not apply to " '[b]odily injury' or 'property damage' expected or in-

> tended from the standpoint of the Insured." (*Id.* at page 2 .) The policy defines "insured" to include "employees," "but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." (*Id.* at page 3.) Nautilus (and the DePieros') alleged that Covington was an employee. Defendants maintain that he was an independent sales representative. Resolution of that fact question may (or may not) determine whether he was an "insured" under the Policy. In either event, the legal issue to be resolved is whether the "occurrence" that caused the damages in the Underlying Suit was the Defendants' act of hiring Covington or Covington's intentional criminal acts, and whether those damages are covered by the terms of the Insurance Policy.
>
> FN5. The policy appears to have been "delivered" in Illinois, but there are facts in the record that strongly suggest Indiana is the state with "most significant relationship" to the parties and the Policy. *See Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc.,* 972 S.W.2d 1, 5 (Tenn.Ct.App.1998). Defendants maintain that Illinois law applies and that they win on the merits under Illinois law. Nautilus maintains that Indiana law applies and that, at worst, it has a legitimate basis for contesting coverage under Indiana law and the Policy language.
>
> FN6. There are clearly disputed issues of fact as to whether any representations were made by any agent whose acts may be attributed to one or more of the Defendants. The existence of this factual dispute alone is sufficient to establish that Nautilus' assertion of the defense of misrepresentation is not frivolous.

The Defendants' Counterclaims are completely meritless. If any party has made claims in this case that might be subject to Rule 11 sanctions, it is not Nautilus.

C. Defendants' Motion to Compel Is Moot.

The ACS Defendants seek to compel production of documents from Nautilus they apparently hope will support their claims that Nautilus allegedly knew it had no legitimate legal basis for contesting coverage of the DePiero Lawsuit. (*See* Doc. Nos. 105, 108.) Because the Counterclaims are being dismissed, the discovery sought is no longer relevant to any issue. The Motion to Compel will therefore be denied as moot.

V. CONCLUSION

***7** For the reasons set forth herein, Nautilus' combined Motion to Dismiss/Motion for Summary Judgment will be granted and Defendants' counterclaims shall all be dismissed in their entirety. The Motion to Compel and Motion to Strike will be denied as moot.

An appropriate order will enter.

M.D.Tenn.,2005.
Nautilus Ins. Co. v. The In Crowd, Inc.
Not Reported in F.Supp.2d, 2005 WL 2671252 (M.D.Tenn.)

END OF DOCUMENT

EXHIBIT “8”

Slip Copy, 2010 WL 3861074 (E.D.Tenn.)
(Cite as: 2010 WL 3861074 (E.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Tennessee.
Michael RHODES, d/b/a Rhodes Investments, LLC, Plaintiff,
v.
BOMBARDIER CAPITAL, INC., Defendant.
No. 3:09-CV-562.

Sept. 24, 2010.

Robert W. Knolton, Kramer, Rayson LLP, Knoxville, TN, Robert A. McNees, III, Law Office of Robert A. McNees III, Oak Ridge, TN, for Plaintiff.

R. Louis Crossley, Jr., Long, Ragsdale & Waters, PC, Knoxville, TN, for Defendant.

MEMORANDUM AND ORDER

THOMAS W. PHILLIPS, District Judge.

***1** This matter is before the court on defendant's motion to dismiss pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure [Doc. 4]. Plaintiff has responded in opposition [Doc. 6]. For the reasons which follow, defendant's motion to dismiss will be denied.

Background

Plaintiff filed the instant action on November 18, 2009 in the Chancery Court for Anderson County, Tennessee. The case arises out of prior litigation between the CIT Group and defendant Bombardier, Hustler Boat Trailers, Mariah Boats and R & C Automotive (now Rhodes Investments LLC). The prior litigation involved a financing agreement for several boats. Plaintiff states that all previous disputes surrounding the prior litigants were eventually settled, except for the dispute between Bombardier and Rhodes. An order of compromise and dismissal was entered as to all actions except the claim between Rhodes and Bombardier. This claim was dismissed without prejudice in accordance with Rule 41.01 of the Tennessee Rules of Civil Procedure. The instant action was refiled on November 18, 2009 in the Chancery Court for Anderson County, Tennessee, and removed to this court pursuant to 28 U.S.C. § 1332.

In the instant case, plaintiff seeks to recover from Bombardier upon claims of fraud, negligent misrepresentation and violation of the Tennessee Consumer Protection Act. The claims arise out of an Inventory Security Agreement between Rhodes and Bombardier. Plaintiff alleges that at the time Rhodes purchased boats from Mariah, he was relying upon representations from Bombardier that the boats could be sold subject only to the security interest of Bombardier. In fact, Bombardier had not fully paid a prior security interest. Rhodes executed a $500,000 letter of credit which was drawn upon in its entirety by Bombardier, and Rhodes has suffered a financial loss as a result of Bombardier's misrepresentations concerning the prior security interest.

Defendant asserts that the complaint fails to properly allege causes of action based upon fraud, negligent misrepresentation, or the Tennessee Consumer Protection Act. In addition, defendant asserts that the claims of Michael Rhodes, individually, are barred by the applicable statute of limitations. Therefore, defendant asserts that plaintiff's complaint should be dismissed pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

Standard for Motion to Dismiss

A motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, requires the court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.) *cert. denied,* 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990). The court may not grant such a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall,* 898 F.2d 1196, 1198 (6th Cir.1990); *Miller v. Currie,* 50 F.3d 373, 377 (6th Cir.1995) (noting that courts should not weigh evidence or evaluate the credibility of witnesses). The court must liberally construe the complaint in favor of the party opposing the motion. *Id.* However, the

complaint must articulate more than a bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434 (6th Cir.1988). "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted).

Fraud/Misrepresentation Claims

***2** A cause of action for fraud in Tennessee requires four elements: (1) an intentional misrepresentation of a material fact; (2) knowledge of the representation's falsity; and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform. *Dobbs v. Guenther,* 846 S.W.2d 270, 274 (Tenn.App.1992).

Liability for negligent misrepresentation will result if defendant is acting in the course of his business, profession, or employment, or in any transaction in which he has pecuniary interest, and if plaintiff establishes that the defendant supplied information to the plaintiff meant to guide others in their business transactions, the information was false, the defendant did not exercise reasonable care in obtaining or communicating the information, and the plaintiff justifiably relied on the information. *Walker v. Sunrise Pontiac-GMC Truck Inc.,* 249 S.W.3d 301, 311 (Tenn.2008).

Rule 9(b) requires that averments of fraud be stated with particularity. At a minimum, a plaintiff must "allege the time, place, and content of the alleged misrepresentation on which he relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex LP,* 2 F.3d 157, 161-62 (6th Cir.1993). However, "allegations of fraudulent misrepresentation must be made with sufficient particularity and with a sufficient factual basis to support an inference that they were knowingly made." *Id.* The threshold test is whether the complaint places the defendant on "sufficient notice of the misrepresentation," allowing the defendant to "answer, addressing, in an informed way plaintiff's claim of fraud." *Id.*

To establish a *prima facie* cause of action under the Tennessee Consumer Protection Act, Tenn.Code Ann. §§ 47-18-101 to 128, plaintiff must prove that defendant engaged in an act or practice that is unfair or deceptive as defined under the Act, and that plaintiff suffered a loss of money, property, or a thing of value as a result of the unfair or deceptive act of defendant. Tenn.Code Ann. § 47-18-109. Plaintiff's claims under the Tennessee Consumer Protection Act are subject to Rule 9(b)'s specific pleading requirements. *Metro. Property & Cas. Ins. Co. v. Bell,* 2005 WL 1993446 (6th Cir. Aug.17, 2005) (citing *Harvey v. Ford Motor Credit Co.,* 8 S.W.3d 274 (Tenn.App.1999)).

Here, plaintiff claims that the defendant made material and substantial misrepresentations as to the security obligations attached to the property at issue. Plaintiff alleges he relied on the false information provided by defendant, and that such reliance resulted in an injury in the form of financial harm. More particularly, plaintiff alleges that defendant withheld direct knowledge of security interests held by CIT when asked about whether the property at issue had any security interests. Therefore, the court finds that plaintiff's complaint adequately states a claim against defendant for fraudulent and/or negligent misrepresentation, as well as a claim under the Tennessee Consumer Protection Act.

Claims of Michael Rhodes

***3** Last, defendant asserts that the claims of Michael Rhodes are barred by the statute of limitations because Michael Rhodes was never a party to the previous case, therefore, the Tennessee Savings Statute is not applicable to his claims.

The Tennessee Savings Statute, Tenn.Code Ann. § 28-1-105 provides:

> If an action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representative and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest.

It is well settled that Tennessee law strongly favors the resolution of all disputes on their merits, and that the

saving statute is to be given a broad and liberal construction in order to achieve this goal. *Henley v. Cobb,* 916 S.W.2d 915, 916 (Tenn.1996). Notice to the party affected is the true test of the statute's applicability. *Id.* The Tennessee Supreme Court states "the reason justifying statutes such as the saving statute is that the bringing of a suit, whether prosecuted to final judgment or not, gives the defendant notice that the plaintiff has a demand which he proposes to assert." *Burns v. People's Telegraph & Telephone Co.,* 161 Tenn. 382, 33 S.W.2d 76 (1930).

Here, Michael Rhodes was the principal of Rhodes LLC; thus, he was in privity with a party to the previous suit. Because defendant was given actual notice of Michael Rhodes' legal claims against it, the court finds that the Savings Statute applies to those claims,

Conclusion

For the reasons stated above, defendant's motion to dismiss [Doc. 4] is **DENIED IN ITS ENTIRETY.**

E.D.Tenn.,2010.
Rhodes v. Bombardier Capital, Inc.
Slip Copy, 2010 WL 3861074 (E.D.Tenn.)

END OF DOCUMENT

EXHIBIT “9”

Not Reported in F.Supp.2d, 2006 WL 2711689 (E.D.Tenn.)
(Cite as: 2006 WL 2711689 (E.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Tennessee.
Deanna Michelle SCRAGGS, individually and on behalf of her children, Plaintiffs,
v.
LA PETITE ACADEMY, INC., Defendant.
No. 3:05-CV-539.

Sept. 21, 2006.

Michael S. Shipwash, Law Office of Michael Shipwash, Knoxville, TN, for Plaintiffs.

Brian C. Neal, M. Clark Spoden, Frost Brown Todd, LLC, Nashville, TN, for Defendant.

MEMORANDUM OPINION

THOMAS A. VARLAN, District Judge.

***1** This civil action involves a variety of claims asserted by Deanna Scraggs, individually and on behalf of her children, Taylor Gilbert and Bradley Newman, against La Petite Academy, Inc. This case is presently before the Court on defendant's Motion to Dismiss [Doc. 4] for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(6). Plaintiffs have responded in opposition to defendant's motion [Doc. 7] and defendant has filed a reply [Doc. 9]. Thus, the motion is now ripe for determination.

The Court has carefully reviewed the pending motion and the responsive pleadings. For the reasons set forth herein, defendant's motion will be granted in part and denied in part.

I. Summary of Facts

As the Court is required to do on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court will construe the complaint [Doc. 1, Ex. 1] in the light most favorable to plaintiffs, accept all well-pleaded factual allegations as true, and determine whether plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Trzebuckowski v. City of Cleveland,* 319 F.3d 853, 855 (6th Cir.2003).

In February and June of 2005, respectively, Scraggs enrolled her two children in La Petite Academy, Inc., a national daycare center with a branch in Knoxville, Tennessee. As part of the enrollment process, Scraggs received a welcome letter and parent handbook. Plaintiffs allege that "certain representations were made" in each of those documents, but do not specify what those representations were. [Doc. 1, Ex. 1 at ¶¶ 6-7].

In July 2005, the two children reported to Scraggs that "gangster rap" was being played at La Petite Academy. As a result, Scraggs approached the director of La Petite Academy and one of its teachers and requested that gangster rap no longer be played at the center. While plaintiffs contend that both the director and teacher agreed to this request, Scraggs claims that shortly thereafter, she "heard one of her children singing versus [sic] of gangster rap" and the child said the lyrics had been learned from music being played at La Petite Academy. [*Id.* at ¶ 10.] Scraggs then spoke with two more teachers at La Petite Academy and "requested that her children not be allowed to listen to any songs that mention sex or sexual innuendo." [*Id.* at ¶ 11].

Thereafter, Scraggs's children made a number of allegations about activity occurring at La Petite Academy.[FN1] First, one of the children claimed that a teacher at La Petite Academy told the child "to lie to their mother about the [rap] music not being played." [Doc. 1, Ex. 1 at ¶ 12]. Then, one of the children claimed that another teacher at La Petite Academy "informed the entire class that they could not listen to music because the minor child was not allowed to listen to the music." [*Id.* at ¶ 13]. As a result, the child was allegedly "made fun of" and "assault [sic] and battered" by other students at the day care center. [*Id.* at ¶¶ 14-15].

FN1. The complaint never specifies which of Scraggs's children made particular allegations; instead, the complaint only references "the minor child" or "said children." [Doc. 1, Ex. 1 at ¶¶ 13-14].

***2** Plaintiffs then allege that in mid-August 2006, the director of La Petite Academy "traveled to Karns Elementary and spoke to one of the minor children's teachers about this incident." [FN2] [*Id.* at ¶ 17]. At this point, Scraggs obtained a lawyer. Plaintiffs claim that upon informing the director of La Petite Academy that they had done so, Scraggs "was not allowed to return to La Petite Academy for the services of her children." [*Id.* at ¶ 19].

> FN2. The complaint does not specify whether Scraggs's children attend Karns Elementary School. However, in keeping with the requirement that the complaint be construed in the light most favorable to plaintiffs, the Court will assume for the purpose of this motion that the children are both students at Karns Elementary School. Plaintiffs also do not explain which incident they are referring to in discussing "this incident."

Plaintiffs filed suit in Knox County Circuit Court, alleging misrepresentation, breach of contract, violation of the Tennessee Consumer Protection Act ("TCPA"), fraud, retaliation, invasion of privacy, and intentional infliction of emotional distress on the part of defendant. Defendant subsequently removed this case to the United States District Court for the Eastern District of Tennessee.

II. Analysis

A. *Standard of Review*

Defendant has moved to dismiss the plaintiffs' claims pursuant to Fed.R.Civ.P. 12(b)(6). A motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) should not be granted "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). All well-pleaded allegations must be taken as true and be construed most favorably toward the non-movant. *Trzebuckowski v. City of Cleveland,* 319 F.3d 853, 855 (6th Cir.2003). While a court may not grant a Rule 12(b)(6) motion based on disbelief of a complaint's factual allegations, *Lawler v. Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990), the court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987). The Sixth Circuit has made it clear that despite the liberal system of notice pleading, "the essential elements of a plaintiff's claim must be alleged in more than vague and conclusory terms" if such a claim is to survive a Rule 12(b)(6) motion. *NicSand, Inc. v. 3M Co.,* 457 F.3d 534, 541 (6th Cir.2006) (internal citations removed). The issue is not whether the plaintiff will prevail, but whether the claimant is entitled to offer evidence to support his or her claim. *Chapman v. City of Detroit,* 80 F.2d 459, 465 (6th Cir.1986). Consequently, a complaint will not be dismissed pursuant to Rule 12(b)(6) unless there is no law to support the claims made, the facts alleged are insufficient to state a claim, or there is an insurmountable bar on the face of the complaint.

The Court will address the arguments made as outlined in defendant's motion.

B. *Negligent Misrepresentation*

Defendant argues that plaintiffs have "merely stated the elements of the tort of negligent misrepresentation," but have failed to allege any facts supporting their allegation that defendant committed that tort. [Doc. 5 at 4.] Plaintiffs respond that the complaint satisfies the requirements for notice pleading. [Doc. 8 at 2-3.]

***3** Defendant is correct that plaintiffs' complaint does little more than set forth the elements of the tort of negligent misrepresentation. However, it does provide some factual allegations tying actions by defendant to those elements. For example, plaintiffs allege defendant failed to exercise reasonable care in communicating the information contained in the welcome letter and parent handbook received by plaintiffs and that representations made in those publications were false. [Doc. 1, Ex. 1 at ¶¶ 21-22.]. Accordingly, defendant's motion to dismiss the negligent misrepresentation claim will be denied.

C. *Breach of Contract*

Defendant notes that it is unclear from plaintiffs' complaint what they are basing their breach of contract claim upon, but argues that if plaintiffs contend that a contractual relationship was formed on the basis of the welcome letter and/or parent handbook, neither

of those documents constitute contracts. [Doc. 5 at 5.] Defendant argues that because the parent handbook contains disclaimer language and because neither document is "contractual" in nature, neither can be contracts. [Doc. 5 at 5.] Plaintiff argues that even if the parties had not executed a written contract, their breach of contract claim "is being pursued whether same [sic] be oral, written, implied or express." [Doc. 8 at 6.]

Here, the Court is presented with the relatively flimsy allegations by plaintiffs that "a valid contractual relationship existed between Plaintiffs and Defendant" and that defendant breached that alleged contract by "[n]ot abiding by the terms of the welcome letter and Parent Handbook; [u]njustly cancelling the contract; [r]etaliating against the Plaintiffs for voicing concerns; and [c]ontinuing to play gangster rap even though they said they wouldn't." [Doc. 1, Ex. 1 at ¶ 26.] Taking those allegations as true for the purposes of a motion to dismiss, the Court is simply unable to conclude on the present record that these facts are insufficient to state a claim. Accordingly, defendant's motion to dismiss the breach of contract claim will be denied.

D. *Fraud*

Defendant argues that plaintiffs' fraud claim should be dismissed because they failed to plead it with particularity as required by Federal Rule of Civil Procedure 9(b). [Doc. 5 at 6.] Plaintiffs do not dispute that Rule 9(b) is applicable to this claim, but contend that they have pled with the requisite particularity. [Doc. 8 at 6.] Plaintiffs argue that the specificity requirement of Rule 9(b) only requires that they allege that "the Defendant, through its agents, committed fraud against the Plaintiffs by engaging in the following acts: by lying to the Plaintiffs about gangster rap not being played anymore; by lying to the Plaintiffs regarding why the minor children were no longer welcome in La Petite; and by lying to the Plaintiffs regarding what was occurring inside La Petite." [Doc. 8 at 6-7.]

To establish a prima facie case of fraud in Tennessee, plaintiffs must establish that defendant: (1) made an intentional misrepresentation with regard to a material fact; (2) had knowledge of the representation's falsity; (3) plaintiffs reasonably relied on the misrepresentation and suffered damages as a result of such reliance; and (4) that the misrepresentation related to an existing or past fact. *Alley v. Quebecor World Kingsport, Inc.,* 182 S.W.3d 300, 303 (Tenn.Ct.App.2005). The heightened pleading requirement of Rule 9(b) requires that a plaintiff alleging fraud identify the particular defendant responsible for the alleged misrepresentations in order "to enable a particular defendant to determine with what it is charged." *Hoover v. Langston Equipment Ass'n, Inc.,* 958 F.2d 742, 745 (6th Cir.1992). At a minimum, this requires a plaintiff to "allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.,* 2 F.3d 157, 161-162 (6th Cir.1993) (internal citations removed). Here, plaintiffs have failed to state what the fraudulent intent of the defendant was, nor have they specified how they were harmed by defendant's alleged fraud. Accordingly, the Court will dismiss plaintiffs' fraud claim.

E. *TCPA Violation*

***4** Defendant argues that plaintiffs' TCPA claim should be dismissed on the grounds that it also was not pled with adequate particularity as required by Tennessee Rule of Civil Procedure 9.02. [Doc. 5 at 7 .] As with the fraud claim, plaintiffs argue that they have pled their TCPA claim with sufficient particularity. [Doc. 8 at 7.]

To establish a prima facie case of violation of the TCPA, plaintiffs must prove: (1) defendant engaged in an act or practice that is unfair or deceptive as defined under the TCPA; and (2) plaintiffs suffered a loss of money, property, or a thing of value as a result of the unfair or deceptive act of defendant. Tenn.Code Ann. § 47-18-109 (2006). Defendant correctly notes that Tennessee courts apply the particularity requirement of Rule 9.02 to claims brought under the TCPA. *Harvey v. Ford Motor Co.,* 8 S.W.3d 373, 375 (Tenn.Ct.App.1999). To satisfy that requirement, a complaint alleging violation of the TCPA must charge "misrepresentation, deceit, and concealment, and minimally [set] forth the facts." *Sullivant v. Americana Homes, Inc.* Here, plaintiffs have presented the bare allegation that "the Defendant, through its agents, intentionally misled the Plaintiff in the welcome letter, Parent Handbook, subsequent negotiations and communications with the Plaintiff and these misrepresentations were both deceptive and unfair." [Doc. 1, Ex. 1 at ¶ 29.] There are no facts indicating how the

alleged misrepresentation of defendant was deceptive and/or unfair, nor that plaintiffs suffered a loss as a result of it. Accordingly, the Court will dismiss plaintiffs' TCPA claim.

F. *Retaliation*

Defendant argues that plaintiffs' claim of retaliation should be dismissed because retaliation outside of the employment context is not a recognized tort in Tennessee. [Doc. 5 at 8.] Plaintiff essentially concedes this point, admitting that "this was not an employee/employer setting." [Doc. 8 at 7.] However, plaintiffs argue the retaliation claim should not be dismissed because that claim "is subsumed in the breach of contract action." [*Id.*]

Defendant is correct that there is no general tort of retaliation under Tennessee law. Accordingly, that claim will be dismissed.

G. *Invasion of Privacy*

Defendant argues that plaintiffs' claim that defendant committed the tort of intrusion should be dismissed because no Tennessee court has found a discussion about an individual to constitute intrusion. [Doc. 5 at 10.] Plaintiff contends, rather circularly, that defendant's argument that Tennessee courts have not found a discussion actionable as intrusion "implies that a Tennessee court can find a mere discussion actionable." [Doc. 8 at 8.]

Under Tennessee law, " 'one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability, to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' " *Givens v. Mullikin ex. rel. Estate of McElwaney,* 75 S.W.3d 383, 411 (Tenn.2002) (quoting *Roberts v. Essex Microtel Assocs., II, L.P.,* 46 S.W.3d 205, 211-212 (Tenn.Ct.App.2001). In their complaint, plaintiffs do little more than assert the elements of the cause of action of intrusion, claiming that "[t]he Defendant intentionally intruded upon the solitude and seclusion of the Plaintiffs by going to Karns school [sic] discussing what was occurring with the teacher" and that "[t]he intrusion by the Defendant would be highly offensive to a reasonable person." [Doc. 1, Ex. 1 at ¶¶ 38-39].

***5** Again, the court cannot assess the viability of plaintiffs' intrusion claim based upon the bare allegations of the complaint and defendant's motion. However, taking those allegations as true for the purposes of a motion to dismiss, the Court is simply unable to conclude on the present record that these facts are insufficient to state a claim. Accordingly, defendant's motion to dismiss the intrusion claim will be denied.

H. *Intentional Infliction of Emotional Distress*

Defendant argues that plaintiffs' claim of intentional infliction of emotional distress should be dismissed because the conduct alleged, even if true, does not rise to the level of outrageous conduct. [Doc. 5 at 11.] Plaintiffs contend that because the acts alleged in the complaint involve children, plaintiffs should be afforded "a lessened [sic] stringent standard when it comes to pleading." [Doc. 8 at 9.]

The three elements of a claim for outrageous conduct or intentional infliction of emotional distress in Tennessee are as follows: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury. *Miller v. Willbanks,* 8 S.W.3d 607, 612 (Tenn.1999) (citing *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn.1997). In assessing whether particular conduct is so intolerable as to be tortious, the Tennessee Supreme Court has adopted the following standard:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'

Bain, 936 S.W.2d at 623.

After citing numerous cases illustrating the high standard that must be met for conduct to be considered extreme and outrageous, defendant contends that none of plaintiffs' allegations, even if true, come close to approaching that level. [Doc. 5 at 11-13.] While the Court has reservations about plaintiffs' claims, the Court cannot conclude, on reviewing a motion to dismiss, that the plaintiffs can prove no set of facts that would entitle them to relief. Accordingly, defendant's motion to dismiss the intentional infliction of emotional distress claims will be denied at this juncture.

III. Conclusion

***6** For the reasons set forth herein, defendant's motion to dismiss [Doc. 4] will be **GRANTED** as to plaintiffs' retaliation claim and that claim will be dismissed with prejudice; **GRANTED** as to plaintiffs' fraud and TCPA claims and those claims will be dismissed without prejudice; and **DENIED** as to plaintiffs' negligent misrepresentation, breach of contract, invasion of privacy, and intentional infliction of emotional distress claims.

ORDER ACCORDINGLY.

E.D.Tenn.,2006.
Scraggs v. La Petite Academy, Inc.
Not Reported in F.Supp.2d, 2006 WL 2711689 (E.D.Tenn.)

END OF DOCUMENT

EXHIBIT “10”

Not Reported in F.Supp.2d, 2009 WL 113457 (W.D.Tenn.)
(Cite as: 2009 WL 113457 (W.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
W.D. Tennessee,
Western Division.
Mary Louise TAYLOR, Plaintiff,
v.
STANDARD INSURANCE COMPANY, Defendant.
No. 08-2585 V.

Jan. 13, 2009.

West KeySummary
Insurance 217 3360

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3360 k. Duty to Settle or Pay. Most Cited Cases
An insurer did not engage in statutory bad faith refusal to pay a claim when it denied a wife's request for life insurance proceeds because there were competing, meritorious claims to the proceeds. The wife alleged she was entitled to the proceeds of her late husband's life insurance policy because she was listed as the beneficiary. However, the husband's ex-wife also had a meritorious claim to the proceeds because the husband was obligated to retain the ex-wife and children as beneficiaries under his life insurance policy pursuant to a divorce decree. West's T.C.A. § 56-7-105.

Kevin A. Snider, Corporate Gardens, Germantown, TN, for Plaintiff.

J. Gregory Grisham, Leitner Williams Dooley & Napolitan, Memphis, TN, W. Sebastian Von Schleicher, Smith Von Schleicher & Associates, Chicago, IL, for Defendant.

Glenwood Paris Roane, Sr., Law Offices of Glenwood P. Roane, Sr., Memphis, TN, for Third-Party Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

DIANE K. VESCOVO, United States Magistrate Judge.

***1** Before the court is the October 8, 2008 motion of the defendant, Standard Insurance Company ("Standard"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint filed against it by the plaintiff, Mary Louise Taylor, for failure to state a claim upon which relief can be granted. In her complaint, Mary Taylor seeks to recover life insurance benefits under a group insurance policy issued by Standard to Shelby County Government, and insuring the decedent, Al Rufus Taylor. In her complaint, Mary Taylor sets forth claims for breach of contract (First Claim); fraud and/or misrepresentation (Second Claim); violation of the Tennessee Consumer Protection Act ("TCPA"), Tenn.Code Ann. § 47-18-101 (Third Claim); and statutory bad faith refusal to pay an insurance claim under Tenn.Code Ann. § 56-7-105 (Fourth Claim).

Mary Taylor filed a response in opposition. The parties have consented to trial before the United States Magistrate Judge. For the reasons the follow, Standard's motion to dismiss is granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

Al Taylor died on December 2, 2007. (Compl. ¶ 9; Ex. D.) At the time of his death, Al Taylor was married to the plaintiff, Mary Taylor, who was his second wife. Al Taylor, as a former employee of Shelby County, was insured under a group life insurance policy since 1967. On May 31, 1990, Al Taylor designated Mary Taylor as the beneficiary of his life insurance policy by signing and submitting a "Group Insurance-Request for Change of Beneficiary" form to The Equitable Life Assurance Society of the United States. (Compl.Ex. C .) When Al Taylor retired from the Shelby County Sheriff's Department on October 31, 2007, he completed a "Retiree Enrollment and Change Form" designating Mary L. Taylor as the beneficiary under his Basic Life Insurance policy, Group Number 642998, available through the Shelby County Government. (Compl.Ex.D.)

Al Taylor was previously married to Betty Louise Taylor. Their marriage was terminated by divorce on July 15, 1974. (Compl.Ex.A.) Their divorce decree, entered by the Circuit Court of Shelby County, Tennessee, in 1974, required Al Taylor to retain Betty Taylor and her children "as beneficiaries of the life insurance, hospitalization insurance presently possessed by [Al Taylor]." (*Id.*)

Following Al Taylor's death, Standard received competing claims to his life insurance benefits from Mary Taylor and Betty Taylor and her children. (Compl.¶ ¶ 10, 11.) Mary Taylor also submitted to Standard an irrevocable assignment of the life insurance proceeds to J.O. Patterson Mortuary in the amount of $6,91.58 for Al Taylor's funeral expenses. (Compl. ¶ 12; Ex. G.) Standard declined to honor the assignment until the competing claims to the proceeds were resolved by a court of law. (Compl. ¶ 13; Ex. D.) As a consequence, Mary Taylor paid the funeral expenses herself. (Compl. ¶ 14; Ex. H.) Faced with the competing claims, Standard decided to file an interpleader action but delayed doing so while Mary Taylor and Betty Taylor, through their attorneys, attempted to settle the competing claims. (Compl.Ex.D.)

***2** On August 8, 2008, Mary Taylor filed the instant lawsuit in the Chancery Court of Shelby County, Tennessee. Standard removed the case to federal court pursuant to 42 U.S.C. § 1441 on the basis of diversity of citizenship and an amount in controversy over $75,0000. Standard then filed a counterclaim and third-party complaint for interpleader. (Doc. No. 10.) Standard seeks permission to deposit the proceeds of the life insurance policy with the court so that the court can adjudicate the rights of the parties to the proceeds. The scheduling order entered October 1, 2008 set a deadline for initial motions to dismiss of October 31, 2008, and Standard filed the present motion to dismiss on October 8, 2008.

II. ANALYSIS

A. *Standard for Motion to Dismiss*

The United States Supreme Court has recently reiterated the standard for courts to adhere to when considering a motion pursuant to Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [citations omitted], a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain,* 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal § 1216 pp 235-236 (3d. Ed.2004) ... ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")[footnote omitted], on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007). When considering a motion to dismiss for failure to state a claim, the court must assume that all of the well-pleaded factual allegations in the complaint are true and must construe those facts in a light most favorable to the plaintiff. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987). In other words, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.[FN1] *Twombly,* 127 S.Ct. at 1967 (citing *Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc.,* 40 F.3d 247, 251 (7th Cir.1994)).

> FN1. Attached to Mary Taylor's response to the motion to dismiss are eleven items of correspondence between her and Standard, none of which were attached to her complaint. In ruling on this motion to dismiss the complaint for failure to state a claim, the court will consider only the allegations in the complaint and declines to consider the additional proffered items.

B. *First Claim-Breach of Contract*

Mary Taylor alleges that Standard's refusal to pay her the proceeds of the life insurance policy and to honor the funeral assignment to cover Al Taylor's funeral expenses constitutes a breach of contract. (Compl.¶

20.) She avers that she was the primary beneficiary on Al Taylor's life insurance policy issued by Standard, that Al Taylor timely paid all the premiums, and that she timely filed a claim for the proceeds. (Compl.¶ 19.)

***3** Under Tennessee law, the essential elements of a breach of contract claim are: (1) the existence of an enforceable contract; (2) nonperformance amounting to a breach of the contract; and (3) damages caused by the breach of the contract. *Life Care Centers of America, Inc. v. Charles Town Associates, Ltd.,* 79 F.3d 496, 514 (6th Cir.1996); *C. & W. Asset Acquisition, LLC v. Oggs,* 230 S.W.3d 671, 676-77 (Tn.Ct.App.2007).

Mary Taylor has failed to allege the existence of an enforceable contract. Mary Taylor fails to identify the specific insurance policy at issue, the amount of the proceeds under the policy, and the terms of the policy. She has further failed to attach a copy of the policy in question. As such, she has failed to allege the essentials for a breach of contract claim. Accordingly, Standard's motion to dismiss Mary Taylor's breach of contract claim is granted.

C. *Second Claim-Fraud and/or Misrepresentation*

In diversity case such as this one, federal courts apply federal procedural law, including the Federal Rules of Civil Procedure.[FN2] *Hanna v. Plummer,* 380 U.S. 460, 471-72, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be pled with particularity: "Parties alleging fraud ... must state with particularity the circumstances constituting fraud." FED.R.CIV.P. 9. Under Sixth Circuit law, a complaint for fraud "at a minimum, must allege the time, place and content of the alleged misrepresentation on which [the plaintiff] relie[s]." *U.S. ex rel. Marlar v. BWXT Y-12, LCC,* 525 F.3d 439, 444 (6th Cir.2008).

> FN2. The court will apply the substantive law of the state of Tennessee.

In the second claim in her complaint, Mary Taylor sets forth four instances of conduct by Standard allegedly constituting fraud: (1) that Standard "engaged in fraud and/or misrepresentation when they represented to Decedent and Plaintiff that they would pay insurance proceeds from Decedent's life insurance policy upon request after Decedent's death when, in fact, Defendant Insurer persists in denying, failing, and/or refusing to pay the life insurance proceeds to Plaintiff ..." (Compl.¶ 23); (2) that Standard "engaged in fraud and/or misrepresentation when they represented to Decedent and Plaintiff that they would honor Plaintiff's funeral assignment to cover the costs of Decedent's funeral when, in fact, Defendant Insurer has denied, refused, and/or failed to honor said funeral assignment, forcing Plaintiff to pay for the funeral herself" (Compl.¶ 24); (3) that Standard "engaged in fraud and/or misrepresentation when they represented to Decedent and Plaintiff that their goods and/or services are of a particular standard, quality, or grade" (Compl.¶ 25); and (4) that Standard "engaged in fraud and/or misrepresentation when they represented to Decedent and Plaintiff that this consumer transaction conferred or involved rights and remedies which it did not have or involve" (Compl.¶ 26).

Under Tennessee law, a claim for fraud requires: (1) an intentional misrepresentation of a material fact; (2) that the statement was made with knowledge of its falsity or with reckless disregard of falsity; (3) that the plaintiff reasonably relied on the statement to his injury; and (4) the statement relates to an existing or past fact. *Power & Tel. Supply Co. v. Sun Trust Banks, Inc.,* 447 F.3d 923, 931 (6th Cir.2006)(citing *Stacks v. Saunders,* 812 S.W.2d 587, 592 (Tenn.Ct.App.1990)). Under Tennessee law, in pleading fraud, a plaintiff must plead the factual circumstances with sufficient particularity. *Kincaid v. South Trust Bank,* 221 S.W.3d 32, 39 (Tenn.Ct.App.2006).

***4** The allegations in Mary Taylor's complaint are not sufficient to satisfy the heightened pleading requirements of Rule 9(b) and Tennessee law. Mary Taylor fails to allege any specific factual allegations regarding allegedly fraudulent statements. She fails to allege when each alleged misrepresentation occurred, the substance of each alleged misrepresentation, the method of communication of each alleged misrepresentation, and the specific content of each alleged misrepresentation. Indeed, the only specific communication from Standard included in the complaint is a May 12, 2008 letter from Standard to Mary Taylor that explains the nature of the competing claims of Betty Taylor and her children and Standard's intent to seek a resolution of the competing claims in court. At best, Mary Taylor's complaint contains only conclusory allegations not supported by any specific factual al-

legations. Furthermore, there is no allegation that Mary Taylor relied on any alleged misrepresentation to her detriment. In the May 12, 2008 letter, Standard specifically declines to honor the funeral expense assignment. Thus, she does not claim that she was induced to incur the funeral expenses based on a representation by Standard that they would honor the assignment.

Accordingly, because the complaint does not plead fraud with the required particularity, Standard's motion to dismiss is granted as to Mary Taylor's Second Claim in her complaint.

D. *Third Claim-Violations of the Tennessee Consumer Protection Act*

For her third claim, Mary Taylor alleges that Standard violated the TCPA by misrepresenting that it would pay to her the proceeds of the life insurance policy and then failing to do so; by misrepresenting that it would honor her funeral assignment to cover the expenses of Al Taylor's funeral and then failing to do so; by misrepresenting that its "goods and/or services are of particular standard, quality, or grade;" "by misrepresenting that this consumer transaction conferred or involved rights and remedies which it did not have or involve;" and "by other acts and/or omissions ... which are deceptive to the consumer." (Compl.¶ 32.)

The TCPA prohibits any "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn.Code Ann. § 47-18-104 (2008). The purpose of the TCPA is "to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts and practices." *Stooksbury v. American Nat'l Prop. and Cas. Co.,* 126 S.W.3d 505, 520 (Tenn.Ct.App.2003). The Supreme Court of Tennessee has held that the TCPA applies to the acts and practices of insurance companies. *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 925-26 (Tenn.1998); *Newman v. Allstate Ins. Co.,* 42 S.W.3d 920, 924 (Tenn.Ct.App.2000). The Tennessee Supreme Court, however, held in *Myint* that the insurance company's handling of the claim was not unfair and deceptive in the absence of "an attempt by [the insurer] to violate the terms of the policy, deceive the [plaintiffs] about the terms of the policy, or otherwise act unfairly." *Myint,* 970 S.W.2d at 926. A denial of an insurance claim is not a violation of the TCPA in the absence of some sort of deceit or misleading conduct. *Sowards v. Grange Mut. Cas. Co.,* 07 CV 354, 2008 WL 3164523 at *13 (M.D.Tenn. Aug.4, 2008).

***5** The TCPA sets forth a list of specific activities that constitute unfair or deceptive acts or practices. Tenn.Code Ann. § 47-18-104(b). Mary Taylor does not rely on any of the specific activities listed but rather appears to merely rely on the catchall provision, which prohibits "any other act or practice which is deceptive to the consumer or to any other person." Tenn.Code Ann. § 47-18-104(b)(27).

Mary Taylor has failed to allege any specific facts that support her conclusory allegations that Standard employed any unfair or deceptive business practices in evaluating her claim. She does not allege that Standard violated the terms of the policy, deceived her about the terms of the policy, or acted unfairly in its initial determination with respect to her claim. Rather, Mary Taylor alleges in her complaint that Standard advised her of competing, meritorious claims to Al Taylor's life insurance proceeds and that a court of law would have to adjudicate the claims unless the claimants could agree on the disposition of the life insurance proceeds. Such allegation is inconsistent with an unfair and deceptive business practice. As the allegations in the complaint are not sufficient to state a violation of the TCPA, Standard's motion to dismiss Mary Taylor's TCPA claim is granted.

E. *Fourth Claim-Bad Faith Refusal to Pay Claim*

Mary Taylor also alleges in the complaint that Standard acted in "bad faith in denying, failing, and/or refusing to pay Plaintiff's claim for the proceeds of the life insurance policy after Decedent's death" in violation of Tenn.Code Ann. § 56-7-105, the "bad faith" penalty statute. (Compl.¶ 36.) The bad faith penalty statute provides that:

> The insurance companies of this state ... in all cases where a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy ... on which the loss occurred, shall be liable to pay the holder of the policy ... in addition to the loss and interest thereon, a sum not exceeding twenty five percent (25%) on the liability of the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure to pay inflicted additional expense, loss

> or injury including attorney fees upon the holder of the policy.

Tenn.Code Ann. § 56-7-105 (2000). Under Tennessee law, "this statute is penal in nature and must be strictly construed." *Minton v. Tenn. Farmers Mut. Ins. Co.,* 832 S.W.2d 35, 38 (Tenn.Ct.App.1992).

To recover under the statute, a complaint must allege: (1) that the policy became due and payable under its terms; (2) the insured made a formal demand for payment; (3) sixty days passed from the date of making the demand, unless the insurer refused to pay the claim prior to the passage of sixty days; and (4) the refusal to pay was in bad faith. *Id.* However, the statutory penalty should not be imposed where an insurer fails to pay a claim if there is an actual dispute over the value of the claim, the insurer has not acted in an intentionally indifferent manner towards the claim, and there is no proof that the insurer acted with improper motive. *Palmer v. Nationwide Mut. Fire Ins. Co.,* 723 S.W.2d 124, 126 (Tenn.Ct.App.1986) (citing *Johnson v. Tenn. Farmers Mut. Ins. Co.,* 556 S.W.2d 750 (Tenn.1977)). A mere delay in payment does not constitute bad faith where "there is a genuine dispute as to the value, no conscious indifference to the claim, and no proof that the insurer acted from 'any improper motive.' " *Kizer v. Progressive Cas. Ins. Co.,* No. 06 CV 1109, 2008 WL2048274 at *5 (M .D. Tenn. May 12, 2008) (*citing Bard's Apparel Mfg. Inc. v. Bituminous Fire & Marine Ins. Co.,* 849 F.2d 245, 249 (6th Cir.1988); *Palmer v. Nationwide Mut. Fire Ins. Co.,* 723 S.W.2d 124, 126 (Tenn.Ct.App.1986)). Moreover, an insurer's refusal to pay is in good faith if the refusal to pay "rests on legitimate and substantial legal grounds." *Kizer v. Progressive Cas. Ins. Co.,* No. 06 CV 1109, 2008 WL2048274 at *5 (M.D.Tenn. May 12, 2008).

***6** There are no specific factual allegations in the complaint of bad faith. To the contrary, the complaint specifically sets forth the existence of competing, meritorious claims establishing that Standard's refusal to pay the life insurance proceeds and to honor Mary Taylor's assignment of proceeds rests on legitimate legal grounds, which is good faith. Moreover, Mary Taylor failed to allege the date she made a demand for payment, other than for the assignment of the proceeds to cover the funeral costs, and the passage of sixty days from the date of the demand. Nor is there any demand letter attached to the complaint.

For these reasons, the allegations in Mary Taylor's complaint are not sufficient to state a claim for statutory bad faith refusal to pay under Tennessee law. Standard's motion to dismiss Mary Taylor's statutory bad faith refusal to pay claim is granted.

III. CONCLUSION

For the reasons stated above, Standard's motion to dismiss is granted in the entirety. A status hearing is set for January 20, 2009, at 3:00 p.m. to discuss Standard's counterclaim and third-party claim for interpleader. Because the amount of the life insurance proceeds in controversy is $41,000, the court believes there is no longer a basis for federal jurisdiction.

IT IS SO ORDERED.

W.D.Tenn.,2009.
Taylor v. Standard Ins. Co.
Not Reported in F.Supp.2d, 2009 WL 113457 (W.D.Tenn.)

END OF DOCUMENT

EXHIBIT “11”

Slip Copy, 2010 WL 145776 (W.D.Tenn.)
(Cite as: 2010 WL 145776 (W.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
W.D. Tennessee,
Eastern Division.
WAGGIN' TRAIN, LLC, Plaintiff,
v.
NORMERICA, INC. and Northdown Industries, Inc., Defendants.
No. 1:09-cv-01093.

Jan. 8, 2010.

West KeySummary
Antitrust and Trade Regulation 29T 161

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(B) Particular Practices
29Tk161 k. Representations, Assertions, and Descriptions in General. Most Cited Cases
Manufacturer of pet-related products failed to state a claim against another manufacturer of pet products under the Tennessee Consumer Protection Act (TCPA). Manufacturer alleged that defendant manufacturer was providing its retailers with misinformation concerning the harmful compounds in its products and that as a result, it was exposed to potential harm. However, manufacturer failed to demonstrate that it had suffered or was suffering from defendant's conduct. West's T.C.A. § 47-18-104(a); 109(a)(1); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Randall D. Noel, Amy Pepke, Eric E. Hudson, Butler Snow O'Mara Stevens & Canada, PLLC, Memphis, TN, Lee Davis Thames, Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Ridgeland, MS, for Plaintiff.

Jonathan D. Rose, Thor Y. Urness, Bradley Arant Boult Cummings, LLP, Nashville, TN, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COUNT V OF THE COMPLAINT

J. DANIEL BREEN, District Judge.

***1** Plaintiff, Waggin' Train, LLC, filed suit against Defendants, Normerica, Inc. and Northdown Industries, Inc., on April 15, 2009. Pending before the Court is the Defendants' Motion to Dismiss Count V of the Complaint (Docket Entry ("D.E.") No. 67), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to which the Plaintiff has responded (D.E. No. 80). For the reasons set forth hereinafter, the Court **GRANTS** the Defendants' motion.

FACTUAL BACKGROUND

Waggin' Train, LLC ("Waggin' Train") is a Delaware company with its principal place of business in Anderson, South Carolina. (D.E. No. 57, Amended Complaint, ¶ 8.) Normerica, Inc. is a Canadian company, and is the parent company of Northdown, Inc., another Delaware company with its principal place of business in Dyersburg, Tennessee. (*Id.* at ¶¶ 9-10.) The Defendants (collectively "Normerica") "function and represent themselves to the world as a single entity and are joint operators concerning the matters alleged" in the complaint-"[t]o industry competitors and the buying public, Defendants are indistinguishable." (*Id.* at ¶ 18.) Plaintiff and Normerica both are manufacturers of pet-related products, although Waggin' Train's share of the market with respect to pet treats is considerably larger than Defendant's. (*Id.* at ¶¶ 2, 19.) Plaintiff distributes its products-specifically its pet treats-to "dozens of major retailers throughout the United States, Canada, and Australia." (*Id.* at ¶ 2.)

Waggin' Train alleges that Normerica has engaged in an "ongoing and organized campaign" to increase its market share and gain an advantage over Waggin' Train by publishing "highly inflammatory, false, and misleading information to at least two of Waggin' Train's most valuable customers, the retailers Costco Wholesale Corporation and Sam's Club." (*Id.* at ¶ 3.) In particular, Plaintiff contends Normerica has been claiming to retailers that Waggin' Train's Chicken and Duck Jerky Tenders contain diethylene glycol and propylene glycol, two compounds that, if present in its products, could be harmful to pets (and thereby to Waggin' Train's business and reputation). (*Id.* at ¶ 4.) Normerica also allegedly gave misinformation to retailers about the level and quality of glycerin in

Waggin' Train's products. (*Id.* at ¶¶ 5 -6, 21.) The spreading of this misinformation has created "an unfounded health scare." (*Id.* at ¶ 20.) Waggin' Train claims that these actions have subjected it to "potential harm" in the form of reputational and financial damage and loss of market share. (*Id.* at ¶¶ 37-41.)

As a result, Plaintiff brought this lawsuit against the Defendants, asserting causes of action for false advertising, intentional interference with business relationships, defamation/product disparagement, unfair competition, and unfair/deceptive practices in violation of the Tennessee Consumer Protection Act ("TCPA"). (*Id.* at ¶¶ 42-59.) The instant motion by the Defendants, however, seeks only to dismiss the TCPA claim.

STANDARD OF REVIEW

***2** Rule 8(a)(2) of the Federal Rules of Civil Procedure instructs that a pleading should be "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 12(b)(6) permits dismissal of a plaintiff's lawsuit when it fails to state a claim upon which relief can be granted. In order for an asserted cause of action to survive a motion to dismiss under Rule 12(b)(6), it need not necessarily be pleaded with "detailed factual allegations, [but must] provide the 'grounds' of [plaintiff's] 'entitle[ment] to relief' [with] more than labels [or] conclusions and a formulaic recitation of the elements of a cause of action...." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). Factual allegations of a complaint "must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)...." *Id.* at 555-56 (citations omitted). The key inquiry is whether the facts in the complaint set out "a claim to relief that is plausible on its face." *Id.* at 570; *see also Hagen v. U-Haul Co. of Tenn.,* 613 F.Supp.2d 986 (W.D.Tenn.2009) (discussing the "plausibility standard").

When considering a motion to dismiss, a court "must accept as true all of the factual allegations contained in the complaint," and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Erickson v. Pardus,* 551 U.S. 89, 93-94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007); *Twombly,* 550 U.S. at 556 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* ---U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citation omitted). Naturally, the type and specificity of the facts that must be pleaded to generate a plausible claim will vary depending on the elements of the cause of action asserted and the circumstances surrounding the litigation. *See United States ex rel. Snapp, Inc. v. Ford Motor Co. .,* 532 F.3d 496, 502 n. 6 (6th Cir.2008) (noting that the requirement to plead particular facts may be especially important in "cases likely to produce 'sprawling, costly, and hugely time-consuming' litigation"); *compare Twombly,* 550 U.S. at 564-69 (conducting a Rule 12(b)(6) analysis in a case involving a wide-ranging antitrust conspiracy among local telephone and internet service providers brought under § 1 of the Sherman Act), *with Erickson,* 551 U.S. at 93-94 (analyzing a prisoner's pro se § 1983 civil rights claim). As the United States Supreme Court has noted, "facial plausibility" is a "context-specific task" that requires a district court to "draw on its judicial experience and common sense." *Iqbal,* 129 S.Ct. at 1950.

ANALYSIS

***3** The TCPA prohibits "[u]nfair or deceptive acts or practices," and a private right of action to recover actual damages is available to "[a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part...." Tenn.Code Ann. §§ 47-18-104(a), 109(a)(1). Tennessee courts have interpreted the TCPA as imposing two distinct proof obligations on a plaintiff seeking to establish a cause of action: "(1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an 'ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated....' " *Tucker v. Sierra Builders,* 180 S.W.3d 109, 115 (Tenn.Ct.App.2005) (quoting Tenn.Code Ann. § 47-18-109(a)(1)). A plaintiff need not prove that the defendant's conduct was willful, but if it was, the TCPA allows the trial judge to award treble damages. *Tucker,* 180 S.W.3d at

115-16 (internal citations omitted).The TCPA is much broader in scope than common-law fraud because it "applies to any act or practice that is unfair or deceptive to consumers." *Id.* at 115. The TCPA outlaws a list of specific actions, and Waggin' Train claims that Normerica has violated three of these prohibitions:

> (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have;
>
> ...
>
> (8) Disparaging the goods, services or business of another by false or misleading representations of fact; and
>
> ...
>
> (27) Engaging in any other act or practice which is deceptive to the consumer or to any other person.[FN1]
>
> FN1. This subsection is the TCPA's "catch-all" provision. *See Fleming v. Murphy,* 2007 WL 2050930, at *7 (Tenn.Ct.App.2007).

Tenn.Code Ann. § 47-18-104(b).

Normerica's primary objection to the TCPA claim is that Plaintiff has alleged only that the Defendants have engaged in anticompetitive conduct, which is not actionable under the TCPA. (D.E. No. 67, Motion to Dismiss, p. 4.) If Normerica is correct, Waggin' Train would be unable to establish the first element of the TCPA prima facie case. *Tucker,* 180 S.W.3d at 115. Indeed, Tennessee decisions, analyzing the legislative history of the TCPA and comparing it to similar statutes in other states, seem to support Normerica's contention that anticompetitive conduct, standing alone, cannot be the predicate for a TCPA claim. *See, e.g., Bennett v. Visa U.S.A., Inc.,* 198 S.W.3d 747, 753-55 (Tenn.Ct.App.2006) (noting that the Tennessee General Assembly deliberately omitted from the TCPA any mention of "unfair methods of competition in or affecting commerce"); *Sherwood v. Microsoft Corp.,* 2003 WL 21780975, at *31-*34 (Tenn.Ct.App.2003) (same, finding that "claims based upon anticompetitive conduct are not cognizable under the TCPA").

***4** For its part, the Plaintiff disputes the Defendants' interpretation of its TCPA allegations as being based only on anticompetitive conduct, denigrating as myopic Normerica's "tortured view of [this lawsuit] as an antitrust action...." (D.E. No. 80, Response to Motion to Dismiss, p. 4.) Nevertheless, the Court need not decide whether Waggin' Train's TCPA claim is based solely upon anticompetitive conduct, because the complaint is devoid of any allegations that Normerica's conduct has caused Waggin' Train to suffer an "ascertainable loss of money or property" as set forth in Tenn.Code Ann. § 47-18-109(a)(1).[FN2] As a result, Waggin' Train's TCPA claim fails because of its inability to establish a prima facie case.

> FN2. Normerica briefly notes this fact, almost in passing, at the close of its "Statement of Facts," although it does not argue explicitly that Waggin' Train has failed to allege the requisite injury. (D.E. No. 67, Motion to Dismiss, p. 3.)

There are few Tennessee cases discussing the scope of "ascertainable loss" that is actionable under Tenn.Code Ann. § 47-18-109(a)(1). However, the language of the statute itself is unambiguous in requiring a plaintiff to claim "actual damages" in the form of a loss of "money or property ... or any other article, commodity, or thing of value...." Tenn.Code Ann. § 47-18-109(a)(1).[FN3] Moreover, the Tennessee Court of Appeals in *Tucker,* in discussing the "unfairness" requirement of the TCPA, stated that the alleged injury must be "substantial": "[t]o be considered 'substantial,' consumer injury *must be more than trivial or speculative.*" *Tucker,* 180 S.W.3d at 117 (emphasis added; internal citations omitted). Thus, it is evident from the language of the statute that to establish a TCPA claim, a plaintiff must demonstrate that it actually has suffered damages that are more than conjectural, and that emanate from the defendant's unfair or deceptive actions.

> FN3. Because of the specificity it requires in terms of the type of loss a plaintiff must allege, the TCPA differs from similar statutes in other states. *See, e.g.,* Va.Code Ann. § 59.1-204(A) (requiring a plaintiff claiming injury under the Virginia Consumer Protec-

> tion Act to demonstrate only that it has suffered "loss" as a result of the violation); Ga.Code Ann. § 10-1-399(a) (providing for a civil cause of action under Georgia's Fair Business Practices Act to "[a]ny person who suffers injury or damages").

Waggin' Train simply has not presented any facts tending to show that it has suffered or is suffering the type of loss described by the statute-or that it has suffered any loss whatsoever. The complaint contains no shortage of allegations of the dire straits in which Plaintiff *potentially* could find itself as a result of Defendants' conduct:

> [T]he damage to Waggin' Train *will be incalculable if* Defendants' campaign of misinformation is not enjoined. (D.E. No. 57, Amended Complaint, ¶ 38) (emphasis added).
>
> *If* Waggin' Train loses [its Canadian import] license as a result of Defendants' malicious false and/or misleading allegations, Waggin' Train *would lose* its entire dog treat business in Canada. (*Id.*) (emphasis added).
>
> Defendants' statements ... *are intended to disparage and damage* Waggin' Train. (*Id.* at ¶ 39) (emphasis added).
>
> The *threat* to Waggin' Train is particularly acute in the case of the "big box" retailers ... *If* a company receives enough potentially troubling information about a particular product-even if the information turns out to be false, it has its own business interest in keeping such product from [sic] the shelves. (*Id.* at ¶ 40) (emphasis added).
>
> ***5** And *if even one retailer of any description severed its relationship* with Waggin' Train out of fear that its products contain [harmful substances], Waggin' Train *could face* a domino effect. (*Id.* at ¶ 41) (emphasis added).

Even the heading of the section of the complaint detailing Waggin' Train's damages reads, "The *Potential* Harm to Waggin' Train From Defendants' Tortious Conduct." (*Id.* at p. 12) (emphasis added). However, despite these warnings of harms that could befall the Plaintiff, the complaint is bereft of any allegations that Waggin' Train actually has suffered any ascertainable loss, either tangible or intangible. Without such a showing, the Plaintiff cannot make out a prima facie case under the TCPA.

Notwithstanding the foregoing, Plaintiff notes that each cause of action in its complaint concludes with the statement, "Waggin' Train has suffered injury to its reputation and business," and from this, it reasons that "[a]s may be expected, [Defendants'] conduct has caused Waggin' Train to suffer [an] 'ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value.' " (D.E. No. 80, Response to Motion to Dismiss, pp. 5-6) (quoting Tenn.Code Ann. § 47-18-109(a)(1)); (D . E. No. 57, Amended Complaint, ¶¶ 44, 49, 53, and 56.) In other words, Waggin' Train claims that it already has suffered injury to its reputation, which, it submits, is actionable under the TCPA. These claims of injury, however, are supported by no factual allegations in the complaint-Plaintiff does not explain how its reputation has been damaged, or in what ways such damage has manifested itself-hence, they are merely conclusory. *See Wilson v. Hofbauer,* 113 F. App'x 651, 653 (6th Cir.2004) ("wholly conclusory allegations are insufficient to state a cognizable claim for relief") (citing *Chapman v. City of Detroit,* 808 F.2d 459, 465 (6th Cir.1986)).

Furthermore, even if the allegations of harm were more than conclusory, no Tennessee authority has been cited holding that reputational injury, without more, is a sufficient basis for a TCPA claim. Plaintiff avers that reputational harm is indeed actionable as an "unfair or deceptive act or practice," claiming to draw support for this proposition from *Wolfe v. MBNA America Bank,* 485 F.Supp.2d 874 (W.D.Tenn.2007). However, despite Waggin' Train's contention to the contrary, the plaintiff in *Wolfe* complained not only of damage to his reputation, but also of identity theft and adverse effects on his credit. In any event, the *Wolfe* court did not specifically consider whether the plaintiff had alleged actionable injury under the TCPA, nor did its disposition of the plaintiff's claims turn on that issue. *Id.* at 878-79, 889-92. Thus, *Wolfe* does not support Plaintiff's position that "damage to name and reputation" standing alone is a sufficient foundation for a TCPA claim. (D.E. No. 80, Response to Motion to Dismiss, p. 6); *see also Tucker,* 180 S.W.3d at 117 (the type of "[s]ubstantial injury" required to establish a prima facie TCPA claim "usually involves monetary

injury or unwarranted health and safety risks").

***6** Nor does Waggin' Train benefit from TCPA § 109(b),[FN4] which authorizes the Court "to enjoin the person who has violated, is violating, or who is otherwise likely to violate" the TCPA. Tenn.Code Ann. § 47-18-109(b). While it is true that this section permits the Court to enjoin conduct prospectively, it does not authorize courts to enjoin activities that the TCPA does not proscribe. As explained *supra,* Plaintiff's allegations that it has suffered or will suffer reputational injury as a result of the Defendants' actions do not set forth a cognizable claim under the TCPA. Moreover, aside from its aforementioned speculative claims about nebulous consequences that may or may not result from the Defendants' activities, Plaintiff has not alleged that it is in immediate danger of suffering any harm that would qualify as an "ascertainable loss of money or property" under the TCPA. Tenn.Code Ann. § 47-18-109(a)(1). Speculative harms are insufficient as a matter of law to form the basis for injunctive relief. Injunctions "will not issue merely to relieve the fears or apprehensions of an applicant.... [A]n injunction will not be granted to prevent an injury where that injury was eventual, remote, contingent-where it may never accrue." *Nashville, C. & St. L. Ry. v. Railroad & Public Utilities Comm'n,* 161 Tenn. 592, 32 S.W.2d 1043, 1045 (Tenn.1930), *cited by Bivens v. Ballenger,* 1990 WL 182256, at *4 (Tenn.Ct.App.1990) and *State ex rel Cunningham v. Feezell,* 218 Tenn. 17, 400 S.W.2d 716, 719 (Tenn.1966)); *see also Greeneville Cabinet Co. v. Hauff,* 197 Tenn. 321, 273 S.W.2d 9, 10 (Tenn.1954) (noting that "damages that are remote, speculative, or contingent" do not provide sufficient grounds for injunctive relief) (internal citations and quotation marks omitted). Thus, the complaint sets forth no basis upon which Waggin' Train is entitled to injunctive relief under TCPA § 109(b).

> FN4. Plaintiff does not explicitly request injunctive relief pursuant to § 109(b).Instead, it seeks "the relief and damages specified in Tenn.Code Ann. §§ 47-18-108 and 47-18-109." (D.E. No. 57, Amended Complaint, pp. 16-17.) In its complaint, Waggin' Train does request injunctive relief in the specific context of its defamation contention, but not with respect to its TCPA claim. (*Id.* ¶ 6) (asking the Court "to enjoin Defendants' libelous campaign"). However, the Court addresses the possibility of an injunction because it is among the types of remedies available under § 47-18-109.

Therefore, Plaintiff has failed to state a claim for relief under the TCPA as a matter of law.

CONCLUSION

For the reasons set forth hereinbefore, the Court **GRANTS** Defendants' Motion to Dismiss Count V of the Complaint.

IT IS SO ORDERED.

W.D.Tenn.,2010.
Waggin' Train, LLC v. Normerica, Inc.
Slip Copy, 2010 WL 145776 (W.D.Tenn.)

END OF DOCUMENT

EXHIBIT “12”

Not Reported in F.Supp.2d, 2008 WL 2421702 (W.D.Tenn.)
(Cite as: 2008 WL 2421702 (W.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
W.D. Tennessee,
Western Division,
Gates WILLIAMS and Sharon Williams, Plaintiffs,
v.
STATE FARM FIRE & CASUALTY, COMPANY, J. Cooper Moving Inc., and Cooper & Cooper Moving, Inc., Defendants.
No. 07-02210-JPM/tmp.

June 12, 2008.

Paul Mark Ledbetter, Taylor, Halliburton & Ledbetter, Memphis, TN, for Plaintiffs.

Bruce McMullen, Stacie S. Winkler, Baker, Donelson, Bearman, Caldwell & Berkowitz, James L. Holt, Jr., Jackson, Shields, Yeiser, Holt, Speakman & Lucas, William M. Jeter, Law Office of William Jeter, Memphis, TN, Kenneth M. Bryant, Kevin C. Baltz, Miller & Martin, LLP, Nashville, TN, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT STATE FARM FIRE & CASUALTY'S MOTION FOR SUMMARY JUDGMENT

JON P. McCALLA, District Judge.

***1** Before the Court is Defendant State Farm Fire & Casualty's Motion for Summary Judgment (Doc. 37), filed February 18, 2008. Plaintiffs filed their Response in Opposition (Doc. 46) on March 28, 2008. A hearing was held on May 14, 2008. For the reasons discussed below, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion for Summary Judgment.[FN1]

> FN1. As to Plaintiffs' negligent infliction of emotional distress claim, Plaintiff concedes that dismissal of the claim is appropriate.

I. Background

This case arises from Plaintiffs Gates and Sharon Williams' ("Plaintiffs") bailment contract with J. Cooper Moving, Inc. and Cooper & Cooper Moving, Inc. (collectively "the Cooper Defendants") and from their insurance contract for the bailment with State Farm Fire & Casualty Co. ("State Farm"). On or about July 29, 2003, Plaintiffs entered into a bailment contract with the Cooper Defendants to store their personal property. (Compl. Doc. 1-2 ¶ 3.) The items stored by the Cooper Defendants and insured by State Farm had an alleged value of $75,000. (*Id.*)

Plaintiffs re-took possession of their personal property on July 29, 2006, when the Cooper Defendants delivered it to their home in Little Rock, Arkansas. (*Id.*) When Plaintiffs received their property, they discovered that it was "not in good condition" and had suffered water damage and mold. (Sharron Williams Dep. 81-92.) Some of the Plaintiffs' property was stolen or missing. (*Id.* at 92.) After discovering this damage, Plaintiffs filed a claim with State Farm under their insurance policy. (Morrison Dep. 13-14.)

State Farm investigated the claim, but neither they nor the Cooper Defendants were able to identify the cause of the damage to Plaintiffs' property. (*Id.* at 49; Frizzell Dep. 18, 76-77.) State Farm wrote on August 24, 2006, informing them that only the stolen or missing items were covered under their policy. (Def.'s Br. Summ. J., Doc. 37 Ex. 5.) State Farm also asked Plaintiffs to provide estimated values and descriptions for the lost or stolen items. (*Id.*) State Farm sent a second letter on November 30, 2006, after Plaintiffs failed to answer the first request for information. (*Id.* Ex. 7.) On January 25, 2007, a final letter asked again for the information about Plaintiffs' lost or stolen property and reminded Plaintiffs of the approaching deadline to submit this claim description. (*Id.* Ex. 8.)

During the theft claims process, State Farm also sent a letter detailing the coverage provided by the policy, explaining that the theft would be covered because "Theft" was a named peril under the policy but that mishandling was not. (*Id.* Ex. 6.) Likewise, State Farm indicated that the water damage could not be attributed to any named peril that would be covered. (*Id.*) Finally, the letter stated that mold and fungus damage were specifically excluded from the policy under a "Mold Exclusion" endorsement. (*Id.* Ex. 1 at 29.) The

parties dispute whether or not the Mold Exclusion was included in Plaintiffs' policy. (*See* Gates Williams Dep. 93-95; Morrison Dep. 17, 38-39.)

***2** On February 15, 2007, Plaintiffs filed the instant action, seeking relief for breach of contract; deceit; unfair and deceptive trade practices in violation of T.C.A. § 47-18-101, *et seq;* and negligent infliction of emotional distress.

II. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *Celotex,* 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *Emmons v. McLaughlin,* 874 F.2d 351, 353 (6th Cir.1989). In considering a motion for summary judgment, however, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.,* 799 F.2d 1128, 1133 (6th Cir.1986) *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Abeita v. TransAm. Mailings, Inc.,* 159 F.3d 246, 250 (6th Cir.1998). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

III. Analysis

A. Breach of Contract

Plaintiffs allege that State Farm breached their insurance contract by refusing to pay for any of the damage their property incurred while the property was covered under their insurance policy. In Tennessee, a plaintiff must prove three elements to recover for a breach of contract claim: (1) the existence of a contract, (2) breach of the contract, and (3) damages resulting from the breach. *Life Centers of Am., Inc. v. Charles Town Assoc. Ltd. P'ship,* 79 F.3d 496, 514 (6th Cir.1996).

Plaintiffs and State Farm agree that the insurance policy is an enforceable contract. Defendants move for summary judgment on the grounds that Plaintiffs have failed to produce evidence of any breach by State Farm. Plaintiffs argue that State Farm committed three breaches of the agreement.

First, Plaintiffs claim that State Farm breached the contract by not paying for the lost or stolen items and that their non-performance cannot be excused by Plaintiffs' failure to cooperate because State Farm waived any requirement of further proof for their claim. (Pls.' Br. Resp. Summ. J., Doc. 48 at 12.) State Farm informed Plaintiffs numerous times that the lost or stolen items were covered under the policy but that Plaintiffs' failure to provide information on the value of the items prevented payment. (Def.'s Br. Summ. J. Ex. 5-8; Gates Williams Dep. 98-99.) The deposition testimony Plaintiffs cite in support of a waiver of the requirement is inapposite. When Martin Morrison, State Farm's claims adjuster, stated that "we've disclaimed coverage. I don't know that there would be a reason to submit a claim form at that point," he was referring to documentation for the denied water damage and negligent handling claims, not to the already accepted theft claim. (Morrison Dep. 51.) Because this testimony is inapplicable to the theft claim, there is no dispute of fact that the non-payment of the theft claim was caused by Plaintiffs' failure to cooperate in the claims process, not by any breach of the insurance policy. Accordingly, the denial of the theft claim cannot serve as the basis for Plaintiffs' breach of contract claim.

***3** Second, Plaintiffs claim that State Farm's refusal to pay for the water-damaged property constitutes breach of the insurance policy. Under the policy, water damage is only covered when it has been caused by

one of several named perils listed as insured under the policy, including "[w]indstorm or [h]ail," "[w]eight of ice, snow or sleet which causes damage to property contained in a building," and "[s]udden and accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system." (Def. Br. Summ. J. Ex. 1 ("Insurance Policy"), at 11-12.) Water damage from other weather events, water from below the ground, and any water that originates from outside the building are all specifically excluded from the agreement. (Insurance Policy at 13.) Under the policy, the insured party bore the burden of identifying the cause of any claimed damage and must submit a signed and sworn "proof of loss" statement that includes the "time and cause of loss." (Insurance Policy at 15.)

Neither Plaintiffs, State Farm, nor the Cooper Defendants could identify the cause of the water damage. (Morrison Dep. 48.) According to the Cooper Defendants' employee who conducted the investigation into the cause of the water damage, "[t]here was just really no answer to the ... problem." (Frizzell Dep. 57.) Damage caused by a windstorm, the weight of ice or snow, or sudden plumbing discharges is easily identifiable as such because these causes leave structural and physical evidence of their occurrence in their wake. Under the policy it was Plaintiffs' responsibility to produce proof that their claim resulted from a named peril. Since Plaintiffs failed to make such a showing there is no dispute of fact that the denial of Plaintiffs' water damage claims was proper. Without any evidence that the water damage was caused by a named peril, the denied water damage claim cannot serve as the basis for Plaintiffs' breach of contract claim.

Finally, Plaintiffs assert that State Farm breached their contract by refusing to pay for the damage caused by the Cooper Defendants' negligent mishandling of the Plaintiffs' property. State Farm contends that this damage is not covered under the policy because none of the seventeen named perils cover this type of damage. However, the contract section titled "LOSSES NOT INSURED" states that any "conduct, act, failure to act, or decision of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault" is insured "unless the resulting loss is itself a Loss Not Insured by this Section." (Insurance Policy at 13-14.) The plain meaning of this section of the policy indicates that damage resulting from negligent mishandling is covered under the policy as long as the loss is not the result of an excluded peril. There is no evidence that a superseding, excluded peril caused the property damage attributed to the Cooper Defendants' mishandling. Therefore, the denial of the mishandling claim can serve as a basis for Plaintiffs' breach of contract claim.

***4** The Court GRANTS State Farm's Motion for Summary Judgment on Plaintiffs' breach of contract claim as to water-damaged and stolen items but DENIES State Farm's Motion for Summary Judgment for the breach of contract claim relating to negligently-handled property.

B. Deceit

In Tennessee, a common law claim of deceit requires that "a party intentionally misrepresents a material fact or produces a false impression in order to mislead another, or to obtain an undue advantage of him." *Haynes v. Cumberland Builders, Inc.,* 546 S.W.2d 228, 232 (Tenn.Ct.App.1976)(*citing Rose v. Foutch,* 4 Tenn.App. 495 (Tenn.Ct.App.1926). It must be shown that the misrepresentation was made with both knowledge of its falsity and also with a fraudulent intent. *Godwin Aircraft, Inc. v. Houston,* 851 S.W.2d 816, 821 (Tenn.Ct.App.1992)(*citing Shwab v. Walters,* 147 Tenn. 638, 251 S.W. 42 (Tenn.1922). The misrepresentation must have been with respect to an existing material fact, and the plaintiff must have reasonably relied on the misrepresentation to her injury. *Whitson v. Gray,* 40 Tenn. 441 (Tenn.1859); *Dozier v. Hawthorne Dev. Co.,* 37 Tenn.App. 279, 262 S.W.2d 705 (Tenn.Ct.App.1953). In commercial transactions, a defendant who makes an unintentional but negligent misrepresentation can be found liable for deceit when the plaintiff has been damaged by reliance on the misrepresentation. *Alley v. Quebecor,* 182 S.W.3d 300, 303-04 (Tenn.Ct.App.2005).

Plaintiffs have alleged five acts of deceit by State Farm. First, Plaintiffs allege State Farm took photographs of the wrong storage unit after losing pictures of the storage unit in which Plaintiffs' property was stored. Plaintiffs have failed to produce evidence that the loss or misidentification of the photographs was intentional or that they relied on the photographs to their detriment. Accordingly, Plaintiffs' allegation regarding State Farm's misrepresentation of photo-

graphs of the Cooper Defendants' storage unit cannot serve as the basis of their deceit claim.

Plaintiffs also claim that State Farm deceived them by "[d]enying the claim, while pretending to accept the claim." (Pls.' Resp. Summ. J. 14.) Presumably, this is a reference to the stolen or missing property claims, which State Farm has yet to satisfy. Plaintiffs do not dispute that State Farm sent Plaintiffs multiple letters asking for valuation information relating to the lost or stolen property. Rather, Plaintiffs argue they were not required to answer these requests. (Pls.' Resp. Summ. J. 5 (*citing* Morrison Dep. 51).) Plaintiffs' reliance on Martin Morrison's deposition testimony is misplaced. Martin Morrison's testimony that "I don't know that there would be a reason to submit a claim form at that point" (Morrison Dep. 51), was made with respect to the denied water damage claims, not the theft claims. Furthermore, during the hearing on this motion, State Farm's counsel reaffirmed its willingness to pay for the lost or stolen property, while Plaintiffs continued to refuse to accept payment on the theft claim separately from their other claims. (Sharron Williams Dep. 112.) Plaintiffs have not offered any evidence that State Farm was unwilling to satisfy the theft claims under the policy or that the theft claims would not have been denied absent Plaintiffs' refusal to cooperate in the claims process. Accordingly, Plaintiffs' allegations regarding State Farm's theft claim denial cannot serve as the basis for their deceit claim.

***5** Plaintiffs' final two deceit allegations involve the mold exclusion that State Farm sent with its letter of November 7, 2006. (Def.Br.Summ. J. Ex. 6.) There is conflicting evidence offered by the parties as to whether or not this exclusion was part of Plaintiffs' policy. (Morrison Dep. 38; Gates Williams Dep. 93.) Even assuming that the exclusion was not part of the policy and that State Farm's representation that it was a part of the policy was either intentional or negligent, Plaintiffs still have not made out a valid deceit claim because they have failed to allege, much less produce evidence of, any detrimental reliance on such a misrepresentation. Accordingly, Plaintiffs' allegations regarding State Farm's mold exclusion cannot serve as the basis for their deceit claims. Plaintiffs have failed to produce any evidence of a misrepresentation of material fact on which they relied to their detriment. Therefore, the Court GRANTS State Farm's Motion for Summary Judgment as to Plaintiffs' claim of deceit.

D. Tennessee Consumer Protection Act

Plaintiffs claim that the same facts alleged under their cause of action for deceit give rise to a violation of the "catch-all" provision of Tenn.Code Ann. § 47-18-101 *et seq.,* also known as the Tennessee Consumer Protection Act ("TCPA"). The "catch-all" provision of the TCPA makes "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person" a violation of the Act. Tenn.Code. Ann. § 47-18-104(b)(27).

Plaintiffs cite *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 926 (Tenn.1998), as an example of a violation of the TCPA by an insurance carrier. However, *Myint* held that an insurer was only liable under the TCPA when there is evidence of an attempt to violate the terms of the policy, deceive the insured about the terms of the policy, or otherwise act unfairly. No evidence has been submitted that State Farm has attempted to violate the terms of the policy; instead, the parties disagree as to what the terms of the policy are. There is also no evidence that State Farm's claim about the mold exclusion was made to deceive Plaintiffs. Without evidence of violation of the policy or deception of the policyholder, Plaintiffs fail to make a TCPA claim. Therefore, the Court GRANTS State Farm's Motion for Summary Judgment as to Plaintiffs' TCPA violation claim.

IV. Conclusion

For the reasons stated above, State Farm's Motion for Summary Judgment is DENIED as to Plaintiffs' breach of contract claim relating to mishandled property and is GRANTED as to all other claims.

So ORDERED.

W.D.Tenn.,2008.
Williams v. State Farm Fire & Cas. Co.
Not Reported in F.Supp.2d, 2008 WL 2421702 (W.D.Tenn.)

END OF DOCUMENT

EXHIBIT “13”

Slip Copy, 2009 WL 5205405 (M.D.Tenn.)
(Cite as: 2009 WL 5205405 (M.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee,
Nashville Division.
Pamela WILLIAMSON, Plaintiff,
v.
OCWEN LOAN SERVICING, LLC, Ocwen Financial Corporation, and John Does 1-10, Defendants.
No. 3:09-0514.

Dec. 23, 2009.

West KeySummary
Antitrust and Trade Regulation 29T 214

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk210 Debt Collection
29Tk214 k. Communications, Representations, and Notices; Debtor's Response. Most Cited Cases

Antitrust and Trade Regulation 29T 215

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk210 Debt Collection
29Tk215 k. Harassment and Abuse. Most Cited Cases
Debtor's allegations that debt collector used false and deceptive means of collecting its debts against her was sufficient to plead a violation of Fair Debt Collection Practices Act (FDCPA). The debtor alleged that the debt collector falsified the amounts paid and owed, interest accrued, and other fees alleged to be due it while using harassing telephone calls and sending harassing written communications through the United States mails to effect its scheme. She also alleged that the debt collector sent her at least ten letters each month and made hundreds of harassing telephone calls each month. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692a.

G. Kline Preston, IV, Kline Preston Law Group, PC, Nashville, TN, for Plaintiff.

H. Lee Barfield, II, Jeffrey P. Yarbro, Bass, Berry & Sims, Nashville, TN, for Defendants.

MEMORANDUM

ROBERT L. ECHOLS, District Judge.

***1** Defendants Ocwen Loan Servicing, LLC, its parent corporation, Ocwen Financial Corporation (collectively "Ocwen"), and John Does 1-10, who are alleged to be the employees, officers and directors of the other named Defendants, filed a Motion to Dismiss Plaintiff's Amended Complaint (Docket Entry No. 14) under Federal Rule of Civil Procedure 12(b)(6), to which Plaintiff Pamela Williamson ("Plaintiff") filed a response in opposition (Docket Entry No. 17), and Defendants filed a reply (Docket Entry No. 20).

In her First Amended Complaint, Plaintiff brought four separate counts under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a)-(d), one count under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, and one count each on the state-law claims for violation of the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47-18-104(a), breach of contract, and conversion of property. The pertinent facts alleged in the First Amended Complaint will be discussed below in connection with each separate claim.

I. STANDARD OF REVIEW

In ruling on a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true the allegations made in the Plaintiff's claim and construe the allegations in the Plaintiff's favor. However, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 550, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

II. ANALYSIS

A. RICO claims

Title 18 U.S.C. § 1964(c) provides in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee[.]"

Title 18 U.S.C. § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." "The term 'racketeering activity' is defined to include a host of so-called predicate acts, including 'any act which is indictable' " under 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). *See Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 2138, 170 L.Ed.2d 1012 (2008). The elements of mail and wire fraud are: (1) a scheme to defraud, and (2) use of the mails, or of an interstate electronic communication, in furtherance of the scheme. *Advocacy Org. for Patients and Providers v. Auto Club Ins. Ass'n,* 176 F.3d 315, 322 (6th Cir.1999). According to the Sixth Circuit:

> ***2** A scheme to defraud consists of "[i]ntentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the designed end." ... To allege intentional fraud, there must be "proof of misrepresentations or omissions which were 'reasonably calculated to deceive persons of ordinary prudence and comprehension.' "

Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 389-390 (6th Cir.1996). False statements or omissions must be alleged with particularity. *Id.* at 390. Defendants identify four reasons why they believe Plaintiff's RICO claims fail to state a claim under Rule 12(b)(6).

1. Defendants assert that Plaintif's predicate act allegations are legally insufficient

Defendants first contend that Plaintiff has not alleged fraud with particularity under Federal Rule of Civil Procedure 9(b). To establish a RICO claim, Plaintiff must plead and prove at least two predicate acts of racketeering activity. *See* 18 U.S.C. § 1961(5). Because Plaintiff alleges that the Defendants engaged in a pattern of racketeering activity consisting of mail and wire fraud, Plaintiff is required to plead the acts of fraud with sufficient particularity to meet the standard of Rule 9(b). *See Advocacy Org. for Patients and Providers,* 176 F.3d at 322. The Sixth Circuit reads Rule 9(b)'s requirement liberally to require the Plaintiff, at a minimum to allege the time, place and content of the alleged misrepresentation; the fraudulent scheme, the fraudulent intent of the Defendants, and the injury resulting from the fraud. *See id.* While this liberal reading stems from the influence of Rule 8, which requires a short and plain statement of the claim and simple, concise, and direct allegations, Rule 9(b) requires that allegations of fraud must be made with sufficient particularity and with sufficient factual basis to support an inference that the statements were knowingly made. *Id.*

Defendants point out that, in her First Amended Complaint, Plaintiff added factual detail to her claims in the form of account statement dates, fees and other charges, interest payments, and past due amounts assessed against her, among other things, but her allegations remain insufficient under Rule 9(b) because Plaintiff failed to specify on what grounds she contends the alleged misrepresentations were false. Defendants argue that the mere existence of fees and charges imposed in connection with the servicing of Plaintiff's mortgage loan, along with a blanket allegation that the fees were "false," is not enough to comply with Rule 9(b).

The Court agrees that statements in Plaintiff's First Amended Complaint which simply label a statement of account Plaintiff received from the Defendants as "false" does not reveal whether Plaintiff alleges that the account statement was inaccurate due to Defendants' negligence or whether Plaintiff claims the statement was false due to Defendants' fraud. When the allegations of the First Amended Complaint are read together, it becomes clear that Plaintiff alleges

intentional fraud on the part of the Defendants, and that such fraud was perpetrated through "at least ten letters each month beginning in October 2006 and hundreds of harassing telephone calls each month beginning in 2006 using the United States mails and wires in furtherance of their scheme to defraud and extort the Plaintiff[.]" (First Amended Complaint ¶ 22.) Plaintiff alleges that she "continued to make her monthly payments ... and Defendant, Ocwen, continued to create false accounts and false assessment of her payments" (*Id.* ¶ 21); "Defendant, Ocwen, used the United States mails and wires in furtherance of its fraudulent and illegal scheme" (*Id.* ¶ 22); "Defendant, Ocwen, charged unlawful fees to Plaintiff ... misapplied [Plaintiff's] payments, and asserted charges not due and owing" (*Id.* ¶ 23); "Defendant, Ocwen, assessed fraudulent charges" (*Id.* ¶ 23); "Defendant ... concealed the true status of her property and ... did so with the present intention to defraud the Plaintiff of the property" (*Id.* ¶ 26); "Defendant, Ocwen, purposely and fraudulently orchestrated the foreclosure to convert the Plaintiff's interest in the property to its own benefit by, for and through an improper purpose" (*Id.* ¶ 27); "Plaintiff avers that the Defendants wrongfully and unlawfully converted her property to their own use and benefit" (*Id.* ¶ 31); and "The amounts alleged to have been due were not in fact due per the express terms of the contract with Ocwen." (*Id.* ¶ 31.)

***3** While these allegations confirm that Plaintiff alleges intentional, not negligent, conduct of the Defendants, the allegations are far too nebulous to satisfy Rule 9(b)'s requirement that fraud be alleged with particularity. *See Advocacy Org. for Patients and Providers,* 176 F.3d at 324 (holding Rule 9(b)'s standard was not met where plaintiffs failed to allege any fact, other than the mere existence of a fee arrangement, from which one could infer that the defendants participated in a scheme to defraud the plaintiffs); *Kenty,* 92 F.3d at 391 (holding plaintiff did not explain why the amounts charged to her were not "premiums and finance charges" or how the amounts charged constituted fraud, resulting in dismissal of her complaint); *Craighead v. E.F. Hutton & Co.,* 899 F.2d 485, 491 (6th Cir.1990) (holding allegation of excessive trading "to be a model of a generalized, conclusory allegation that lacks the particularity necessary to plead fraud). Plaintiff includes in her First Amended Complaint excerpts of certain account statements she received from Defendants, but she does not specify what, in particular, made each of the account statements fraudulent. Defendants cannot discern from Plaintiff's pleading whether they are accused of creating and charging fees or other payments that were not allowed by law or Plaintiff's mortgage agreements, or whether Defendants simply miscalculated applicable figures and sent erroneous account statements to the Plaintiff. While Plaintiff may have met the time and place requirements for pleading fraud under Rule 9(b), she has not sufficiently plead the content of the fraudulent misrepresentations made to her by the Defendants. *See Advocacy Org. for Patients and Providers,* 176 F.3d at 322. Therefore, Plaintiff's RICO claims are subject to dismissal for failure to plead fraud with particularity.

2. Defendants assert that Plaintiff failed to allege injury cognizable under sections 1962(a) & (b)

The Court also agrees with Defendants that, in addition to failing to plead fraud with particularity, Plaintiff's RICO claims under § 1962(a) & (b) must be dismissed for another reason. Section 1962(a) prohibits "any person" who has received any income derived from a pattern of racketeering activity or through collection of an unlawful debt from using or investing any part of the income or proceeds from such income in acquisition of any interest in or the establishment or operation of any enterprise. Section 1962(b) makes it unlawful for "any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

The Sixth Circuit has held that, to state a claim under § 1962(a), a plaintiff must allege an injury to business or property caused by the investment of the alleged racketeering proceeds; an injury caused by the alleged racketeering activities themselves is insufficient. *Craighead,* 899 F.2d at 494. Similarly, the Sixth Circuit has held that, to state a claim under § 1962(b), a plaintiff must plead an injury proximately caused by the acquisition of an interest in the targeted enterprise, not an injury from the alleged predicate acts. *Advocacy Org. for Patients and Providers,* 176 F.3d at 329. Plaintiff's First Amended Complaint is devoid of any allegations concerning an injury she suffered that was proximately caused by Defendants' investment of the alleged racketeering proceeds in the enterprise or by Defendants' acquisition of an interest in the targeted

enterprise, as contemplated by §§ 1962(a) & (b). Plaintiff's alleged injury is the loss of her home and personal property, which is injury she alleges was directly caused by the alleged racketeering activities of mail and wire fraud. *See Craighead,* 899 F.2d at 494. Therefore, Defendants' motion to dismiss these claims will be granted.

3. Defendants contend Plaintiff's section 1962(c) claim fails because the alleged "enterprise" lacks any participant other than the affiliated defendants

***4** Section 1962(c) requires Plaintiff to identify separate entities serving as the "enterprise" and the "person." This statutory section "precludes the 'person' conducting or participating in an enterprise's affairs from simultaneously serving as the 'enterprise.' " *Puckett v. Tennessee Eastman Co.,* 889 F.2d 1481, 1488-1489 (6th Cir.1989).

Plaintiff named as Defendants two Ocwen corporations, a parent company and its subsidiary, and "John Does 1-10" who are alleged to be the "employees, officers and directors of the other named Defendants and/or other Ocwen entities and their employees, officers and directors who have participated in, planned, conspired, supervised, and assisted the named 'enterprise' defendants in violating the RICO statute." (First Amended Complaint ¶ 4.) While Plaintiff initially alleged that the John Doe 1-10 Defendants "are 'persons' within the meaning of 18 U.S.C.A. § 1961 *et. seq."* (*id.*), her allegations in Count One asserting the § 1962(c) claim dropped this distinction and alleged instead that the John Doe 1-10 Defendants were an "enterprise." In Count One Plaintiff alleged in pertinent part (emphasis added):

> 34. The Plaintiff avers that, at all relevant times, the Defendants, Ocwen Loan Servicing, LLC, Ocwen Financial Corporation, and others yet unnamed John Does, *each constituted an "enterprise"* within the meaning of 18 U.S.C. § 1961(4) and § 1962(c) in that they were corporations or other juridical entities.
>
> 35. The Plaintiff avers that the Defendants, Ocwen Loan Servicing, LLC, Ocwen Financial Corporation, and John Does 1-10 conducted, participated in, engaged in, conspired to engage in and/or aided and abetted, the conduct of the affairs of the enterprise through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1), § 1961(5), and § 1962(c).

Thus, Plaintiff has alleged that each of the named Defendants constituted an "enterprise," but Plaintiff has not alleged the participation of a separate "person." *See Puckett,* 889 F.2d at 1488-1489; *Begala v. PNC Bank,* 214 F.3d 776, 781 (6th Cir.2000); *Foundation for Moral Law, Inc. v. Infocision Mgt. Corp.,* 2008 WL 5725627 at * 13 (N.D.Ohio May 27, 2008). In *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 163-165, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), the Supreme Court suggested that a corporate employee, acting within or beyond the scope of employment, could serve as the "person" distinct from a corporation itself for purposes of § 1962(c), but in this case Plaintiff alleged that the corporate employees, officers and directors served as an "enterprise," not as "persons." Even if Plaintiff were attempting to establish the existence of an association-in-fact enterprise, Plaintiff failed to allege that the associated persons formed an ongoing organization that functioned as a continuing unit and was separate from the pattern of racketeering activity in which it engaged. *See City of Cleveland v. Woodhill Supply, Inc.,* 403 F.Supp.2d 631, 635 (N.D.Ohio 2005). For these reasons, Plaintiff fails to state a claim, and her claim under § 1962(c) will be dismissed.

4. Defendants contend Plaintiff's section 1962(d) claim depends on allegations of intracorporate conspiracy

***5** Plaintiff's claim under § 1962(d) is that the parent company, its subsidiary, and its corporate employees conspired with one another to violate RICO. As a general matter of conspiracy law, a company cannot conspire with its corporate affiliates or employees. *See Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.,* 926 F.2d 505, 509 (6th Cir.1991). The Eighth Circuit extended this rule to alleged conspiracies under § 1962(d) and held that a parent corporation could not conspire with "its arms and hands." [FN1] *Fogie v. Thorn Americas, Inc.,* 190 F.3d 889, 898 (8th Cir.1999). Further, a conspiracy count under § 1962(d) cannot stand where the other RICO counts are dismissed. *Craighead,* 899 F.2d at 495. The Court concludes that Plaintiff's conspiracy claim must be dismissed for failure to state a claim.

FN1. The Court recognizes there is contrary

> authority, *see Ashland Oil, Inc. v. Arnett,* 875 F.2d 1271 (7th Cir.1989) (holding RICO conspiracy may consist of parent and wholly owned subsidiary); *Webster v. Omnitrition Int'l, Inc.,* 79 F.3d 776, 787 (9th Cir.), *cert. denied,* 519 U.S. 865, 117 S.Ct. 174, 136 L.Ed.2d 115 (1996) (same), but the Court chooses to follow the reasoning of the Eighth Circuit as it is most closely aligned with the Sixth Circuit law of conspiracy.

B. Plaintiff's FDCPA claim

Defendants move to dismiss Plaintiff's FDCPA claim on the ground that Plaintiff did not specifically allege what communications she contends were false or harassing, or on what basis she contends those communications were false or harassing. Defendants rely on *Hambrick v. Wells Fargo Bank, N.A.,* 2009 WL 1532676 at *1 (N.D.Miss. June 2, 2009), and *Hargrove v. WMC Mortgage Corp.,* 2008 WL 4056292 at *3 (S.D.Tex. Aug.29, 2008), cases in which the district courts dismissed FDCPA claims for failure to plead sufficient facts to raise the right to relief above the speculative level under *Twombly.* The Court finds that *Hambrick* and *Hargrove* are distinguishable on their facts.

Title 15 U.S.C. § 1692d prohibits a debt collector from engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Among the prohibited acts are "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." Title 15 U.S.C. § 1692e prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Prohibited conduct includes false representations concerning the character, amount or legal status of any debt, or any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt. *Id.*

Plaintiff alleges that Defendants "used false and deceptive means of collecting its debts against the Plaintiff." (First Amended Complaint ¶ 60.) Plaintiff also alleges that the "Defendant Ocwen has used the false and deceptive means by falsifying the amounts paid and owed, interest accrued, and other fees alleged to be due it while using harassing telephone calls and sending harassing written communications through the United States mails to effect its scheme. The Defendants' actions have been continuous and constant since 2006 and she has relied upon false statements as to money due and payable as well as other fees and expenses." (*Id.*) Plaintiff also alleges that Defendants sent her "at least ten letters each month beginning in October 2006 and [made] hundreds of harassing telephone calls each month beginning in 2006 [.]" (*Id.* ¶ 22.)

***6** Accepting the allegations of the First Amended Complaint as true, the Court concludes that Plaintiff has alleged sufficient facts to proceed on her FDCPA claim. *See Gutierrez v. Ocwen Loan Servicing, LLC,* 2009 WL 426606 at *4 (E.D.Cal. Feb.20, 2009) (permitting FDCPA claim to proceed on similar allegations). Defendants do not contend that they are not debt collectors within the meaning of the FDCPA, which might have resulted in a dismissal for failure to state a claim. *See Bridge v. Ocwen Federal Bank,* 2009 WL 2781103 at ----4-5 (N.D.Ohio 2009).

C. Plaintiff's state-law claims

1. TCPA claim

Plaintiff's TCPA claim must be dismissed for the same reason the RICO claims are dismissed: Plaintiff did not plead misrepresentation or fraud with the requisite particularity. *Harvey v. Ford Motor Credit Co.,* 8 S.W.3d 274, 275 (Tenn.Ct.App.1999); *Metropolitan Property & Cas. Ins. Co. v. Bell,* 2005 WL 1993446 at *5 (6th Cir. Aug.17, 2005). Consequently, this claim will be dismissed for failure to state a claim.

2. Breach of contract claim

To state a claim for breach of contract under Tennessee law, a plaintiff must allege: (1) the existence of an enforceable contract, (2) nonperformance of the contract amounting to a breach of the contract; and (3) damages caused by the breach. *Life Care Ctrs. of Am., Inc. v. Charles Town Assocs., Ltd.,* 79 F.3d 496, 514 (6th Cir.1996) (applying Tennessee law); *C & W Asset Acquisition, LLC v. Oggs,* 230 S.W.3d 671, 676-677 (Tenn.Ct.App.2007). Plaintiff alleges that Defendants violated the mortgage contract through false accountings and failure to timely credit her payments. Plaintiff also alleges that Defendants breached the

implied covenant of good faith and fair dealing.

Defendants contend that mortgage servicers are legally entitled to take reasonable actions to protect the interest of the lender in the event of default and to charge the costs of such action to the borrower. While that may be so and could be shown on motion for summary judgment, the Court does not have before it on the motion to dismiss the contract(s) at issue or a comprehensive recitation of the applicable facts. The Court must take as true the allegations in the First Amended Complaint, and the Court concludes that Plaintiff has alleged sufficient facts to proceed on the breach of contract claim.

3. Conversion claim

Conversion is the appropriation of property to the party's own use and benefit, by the exercise of dominion over it, in defiance of plaintiff's right. *Brandt v. Bib Enter., Ltd.,* 986 S.W.2d 586, 595 (Tenn.Ct.App.1998). Defendants contend that they had a legal right to foreclose on Plaintiff's real property, but again, the contracts are not before the Court for review at this time. Additionally, Plaintiff contends that Defendants converted her personal property that was stored at the residence, and Defendants did not address this claim. Thus, Defendants' motion to dismiss the conversion claim will be denied.

III. CONCLUSION

***7** For all of the reasons stated, Plaintiff failed to allege misrepresentation or fraud with sufficient particularity to state claims under RICO and the TCPA; however, Plaintiff's allegations under the FDCPA and for breach of contract and conversion are sufficient and those claims will proceed. Therefore, Defendants' Motion To Dismiss Plaintiff's Amended Complaint (Docket Entry No. 14) will be granted in part and denied in part.

An appropriate Order will be entered.

M.D.Tenn.,2009.
Williamson v. Ocwen Loan Servicing, LLC
Slip Copy, 2009 WL 5205405 (M.D.Tenn.)

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