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

KENNETH R. BURD, JR., **Plaintiff,** **v.** **CHRISTOPHER MICHAEL RICHEY, KINDRED SHAY SMITH, GREENRISE TECHNOLOGIES, LLC, MID-TN ACQUISITION, LLC, MTESC HOLDINGS, INC., MTEP HOLDINGS, INC., MID-TN EROSION & SEDIMENT CONTROL, LLC, and MID-TN EROSION PRODUCTS, LLC,** **Defendants.**	)))))))))))))))	**Case No. 22-0926-BC**

<u>MEMORANDUM AND ORDER</u>

This matter came before the Court on October 24, 2022 upon three separate Motions to Dismiss the Complaint filed by various Defendants pursuant to Tenn. R. Civ. P. 12.02(6): Defendants Christopher Michael Richey ("Richey"), Kindred Shay Smith ("Smith"), METP Holdings, Inc. ("METP"), and MTESC Holdings, Inc. ("MTESC") (collectively the "Seller Defendants"); Defendants Mid-TN Erosion & Sediment Control, LLC ("New Erosion") and Mid-TN Erosion Products, LLC ("New Products") (collectively the "Operating Entities"); and Defendants Greenrise Technologies, LLC ("Greenrise") and Mid-TN Acquisition, LLC ("Mid-TN Acquisition") (collectively the "Greenrise Defendants").

Plaintiff alleges that Defendants engaged in a conspiracy to defraud him out of two companies that he owned with Defendants Richey and Smith. Plaintiff signed a Restrictive Covenant Agreement and received payment in exchange that he believed was for his ownership interest in the companies. Plaintiff filed this lawsuit on July 5, 2022 asserting the following causes of action against the following Defendants:

- Count I: Intentional Misrepresentation and Fraudulent Concealment – against Defendants Richey and Smith;
- Count II: Fraudulent Inducement to Contract – against Defendants Smith and Greenrise;
- Count III: Breach of Fiduciary Duty – against Defendant Smith;
- Count IV: Breach of Fiduciary Duty – Defendant Richey;
- Count V: Conspiracy to Defraud – against all Defendants;
- Count VI: Implied Partnership – against Defendants Richey, New Erosion and New Products;
- Count VII: Access to Company Books and Records of "Old Erosion" and "Old Products" – against Defendants New Erosion and New Products;
- Count VIII: Access to Company Books and Records of New Erosion and New Products – against Defendants New Erosion and New Products.

In the Complaint, Plaintiff seeks compensatory and punitive damages, a determination that the Restrictive Covenant Agreement is void and unenforceable, an order compelling access to company records and an accounting, a dissolution of the implied partnership between Plaintiff and Defendant Richey and distribution of all partnership property according to each partner's ownership interest, among other relief.

Legal Standard

A motion to dismiss based upon Tennessee Rule of Civil Procedure 12.02(6) requires a court to determine if the pleadings state a claim upon which relief may be granted. Tenn. R. Civ. P. 12.02(6); *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013). A Rule 12.02(6) motion challenges "only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). A defendant filing a motion to dismiss "admits the truth of all the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Id.* (quoting *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010)) (alteration in original) (internal quotation marks omitted). The resolution of such a motion is determined by examining the pleadings alone. *Id.; see also Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 237 (Tenn. 2014).

Factual Allegations in the Complaint

The introductory paragraph of the Complaint provides:

> This case arises from the Defendants' conspiracy to defraud Plaintiff Kenneth R. Burd and oust him from two companies he owned with Defendant Christopher Michael Richey, after Plaintiff informed a potential buyer, Defendant Greenrise Technologies, LLC, that he would only work under the new ownership structure after selling his shares if certain conditions were met. Rather than meet those conditions or otherwise negotiate with Plaintiff regarding his requests, Defendants Richey, Greenrise, and attorney/CPA Defendant Kindred Shay Smith embarked upon a scheme to defraud Plaintiff using the various other entities named as parties herein. Plaintiff asks this Court to remedy this wrong, order an accounting of the companies, and require Defendants to pay Plaintiff fair compensation for his ownership in the companies.

The body of the Complaint provides a more detailed discussion of the facts alleged, claims made and remedies sought. The below sets out those details as pled, taken as true for the purposes of these motions.

In 2004, Defendant Richey formed Mid-TN Erosion & Sediment Control, Inc. ("Old Erosion"), a Tennessee entity. Old Erosion provided erosion control and stormwater management services for commercial and residential contractors throughout the Mid-South. In November 2021, Defendant Richey filed Articles of Conversion with the Tennessee Secretary of State, converting Old Erosion to Defendant New Erosion, a Delaware entity.

In 2010, Defendant Richey formed Mid-TN Erosion Products, Inc. ("Old Products"), a Tennessee entity, and the companion company to Old Erosion, to handle the sale of materials and products for use by contractors and consumers for erosion control and stormwater management.

In November 2021, Defendant Richey filed Articles of Conversion with the Tennessee Secretary of State, converting Old Products to Defendant New Products, a Delaware entity.

In 2004, Plaintiff began working for Old Erosion, which at that time was solely owned by Defendant Richey, who relied upon Plaintiff to manage, operate, and build the company. In approximately 2007, Defendant Richey asked Plaintiff to become a partner in Old Erosion. Plaintiff declined and remained a salaried employee of Old Erosion. After Defendant Richey formed Old Products in 2010, Plaintiff also assumed responsibility for management and operation of Old Products.

In January of 2012, Defendant Richey filed a petition for Chapter 11 bankruptcy. In November of 2012, the Bankruptcy Trustee sought leave from the Bankruptcy Court to sell Defendant Richey's interests in Old Erosion, Old Products, and another company to an unrelated third party. Plaintiff contacted Defendant Richey and confronted him about the bankruptcy and the pending sale. Plaintiff and Defendant Richey agreed that if Defendant Richey retained his shares of Old Erosion and Old Products, Plaintiff would become a shareholder of both companies.

Defendant Richey purchased the companies at auction held by the Bankruptcy Trustee. In early 2013, Defendant Richey conveyed 25% ownership of Old Erosion to Plaintiff and 50% ownership of Old Products to Plaintiff. Defendant Richey's conveyance of shares to Plaintiff was documented in a written agreement that Defendant Smith prepared and that both Defendant Richey and Plaintiff signed. Defendant Smith kept this written agreement at his office and did not provide a copy of the agreement to Plaintiff.

From 2013 until November 2021, Plaintiff and Defendant Richey operated Old Erosion and Old Products as co-owners, sharing in the profits and accepting responsibility for the debts of both companies. During this time, Plaintiff and Defendant Richey were each paid a salary by Old

Erosion, and, when profits permitted, they received distributions of those profits in the form of bonuses. Plaintiff and Defendant Richey were both described as owners of Old Erosion and Old Products in communications with vendors, suppliers, customers, and employees, and were identified as the owners of Old Erosion on its website. Plaintiff and Defendant Richey both signed personal guaranties for loans obtained by Old Erosion, signed legal documents and contracts on behalf of Old Erosion and Old Products, and signed checks and accessed financial accounts on behalf of the companies. By 2019, through the efforts and management of Plaintiff, Old Erosion was grossing in excess of $15,000,000 annually.

As for Defendant Smith, he is licensed in Tennessee as an attorney and CPA. From approximately 2005 until 2008, Defendant Smith worked as an employee of Old Erosion, providing accounting and financial services to the company. In 2008, Defendant Smith formed Sterling Consulting Services, PLLC, through which he performed accounting services for clients. After forming Sterling Consulting and through November 2021, Defendant Smith continued to serve as advisor, attorney and CPA for Old Erosion and Old Products. During this time, Defendant Smith also provided legal and accounting services and advice to Plaintiff individually. Plaintiff relied upon Defendant Smith to prepare his personal tax filings and to guide him in his financial decisions. Plaintiff also relied upon Defendant Smith to prepare legal documents, including business formation documents, and to ensure that all the proper documentation was prepared for each of Plaintiff's endeavors, including his partnerships with Defendant Richey. For each of the business entities and partnerships in which Plaintiff has held an ownership interest since 2013, Defendant Smith maintained and safeguarded the entities' business and financial documents at the Sterling Consulting offices.

Beginning in approximately 2013, Plaintiff, Defendant Richey, and Defendant Smith met on a monthly basis at Old Erosion's offices. During these monthly meetings Plaintiff, Defendant Richey, and Defendant Smith reviewed the financial reports for each of the businesses that Plaintiff and Defendant Richey owned together, including Old Erosion and Old Products, and discussed business strategies and decisions for each company. Plaintiff trusted Defendant Smith to use his knowledge and experience as an attorney and CPA to guide Plaintiff to make decisions that were in Plaintiff's best interests and to ensure that Plaintiff was protected.

In or about September of 2020, Defendant Smith and Defendant Richey informed Plaintiff that an investor, Defendant Greenrise, was interested in purchasing Old Erosion and Old Products. Shortly after Defendant Greenrise's initial contact, Ray Derbecker, who was the Defendant Greenrise's CEO, met with Plaintiff and Defendant Smith at Sterling Consulting's offices to discuss the possibility of Defendant Greenrise purchasing Old Erosion and Old Products. Plaintiff then met alone with Mr. Derbecker and continued to discuss the prospective sale. During this discussion, Mr. Derbecker asked Plaintiff what he would want in order to continue working for the companies after the sale. Plaintiff informed Mr. Derbecker that he had four conditions that would need to be met: (1) assurance that the employees would be taken care of after the sale; (2) continued donations to the charities that Plaintiff supported; (3) continuation of Plaintiff's benefits; and (4) his desired salary. Mr. Derbecker responded that he believed they could meet two of the four requests, and that Plaintiff's requested salary was too high because Plaintiff would already be well-compensated for selling his ownership in Old Erosion and Old Products to Defendant Greenrise.

Not long after Plaintiff's discussion with Mr. Derbecker, Mr. Derbecker called Plaintiff and informed him that Defendant Greenrise was no longer interested in purchasing Old Erosion and Old Products. Within a few days of Defendant Greenrise's decision not to pursue its purchase of the companies, Defendant Smith called Plaintiff and asked him to meet Defendant Smith and Defendant Richey after work. During their meeting, Defendant Smith proposed that he close Sterling Consulting and begin working for Old Erosion full-time, in exchange for an annual salary of $350,000 plus 25% ownership of Old Erosion in order to grow the business. Plaintiff agreed to Defendant Smith's proposal.

Following this agreement and adjustment in ownership, Old Erosion had three shareholders: Defendant Richey, who owned 50%, and Plaintiff and Defendant Smith, who each owned 25%. In or about September of 2021, Defendant Smith called Plaintiff and asked Plaintiff to meet Defendant Richey and him for breakfast. During the breakfast, Defendant Smith informed Plaintiff that Defendant Greenrise had returned and was now offering a purchase price of $1,000,000 more, and that under this new offer, Defendant Greenrise did not intend to keep any of the current owners involved in the company after the sale. Plaintiff asked what would happen to his medical benefits and Smith replied that the new company would pay for medical benefits for 18 months after the sale. Defendant Richey was present for the entirety of the September 2021 breakfast, and he did not correct any of the representations Defendant Smith made to Plaintiff.

In or about mid-October of 2021, Defendant Smith told Plaintiff that Defendant Greenrise had changed its position and had convinced Defendant Smith to agree to work for the new companies for one year with a salary of $200,000 to assist in the transition to the new ownership. As the date of the sale approached, Defendant Smith confirmed to Plaintiff that under the terms of the sale, in addition to payout of the value of Plaintiff's ownership shares in Old Erosion and Old Products, the new company would continue to pay for Plaintiff's health insurance. Defendant Smith and Defendant Richey told Plaintiff that the total sale price to be paid by Defendant

Greenrise for both Old Erosion and Old Products was $15,000,000.[1] Defendant Smith and Defendant Richey told Plaintiff that he would receive a payout amount that corresponded to his ownership interest in the two companies.

On or about November 12, 2021, Defendant Smith asked Plaintiff to sign a document, a Restrictive Covenant Agreement, to complete his part in the sale of Old Erosion and Old Products, a copy of which is attached to the Complaint. Under the terms of the Restrictive Covenant Agreement, Plaintiff is prohibited from competing with Defendants New Erosion and New Products for a period of five years in an area encompassing a minimum of nine states. After Plaintiff signed the Restrictive Covenant Agreement, Defendant Smith and Defendant Richey gave Plaintiff a check that they told him represented Plaintiff's portion of the sale proceeds. At Defendant Smith's direction, Old Erosion treated the payment amount as wages and withheld taxes as though the amount represented wages. Plaintiff alleges this resulted in a significant over-withholding and harm to Plaintiff, as the tax rate for wages is substantially higher than the rate for capital gains. Plaintiff alleges Defendant Smith made false representations, which Defendant Richey heard but did not correct, in order to induce Plaintiff to agree to the sale of Old Erosion and Old Products, to not interfere with the sale, and to agree to and sign the Restrictive Covenant Agreement.

Of importance, the Restrictive Covenant Agreement included a release provision, which provided:

> 6. Release. In consideration for the proceeds to be received, directly or indirectly, by the Restricted Party (or an Affiliate thereof) in connection with the transactions consummated in accordance with this Agreement and the Purchase Agreement, and for such other good and valuable consideration, the value and receipt of which is hereby acknowledged by the Restricted Party, effective as of the Closing (the **"Effective Time"**), the Restricted Party, on behalf of the Restricted Party and each of the Restricted Party's Affiliates and their respective directors, officers,

[1] The Greenrise Defendants have admitted in their briefing that the purchase price was actually $18,000,000.

> employees, partners, members, managers, equityholders, agents, representatives, successors and assigns, hereby fully and unconditionally releases, acquits and forever discharges the Buyer, the Company and each of their respective past, present and future successors, predecessors, assigns, employees, employee benefit plans, agents, partners, members, managers, directors and officers (corporate or otherwise) and other Representatives (collectively, the **"Releasees"**) from any and all claims, actions, causes of action, suits, damages, judgments, expenses, demands and other obligations or Liabilities of any kind or nature whatsoever, known or unknown, fixed or contingent, past, present or future, in law or in equity, relating to, arising out of, or in connection with any claims that the Restricted Party may now have or may in the future have against the Company[2] or their respective subsidiaries, relating to any events occurring prior to the Effective Time (collectively, the **"Released Claims"**) and such Restricted Party shall not be entitled to recover and covenants not to sue to recover, and shall not encourage any Person to, directly or indirectly seek to recover any amounts in connection therewith or thereunder from the Releasees. Notwithstanding the foregoing, the parties hereto acknowledge and agree the "Released Claims" shall not include, and this Section 6 shall not affect, rights of the Releasees under or in respect of the Purchase Agreement or any Ancillary Agreements that survive the Closing. The releases contained in this paragraph are for the benefit of the Releasees and shall be enforceable by any of them directly against the Restricted Party. Each of the Releasees shall be an intended third-party beneficiary of this paragraph and is entitled to directly enforce the releases contained herein.

Prior to signing the Restrictive Covenant Agreement, on or about November 10, 2021, Defendant Richey formed four new companies: two limited liability companies in Delaware (Defendants New Erosion and New Products), and two corporations in Tennessee (Defendants METP and MTESC). Defendant Richey also signed Articles of Conversion dated November 10, 2021, converting Old Erosion into Defendant New Erosion and converting Old Products into Defendant New Products. Although Defendant Richey stated in the November 10, 2021 Articles of Conversion that all shareholders of Old Erosion and Old Products approved the plan of conversion, Plaintiff was never presented with or approved a plan of conversion, and was not asked to sign any document transferring or assigning his shares of Old Erosion and Old Products to any person or entity.

[2] The "Company" is defined as, each and collectively, defendants Mid-TN Erosion & Sediment Control, LLC and Mid-TN Erosion Products, LLC.

The amount of consideration Plaintiff received for signing the Restrictive Covenant Agreement is not stated in the document or in the Complaint. After signing the Restrictive Covenant Agreement, Plaintiff did not receive medical benefits and Defendant Smith, Defendant Richey, and Defendant Greenrise denied that Plaintiff had any ownership interest in Old Erosion and Old Products or that he had ever been anything more than an employee of either company. In February of 2022, Plaintiff sent a separate request to Defendant Smith seeking copies of all documents in Defendant Smith's possession, custody, or control concerning Plaintiff's real estate holdings, Plaintiff's businesses, and Plaintiff's personal finances and tax filings, but he only provided Plaintiff's individual tax returns for 2020 and documents related to the purchase or sale of some real property.

Plaintiff seeks an accounting of Old Erosion and Old Products, of their successors, Defendants New Erosion and New Products, and of the transaction that was represented to Plaintiff as being a complete purchase of Old Erosion and Old Products by Defendant Greenrise. In the event that an accounting confirms that Plaintiff received less consideration for his ownership in Old Erosion and Old Products than either Defendant Richey or Defendant Smith received per share (whether in cash or in other forms of consideration, including offers of employment), Plaintiff seeks an award of damages to compensate him for this harm. Plaintiff also seeks an award of damages to compensate him for the harm he has suffered as a result of Defendants' wrongful acts, and an order declaring that the fraudulently induced Restrictive Covenant Agreement is void and unenforceable.

Legal Analysis

<u>Greenrise Defendants/Buying Entities</u>

The Greenrise Defendants argue that this was an independent, arms-length transaction and that the gravamen of Plaintiff's complaint is not between Plaintiff and the Greenrise Defendants, but between him and his ex-partners, Defendants Richey and Smith, as Plaintiff alleges he did not receive his fair share of the sale proceeds and other benefits that were promised to him by Defendant Smith. Plaintiff brings two counts against the Greenrise Defendants: fraud in the inducement and civil conspiracy. The Greenrise Defendants allege that the Complaint fails to state a claim upon which relief can be granted because: (1) Plaintiff executed a full release in favor of the Greenrise Defendants and accepted consideration for same, but failed to follow the tender back rule, which the Court addresses separately below; (2) Plaintiff fails to allege any misrepresentation or omission by the Greenrise Defendants; and (3) Plaintiff fails to allege any improper unlawful overt act by the Greenrise Defendants in furtherance of the alleged conspiracy.

1) Fraudulent Inducement to Contract

As to the fraud claim, Plaintiff asserts that Defendant Greenrise acted intentionally to misrepresent the terms of the purchase agreement in order to induce him to sign the Restrictive Covenant Agreement. To be successful, a party making a fraudulent inducement claim has the burden of proving that the defendant (1) made a false statement concerning a fact material to the transaction (2) with knowledge of the statement's falsity or utter disregard for its truth (3) with the intent of inducing reliance on the statement, (4) the statement was reasonably relied upon, and (5) an injury resulted from this reliance. *Baugh v. Novak*, 340 S.W.3d 372, 388 (Tenn. 2011) (citing *Lamb v. MegaFlight, Inc.*, 26 S.W.3d 627, 630–31 (Tenn. Ct. App. 2000)).

The Greenrise Defendants contend that Plaintiff did not allege any misrepresentation or omission by the Greenrise Defendants. Upon review of the Complaint, the only allegations of misrepresentations pertain to Defendant Smith; there are no allegations that the Greenrise Defendants made any misrepresentations or had a duty to disclose to the Plaintiff. Instead, Plaintiff alleges that Defendant Smith made misrepresentations and was acting as an agent for Defendant Greenrise:

> 130. Defendant Smith made multiple representations to Plaintiff concerning Defendant Greenrise's offer to purchase Old Erosion and Old Products, including representing that neither Defendant Smith nor Defendant Richey would remain involved in the new companies after the sale, that Defendant Greenrise had changed its mind and convinced Defendant Smith to remain as an employee of the new companies for one year, that Defendant Greenrise was forced to keep Defendant Richey while an appeal was pending, that Defendant Richey was not receiving any compensation from Defendant New Erosion or Defendant New Products, that the new companies would pay for Plaintiff's medical insurance for 18 months after the sale, and that the document Plaintiff was asked to sign was the paperwork required to complete Plaintiff's part in the sale of Old Erosion and Old Products.
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> 131. Defendant Smith also misrepresented the nature of the transaction with Defendant Greenrise by concealing the fact that both Defendant Smith and Defendant Richey were going to receive ownership interests in Defendant New Erosion and Defendant New Products after the sale.
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> 132. These representations were false, and Defendant Smith knew or should have known that they were false at the time they were made. Defendant Smith made these misrepresentations and concealed material facts intentionally, willfully, maliciously, fraudulently, and/or recklessly and with the intent that Plaintiff rely upon them.
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> ***133. On or about November 12, 2021, on behalf of Defendant Greenrise, Defendant Smith asked Plaintiff to sign a document to complete his part in the sale of Old Erosion and Old Products.*** This document was a Restrictive Covenant Agreement, a true and correct copy of which is attached hereto as Exhibit 1.
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> ***134. By virtue of Defendant Greenrise appointing Defendant Smith to act as its agent or representative in obtaining Plaintiff's signature on the Restrictive Covenant Agreement, Defendant Smith's misrepresentations and omissions are imputed to Defendant Greenrise.***

> 135. In justifiable reliance upon these misrepresentations and without knowledge of the fraudulently concealed facts, Plaintiff signed the Restrictive Covenant Agreement.
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> 136. If Plaintiff had known that these representations were false and that Defendant Smith had concealed material facts, Plaintiff would have refused to sign the Restrictive Covenant Agreement.

(Emphasis added). Plaintiff argues that this Court can infer that Defendant Smith obtained Plaintiff's signature on the Restrictive Covenant Agreement at Defendant Greenrise's behest, since Defendant Greenrise was the only other party to the agreement.

In response, the Greenrise Defendants contend that Defendant Smith could not be the agent of Greenrise, as he was the seller's attorney, whom Plaintiff alleged also acted as his own attorney. To suggest that by obtaining his own client's signature Defendant Smith is somehow acting as the agent for the opposing party is not, Greenrise argues, a reasonable inference the Court can draw. In order to impute the actions of Defendant Smith onto Greenrise, Plaintiff would have to plead and prove that the actions of the principal, Greenrise, created actual or apparent agency. Absent such agency, the Greenrise Defendants argue, there is no allegation of misrepresentation or concealment by omission attributable to the Greenrise Defendants.

Determining whether an agency relationship exists requires an examination of the conduct and relationship between the parties. *Harben v. Hutton*, 739 S.W.2d 602, 606 (Tenn. Ct. App. 1987) (citing *V.L. Nicholson Co. v. Transcon Investment and Financial Ltd., Inc.*, 595 S.W.2d 474, 483 (Tenn. 1980); *Kerney v. Aetna Casualty and Surety Co.*, 648 S.W.2d 247, 252–53 (Tenn. Ct. App. 1982)). If the facts establish the existence of an agency relationship, it will be found to exist whether the parties intended to create one or not. *Id*. (citing *Smith v. Tennessee Coach Co.*, 194 S.W.2d 867, 869 (Tenn. 1946); *Kerney*, 648 S.W.2d at 252–53). An agency relationship cannot be proven by the extrajudicial statements of the agent alone. *Id*. (citing *John J. Heirigs Construction*

Co. v. Exide, 709 S.W.2d 604, 608 (Tenn. Ct. App. 1986); *Sloan v. Hall*, 673 S.W.2d 548, 551 (Tenn. Ct. App. 1984); *Testerman v. Home Beneficial Life Insurance Co.*, 524 S.W.2d 664, 670 (Tenn. Ct. App. 1974)). Its existence must be traceable to the principal, because an agency relationship is created by the actions of the principal, not the actions of the agent. *Id*. (citations omitted). It is also well settled that an agent may serve two masters simultaneously, so long as the objectives of one master are not contrary to the objectives of the other. *White v. Revco Disc. Drug Centers, Inc.*, 33 S.W.3d 713, 724 (Tenn. 2000) (citing *Monroe County Motor Co. v. Tennessee Odin Ins. Co.*, 231 S.W.2d 386, 394 (Tenn. Ct. App. 1950)).

Although the Court is required to construe the factual allegations in Plaintiff's favor, and therefore accept the allegations of fact as true, it is not required to give the same deference to conclusory allegations. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006) (citing *Riggs v. Burson*, 941 S.W.2d 44, 48 (Tenn. 1997)). Additionally, the Court is not required to accept as true the inferences to be drawn from conclusory allegations. *Id*. (citing *Riggs*, 941 S.W.2d at 48). Here, the Court cannot reasonably infer that Defendant Smith was acting as an agent of Defendant Greenrise, as Plaintiff has alleged that Defendant Smith was acting as his own attorney and Defendant Smith was adverse to the Greenrise Defendants. Plaintiff has failed to allege facts that would demonstrate any action attributable to Greenrise that would create an actual or apparent agency relationship with Defendant Smith. Having failed to establish an essential element of a claim for fraudulent inducement, this claim against the Greenrise Defendants cannot survive a motion to dismiss for failure to state a claim under Tenn. R. Civ. P. 12.02(6).

2) Conspiracy to Defraud

As for the conspiracy claim, the Greenrise Defendants argue that Greenrise took no overt action in furtherance of the conspiracy to defraud other than signing transaction documents.

Plaintiff brings this claim against all Defendants, alleging that they entered into a scheme to accomplish the sale of Old Erosion and Old Products and remove Plaintiff as a shareholder without his knowledge and participation in the terms of the sale.

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. *Morgan v. Brush Wellman, Inc.*, 165 F.Supp.2d 704, 720 (E.D. Tenn. 2001). Conspiracy claims must be pled with some degree of specificity. *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002) (citing *Haynes v. Harris*, No. 01A01-9810-CV-00518, 1999 WL 317946, at *2 (Tenn. Ct. App. 1999)). Conclusory allegations, however, unsupported by material facts will not be sufficient to state such a claim. *Id*.

Plaintiff alleges the following as to the Greenrise Defendants' overt acts in furtherance of the conspiracy to defraud in his Complaint:

> 169. Between November of 2020 and November of 2021, Defendant Smith, Defendant Richey, and Defendant Greenrise entered into a scheme to accomplish the sale of Old Erosion and Old Products and remove Plaintiff as a shareholder of the companies without Plaintiff's full knowledge and participation of the terms of the transaction.
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> . . .
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> 172. In furtherance of this scheme, Defendant Greenrise formed Defendant Acquisition and Defendant Richey formed Defendant New Erosion, Defendant New Products, Defendant Erosion Holdings, and Defendant Products Holdings. Each of these entities were used in furtherance of the conspiracy to defraud Plaintiff.
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> 173. In furtherance of this scheme, Defendant Greenrise and Defendant Richey, individually or through their newly formed entities named as Defendants herein, entered into an agreement for Defendant Greenrise's purchase of Old Erosion and Old Products.
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> 174. Despite Defendants' knowledge of Plaintiff's ownership interest in Old Erosion and Old Products, Defendants completed the sale of Old Erosion and Old Products without including Plaintiff as a party to the transaction.

> 175. As a direct and proximate result of Defendants' misconduct, Plaintiff has suffered and continues to suffer harm, including but not limited to: the difference between the consideration Plaintiff received for his shares in Old Erosion and Old Products and that received by Defendant Smith and Defendant Richey for their shares in Old Erosion and Old Products; the amount wrongfully withheld as taxes from Plaintiff's portion of the sale proceeds; and lost income and business opportunities due to the restriction on Plaintiff's ability to earn a living.
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> 176. In addition to compensatory damages, the misconduct of Defendants is such as to justify the imposition of punitive damages against Defendants in an amount sufficient to punish Defendants to deter Defendants and others similarly situated from ever engaging in similar misconduct again.

The Greenrise Defendants argue that this claim should be dismissed because Plaintiff failed to allege either an underlying unlawful purpose, or an unlawful means to accomplish a lawful purpose. They contend that they had the absolute right to form the acquisition entity, sign a contract to purchase the operating entities, and close on that contract. As the Complaint alleges, the Greenrise Defendants' purpose was to purchase a business, which would be a lawful purpose. Alternatively, Plaintiff must demonstrate that the Greenrise Defendants accomplished a lawful purpose by unlawful means. Having examined the factual allegations in the Complaint as they pertain to the actions of the Greenrise Defendants, the Court has concluded that the Complaint fails to state a claim that the Greenrise Defendants employed unlawful means to accomplish a lawful purpose. Plaintiff argues that the Greenrise Defendants entered into an agreement for the sale of the entities without Plaintiff as a party to the transaction, despite alleging that the CEO had previous knowledge that Plaintiff held an ownership interest. However, the Unit Purchase Agreement, which was attached to the Greenrise Defendants' Motion to Dismiss and specifically mentioned and incorporated into the Restrictive Covenant Agreement, included express written representations and warranties regarding ownership at that time and, further, that no representation or warranty of the sellers contained any untrue statement of a material fact or omitted to state a material fact.[3] There is nothing unlawful about a buyer purchasing a business and entering into an agreement in which the sellers represent and warrant that they are the sole owners. Therefore, not only was the purpose lawful but the means employed to accomplish the purpose as to the Greenrise Defendants were lawful as well. Having failed to establish an essential element of a claim for conspiracy, the conspiracy claim against the Greenrise Defendants cannot survive a motion to dismiss for failure to state a claim under Tenn. R. Civ. P. 12.02(6).

Tender Back Rule

All Defendants contend that Plaintiff's Complaint fails to state a claim because Plaintiff executed an agreement with a release and failed to tender back the consideration received. While the language in the release is incredibly broad and would likely encompass the claims at issue here, Defendants acknowledge the general rule that a release may be set aside if it was procured by fraud, and Plaintiff has alleged that he was fraudulently induced to sign the Restrictive Covenant Agreement. *Farley v. Clayton*, 928 S.W.2d 931, 934 (Tenn. Ct. App. 1996) (citing *Brundige v. Railroad*, 81 S.W. 1248 (Tenn. 1903); *Crigger v. Mutual Benefit Health & Accident Association*, 69 S.W.2d 907 (Tenn. Ct. App. 1933)). Nevertheless, Defendants contend that Plaintiff was required to follow the "tender back rule," which generally provides that "in an action to disaffirm a contract or agreement on the ground of fraud that party seeking to disaffirm and repudiate must do so promptly, and pay or tender back the consideration received as a condition precedent to his right to recover." *Memphis St. Ry. Co. v. Giardino*, 92 S.W. 855, 857 (Tenn. 1906); *see also*

[3] Although the Unit Purchase Agreement was not attached to the Complaint, the Court finds it can rely on this agreement without converting the motion to dismiss to one for summary judgment as it is integral to Plaintiff's claims and incorporated into the Restrictive Covenant Agreement and was referenced in the Complaint as part of the overall sale of the companies. "Numerous cases . . . have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment." *Indiana State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009) (quoting Wright and Miller, Federal Practice and Procedure, Civil § 1357, p. 376 (3d ed. 2004)).

Dobbins v. Dabbs, No. W2006-00322-COA-R3CV, 2007 WL 187960, at *9 (Tenn. Ct. App. Jan. 25, 2007) (citing *Smith v. Boyd*, 2 Tenn. App. 334 (Tenn. Ct. App. 1926)).

Plaintiff disputes that he is required to tender back funds under Tennessee law because the Restrictive Covenant Agreement did not involve a negotiated settlement of a disputed claim, relying on *Dobbins v. Dabbs* and *Betts v. Tom Wade Gin*. In *Dobbins*, the Court of Appeals analyzed whether plaintiff's claims were barred due to accord and satisfaction and found that they were, in part, because plaintiff failed to tender back the settlement payments rendering her attempted repudiation ineffective. *Dobbins*, 2007 WL 187960, at *9. The Court stated that "Tennessee adheres to the 'tender rule,' which recognizes that settlement agreements are binding until rescinded for cause, and that tendering back the consideration received is a condition precedent to the right to repudiate the settlement agreement." *Id*. (citing *Smith v. Boyd*, 2 Tenn. App. 334 (Tenn. Ct. App. 1926)). In *Betts*, the Supreme Court abandoned the rule of tender in workers' compensation cases in which the plaintiff seeks to set aside a prior settlement agreement. *Betts v. Tom Wade Gin*, 810 S.W.2d 140, 143 (Tenn. 1991). In creating this exception to the tender back rule, Plaintiff argues that the Supreme Court cited with approval decisions from Texas and Missouri; specifically, that "if the plaintiff is clearly entitled to a greater amount of compensation, 'he should not be required to make a tender' only to receive that money back again," *id*. (citing *Texas Employers Insurance Assn. v. Kennedy*, 143 S.W.2d 583, 585 (Tex. 1940)), and "this rule has its exceptions, one of which is that a releasor is not required to return that which he would in any event be entitled to retain by virtue of the original liability," *id*. at 144 (citing *Trokey v. United States Cartridge Co.*, 222 S.W.2d 496, 503 (Mo. App. 1949)). Thus, Plaintiff contends that there is no reference to a settlement or disputed claim creating an obligation to tender back the consideration received, and, further, that Plaintiff learned for the first time in the Greenrise

Defendants' Motion to Dismiss that the purchase price for the sale was $18,000,000, rather than the $15,000,000 he was purportedly told, and thus, he is entitled to receive a greater amount of compensation and is not obligated to tender back the amount he received.

To support their argument that the tender back rule applies, Defendants cite to *Tabor v. Allstate Ins. Co.*, No. CV 15-2602, 2015 WL 7756188 (E.D. Pa. Dec. 1, 2015), in which the court applied Tennessee law and granted a motion to dismiss plaintiffs' state law claims for breach of contract and breach of fiduciary duty, finding that the claims were barred by releases signed in connection with their termination, because plaintiffs' failure to tender back consideration received in exchange for signing the releases constituted a ratification of the releases. The court explained:

> The tender-back rule is a principle of contract law. According to this precept, if a party signs a contract releasing claims in exchange for consideration, the tender back of that consideration is an absolute prerequisite to avoidance of the release. *See* 17A Am. Jur. 2d Contracts § 574 ("[T]he general rule is that a party who wishes to rescind a contract must return the opposite party to the status quo."). Tennessee law requires the tender back of the consideration for the release within a reasonable time after discovering the alleged fraud if a party wishes to rescind and repudiate the release. *Mackey v. Judy's Foods, Inc.*, 867 F.2d 325, 329 (6th Cir. 1989) (citing *Cordell v. Sky Rides of Am., Inc.*, 404 S.W.2d 488, 489 (Tenn. 1966)); *see also Dobbins v. Dabbs*, No. Civ.A.2006-00322, 2007 WL 187960, at *9 (Tenn. Ct. App. 2007) (stating that return or tender of consideration for release or compromise is a condition in action for recission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise). "[T]ender or payment must be made so soon as the plaintiff asks the court to set aside the agreement; and he cannot be permitted to proceed with the original consideration in his hands, and test the judgment of the court whether he shall receive more. It is not a question of damage to the defendant, but of the right of the plaintiff to proceed." *Patterson v. Bivins*, No. Civ.A.97-70, 1987 WL 14828, at *5–6 (Tenn. App. 1987) (citing *Tuck v. Payne*, 6 Smith 192 (Tenn. 1929)); see also 66 Am. Jur. 2d Release § 57 (2d ed. 1973) (holding, under the tender-back requirement, that "one who seeks to avoid the effect of a release must first return or tender the consideration paid him in connection with his execution of the release"). The Tennessee Supreme Court has held that offering a credit on a potential recovery does not satisfy the tender requirement because there may never be anything due a plaintiff on the original claim. *Lane v. Dayton Coal & Iron Co.*, 48 S.W. 1094 (Tenn. 1899).

Tabor, 2015 WL 7756188, at *4.

The *Tabor* court cited the Restatement Second of Contracts § 381, which discussed what factors to analyze in considering what constituted a reasonable time to tender back consideration before a party was deemed to have ratified a contract. The Court noted that plaintiffs had signed the releases nearly fifteen years earlier, and since then, defendant had spent years litigating the state-law claims, having never received either the benefit of the bargain under the releases or the consideration it paid for that bargain. *Id.* at *4-5. The Court found that plaintiffs' failure to tender back the consideration received in exchange for signing the release constituted a ratification of those releases with respect to the state claims, reiterating that "[i]f a tender or offer of tender comes too late in an action, then the party seeking to avoid the release is estopped from rescinding that contract and is deemed to have ratified it." *Id*. at *4 (citing *Memphis St. Ry. Co.,* 92 S.W. at 858).

The Court finds that the tender back rule applies to the circumstances in this case, and that there are no applicable exceptions, as Plaintiff entered into an agreement and received consideration in exchange for what he believed was his ownership interest as well as agreeing not to compete and to release claims. The Court cannot agree with Plaintiff's narrow interpretation of the tender back rule that it only applies to settlement agreements, as it is a principle of contract law that generally provides "if a party signs a contract releasing claims in exchange for consideration, the tender back of that consideration is an absolute prerequisite to avoidance of the release." *Atwell v. Tennessee State Emps. Ass'n*, No. 3:14-CV-1808, 2015 WL 5697311, at *2 (M.D. Tenn. Sept. 28, 2015) (citing 17A Am.Jur.2d Contracts § 574 ("[T]he general rule is that a party who wishes to rescind a contract must return the opposite party to the status quo.")). Plaintiff's interpretation would further undermine the general purpose of the rule—that it would be inconsistent and unjust to permit one to attack a contract he has executed and at the same time retain the benefits received therein. *See Tabor*, 2015 WL 7756188, at *4 (citing *Patterson v. Bivins*, No. Civ.A.97-70, 1987

WL 14828, at *5-6 (Tenn. App. 1987); *Tuck v. Payne*, 6 Smith 192 (Tenn. 1929) ("[T]ender or payment must be made so soon as the plaintiff asks the court to set aside the agreement; and he cannot be permitted to proceed with the original consideration in his hands, and test the judgment of the court whether he shall receive more. It is not a question of damage to the defendant, but of the right of the plaintiff to proceed.")); *see also* 66 Am. Jur. 2d Release § 57 (2d ed. 1973) (holding, under the tender-back requirement, that "one who seeks to avoid the effect of a release must first return or tender the consideration paid him in connection with his execution of the release").

Plaintiff has neither made a tender back nor offered to tender back the consideration he received in exchange for the Restrictive Covenant Agreement and release therein. He seeks to find the Restrictive Covenant Agreement void and unenforceable, but also claims he is entitled to additional compensation. Since Plaintiff has failed to comply with the tender back rule, his claims should be dismissed. However, the Court will entertain a Motion to Amend the Complaint if Plaintiff tenders back the monies received. Whether such tender, if made, was done within a reasonable time requires further analysis based on potential factual implications. *See Tabor*, 2015 WL 7756188, at *4 (citing Restatement (Second) Contracts § 381(3) (1981)).

Conclusion

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Greenrise Defendants' Motion to Dismiss is GRANTED. Therefore, Count II Fraudulent Inducement to Contract and Count V Conspiracy to Defraud against the Greenrise Defendants are hereby DISMISSED with prejudice for failure to state a claim upon which relief may be granted. The Greenrise Defendants are dismissed as defendants in this action.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Operating Entities' Motion to Dismiss is DENIED at this time.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Seller Defendants' Motion to Dismiss is DENIED at this time.

The Court finds that Plaintiff is required to tender back the consideration he received and amend his Complaint to reflect compliance with this obligation before the litigation continues. If Plaintiff fails to tender back the consideration and file a motion to amend within forty-five (45) days of this Order, the remaining Defendants may renew the motions to dismiss, and the Court will enter a Final Order dismissing the Complaint without prejudice.

It is so ORDERED.

s/Anne C. Martin
ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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