UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 6:20-cv-00877-PGB-DCI

ADVENTIST HEALTH SYSTEM SUNBELT CORPORATION, a Florida not for profit corporation,

Plaintiff,

vs.

DISPOSITIVE MOTION[1]

MICHAEL H. WEISS, P.C., a California professional corporation, MICHAEL H. WEISS, a California resident, TOMAX CAPITAL MANAGEMENT, INC., a California corporation, and YEHORAM TOM EFRATI, a California resident,

Defendants.
_____/

MOTION OF DEFENDANTS MICHAEL H. WEISS, P.C. AND MICHAEL H. WEISS TO DISMISS FIRST AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Rules 9(b), 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure and Local Rule 3.01, Defendants Michael H. Weiss, P.C. and Michael H. Weiss individually, move to dismiss Counts IV, V, VIII, IX, and XI of Plaintiff's First Amended Complaint (the "Complaint") [D.E. 19].[2]

[1] Dispositive as to Defendant, Michael H. Weiss, individually.

[2] While the Law Firm has not moved to dismiss all counts of Plaintiff's Complaint, it should not be required to file an answer to any portion of the Complaint until after this Court rules on this Motion to Dismiss. *See, e.g., Uccello Immobilien GMBH, Inc. v. Steel Bridge Capital, LLC*, 2007 WL 9702755, at *3, Case No. 07-21018-CIV-ALTONAGA/Turnoff (S.D. Fla. July 2, 2007) ("'[S]ignificant case law and one of the most authoritative treatises on Federal Practice and Procedure [support] the position that, when a defendant files a Rule 12(b)(6)

I. INTRODUCTION

Plaintiff, Adventist Health System Sunbelt Corporation ("AdventHealth"), has sued multiple Defendants – (1) the law firm of Michael H. Weiss, P.C. (the "Law Firm"); (2) Michael H. Weiss ("Weiss"), an attorney, president and manager of the Law Firm; (3) Tomax Capital Management, Inc. ("Tomax"); and (4) Yehoram Tom Efrati ("Efrati"), CEO of Tomax – for the alleged "wrongful release, receipt, and retention" of money paid by AdventHealth to the Law Firm to hold in escrow. [D.E. 19, ¶ 11].

AdventHealth has sued the Law Firm and Weiss for claims of breach of contract, breach of fiduciary duty, conversion, conspiracy to commit conversion, conspiracy to defraud, and civil theft. As set forth below, the claims against Weiss, individually, should be dismissed for several reasons, including because the Court lacks personal jurisdiction over him and because Weiss is not a party to the Paymaster Agreement in his individual capacity, and there is no basis to pierce the corporate veil to impose personal liability on him. The conspiracy to commit conversion and conspiracy to defraud claims against Weiss and the Law Firm should also be dismissed for failure to state a plausible claim against either of those Defendants.

II. FACTUAL BACKGROUND GIVING RISE TO PLAINTIFF'S CLAIMS[3]

On or about April 8, 2020, AdventHealth contracted with Tomax to purchase 10,000,000 3M N95 1860 ventilator masks for $57,500,000 (the "Purchase Order"). [D.E. 19,

motion to dismiss, addressing only some of the claims contained in the plaintiff's complaint, the defendant is not required to file an answer until the Court rules on the motion to dismiss.'"); *Gray v. Nationstar Mortg., LLC*, 2014 WL 12139086, at *2, No. 1:14-CV-0431-WBH (N.D. Ga. Aug. 4, 2014).

[3] This factual background is drawn from the allegations in the Complaint. [D.E. 19]. The Law Firm and Weiss acknowledge that Plaintiff's allegations are taken as true solely for the purpose of considering this Motion, but these Defendants neither endorse nor admit any of the allegations and characterizations in the Complaint.

¶ 14]. The parties incorporated the terms of the Purchase Order into a Paymaster Agreement dated April 9, 2020 (the "Paymaster Agreement"), attached to the Complaint as Exhibit "A." *Id.*, ¶ 16; [D.E. 19-1]. The parties to the Paymaster Agreement are: (1) AdventHealth; (2) Tomax; and (3) the Law Firm, as Paymaster. *Id.* Weiss signed the agreement as the Law Firm's "President," not individually. [D.E. 19, ¶ 51; ¶17 ("Under the Paymaster Agreement, the ***Law Firm*** agreed to serve as the escrow agent and abide by the Payment Instructions.") (emphasis added); D.E. 19-1]. The Law Firm agreed to hold the money received from AdventHealth in its IOLTA account until certain conditions under the Paymaster Agreement had been satisfied. [D.E. 19, ¶ 18; D.E. 19-1]. AdventHealth wired $57,500,000 to the Law Firm's IOLTA account (the "Escrow Funds"). [D.E. 19, ¶¶ 18-19].

AdventHealth alleges that Tomax did not: perform its obligations under the Paymaster Agreement; provide AdventHealth with a redacted 3M distributor invoice; and deliver the masks to AdventHealth. *Id.* at ¶¶ 24-25. It alleges the conditions to the release of the Escrow Funds to Tomax were never satisfied and, after Tomax defaulted and breached its contractual obligations, the Law Firm had a duty to return the funds to AdventHealth. *Id.* at ¶¶ 22, 26-28.

AdventHealth notified the Law Firm, Weiss, and Efrati of Tomax's breach and directed a return of the Escrow Funds to AdventHealth. *Id.* at ¶ 29. AdventHealth alleges that, on May 15, 2020, the Law Firm and Mr. Weiss returned $55,500,000 of the Escrow Funds to AdventHealth, but AdventHealth was still missing $2,000,000 of the Escrow Funds. *Id.* at ¶¶ 39-40. AdventHealth advised Efrati that it had received partial payment of the Escrow Funds and inquired when the remaining funds would be returned to it. *Id.* at ¶ 42. ***Efrati*** responded, "It was a huge issue since yesterday because the bank compliance stop[p]ed the transfer. The

flag the account [sic] and didn't release it till almost 2pm. The full balance will be wire[d] Monday [May 18, 2020] morning, it's about $2M." *Id.* at ¶¶ 43, 145. According to AdventHealth, "Mr. Efrati's email indicates ***he had control*** over the Escrow Funds and knew where the funds were deposited. Yet, ***Mr. Efrati*** refused and failed to return AdventHealth's money." *Id.* at ¶ 146 (emphasis added). As alleged, "***Tomax failed to transfer the remaining balance*** of the Escrow Funds to AdventHealth ***as promised by Mr. Efrati***" by May 18. *Id.* at ¶ 44 (emphasis added); *id.* at ¶ 144 ("… Mr. Efrati refused to refund the balance due to AdventHealth, despite his knowledge of the various breaches by the Defendants and ***his control over*** the Escrow Funds at that time.") (emphasis added). Weiss confirmed to AdventHealth that the remaining balance of the Escrow Funds was in Tomax's possession. *Id.* at ¶ 47.

AdventHealth claims that the Defendants schemed to deprive it of $2,000,000 of the Escrow Funds with no intention to perform their contractual obligations or, alternatively, intentionally refused to perform. *Id.* at ¶ 50. It alleges that the Law Firm and Weiss knew that the conditions precedent in the Paymaster Agreement had not yet been satisfied, and nevertheless transferred the Escrow Funds to Tomax, Efrati, or Weiss. *Id.* at ¶¶ 51-52.

AdventHealth has sued the Law Firm for Breach of Contract (Count I). Additionally, AdventHealth has sued both the Law Firm and Weiss for: Conversion (Counts II and IV); Breach of Fiduciary Duty (Counts III and V); Civil Conspiracy to Commit Conversion (Count VIII); Civil Conspiracy to Defraud (Count IX); and Civil Theft (Counts X and XI).[4]

[4] AdventHealth has sued Tomax for breach of contract and conversion, and has sued Tomax and Efrati for conspiracy to commit conversion and conspiracy to defraud.

All of the Counts against Weiss, individually (Counts IV, V, VIII, IX, and XI) and Counts VIII and IX against the Law Firm should be dismissed for the reasons set forth below.

III. MEMORANDUM OF LAW

A. Standard for Motion to Dismiss for Failure to State a Claim.

A court shall grant a motion to dismiss where, based upon a dispositive issue of law, the factual allegations of the complaint cannot support the asserted claim. Fed. R. Civ. P. 12(b)(6); *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006); *Hernandez v. Two Bros. Farm, LLC*, 579 F. Supp. 2d 1379, 1382 (S.D. Fla. 2008). While a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1949 (2009), the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Although this pleading standard 'does not require detailed factual allegations, . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Iqbal*, 556 U.S. at 663.

Thus, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 663 (*quoting Twombly*, 550 U.S. at 570); *see also James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (citation omitted); *Solomon v. Blue Cross & Blue Shield Ass'n*, 574 F. Supp. 2d 1288, 1291 (S.D. Fla. 2008). To meet this "plausibility standard," a plaintiff must "plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663; *see also Hernandez*, 579 F. Supp. 2d at 1382 (*quoting Twombly*, 127 S. Ct. at 1965) ("[T]he basis

for relief in the complaint must state 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'"). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Ashmore v. F.A.A.*, 2011 WL 3915752, at *1, Case No. 11-CV-60272 (S.D. Fla. Sept. 2, 2011) (citation omitted). Pleadings that "are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 664; *Sinaltrainal v. Coca–Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) ("'[U]nwarranted deductions of fact' in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations.").

In analyzing the legal sufficiency of a complaint, the Court may consider documents central to or referenced in the complaint. *Horsley v. Univ. of Ala.*, 564 Fed. App'x 1006, 1008 (11th Cir. 2014). Accordingly, this Court may consider the Paymaster Agreement, attached as Exhibit "A" to the Complaint, in determining the merits of this Motion to Dismiss.

B. The Court Lacks Personal Jurisdiction Over Weiss.

All claims against Weiss (Counts IV, V, VIII, IX, and XI) should be dismissed because the Court lacks personal jurisdiction over him. "As a general rule, courts should address issues relating to personal jurisdiction before reaching the merits of a plaintiff's claims." *Argos Global Partner Svcs., LLC v. Ciuchini*, 2020 WL 1166719, at *7, Case No. 18-23070-CIV-ALTONAGA/Goodman (S.D. Fla. Mar. 11, 2020) (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 940 (11th Cir. 1997)). "Unless waived or forfeited, personal jurisdiction is 'an essential element of the jurisdiction of a district court, without

which the court is powerless to proceed to an adjudication.'" *Mengle v. Goldsmith*, 2011 WL 1058852, at *3, Case No. 2:09-CV-46-FtM-29SPC (M.D. Fla. Mar. 21, 2011).

Federal courts sitting in diversity jurisdiction undertake a two-step inquiry in determining whether personal jurisdiction exists. *Auf v. Howard Univ.*, 2020 WL 1452350, at *5, Case. No. 19-22065-CIV-SMITH (S.D. Fla. Mar. 25, 2020). First, federal courts must examine whether the state long-arm statute – in this case, Florida Statute Section 48.193 (the "Long-Arm Statute") – provides jurisdiction over the nonresident defendant, and the statute is to be construed as it would be by the state's supreme court. *Id.*; *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1265 (11th Cir. 1998); *Schwab v. Hites*, 896 F. Supp. 2d 1124, 1131 (M.D. Fla. 2012) ("The reach of Florida's long-arm statute is a question of Florida law."); *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989); *see also Wendt v. Horowitz*, 822 So. 2d 1252, 1257 (Fla. 2002).

Second, if the requirements of the Long-Arm Statute are satisfied, the Court must then determine "whether sufficient 'minimum contacts' are demonstrated to satisfy due process requirements" of the Fourteenth Amendment to the United States Constitution. *Auf*, 2020 WL 1452350, at *5; *Venetian Salami*, 554 So. 2d at 502. Determining whether jurisdiction is appropriate under the Long-Arm Statute is a separate inquiry from determining whether exercising personal jurisdiction comports with due process – both parts must be satisfied for a court to exercise personal jurisdiction over a non-resident defendant. *Melgarejo v. Pycsa Panama, S.A.*, 537 F. App'x 852, 859 (11th Cir. 2013); *Netsurion, LLC v. Asurion, LLC*, 2019 WL 27116236, Case No. 19-CIV-60898-RAR (S.D. Fla., June 28, 2019).

To determine whether a defendant is subject to the Court's jurisdiction, a complaint must allege sufficient facts that meet the pleading requirements in Federal Rule of Civil Procedure 8.[5] Conclusory statements are afforded no credence. *Iqbal*, 556 U.S. at 664 (Pleadings that "are no more than conclusions, are not entitled to the assumption of truth."). Weiss has submitted with this Motion a supporting Declaration[6] factually denying and challenging both specific and general jurisdiction, thereby shifting the burden to AdventHealth to not merely allege, but ***to prove*** – through affidavits, testimony, or other documents – that this Court can exercise personal jurisdiction over Weiss. *Argos Global*, 2020 WL 1166719, at *8. (citations omitted).

The personal jurisdiction allegations in Paragraph 3 of the Complaint improperly lump together all Defendants[7] and their alleged contacts to Florida as follows:

> This Court has personal jurisdiction over Defendants because there are sufficient minimum contacts between each Defendant and Florida. The parties' Paymaster Agreement provides that jurisdiction and venue is appropriate in this Court. *See* Exhibit "A." Defendants breached their respective duties that arise from their contractual and business relationship with AdventHealth, and they are engaged in substantial and not isolated activity within Florida, which is more fully set forth below but includes: (a) Tomax's agreement to deliver the product to AdventHealth in Orlando, Florida; (b) Mr. Weiss, Tomax, the Law Firm, and Efrati each communicating by phone and email with AdventHealth and its representatives in AdventHealth's Florida headquarters; and (c) Mr. Weiss, Tomax, the Law Firm, and Efrati each making misrepresentations to

[5] *See Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) ("When, as here, personal jurisdiction is found wanting on the basis of the complaint and affidavits, our review of the district court's dismissal is *de novo*, taking as true all well-pled (that is, plausible, non-conclusory, and non-speculative, *see* [*Twombly*, 127 S.Ct. at 1964-65] facts alleged in plaintiffs' complaint.").)

[6] The Declaration is attached as **Exhibit "A"** and is cited herein as "Weiss Decl., ¶ ___."

[7] "In a case with multiple defendants, the complaint should contain specific allegations with respect to each defendant; generalized allegations 'lumping' multiple defendants together are insufficient." *West Coast Roofing & Waterproofing, Inc. v. Johns-Manville, Inc.*, 287 Fed. Appx. 81, 86 (11th Cir. 2008); *Yahav Enters. LLC v. Beach Resorts Suites LLC*, 2016 WL 111361, at *3, Case No. 1:15-cv-22227-KMM (S.D. Fla. Jan. 11, 2016).

> AdventHealth and its Florida representatives to conceal and retain AdventHealth's funds. *See, e.g., infra* ¶¶ 13, 15, 31, 33, 35, 37, 43 & 47.[8] The harm intended and caused by the Defendants' actions is occurring in Florida.

[D.E. 19, ¶ 3]. The Complaint pleads no facts that show that Weiss individually had any contractual or business relationship with AdventHealth – that relationship was with the Law Firm and Tomax. *Id.* at ¶¶ 16-17]. But for acting on behalf of the Law Firm in its role as paymaster, AdventHealth has alleged no acts by Weiss in Florida. There is no factual basis in the Complaint for AdventHealth's averment that Weiss (or the Law Firm for that matter) "engaged in substantial and not isolated activity within Florida." Any actions by Weiss occurred from his location in California, and AdventHealth does not allege otherwise. [Weiss Decl., ¶¶ 10, 16].

1. No Personal Jurisdiction Exists Over Weiss, Individually, Under Florida's Long-Arm Statute.

Florida's Long-Arm Statute provides for two forms of personal jurisdiction: (1) specific and (2) general. Fla. Stat. §§ 48.193(1) and (2). ***Specific*** jurisdiction exists where a defendant's activities or actions are directly connected to the forum state. *Argos Global*, 2020 WL 1166719, at *7. ***General*** jurisdiction "is based on a defendant's substantial activity in [a state] without regard to where the cause of action arose." *Id.* The Complaint does not support the exercise of personal jurisdiction over Weiss on either ground.

[8] Only Paragraphs 31, 33, 37, and 47 of the Complaint pertain to Weiss, and those are addressed on pages 16-17, *infra*. The rest of the Paragraphs cited by Plaintiff pertain to representations made by Tomax and/or Efrati.

a) Specific Jurisdiction

The Long-Arm Statute outlines nine acts that could submit a nonresident defendant to the specific jurisdiction of Florida courts. Fla. Stat. § 48.193(1)(a). To provide a basis for specific jurisdiction, the act itself must give rise to the cause of action. Fla. Stat. § 48.193(1)(a) ("A person . . . submits himself . . . to the jurisdiction of the courts of this state for any cause of action ***arising from any of the following acts***: . . .") (emphasis added).

AdventHealth alleges that this Court has personal jurisdiction over Defendants because, *inter alia*, the Paymaster Agreement provides that jurisdiction is appropriate in this Court and "Defendants breached their respective duties that arise from their contractual and business relationship with AdventHealth . . . ." [D.E. 19, ¶ 3]. Based on that jurisdictional allegation, AdventHealth is travelling under Section 48.193(1)(a)(7) to allege specific jurisdiction – *i.e.*, breaching "a contract in this state by failing to perform acts required by the contract to be performed in this state." This provision of the Long-Arm Statute "must be strictly construed in order to guarantee compliance with due process requirements." *Olson v. Robbie*, 141 So. 3d 636, 641 (Fla. 4th DCA 2014) (citations omitted)

Paragraph 24 of the Paymaster Agreement contains a "prorogation," or exclusive forum selection, clause conferring personal jurisdiction in this Court over the ***parties*** to that agreement – AdventHealth, Tomax, and the Law Firm. Such agreements are *prima facie* valid and binding, and can supply the minimum contacts necessary to confer personal jurisdiction over ***the parties to the contract***. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-16 (1972); *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 472 n. 14 (1985) (a forum-selection clause meets the due process standard if "freely negotiated" and not "unreasonable and

unjust."). "A prorogation clause generally binds ***only the parties to the agreement*** and, thus, may not be binding on third parties, even though the action arises out of the contract or transaction to which the clause relates." 16 *Moore's Federal Practice - Civil* § 108.53 (2020) (emphasis added).

Weiss is not a party to the Paymaster Agreement, and AdventHealth does not allege otherwise. Weiss signed the Paymaster Agreement, attached as Exhibit "A" to the Complaint, on behalf of Michael H. Weiss, P.C., as "Its President." [D.E. 19, ¶ 51; D.E. 19-1, p. 6]; *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (Where the exhibits to a complaint contradict the conclusory allegations of the complaint, the exhibits control). Further, nothing in the Paymaster Agreement or the Complaint suggests that Weiss, individually, was personally required to perform any contractual obligations ***in Florida***. Likewise, nothing suggests that the Law Firm was required to perform any contractual obligations ***in Florida***. *Olson*, 141 So. 3d at 640 (holding a defendant is not subject to personal jurisdiction under § 48.193(1)(a)(7) if he can perform an act under the contract from a location other than Florida). The acts that the Law Firm was to perform under the Paymaster Agreement were receipt of payments into and disbursement out of its IOLTA account that it maintained at a bank in California – nothing more. [D.E. 19, ¶¶ 18-19, 23; D.E. 19-1, p. 1, "Transaction Procedures"]. Thus, Section 48.193(1)(a)(7) does not confer personal jurisdiction over Weiss.

AdventHealth also appears to rely on Section 48.193(1)(a)(2) to allege specific jurisdiction – *i.e.*, "[c]ommitting a tortious act within this state." That prong of the Long-Arm Statute is also not satisfied. The Complaint alleges no tortious acts that Weiss personally committed ***in Florida***. AdventHealth complains about acts that allegedly occurred in

California. Again, under the Paymaster Agreement, in the section titled "Transaction Procedures," and as alleged in the Complaint at Paragraph 18, AdventHealth paid funds into the Law Firm's IOLTA account which it maintains in California. [D.E. 19, ¶¶ 17-18, D.E. 19-1, p. 1; Weiss Decl., ¶ 15]. The Complaint then alleges, in a conclusory and contradictory fashion, that the Law Firm improperly paid out $2,000,000 from that account to either Tomax, Efrati, or Weiss – all parties located and domiciled in California. [D.E. 19, ¶¶ 6-9, 52].[9]

The essence of the torts alleged against Weiss are the mishandling of escrow funds, none of which occurred in Florida. *See Wendt*, 822 So. 2d at 1260; *Auf*, 2020 WL 1452350, at *7 (dismissing complaint for lack of personal jurisdiction, where alleged duties of care and breach of those duties did not occur in Florida); *Hirsch v. Weitz*, 16 So. 3d 148, 151 (Fla. 4th DCA 2009) (reversing trial court order denying dismissal of legal malpractice action, holding that any claim accrued in New York where the necessary legal work was performed).

Weiss took no actions in Florida in connection with the claims at issue. The mere fact that he had communications with AdventHealth's representatives – after the Paymaster Agreement was entered into between AdventHealth, Tomax, and the Law Firm and after Tomax failed to deliver the masks to AdventHealth – is insufficient to confer specific jurisdiction over Weiss in this forum. *Musiker v. Projectavision, Inc.*, 960 F. Supp. 292, 296 (S.D. Fla. 1997) (alleged fraudulent representations made telephonically by former officer of defendant company to induce plaintiff to purchase stock were not committed in Florida, as required for personal jurisdiction under tortious activity subsection of Florida long-arm

[9] Notably, as confirmed by the Complaint's allegations, after the Law Firm returned $55,500,000 to AdventHealth, Weiss advised AdventHealth that Tomax had the other $2,000,000, ***which Efrati essentially confirmed and promised to return to AdventHealth***. *See, e.g.*, D.E. 19, ¶¶ 39, 43-44, 47, 145-46.

statute); *see also Koock v. Sugar & Felsenthal LLP*, 2010 WL 1223794, No. 8:09-CV-609-T-17EAJ (M.D. Fla. Mar. 25, 2010) (defendant's communications with manager of alleged Ponzi scheme through phone, email, and mail did not satisfy the Long-Arm Statute provision for specific jurisdiction over persons committing torts within the state; the communications themselves were not the tort and, thus, the tort did not arise from the communications).

Furthermore, under the "corporate shield doctrine," the Florida Supreme Court has placed significant restrictions on the reach of the Long-Arm Statute over non-resident employees ***who work outside of Florida*** and take actions within the scope of their employment on behalf of their corporate employers. *Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993). "[A] nonresident employee-defendant who works only outside of Florida, commits no acts in Florida, and has no personal connection with Florida will not be subject to the personal jurisdiction of Florida courts simply because he or she is a corporate officer or employee." *Kitroser v. Hurt*, 85 So. 3d 1084, 1088 (Fla. 2012); *see also Ten Mile Indus. Park v. W. Plains Serv. Corp.*, 810 F.2d 1518, 1527 (10th Cir. 1987) ("Jurisdiction over the representatives of a corporation may not be predicated on jurisdiction over the corporation itself . . . jurisdiction over the individual officers and directors must be based on their individual contacts with the forum state."). The rationale of this doctrine is the notion that it is unfair to force an individual to defend himself in a forum in which his only relevant contacts are acts performed outside of the forum state and exclusively for the benefit of his employer. *Thompson*, 620 So. 2d at 1006 (chief executive officer acting within the scope of his employment for his corporate employer was not subject to personal jurisdiction by virtue of his position with corporation which operated businesses in Florida); *Kitroser*, 85 So. 2d at 1088.

The Complaint alleges that Weiss "signed the agreement in his capacity as President of the Law Firm," and performed acts on behalf of the Law Firm – *i.e.*, receipt of funds into and payment of funds out of the Law Firm's IOLTA account that was located in California. [DE 19, ¶¶ 18-19, 51, 103-108; D.E. 19-1, p. 1, "Transaction Procedures," p. 6]. Thus, the corporate shield doctrine precludes this Court from exercising personal jurisdiction over Weiss for acts he allegedly performed on behalf of the Law Firm while he was physically outside of Florida.[10]

Finally, the mere presence of the prorogation clause in the Paymaster Agreement providing for jurisdiction in Florida over the parties is insufficient to confer jurisdiction over ***Weiss*** under Section 48.193(1)(a)(2). *See Panchal v. Ethen*, 648 So. 2d 245 (Fla. 4th DCA 1994) (holding that there was no personal jurisdiction over cruise ship employee for his alleged tortious conduct simply because of his association with the cruise company, which had a forum selection clause in favor of Florida on its customer tickets – "a separate basis for personal jurisdiction must exist before Defendant can be brought before a Florida court."). Thus, AdventHealth also fails to establish specific jurisdiction under Section 48.193(1)(a)(2).

b) General Jurisdiction

Weiss is not subject to general jurisdiction in Florida. Section 48.193(2) of Florida's Long-Arm Statute sets forth the requirements for general jurisdiction: "A defendant who is engaged in ***substantial and not isolated activity within this state***, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state,

[10] While the corporate shield doctrine does not protect a corporate officer accused of committing an intentional tort, *Andrew v. Radiancy, Inc.*, 2017 WL 2692840, at *5, Case No. 6:16-cv-1061-Orl-37GJK (M.D. Fla. Jun. 22, 2017), AdventHealth fails to state any plausible intentional tort claim against Weiss. The Complaint alleges that ***Tomax and/or Efrati*** were in possession of the $2,000,000 at issue, which Efrati promised to return. Additionally, the Complaint alleges no facts demonstrating that Weiss is the alter ego of the Law Firm or that there is any basis to pierce the corporate veil and hold him personally liable for acts he took on its behalf. *See* Section III., C., *infra*.

whether or not the claim arises from that activity." § 48.193(2), Fla. Stat. (emphasis added). The term "substantial and not isolated activity" used in Section 48.193(2) means "continuous and systematic general business contact" with Florida. *Bernardele v. Bonorino*, 608 F. Supp. 2d 1313, 1327 (S.D. Fla. 2009) (citations omitted).

"The reach of this provision extends to the limits on personal jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment." *Fraser v. Smith*, 594 F.3d 842 (11th Cir. 2010) (citations omitted). With respect to general jurisdiction under the Long-Arm Statute, the Court need only determine whether the exercise of general jurisdiction over Weiss would exceed constitutional bounds. *Id.*; *Argos Global*, 2020 WL 1166719, at *8; *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015). The due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction, and the absence of specific jurisdiction is indicative of the lack of general jurisdiction. *Bernardele*, 608. F. Supp. 2d at 1327.

"For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 2854 (2011). In this case, Weiss was at the time of the alleged causes of action, and is currently, domiciled in Los Angeles, California. [D.E. 19, ¶ 7; Weiss Decl., ¶ 6]. Weiss has been licensed as an attorney in California since December 9, 1982 (California Bar Number 107481). [D.E. 19, ¶ 8; Weiss Decl., ¶ 1]. Weiss performs services on behalf of the Law Firm from his office in California, not from any location in Florida. [Weiss Decl., ¶¶ 10, 16]. Weiss does not routinely conduct business in Florida and did not attend any meetings in Florida with any representatives or agents of AdventHealth or Tomax. *Id.* at ¶ 17, 20. Weiss

(and the Law Firm, for that matter) does not maintain any office or place of business in Florida, does not have any agent, employee, or law partner doing business in or located in Florida, and does not otherwise direct operations from Florida. *Id.* at ¶ 10, 11, 16-18. Weiss does not own, possess, or hold a mortgage or other lien on any real property, or own any real property, in the State of Florida. *Id.* at ¶ 21. He pays no taxes in Florida, has no bank accounts in Florida, does not advertise his services in Florida, and expends no money in Florida in furtherance of his professional services. *Id.* at ¶¶ 22-25.

AdventHealth cannot establish general personal jurisdiction by simply alleging that the Defendants "are engaged in substantial and not isolated activity within Florida." [D.E. 19, ¶ 3]. Although AdventHealth purports to list various supporting allegations, most of those allegations deal with Tomax's agreement to deliver products to AdventHealth in Florida and communications by the parties while located in different states. [D.E. 19, ¶ 3]. However, as to Weiss, specifically, the only "activity" alleged in Paragraph 3 are the following communications between AdventHealth's representatives (located in the Middle District of Florida) and Weiss (located in California): (1) an email by Weiss ***in response*** to an email from AdventHealth noting that payment will be made in five business days [D.E. 19, ¶ 31]; (2) an email by Weiss ***in response*** to an email from AdventHealth noting that the wire would be ordered on May 13, 2020 [D.E. 19, ¶ 33]; (3) an email by Weiss ***in response*** to an email from AdventHealth noting that the bank advised the wire would be cleared for payment the next day [D.E. 19, ¶ 37]; and (4) an email by Weiss to AdventHealth, ***after*** the Law Firm already transferred $55,500,000 of the Escrow Funds to AdventHealth, advising that the remaining

balance of the Escrow Funds were in Tomax's possession – which Efrati confirmed he would wire back to AdventHealth. [D.E. 19, ¶¶ 47, 43-44, 145-146].

These alleged communications fail to show Weiss engaged in continuous and systematic general business contact with Florida to satisfy the requirements for exercising general jurisdiction over him. The alleged communications were ***initiated by*** AdventHealth's representatives ***to*** Weiss ***after*** Tomax (not Weiss) did not supply the masks pursuant to the Paymaster Agreement. They are an insufficient basis to allege general personal jurisdiction over Weiss. *Musiker*, 960 F. Supp. at 297 ("Viewed in its entirety, [defendants'] conduct consisted of telephone calls to [plaintiff] after an initial phone call from [plaintiff], material provided to [plaintiff] via mail and fax and a presentation by [defendant] to stockbrokers in Florida. These acts do not constitute 'substantial and not isolated conduct' by [defendants] which would justify the exercise of personal jurisdiction pursuant to § 48.193(2).").

Mere communications between the parties over the phone and by email – where plaintiff is physically located in the forum state but defendant is not – are not enough to confer jurisdiction under Eleventh Circuit precedent. *Sculptchair, Inc., v. Century Arts, Ltd.*, 94 F.3d 623, 628 (11th Cir. 1996) (holding that nonresident defendants were not carrying on a business or business venture in Florida when one defendant's only ties to Florida were a series of telephone conversations with the plaintiff-company's Florida office and a one-hour meeting to facilitate a contract to be performed wholly in Canada, and two other defendants "were acting in their corporate representative capacities as opposed to their individual capacities."); *Auf*, 2020 WL 1452350, at *6; *Bernardele*, 608 F. Supp. 2d at 1322 (two meetings and email communication into Florida "cannot be found to constitute a general course of business activity

in Florida for pecuniary benefit."); *Gulf Atl. Transp. Co. v. Offshore Tugs, Inc.*, 740 F. Supp. 823, 830-31 (M.D. Fla. 1990); *see also Tinsley v. BP Corp. N. Am., Inc.*, 112 F. Supp. 3d 1253, 1259 (N.D. Ala. 2015) (five emails and two telephone calls between a defendant and a plaintiff who resided in the forum state were not sufficient to meet the minimum contacts test). Accordingly, the requirements for general personal jurisdiction are not satisfied.

2. Exercising Jurisdiction Over Weiss Would Violate Due Process.

"[A] court can exercise jurisdiction only if it is 'reasonable.'" *Caiazzo v. Am. Royal Arts Corp.*, 73 So. 3d 245, 256 (Fla. 4th DCA 2011) (citing *Asahi Metal Indus. Co. v. Super. Ct. of Cal. Solano Cnty.*, 480 U.S. 102, 113 (1987)). Not only has AdventHealth failed to establish that Weiss engaged in any of the activities set forth in the Long-Arm Statute, it also does not allege any sufficient minimum contacts with Florida to satisfy the due process requirements of the Fourteenth Amendment. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the United States Supreme Court held that to subject a nonresident defendant to the personal jurisdiction of the forum state, due process requires the defendant to have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316; *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Pres-Kap, Inc. v. Sys. One, Direct Access, Inc.*, 636 So. 2d 1351, 1352 (Fla. 3d DCA 1994).

The "constitutional touchstone" of this analysis is whether a defendant "purposely avail[ed] itself of the privilege of conducting activities" within the forum state, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), thereby invoking "the benefits and protections of the laws of that state." *International Shoe*, 326 U.S. at 319; *Burger King*, 471 U.S. at 465. Whether a

party has sufficient minimum contacts is analyzed on a case-by-case basis. *Venetian Salami* 554 So. 2d at 502. To meet this fundamental constitutional requirement, a Long-Arm Statute may not form the basis for jurisdiction over a nonresident defendant unless the plaintiff presents some evidence to show that the defendant purposely availed itself of the privilege of conducting activities within the forum state. *Biloki v. Majestic Greeting Card Co., Inc*., 33 So. 3d 815, 821 (Fla. 4th DCA 2010) (citing *Burger King*, 471 U.S. at 475). "This means that the defendant has deliberately engaged 'in significant activities within a state or has created continuing obligations between himself and residents of the forum.'" *Biloki* at 821 (quoting *Burger King*, 471 U.S. at 475-76).

As set forth above in Sections III., B., 1., a. and III., B. 1., b., *supra*, Weiss's limited contacts with Florida do not rise to the level required to support personal jurisdiction under the Fourteenth Amendment. Weiss did not consent to personal jurisdiction in Florida, did not purposefully avail himself of the privileges of conducting business within Florida such that he could have anticipated being sued in Florida in his individual capacity. [Weiss Decl., ¶ 26]. AdventHealth has alleged no actions or dealings attributable to Weiss, in his individual capacity, that have any connection to Florida – all actions complained of deal with obligations undertaken by the Law Firm and Tomax to AdventHealth. *See* Section III., C, *infra*. AdventHealth has not alleged that Weiss is an alter ego of the Law Firm, or in any way pled sufficient allegations to pierce the corporate veil and impose personal liability on Weiss. *Id*.

All of the claims against Weiss should be dismissed for lack of personal jurisdiction.

C. The Corporate Veil Cannot be Pierced to Impose Personal Liability on Weiss.

The claims against Weiss should be dismissed for the additional reason that the Complaint fails to allege sufficient facts to give rise to a plausible claim against Weiss – individually – under the general principle of corporate law that "a corporation is a separate legal entity, distinct from the persons comprising" it. *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008) (holding that president of corporation could not be held personally liable for the return of $300,000 based on claims for unjust enrichment, civil theft, and conversion arising out of a contract between plaintiff and the corporation, to which the president was not a party). A plaintiff must establish the following to pierce the corporate veil:

> (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation;
>
> (2) the corporate form must have been used fraudulently or for an improper purpose; and
>
> (3) the fraudulent or improper use of the corporate form caused injury to the claimant.

Id. Ownership of a corporation by one shareholder is an insufficient reason to pierce the corporate veil. *Gasparini*, 972 So. 2d at 1055; *see also Merchant One, Inc. v. TLO, Inc.*, 2020 WL 248608, at *5, Case No. 19-cv-23719-BLOOM/Louis (S.D. Fla. Jan. 16, 2020) (granting motion to dismiss claims against owner and CEO of corporate defendant based on *Gasparini*, holding that plaintiff did not allege the 3-part test, and only alleged that individual defendant was acting both in his individual capacity and as a representative of the corporate defendant).

The core allegations supporting AdventHealth's claims against Weiss rest upon the ***Law Firm's*** alleged failure to perform under the Paymaster Agreement, which are insufficient

to allege a basis for liability on the part of Weiss. *See Houri v. Boaziz*, 196 So. 3d 383 (Fla. 3d DCA 2016) (plaintiff failed to allege that part-owner and sole managing member of company was personally liable to the company's minority member because plaintiff did not allege a basis to disregard the corporate identity, mere ownership in the company was not enough, and contract under which plaintiff based his claim was between plaintiff and the defendant company – not with the individual defendant). The bare allegation that Weiss acted both in his individual capacity and as a representative of the Law Firm is insufficient to allege a veil-piercing theory to hold Weiss personally liable. *See Merchant One*, 2020 WL 248608, at *5.

In *Solnes v. Wallis & Wallis, P.A.*, 15 F. Supp. 3d 1258 (S.D. Fla. 2014), the Court declined to hold an individual attorney personally liable for the law firm's acts as an escrow agent in connection with the sale of a yacht. Plaintiff-buyer sued the defendant-law firm and the individual defendant-attorney, alleging that defendants accepted money on the seller's behalf and wrongfully disbursed the money to the seller – exactly the scenario alleged here by AdventHealth with respect to Weiss and the Law firm. Despite plaintiff's repeated demands, defendants did not return the money to plaintiff because they claimed they distributed the money under the agreement between buyer and seller.

The plaintiff in *Solnes* attempted to impose personal liability on the attorney because he was an attorney at the law firm that acted as escrow agent. Relying on *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999) and Section 621.07, Fla. Stat., the plaintiff sought to hold the attorney personally liable for his acts while working on behalf of a professional

association. *Id.* at 1268-69. The Court held that plaintiff's reliance on that authority was misplaced because plaintiff sued the attorney for breach of contract, not negligence:

> Section 621.07, Fla. Stat., better known as Florida's Professional Association Practices Act, expressly provides for liability against a professional for the "negligent or wrongful acts or misconduct ... committed by that person ... while rendering professional service...." Fla. Stat. § 621.07 (2012). The Act, however, applies only to tort actions. First, the language of the statute speaks in tort terms. ***Second, if the Act applied to contract actions, corporate structure would be meaningless in contractual actions because contractual signors on behalf of corporations could always be sued in their individual capacities for any causes of action relating to the contract, including breach of contract***.

Id. at 1269 (emphasis added); *see also FDIC v. Law Office of Rafael Ubieta*, 2012 WL 5307152, at *8-9, Case No. 12-21864-CIV (S.D. Fla. Oct. 29, 2012) (holding same, and granting motion to dismiss breach of contract claim against attorney, in his individual capacity, who signed closing instructions on behalf of law firm).

The *Solnes* court further held that the plaintiff did not establish the elements needed to pierce the corporate veil and hold the attorney liable individually for the law firm's breach:

> When, as here, a plaintiff sues a corporation's agent, that plaintiff faces the foundational principle that the corporate form protects agents of the corporation from being held personally liable. The only exception to this rule is piercing of the corporate veil. To do this, a plaintiff must allege that "(1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant." *Gasparini v. Pordomingo*, 972 So.2d 1053, 1055 (Fla. 3d DCA 2008) (per curiam) (citation omitted); *See also Dania Jai–Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1121 (Fla.1984) (plaintiff must show that the corporation was "formed or used for some illegal, fraudulent, or other unjust purpose which justifies piercing of [its] corporate veil.").

Solnes, 15 F. Supp. 3d at 1269; *see also Law Office of Rafael Ubieta*, 2012 WL 5307152 at *8-9 (holding same, and dismissing claims against individual attorney because plaintiff failed

to allege sufficient facts to suggest court should disregard the corporate form and allow plaintiff to hold attorney liable in his individual capacity).

As in *Solnes* and *Ubieta*, AdventHealth attempts to impose personal liability on Weiss simply because he was an attorney employed by and principal of the Law Firm that held and disbursed funds in an escrow capacity. But, AdventHealth does not allege the elements necessary to pierce the corporate veil and hold Weiss personally liable. AdventHealth has not alleged ***any*** facts that suggest that the Law Firm was formed or operated for an improper or fraudulent purpose. *See Solnes*, 15 F. Supp. 3d. at 1269. Nor has AdventHealth alleged that Weiss dominated and controlled the Law Firm to the extent that it lacked an independent existence. *Id.*; *Advertects v. Sawyer Indus., Inc.*, 84 So. 2d 21, 23 (Fla. 1955) ("The mere fact that one or two individuals own and control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud or that it is necessarily the alter ego of its stockholders to the extent that the debts of the corporation should be imposed upon them personally."). AdventHealth has advanced no facts to suggest that the Court should disregard the corporate form and hold Weiss liable in his individual capacity for any alleged breach by the Law Firm.

Further, Weiss did not sign the Paymaster Agreement in his individual capacity. He signed it as "President" of the Law Firm. Under Florida law, a corporate officer may not be held individually liable on a contract unless he signed it in his individual capacity. *PB Legacy, Inc. v. Am. Mariculture, Inc.*, 2020 WL 377048, at *3, Case No. 2:17-cv-9-FtM-29NPM (M.D. Fla. Jan. 23, 2020) (holding that term sheet did not contain any specific language subjecting president to individual liability thereunder, and did not explicitly indicate an intention for him

to personally guarantee the agreement); *see also Porlick, Poliquin, Samara, Inc. v. Compton*, 683 So. 2d 545 (Fla. 3d DCA 1996) (president of law firm organized as a professional service corporation was not personally liable for corporation's debt under contract that clearly indicated that the law firm, not the individual attorney, agreed to pay electrical engineer expert for his expert witness services).

D. THE ALLEGATIONS OF THE COMPLAINT FAIL TO STATE ANY CLAIM FOR CONSPIRACY.

AdventHealth's conspiracy claims should be dismissed as to both the Law Firm and Weiss (Counts VIII and IX) for the following reasons:

1. An Agent Cannot Conspire with its Principal.

"To state a claim for civil conspiracy, a plaintiff must show: '(a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy.'" *Virani v. Homefield Fin., Inc.*, 2009 WL 10670430, at *9, Case No. 6:09-cv-511-Orl-22DAB (M.D. Fla. Dec. 23, 2009) (quoting *Walters v. Blankenship*, 931 So. 2d 137, 140 (Fla. 5th DCA 2006)); *see also Merchant One*, 2020 WL 248608, at *8. A conspiracy requires the combination of two or more parties – "a meeting of two independent minds intent on one purpose." *Merchant One*, 2020 WL 248608 at *8.

Under the intracorporate conspiracy doctrine, it is not legally possible for an individual to conspire with himself or for a single legal entity consisting of the corporation and its agent to conspire with itself. *Id.* "According to the intracorporate conspiracy doctrine . . . a civil conspiracy claim will not succeed where the only members of the alleged conspiracy are a

corporation and/or its officers. . . . This is because the actions of corporate agents, acting within the scope of their employment, are attributed to the corporation itself, thereby negating the multiplicity of actions needed for a conspiracy." *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, 302 F. Supp. 3d 1319, 1325-26 (M.D. Fla. 2016); *see also Lipsig v. Ramlawi*, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) ("Generally speaking, neither an agent nor an employee can conspire with his or her corporate principal or employer."). Thus, AdventHealth cannot allege a conspiracy between Weiss and the Law Firm.

Nor can AdventHealth allege a conspiracy between the Law Firm/Weiss and Tomax. To the extent Weiss may have taken any actions, he did so solely as a "principal, partner and/or manager of the Law Firm," [D.E. 19 ¶ 8], and thus Weiss and the Law Firm are essentially treated as one entity in considering conspiracy liability. Further, the Law Firm is alleged to have acted as "agent" for the other parties to the Paymaster Agreement. *Id.* at ¶ 17. The Law Firm can no more conspire with one of its principals (Tomax), than the Law Firm can conspire with its agent (Weiss).

AdventHealth's attempt to plead around application of these principles by alleging, in conclusory terms, that Weiss "had an independent, personal stake in the outcome of this conspiracy," because the Law Firm is alleged to have retained the escrow agent fee and Weiss is alleged to have retained the balance of the Escrow Funds, [D.E. 19 ¶ 140], is unavailing. First, any allegation that Weiss or the Law Firm retained any portion of the Escrow Funds is contradicted by AdventHealth's acknowledgment that ***Tomax (and Efrati)*** had control over the remaining $2,000,000 balance of the Escrow Funds and assured AdventHealth that ***Tomax*** would reimburse the funds. *Id*. at ¶¶ 43-44, 145-146. Second, AdventHealth does not allege,

even in conclusory terms, that the ***Law Firm*** possessed any personal stake in the conspiracy independent of its role as "agent" on behalf of AdventHealth and Tomax.

And, as to Weiss, the bare allegation that he had "an independent, personal stake" in the conspiracy is not supported by any allegations of ***facts***. As the Court explained in *HRCC*, "the personal stake exception requires more than some incidental personal benefit – the exception applies only 'where the corporate employees are shown to have been motivated ***solely*** by personal bias.'" *HRCC*, 302 F. Supp. 3d at 1325-26 (citation omitted); *see also Mancinelli v. Davis*, 217 So. 3d 1034, 1037 (Fla. 4th DCA 2017) (to avoid application of the intracorporate conspiracy doctrine, an agent must have "a personal stake in the activities that are separate and distinct from the corporation's interest." … In other words, the agent must have "acted 'in their personal interests, ***wholly and separately*** from the corporation.'") (quoting *Microsoft Corp. v. Big Boy Distr. LLC*, 589 F.Supp.2d 1308, 1323 (S.D. Fla. 2008)) (emphasis added). AdventHealth does not allege any ***facts*** to support application of the "personal stake" exception as to Weiss, and does not include any allegation (even in conclusory terms) of a personal stake by the Law Firm.[11]

[11] The law and the result in this case is the same under California law. *See, e.g., Villains, Inc. v. Am. Econ. Ins. Co.*, 870 F. Supp. 2d 792, 795-96 (N.D. Cal. 2012) (Under the "agency immunity rule … the agent is, in effect, immune from liability because a 'corporation cannot conspire with itself'— *i.e.*, 'an agent or employee who is acting within the scope of his authority is (in the eyes of the law) one and the same 'person' as the corporation.'"); *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 947-48 (N.D. Cal. 2003) (a plaintiff "cannot indiscriminately allege that conspiracies existed between and among all defendants," and plaintiff failed to state a claim against president and CEO for conspiring with the corporation while he was acting in his official capacity); *Hoefer v. Fluor Daniel, Inc.*, 92 F. Supp. 2d 1055, 1057 (C.D. Cal. 2000) ("The intracorporate conspiracy doctrine provides that, as a matter of law, a corporation cannot conspire with its own employees or agents."); *United States v. Vandewater Int'l Inc.*, 2:17-CV-04393-RGK-KS, 2019 WL 6917927, at *5 (C.D. Cal. Sept. 3, 2019) (the "personal stake exception" to the intracorporate conspiracy doctrine applies "only where a co-conspirator possesses a personal stake ***independent*** of his relationship to the corporation").

2. The Conspiracy to Defraud Count is not Stated with the Particularity Required by Rule 9(b).

Count IX for Conspiracy to Defraud should be dismissed as to the Law Firm and Weiss for the additional reason that it is not stated with the requisite particularity. Rule 9(b) of the Federal Rules of Civil Procedure requires a plaintiff to plead its fraud claims against each defendant with particularity. *Virani*, 2009 WL 10670430, at *8 (citing *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380-81 (11th Cir. 1997)); *Fitch v. Radnor Indus., Ltd.*, 1990 WL 150110, *1, Case No. CIV. A. No. 90-2084 (E.D. Pa. Sept. 27, 1990)); *Tucci v. Smoothie King Franchises, Inc.*, 215 F. Supp. 2d 1295 (M.D. Fla. 2002) (dismissing conspiracy to defraud claim for failure to plead it with requisite specificity). A plaintiff may not "lump all of the Defendants together" without specifying the alleged statement made or the fraud committed by each one. *Virani*, 2009 WL 10670430, at *8 (dismissing fraud claim where plaintiff did not identify the precise misrepresentations, which defendant made each representation, or which defendants were responsible for each of the misrepresentations).

AdventHealth has failed to meet this heightened pleading standard. First, AdventHealth broadly states, without alleging any underlying supporting facts or statements, that "Defendants participated in a fraudulent scheme under which they induced AdventHealth to transfer the Escrow Funds to the Law Firm in connection with the sham Paymaster Agreement. . . ." [D.E. 19, ¶ 154]. "Under Florida law, 'fraud in the inducement' occurs when one party's ability to negotiate and make informed decisions as to the contract is undermined by the other party's ***pre-contractual*** fraudulent behavior," which includes a misrepresentation by a defendant to induce plaintiff to enter into the contract. *Badger Auctioneers, Inc. v. Ali*, 2017 WL 3438224, Case No. 6:16-cv-572-Orl-31TBS, at * 3 (M.D. Fla. Aug. 10, 2017)

(emphasis added); *see also Geico Marine Ins. Co. v. Baron*, 426 F. Supp. 3d 1263, 1265 (M.D. Fla. 2019). AdventHealth does not allege a single ***pre-contractual*** representation made by the Law Firm or Weiss to AdventHealth whatsoever, let alone a misrepresentation made to induce AdventHealth to enter into the Paymaster Agreement.

Second, there are no allegations that the Law Firm and Weiss – on the one hand – and Tomax and Efrati – on the other hand – had a meeting of the minds to convert money or defraud AdventHealth. The allegations in the Complaint contain a glaring disconnect – as alleged, Weiss returned $55,500,000 to AdventHealth and advised that Tomax had the other $2,000,000, which Tomax confirmed and promised to return to AdventHealth. [D.E. 19 ¶¶ 43, 47]. The conclusory allegation that, "[u]pon information and belief, the Law Firm retained the escrow agent fee and Mr. Weiss retained the balance of the Escrow Funds," [D.E. 19, ¶ 162], is directly contrary to the allegations in the Complaint and insufficient to provide an underlying factual basis for the conspiracy claims. *See, e.g., Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005) (upholding dismissal of complaint for failure to comply with Rule 9(b) where claim for conspiracy to defraud was based "on information and belief" supported by bare legal conclusions, and failed to provide an underlying factual basis for the claim); *see also Houri*, 196 So. 3d at 393 (dismissing fraudulent inducement claim for lack of specificity).

Finally, AdventHealth has not alleged any separate, underlying tort of "fraud," nor are the allegations in the conspiracy to defraud count sufficiently specific to properly state a claim for fraud. "Florida law does not recognize an independent cause of action for civil conspiracy; rather, a valid claim must allege an underlying illegal act or tort on which the conspiracy is based." *Merchant One*, 2020 WL 248608, at *8 (citations omitted); *In re Ernie Haire Ford*,

Inc., 459 B.R. 824, 840 (M.D. Fla. 2011) ("Normally, a claim for civil conspiracy requires the existence of an underlying tort."). AdventHealth alleges that Defendants "conspired together to defraud AdventHealth of the Escrow funds." *Id.* at ¶ 153. However, these allegations are legal conclusions and do not state sufficient facts to survive dismissal. *Virani*, 2009 WL 10670430, at *9 (dismissing conspiracy claim because plaintiff did not plead sufficient facts showing that defendants conspired to commit fraud).

WHEREFORE, Defendant Michael H. Weiss respectfully requests that the Court grant this Motion, and dismiss all claims as to Michael H. Weiss individually (Counts IV, V, VIII, IX, and XI of Plaintiff's First Amended Complaint). Defendant Michael H. Weiss, P.C. respectfully requests that the Court grant this Motion, and dismiss Counts VIII and IX of Plaintiff's First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System, which will send the foregoing to counsel of record on the attached Service List.

/s/ D. David Keller
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