IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

HOMETRUST BANK,

Plaintiff,

v. No. 3:20-cv-00041-JDB-DCP

CRAINE, THOMPSON AND JONES, PC,

Defendant.

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ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S PARTIAL MOTION TO DISMISS

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Before the Court is the motion of Defendant, Craine, Thompson and Jones, PC ("CTJ"), to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Counts I and III through IX of Plaintiff's complaint. (Docket Entry ("D.E.") 9–10.) Plaintiff, Hometrust Bank ("Hometrust"), submitted a response in opposition. (D.E. 18.) Accordingly, the matter is ripe for disposition.

**BACKGROUND**

The following facts are taken as true for purposes of Defendant's motion. G.W. Wyatt Contracting, LLC ("GWW")[1] was a sitework contractor that provided construction services for private developers, general contractors, and state and federal agencies in the southeastern United States. (Compl. ¶ 6.) The company was wholly owned by Gary Wyatt and Kevin Trent. (*Id.*) "Site contractors such as GWW are typically compensated over the course of a project, which can take many months and even years to fully complete." (*Id.* ¶ 7.) Accordingly, it is "common

[1] GWW is not a party to this case.

practice" in the construction industry for contractors like GWW to have their financial statements audited by independent certified public accountants, such as CTJ. (*Id.* ¶ 8.)

"In the fall of 2017, GWW sought financing from HomeTrust." (*Id.* ¶ 22.) During pre-loan discussions, the company provided Plaintiff with certain documents audited by Defendant, namely the company's audited financial statements for the 2015 and 2016 fiscal years, "which expressed [the accounting firm's] unmodified opinions regarding GWW's financial statements."[2] (*Id.*) CTJ's audit reports provided that GWW "was a profitable, viable company with in [sic] excess of $6,000,000 in unrestricted current cash assets as of December 2016 and over $4,500,000 as of December 2015[,] and members' equity of over $12,000,000 and $9,300,000 as of December 31, 2016 and 2015, respectively." (*Id.* ¶ 24.) Defendant further stated that the company's working capital was "positive by approximately $1,400,000 in 2015 and $7,200,000 in 2016." (*Id.* ¶ 37.) Additionally, CTJ represented that GWW's audited financial statements:

> present[ed] fairly, in all material respects, the financial position of [GWW] as of December 31, 2016 and 2015 and the results of its operations and its cash flows for the years then ended in accordance with accounting principles generally accepted in the United States of America.

(*Id.* ¶ 23.)

On February 18, 2018, Plaintiff "loaned $5,000,000 to GWW and assumed full recourse on a $1,000,000 P-Card extension of credit to GWW by another lender." (*Id.* ¶ 25.) In March 2019, "GWW defaulted on its payment obligations to HomeTrust, went out of business, and its Owners . . . filed for personal bankruptcy protection." (*Id.* ¶ 27.) After the company failed to repay its debt, Plaintiff filed the instant action against Defendant, asserting nine causes of action: (1) professional malpractice/negligence/breach of professional standards; (2) negligent

[2] The other records submitted to Plaintiff included "Notes to those Financial Statements, Supplemental Information, and CTJ's Independent Auditor's Report dated July 3, 2017." (Compl. ¶ 22.)

misrepresentation; (3) fraudulent concealment/misrepresentation; (4) constructive fraud; (5) unfair and deceptive trade practices under the Tennessee Consumer Protection Act ("TCPA"); (6) aiding and abetting; (7) negligence per se; (8) civil conspiracy; and (9) unjust enrichment.

HomeTrust's theory of relief revolves around a handful of purported errors in GWW's audited financial statements, which it claims CTJ knew about but nevertheless issued an unmodified audit opinion representing the company's financial records as accurate. The first discrepancy concerns the $6,000,000 and $4,500,000 loans that were reported as unrestricted current cash assets in 2016 and 2015, respectively. Plaintiff alleges that these funds were "short-term personal loans made to . . . Wyatt by another lender," "did not belong to GWW, could not be accessed by GWW and were not available for use in its normal operations." (*Id.* ¶¶ 31–32.) It further asserts that the loan proceeds "were pledged to that other lender as collateral," were restricted to the repayment of the loans, and were in fact used to pay off the loans "in the quarter following funding and receipt" by Wyatt. (*Id.* ¶¶ 32, 35.) Neither Defendant nor GWW disclosed this information in the company's financial statements. (*Id.* ¶ 35.)

The next purported misrepresentation pertains to CTJ and GWW's characterization of a certain member's capital contribution to the company. GWW's 2014 audited financial statement[3] reported that "approximately $4,500,000 of cash and member's equity . . . was deposited near the end of 2014 and then distributed back to the member in early 2015." (*Id.* ¶ 33.) The "cash activity" related to this transaction was "not shown as cash inflows and outflows in either the statements of members' equity or cash flows" for the 2015 and 2016 fiscal years. (*Id.*) "Instead, the audited financial statements for 2016 reflected the 'net' of these transactions, which was described as

[3] Construing the complaint in Plaintiff's favor, Defendant is alleged to have prepared the company's 2014 audited financial statements, as the complaint asserts that it provided accounting services to GWW throughout the events described therein. (*See* Compl. ¶ 19.)

'Member Contributions' in the amount of $1,500,000 in both the statements of members' equity and cash flows." (*Id.*)

The third alleged error involves a $1,200,000 debt owed by Wyatt to GWW, which originated from a 2014 note. The company and CTJ classified Wyatt's obligation as a current asset in the 2015 and 2016 financial statements—$600,000 for each year—even though the co-owner had never made a payment on this debt. (*Id.* ¶ 34.)

Lastly, HomeTrust points to Defendant and GWW's characterization of certain debts the company owed to its vendors as current liabilities. It alleges that GWW's audited financial statements reported "over $1,600,000 in 2016 and almost $2,400,000 in 2015 as non-current 'Long-Term Payables,'" but that the company had no "contractual agreements to defer payment for more than a year." (*Id.* ¶ 36.)

**STANDARD OF REVIEW**

Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." In determining whether dismissal under this Rule is appropriate, the court "must accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor." *Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016) (citing *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)). "However, 'a legal conclusion couched as a factual allegation' need not be accepted as true." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive such a motion, the complaint "must state a claim to relief that rises 'above the speculative level' and is 'plausible on its face.'" *Luis*, 833 F.3d at 625 (quoting *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009)). "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.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[I]f it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claims that would entitle [it] to relief, then . . . dismissal is proper." *Smith v. Lerner, Sampson & Rothfuss, L.P.A.*, 658 F. App'x 268, 272 (6th Cir. 2016) (quoting *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 515 (6th Cir. 1999)).

**ANALYSIS**

As a preliminary matter, CTJ insists that the Court should take judicial notice of HomeTrust's "position as a creditor" in Wyatt's and Trent's personal bankruptcy proceedings. (D.E. 10 at PageID 50.) Apparently, Defendant believes that because Plaintiff omitted claims of fraud against GWW's owners, it should not be permitted to make such assertions in this case. (*See id.* at PageID 50–52.)

"Assessment of the facial sufficiency of the complaint must ordinarily be undertaken without resort to matters outside the pleadings." *Gavitt*, 835 F.3d at 640. "However, a court may consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." *Id.*; *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) ("A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice."). But as the Sixth Circuit has noted, even if a court takes judicial notice of a public document, such as one in a separate judicial proceeding, "the use of such documents is proper only for the fact of the documents' existence, and not for the truth of

the matters asserted therein." *Passa v. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005) (citations omitted). The Court therefore declines CTJ's request to take judicial notice of HomeTrust's allegations presented in Wyatt's and Trent's bankruptcy proceedings.

### *A. Professional Malpractice (Count I)*

Defendant avers that Plaintiff cannot sue it for professional malpractice as there is no privity or contractual relationship between the parties. (D.E. 10 at PageID 55.) In response, HomeTrust insists that the Tennessee Supreme Court rejected the restrictive privity rule in cases involving an accountant's liability to non-clients in *Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592 (Tenn. 1991).[4] (D.E. 18 at PageID 161–62.) CTJ acknowledges that Plaintiff may assert a negligent-misrepresentation claim, as Plaintiff does in Count II, since privity is not required in such cases, but maintains that privity is still an essential element for professional malpractice claims. (D.E. 10 at PageID 55–56.)

Defendant's argument is well taken. Since *Bethlehem Steel Corp.* was decided, the Tennessee Court of Appeals has held that a "cause of action for malpractice . . . differs from a cause of action for negligent misrepresentation, in that a cause of action for malpractice requires an employment relationship or privity, whereas an action for negligent misrepresentation does not." *McNamara v. Monroe*, 2003 WL 192161, at *2 (Tenn. Ct. App. Jan. 29, 2003) (citation omitted). Because HomeTrust does not allege that it employed CTJ for its accounting services or that it was otherwise in privity with CTJ, the Court concludes that Count I of the complaint should be dismissed.

[4] In *Bethlehem Steel Corp.*, the Tennessee Supreme Court "held that Section 552 [of the Restatement (Second) of Torts] is the appropriate standard for determining the liability of accountants . . . in actions for negligently supplying false information brought by parties with whom there is no privity of contract." *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 131 (Tenn. 1995) (citing *Bethlehem Steel Corp.*, 822 S.W.2d 592, 595 (Tenn. 1991)).

### *B. Negligence Per Se (Count VII)*

To state a prima facie claim of negligence per se, Plaintiff must establish three elements:

> First, the defendant must have violated a statute or ordinance that imposes a duty or prohibition for the benefit of a person or the public. Second, the injured party must be within the class of persons intended to benefit from or be protected by the statute. Finally, the injured party must show that the negligence was the proximate cause of the injury.

*Fitzpatrick v. Law Solutions Chicago, LLC*, 584 B.R. 203, 222 (E.D. Tenn. 2018) (quoting *Bennett v. Putnam Cty.*, 47 S.W.3d 438, 443 (Tenn. Ct. App. 2000)).

Defendant contends that negligence per se principles do not apply to criminal statutes and that the complaint fails to allege that any of its agents have been charged or convicted under any of the statutes cited therein. (D.E. 10 at PageID 65–66.) CTJ further avers that HomeTrust has not identified any specific standard of care in any of the statutes or acts listed in Count VII, and that none of those laws were designed to protect Plaintiff from the harm alleged. (*Id.* at PageID 65–67.) In sum, Defendant insists that Plaintiff must do more than simply cite statutes that Defendant allegedly violated.

In response, Plaintiff asserts that it is "quite obvious[]" that the statutes cited in Count VII were designed to prevent the type of injury Plaintiff suffered. (D.E. 18 at PageID 173.) Moreover, HomeTrust claims that "[a] legal brief is not required at this juncture" and that "[c]iting statutes that prohibit the misconduct in which Plaintiff alleges Defendant engaged" satisfies the notice-pleading standard. (*Id.*)

As an initial matter, the Court notes that Defendant's contention that negligence per se does not apply to criminal statutes is without merit. *See, e.g., Rains v. Bend of the River*, 124 S.W.3d 580, 589 (Tenn. Ct. App. 2003) (emphasis added) ("The negligence per se doctrine enables the courts to mold standards of conduct *in penal statutes* into rules of civil liability."). Plaintiff's

assertion that all that is required to state a claim for negligence per se is to cite the statutory provision(s) is equally without merit, as the Tennessee Court of Appeals has explained:

> [I]t is not sufficient for a plaintiff to assume, as these plaintiffs have, that the alleged violation of a statute automatically supports a claim of negligence per se. *Even if the plaintiffs are within the class to be protected by the statute, a statutory negligence per se claim cannot stand unless the statute establishes a standard of care*.

*King v. Danek Med., Inc.*, 37 S.W.3d 429, 460 (Tenn. Ct. App. 2000) (emphasis added) (citation omitted); *see also Rains*, 124 S.W.3d at 590 ("Not every statutory violation amounts to negligence per se. . . . The fact that the General Assembly has enacted a statute defining criminal conduct does not necessarily mean that the courts must adopt it as a standard of civil liability."). Further, HomeTrust's apparent reliance on Tennessee's notice-pleading standard is misplaced, as "[i]t is well established that the Federal Rules of Civil Procedure apply to removed cases[,]" "even where the state pleading standard is more lenient." *Vanhook v. Somerset Health Facilities, LP*, 67 F. Supp. 3d 810, 815 (E.D. Ky. 2014) (citations omitted); *see also Maness v. Boston Sci.*, 751 F. Supp. 2d 962, 966–67 (E.D. Tenn. 2010). And Plaintiff's claim that a legal brief is not required at the motion to dismiss stage is wholly unfounded.

Regarding CTJ's latter contention, the Court agrees that the complaint does nothing more than list statutory provisions that CTJ allegedly violated. In Count VII, Plaintiff cites four statutes and two acts: (1) "the Dodd-Frank Wall Street Reform and Consumer Protection Act"; (2) 18 U.S.C. § 1344; (3) Tenn. Code Ann. § 39-14-120; (4) Tenn. Code Ann. § 47-18-104(a); (5) Tenn. Code Ann. § 39-14-103; and (6) the Tennessee Accountancy Act of 1998, Tenn. Code Ann. §§ 62-1-102, -104, -111, -113, -114(b). (Compl. ¶¶ 118–19.) As to the Dodd-Frank Act, HomeTrust simply recites the general purpose of the Act; it does not identify any standard of care established therein or even cite a particular section of the Act. (*See id.* ¶ 118.) With respect to the Tennessee

Accountancy Act, Plaintiff again quotes the broad purpose of the Act, but only cites particular provisions of the Act. None of those sections, however, identify any specific standard of conduct, let alone a standard that would apply to an accounting firm under the facts of this case. For example, Tenn. Code Ann. § 62-1-104 creates a state board of accountancy; Tenn. Code Ann. § 62-1-113(b) requires licensed accountants "performing attest services" to "provide those services pursuant to statements on standards relating to those services adopted by reference or directly by the board"; and Tenn. Code Ann. § 62-1-114(b) classifies a knowing violation of the Act as a Class C misdemeanor. Presumably, HomeTrust argues that § 62-1-113(b) imposes a standard of care because it requires accountants to perform certain services pursuant to standards adopted by the board of accountancy; however, it points to no specific standard adopted by the board and cites no authority to support its position. It is not enough for Plaintiff to allege generally that Defendant violated a number of statutes and, therefore, is liable for negligence per se. *See Agema v. City of Allegan*, 826 F.3d 326, 332–33 (6th Cir. 2016) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 996 (6th Cir. 1997)) ("[M]erely asserting that [it] alleged sufficient facts without telling [the Court] what those facts are amount to mentioning an argument 'in the most skeletal way . . . leaving the court to put flesh on its bones.").

Moreover, as noted above, not every statutory violation is *ipso facto* negligence per se. *King*, 37 S.W.3d at 460; *Rains*, 124 S.W.3d at 590. HomeTrust's blanket assertion that CTJ violated a number of enactments and, therefore, is liable for negligence per se, is insufficient to state a plausible claim for relief. Accordingly, the Court concludes that Count VII fails to state a claim for negligence per se.

### *C. Fraud Claims*

"Fed. R. Civ. P. 9(b) requires that averments of fraud must be stated with particularity." *Coffey v. Foamex* L.P., 2 F.3d 157, 161 (6th Cir. 1993). This requires "a plaintiff, at a minimum, to 'allege the time, place, and content of the alleged misrepresentation on which [it] relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.'" *Id.* at 161–62 (citation omitted); *see also Dauenhauer v. Bank of N.Y. Mellon*, 562 F. App'x 473, 481–82 (6th Cir. 2014). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

In Count III, Plaintiff asserts a claim for "fraudulent concealment/misrepresentation." Under Tennessee law, however, these are separate and independent claims. *See, e.g.*, *PNC Multifamily Capital Inst. Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 547–51 (Tenn. Ct. App. 2012) (addressing fraudulent misrepresentation and fraudulent concealment as separate causes of action). Additionally, Tennessee courts analyze claims for fraudulent concealment and constructive fraud as one in the same. *See id.* at 490–50 (quoting *Shadrick v. Coker*, 963 S.W.2d 726, 736 (Tenn. 1998)) ("Fiduciary relationship, confidential relationship, constructive fraud and fraudulent concealment are all parts of the same concept."); *Wigley v. Am. Equity Mortg.*, 2015 WL 7292562, at *6 (W.D. Tenn. Nov. 17, 2015) ("Under Tennessee law, the tort of fraudulent concealment, also known as 'constructive fraud,' occurs when 'a party who has a duty to disclose a known fact or condition fails to do so, and another party reasonably relies upon the resulting misrepresentation, thereby suffering injury.'"). Accordingly, the Court construes Count III as a claim for fraudulent misrepresentation and Count IV as one for fraudulent concealment/constructive fraud.

**1. Fraudulent Misrepresentation (Count III)**

Defendant's motion does not address Plaintiff's fraudulent misrepresentation claim. Instead, CTJ focuses only on the elements of fraudulent concealment, even though it acknowledges that fraudulent concealment and constructive fraud are synonymous. (*See* D.E. 10 at PageID 60–61.) Local Rule 7.1(b) provides that "[b]riefs shall include a concise statement of the factual and legal grounds which justify the ruling sought from the Court." Since Defendant made no attempt to develop an argument with respect to the fraudulent misrepresentation claim, the Court concludes that it has waived any such argument(s) at this stage. *See McPherson*, 125 F.3d at 995 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

**2. Fraudulent Concealment/Constructive Fraud (Count IV)**

As noted above, fraudulent concealment and constructive fraud are different names for the same cause of action. In *Shadrick*, the Tennessee Supreme Court explained this theory of relief as follows:

> [C]onstructive fraud and fraudulent concealment are all parts of the same concept. [T]he nature of the relationship which creates a duty to disclose, and a breach of [that] duty constitutes constructive fraud or fraudulent concealment, springs from the confidence and trust reposed by one in another, who by reason of a specific skill, knowledge, training, judgment or expertise, is in a superior position to advise or act on behalf of the party bestowing trust and confidence in him. Once the relationship exists "there exists a duty to speak . . . [and] mere silence constitutes fraudulent concealment."

*Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 549–50 (Tenn. Ct. App. 2012) (first alteration added) (quoting *Shadrick*, 963 S.W.2d at 736). To establish a claim of fraudulent concealment, a plaintiff must show:

> (1) an affirmative act by the defendant to conceal the cause of action *or* the failure to disclose material facts despite a duty to speak; (2) that the plaintiff "could not have discovered the cause of action despite exercising reasonable care and

> diligence"; (3) the defendant must be aware of the wrong; [and] (4) the "concealment of material information from the plaintiff."

*Estate of Morris v. Morris*, 329 S.W.3d 779, 784 (Tenn. Ct. App. 2009) (emphasis added) (quoting *Shadrick*, 963 S.W.2d at 735).

Regarding the first element, Tennessee courts "recognize[] two actionable types of concealment: [1] where the concealment constitutes a trick or contrivance and [2] when there is a duty to disclose." *Bluff City Cmty. Dev. Corp.*, 387 S.W.3d at 550. Under the first theory, "the affirmative action . . . must be something more than mere silence or a mere failure to disclose known facts. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry . . . ." *Benton v. Snyder*, 825 S.W.2d 409, 414 (Tenn. 1992). As to the latter approach, "[i]f a fiduciary relationship exists between the plaintiff and defendant, the party asserting fraudulent concealment need not show affirmative concealment of the cause of action, because 'the failure to speak where there is a duty to speak is the equivalent of some positive act or artifice planned to prevent inquiry or escape investigation.'" *Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d 712, 720 (Tenn. Ct. App. 2008) (quoting Shadrick, 963 S.W.2d at 735)).

Defendant avers that the complaint does not allege any "affirmative act" by it to conceal the purported errors in GWW's audited financial statements, and that "[m]erely alleging the [financial statements] contained errors is not enough." (D.E. 10 at PageID 57.) CTJ's characterization of HomeTrust's allegations is too narrow. As Plaintiff correctly points out, the complaint alleges that Defendant affirmatively represented that the company's audited financial statements "present[ed] fairly, in all material respects, the financial position of [GWW] as of December 31, 2016 and 2015" and that "the results of [GWW's] operations and its cash flows" for these years was in accordance with generally accepted accounting principles. (D.E. 18 at PageID 165; Compl. ¶ 23.) CTJ also represented that the company possessed more than $6,000,000 in

unrestricted current cash assets as of December 2016 and over $4,500,000 as of December 2015, and that it had $12,000,000 and $9,300,000 in members' equity as of December 31, 2016 and 2015, respectively. (Compl. ¶ 24.) HomeTrust further argues that Defendant's issuance of *unmodified* audit opinions was an affirmative act. (*Id.* ¶¶ 22, 29.) According to Plaintiff, a *modified* opinion should be supplied "when reasonable assurance regarding the accuracy of an entity's financial statements and representations thereof cannot be obtained." (*Id.* ¶ 18.) Construing the complaint in HomeTrust's favor, it claims that by issuing unmodified audit opinions CTJ affirmed that it was able to verify the accuracy of GWW's financial statements. These representations clearly go beyond mere silence or a failure to disclose, and Defendant does not explain exactly how these declarations fall short of affirmative acts.

CTJ further contends that the complaint "fails to demonstrate the 'concealment of material information' from Plaintiff." (D.E. 10 at PageID 58.) Defendant does not present any argument regarding the materiality of the information allegedly hidden, but rather vaguely avers that "without being able to provide more detail as to how [it] . . . actively concealed the information from [HomeTrust], [HomeTrust] has failed to demonstrate this requisite element necessary for a [f]raudulent [c]oncealment claim." (*Id.* at PageID 58–59.) Similarly, CTJ asserts that the complaint fails to satisfy Rule 9(b)'s heightened pleading standard because Plaintiff has not "sufficiently identif[ied] how it *knew* CTJ acted with a fraudulent intent." (*Id.* at PageID 59.)

Defendant, however, does not point to any particular portion of the complaint that it insists is lacking in detail, and the Court declines to search through the complaint for potential defects. *See City of Morristown v. BellSouth Telecomms., LLC*, 206 F. Supp. 3d 1321, 1337 (E.D. Tenn. 2016) ("Defendants' argument is two sentences long. Defendants do not identify any portion of the Complaint—paragraphs, phrases, or words—that is wanting in particularity. The Court is not

at liberty to scour the Complaint for defects that come within the wide net that Defendants have cast."); *see also McPherson*, 125 F.3d at 995–96; Local R. 7.1(b). Accordingly, the Court concludes that CTJ has not met its burden to dismiss Count IV of the complaint.[5]

**3. Aiding and Abetting (Count VI)**

In Count VI, Plaintiff alleges that Defendant aided and abetted GWW in committing fraud against it. Under Tennessee law, a claim for aiding and abetting requires a plaintiff to show that the defendant (1) "knew that his companions' conduct constituted a breach of duty," and (2) "gave substantial assistance or encouragement to them in their acts." *Bluff City Cmty. Dev. Corp.*, 387 S.W.3d at 552 (quoting *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 836 (Tenn. 1997)). Additionally, "civil liability for aiding and abetting requires affirmative conduct. Failure to act or mere presence during the commission of a tort is insufficient for tort accomplice liability." *Carr*, 955 S.W.2d at 836. Allegations of aiding and abetting fraud must be plead with particularity pursuant to Fed. R. Civ. P. 9(b). *Accord Mark IV Enters., Inc. v. Bank of Am., N.A.*, 2018 WL 3146305, at *3 (Tenn. Ct. App. June 26, 2018).

CTJ avers that HomeTrust fails to state a claim for aiding and abetting because the complaint does not include facts demonstrating that it had actual knowledge of GWW's wrongful conduct or that GWW engaged in such conduct. (D.E. 10 at PageID 64.) Defendant further points to paragraphs 108, 109, 111, and 115 of the complaint and insists that these allegations amount to nothing more than conclusory assertions that Defendant knew that GWW's financial statements

[5] The Court notes that while Defendant provided the legal framework regarding Plaintiff's second theory of fraudulent concealment—i.e., constructive fraud via the failure to disclose information when under a duty to do so—it did not present any arguments pertaining to this theory of concealment but rather incorporated its prior arguments, which did not address whether Defendant owed a duty to disclose or otherwise failed to disclose material information. (*See* D.E. 10 at PageID 60–61.) Since CTJ did not develop any argument on this point, it is deemed to have waived the issue. *McPherson*, 125 F.3d at 995–96.

were inaccurate. (*Id.*) The Court agrees that those four paragraphs simply mirror the elements of aiding and abetting; however, this does not end the Court's analysis as there are several factual allegations that HomeTrust relies on, which CTJ did not address.

As to GWW's breach of duty, Plaintiff claims that the nature of the four financial transactions described in the complaint is sufficient circumstantial evidence to show that the company concealed its true financial condition and, therefore, breached its duty to disclose. (D.E. 18 at PageID 170–72 (citing Compl. ¶¶ 30–37).) As for the two short-term personal loans made to Wyatt, (*see* Compl. ¶¶ 31–32, 35), HomeTrust avers that Defendant's repayment of these loans—with the proceeds therefrom—in the quarter following receipt is circumstantial evidence of the company's scheme to inflate its working capital in its financial statements so it could obtain financing. (D.E. 18 at PageID 170–71 (citing *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 535 (6th Cir. 2000), and *Great Am. Ins. Co. v. Poynter*, 2013 WL 1181445 (W.D. Ky. Mar. 20, 2013)).) Plaintiff further points to the fact that GWW's audited financial statements did not disclose that these loans had been repaid. Regarding the $4,500,000 member contribution, (*see* Compl. ¶ 33), HomeTrust similarly argues that this fact supports the inference that GWW was concealing the temporary nature of this transaction in its 2015 and 2016 financial statements by improperly netting this activity, instead of reporting it as cash inflows and outflows in the company's statements of members' equity or cash flows. Further, Plaintiff appears to contend that the company's characterization of Wyatt's unpaid debt, stemming from the 2014 note, as a current asset in its 2015 and 2016 audited financial statements is circumstantial evidence that GWW intentionally inflated its working capital.

Drawing all reasonable inferences in HomeTrust's favor, the Court concludes that the complaint alleges enough facts to demonstrate that GWW breached its duty to disclose by intentionally misrepresenting its working capital in its financial statements.

Turning to Defendant's knowledge of GWW's wrongful conduct, Plaintiff maintains that the circumstances surrounding the company's financial transactions is ample evidence to show that Defendant actually knew GWW's financial statements misrepresented its assets and liabilities. (D.E. 18 at PageID 170–71.) Specifically, HomeTrust avers that the prompt repayment of the $4,500,000 loan in 2015 and $6,000,000 loan in 2016 with the proceeds therefrom supports the inference that CTJ knew the company was obtaining sham loans to inflate its working capital. For the same reason, Plaintiff contends that the $4,500,000 member's equity contribution, which was deposited near the end of 2014 and distributed back to the member in early 2015, further demonstrates that Defendant, an accounting firm, knew that the company's reported assets were overstated. This argument is well taken.

In *Aetna*, the Sixth Circuit Court of Appeals concluded that there was "sufficient circumstantial evidence" to infer that the defendant-bank knew that its customer (a construction company) was engaging in fraudulent conduct based on (1) the defendant's understanding that its customer was seeking a loan so it could satisfy the capital requirements needed to obtain bonding from the plaintiff, (2) the customer's request that the funds be deposited by the end of the month, and (3) the customer's repayment of the loan four days later, even though the loan was structured as a thirty-day agreement. 219 F.3d at 535–36; *see also id.* at 536 ("[I]t was not unreasonable for the jury to believe that, as a bank officer who had previously processed loans for bonding purposes, [defendant] knew enough to realize that adding significant funds to a company's bank account for

only a four-day period would not serve to meet a bonding company's capitalization requirements.").

Similarly, in *Poynter*, where an insurer claimed that a bank aided and abetted a construction company's fraud, the court concluded that actual knowledge of the company's wrongdoing could be inferred from: (1) the fact that the bank knew the company planned to use the loans to obtain bonding from plaintiff; (2) the prompt repayment of the loans, despite the inclusion of a thirteen-month repayment plan; (3) the fact that the loans were placed in blocked accounts that the company could not access; (4) the company's use of the loan proceeds to pay off the same loan; and (5) the mischaracterization of a $500,000 loan as a member's contribution. 2013 WL 1181445, at *4. Notably, the court found that "the details of the particular loans were highly unusual," as they "were made for short periods of time straddling the years' end and the proceeds, which were used to repay the loans, were placed in blocked accounts." *Id.* at *5.

The Court finds these cases persuasive, as the particulars of GWW's financial activity is comparable to the transactions in *Aetna* and *Poynter*. In this case, Plaintiff has alleged that Defendant had an on-going accountant-client relationship with GWW and had prepared audited financial statements for the company at least three times. This fact is sufficient to establish that CTJ knew of GWW's intended use of its audit reports. Further, given the amount of Wyatt's short-term personal loans, the relatively prompt repayment of those loans, and that the funds were used to pay back those debts, it is reasonable to infer that Defendant knew GWW was using these monies to inflate its assets and conceal its actual working capital. Additionally, the value and temporary nature of the 2014 member contribution supports the conclusion that CTJ actually knew the company was intentionally inflating its assets.

Though discovery may reveal that Defendant did not have actual knowledge of GWW's allegedly fraudulent scheme, the Court concludes that the complaint provides enough facts to plausibly state a claim for aiding and abetting fraud.

**4. Civil Conspiracy (Count VIII)**

"The elements of a cause of action for civil conspiracy are: (1) a common design between two or more persons, (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) resulting injury." *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006) (citation omitted). The agreement, or common design, need not be a formal one, and "plaintiffs can prove the existence of a conspiracy through circumstantial evidence, including inferences from the relationships among the parties." *Willingham v. NovaStar Mortg., Inc.*, 2006 WL 6676801, 2006 U.S. Dist. LEXIS 97149, at *51 (W.D. Tenn. Feb. 7, 2006) (quoting *Echols v. A-USA*, 2001 U.S. Dist. LEXIS 25878, at *68–69 (W.D. Tenn. Aug. 29, 2001)). "Civil conspiracy also requires an underlying predicate tort allegedly committed pursuant to the conspiracy." *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1055 (W.D. Tenn. 2009) (internal quotation marks omitted) (quoting *Hauck Mfg. Co. v. Astec Indus., Inc.*, 375 F. Supp. 2d 649, 660 (E.D. Tenn. 2004)).

Defendant claims that paragraphs 124 and 125 of the complaint "are textbook conclusory allegations that merely regurgitate the elements of a civil conspiracy without any factual support." (D.E. 10 at PageID 67.) While CTJ is correct in that these two paragraphs are very much conclusory, it again ignores the factual allegations that form the foundation of Plaintiff's entire case: the four transactions discussed above. And, again, Defendant asserts that HomeTrust has not pled this claim with the necessary "degree of specificity," yet it omits any explanation as to

why Plaintiff's allegations are not specific enough—i.e., what information is lacking. For that reason, the Court declines to address CTJ's Rule 9(b) argument. *McPherson*, 125 F.3d at 995–96.

Next, Defendant maintains that the complaint does not demonstrate a common design or concerted action by it and GWW "other than [its] mere preparation of [GWW's] Audited Financial Statements," which "is not enough to form the basis of a civil conspiracy claim." (D.E. 10 at PageID 67–68.) However, "[w]hen considered in context . . . otherwise legitimate conduct can give rise to a negative inference." *Aetna Cas. & Sur. Co.*, 219 F.3d at 536 (citation omitted). As the Court has explained, the circumstances surrounding GWW's financial transactions support HomeTrust's proffered conclusion that the company was intentionally inflating its working capital in its financial statements and that Defendant actually knew such representations were false. Further, the Court agrees with Plaintiff's assertion that CTJ's issuance of unmodified audit opinions that affirmed the accuracy of GWW's financial statements is circumstantial evidence of a concerted action to deceive Plaintiff into lending the company money for which it did not otherwise qualify. Accordingly, the Court concludes that HomeTrust has stated a claim for civil conspiracy.[6]

***D. Tennessee Consumer Protection Act (Count V)***

The Tennessee Consumer Protection Act prohibits the use of "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(a). "To make out a claim under the TCPA, a plaintiff must establish: (1) an ascertainable loss of money or property; (2) that such loss resulted from an unfair or deceptive act or practice; and (3) that the act or practice is declared unlawful under the TCPA." *Bridgestone Am.'s, Inc. v. IBM Corp.*, 172

[6] Defendant also contends that Plaintiff's conspiracy claim fails because there is no underlying tort. (D.E. 10 at PageID 68.) The Court rejects this argument, as it has concluded that HomeTrust may proceed on its claims of fraudulent misrepresentation and fraudulent concealment/constructive fraud.

F. Supp. 3d 1007, 1019 (M.D. Tenn. 2016) (citing Tenn. Code Ann. § 47-18-109). The TCPA does not define "unfair" or "deceptive," but the Tennessee Supreme Court has defined these terms as "a material representation, practice or omission likely to mislead a reasonable consumer"; this includes, but is not limited to, "the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact." *Cloud Nine, LLC v. Whaley*, 650 F. Supp. 2d 789, 796–97 (E.D. Tenn. 2009) (citations omitted). "[W]hether a specific representation in a particular case is 'unfair' or 'deceptive' is a question of fact." *Id.* at 798 (alteration in original) (quoting *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005)). Moreover, "TCPA claims are subject to the higher pleading standard articulated in Rule 9(b)." *Bridgestone Am.'s, Inc.*, 172 F. Supp. 3d at 1019 (citations omitted); *accord Davis v. McGuigan*, 325 S.W.3d 149, 174 (Tenn. 2010) ("Claims under [the TCPA] must be alleged with the same specificity applicable to fraud claims.").

Defendant contends that the complaint provides "zero factual context to support Plaintiff's intent-based allegations." (D.E. 10 at PageID 63.) CTJ further insists that Count V does not satisfy Rule 9(b)'s heightened pleading standard as it "fails to go beyond a general, formulaic recitation of the elements of a TCPA claim." (*Id.*)

The Court rejects Defendant's arguments for two reasons. First, the Tennessee Supreme Court has held that "[t]o be considered deceptive" under the TCPA, "an act is not necessarily required to be knowing or intentional. Negligent misrepresentations may be found to be violations of the Act." *Fayne v. Vincent*, 301 S.W.3d 162, 177 (Tenn. 2009); *see also Davis v. McGuigan*, 325 S.W.3d 149, 174 (Tenn. 2010) ("In the proper circumstances, negligent misrepresentations may constitute an unfair or deceptive act or practice."). Thus, at this stage, Plaintiff's TCPA claim may proceed even if it omitted facts regarding fraudulent intent. Second, CTJ does not identify

any particular portion of the complaint that is lacking in particularity. As Defendant failed to develop this argument, the Court concludes that CTJ has not met its burden to dismiss Count V of the complaint. *See McPherson*, 125 F.3d at 995–96; *BellSouth Telecomms., LLC*, 206 F. Supp. 3d at 1337.

***E. Unjust Enrichment (Count IX)***

"The elements of an unjust enrichment claim are: (1) [a] benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005) (alteration in original) (internal quotation marks omitted) (quoting *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966)).

CTJ avers that the complaint fails to allege that HomeTrust conferred a benefit on it, as any benefit provided by HomeTrust was conferred upon GWW. (D.E. 10 at PageID 69.) In response, Plaintiff contends that it need not be in privity with Defendant to recover on its unjust enrichment claim and that Defendant received a benefit "when the object of its conspiracy—GWW obtaining a loan—was realized." (D.E. 18 at PageID 175–76.) Put differently, HomeTrust claims that GWW was unjustly enriched and that CTJ is liable as a co-conspirator.[7] (*Id.* at PageID 176.)

"A benefit is any form of advantage that has a measurable value including the advantage of being saved from an expense or loss." *Freeman Indus., LLC*, 172 S.W.3d at 525. "[A] plaintiff

[7] HomeTrust also insists that this claim "should be developed in discovery, which *may* reveal CTJ knew GWW needed audited financial statements specifically for Plaintiff, for the stated purpose of obtaining a loan, which *could* make Plaintiff a third-party beneficiary of the CTJ/GWW contract." (D.E. 18 at PageID 176 (emphasis added).) This argument is without merit, as the United States Supreme Court has made clear that to "unlock the doors of discovery," a plaintiff must first state a plausible claim for relief. *See, e.g.*, *Agema*, 826 F.3d at 332 (citing *Iqbal*, 556 U.S. at 678–79).

need not establish that the defendant received a direct benefit from the plaintiff. Rather, a plaintiff may recover for unjust enrichment against a defendant who receives *any* benefit from the plaintiff if the defendant's retention of the benefit would be unjust." *Id.* At the same time, however, an indirect benefit that is too attenuated from the plaintiff does not support a claim for unjust enrichment. *Coffey v. Coffey*, 578 S.W.3d 10, 26 (Tenn. Ct. App. 2018); *Abriq v. Hall*, 295 F. Supp. 3d 874, 882–83 (M.D. Tenn. 2018).

In the complaint, Plaintiff broadly alleges that it conferred "direct and indirect benefits" upon Defendant, (Compl. ¶ 130)); however, the only benefits identified in the complaint are "the benefits of [CTJ's] conspiracy with GWW" and the compensation CTJ received from GWW for the accounting services it provided. (*Id.* ¶¶ 130, 133.) Significantly, HomeTrust does not allege that it distributed any portion of the loan proceeds to Defendant, or that GWW shared such proceeds with Defendant or otherwise used that money to pay Defendant for the accounting services it rendered. Thus, Plaintiff's assertion that it conferred a direct benefit on CTJ amounts to a conclusory statement.

Moreover, even if HomeTrust did allege that GWW used the loan to pay Defendant for its services, such an indirect benefit, under these circumstances, is too tenuous to support an unjust enrichment claim against Defendant. *See In re TelexFree Sec. Litig.*, 358 F. Supp. 3d 112, 116 (D. Mass. 2019) ("The Plaintiffs' claims are based on Defendant's receipt of fees for accounting services. It was TelexFree, not the Plaintiffs, which conferred the alleged benefit on [Defendant]. Therefore, only TelexFree would have standing to assert a claim relating to the alleged benefit."). Accordingly, the Court concludes that Count IX of the complaint fails to state a claim against CTJ for unjust enrichment.

### *F. Miscellaneous Issues*

In its motion, Defendant also asks the Court to dismiss Plaintiff's claim for punitive damages. (D.E. 10 at PageID 70.) Since the Court has concluded that HomeTrust's fraud-related claims may proceed to discovery, and as there has been no discovery in this case, the Court finds CTJ's request to be premature. *See Cates v. Stryker Corp.*, 2012 WL 256199, at *7 (E.D. Tenn. Jan. 27, 2012).

As to Defendant's alternative request for a more definite statement, pursuant to Fed. R. Civ. P. 12(e), the Court concludes that Defendant has waived this argument by failing to develop any argument in support thereof. *McPherson*, 125 F.3d at 995–96. Additionally, the Court notes that Plaintiff's one-sentence request, inserted at the end of its response, for leave to amend its complaint is not well taken. If HomeTrust desires to amend its complaint, it must file a separate motion and brief in accordance with Fed. R. Civ. P. 15 and Local Rule 7.1.

## CONCLUSION

For the reasons above, Defendant's motion to dismiss is GRANTED IN PART and DENIED IN PART. Counts I, VII, and IX of the complaint are hereby DISMISSED.

IT IS SO ORDERED this 16th day of July 2020.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE