IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ADVENTIST HEALTH SYSTEM SUNBELT HEALTHCARE CORPORATION, a Florida not for profit corporation, Plaintiff, v. MICHAEL H. WEISS, P.C., a California professional corporation; MICHAEL H. WEISS, a California resident; and TOMAX CAPITAL MANAGEMENT, INC., a California corporation, and YEHORAM TOM EFRATI, a California resident. Defendants.	Case No.: 6:20-CV-00877-PGB-DCI

PLAINTIFF'S RESPONSE IN OPPOSITION TO TOMAX'S AND MR. EFRATI'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff, Adventist Health System Sunbelt Healthcare Corporation ("AdventHealth"), pursuant to Federal Rule of Civil Procedure 12(b)(6), respectfully requests this Court deny the Motion to Dismiss Amended Complaint (Doc. 25) filed by Tomax Capital Management, Inc. ("Tomax") and Yehoram Tom Efrati ("Mr. Efrati"), and states:

I. Introduction

After playing a shell game with AdventHealth's $57,500,000 intended for the purchase of PPE for healthcare workers, the Defendants attempt to avoid liability for their respective roles in this illegal scheme that caused AdventHealth and its Florida operations to lose $2,000,000. (Doc. 19 ¶¶ 50-55, 136 & 154.) It started with the sham Paymaster Agreement that Tomax and Michael H. Weiss, P.C. (the "Law Firm") had no intention to perform. *Id.* Once the funds cleared, the Defendants engaged in a shell game with AdventHealth's money. They

now refuse to return $2,000,000 of AdventHealth's money. *Id.* Mr. Efrati and Tomax conspired with the Law Firm and Michael H. Weiss to defraud and convert AdventHealth's funds. *Id.* at ¶¶ 134-51 & 152-72. The $2,000,000 loss to AdventHealth occurred in Florida. *Id.* at ¶¶ 3-4.

This Court has personal jurisdiction over Mr. Efrati as a co-conspirator, who took actions in furtherance of this criminal conspiracy that targeted AdventHealth's Florida operations and in which he had a personal stake. *See, e.g., id.* AdventHealth is only required to plead the elements of a conspiracy and allege one Defendant committed the underlying tort of fraud or conversion to establish personal jurisdiction over Mr. Efrati. AdventHealth sufficiently pled both. Performance of the contract was in Florida, delivery was to occur at AdventHealth in Florida, the Defendants' misrepresentations were made in Florida, relied on in Florida, and caused injury to AdventHealth in Florida. *See, e.g., id.* AdventHealth already stated one underlying tort for conversion against Law Firm, which did not challenge this claim in its Motion to Dismiss (Doc. 28).

Even though the Defendants designed this conspiracy to keep AdventHealth in the dark, Tomax and Mr. Efrati request dismissal because AdventHealth does not know the specifics of their unlawful scheme. Indeed, Tomax and Mr. Efrati attempt to deflect responsibility onto their co-Defendants without addressing the specific allegations against them. However, AdventHealth is not required to allege the Defendants' respective conduct with absolute particularity, especially when some matters are beyond the knowledge of AdventHealth just as the co-conspirators intended. AdventHealth sufficiently alleges Tomax and Mr. Efrati shuffled AdventHealth's money between the Defendants, refused to disclose the location of the funds despite demand, and intentionally misrepresented the location of the funds. *See, e.g.*, (Doc. 19

¶¶ 50-55, 136 & 154.) Their actions caused a substantial financial loss to AdventHealth's Florida operations. None of these Defendants dispute AdventHealth is entitled to, but did not receive, a full return.

II. Memorandum of Law

A. This Court has personal jurisdiction over Mr. Efrati.

This Court has personal jurisdiction over Mr. Efrati because his misconduct in furtherance of the conspiracies satisfies Florida's long-arm statute and Fourteenth Amendment Due Process. Establishing personal jurisdiction over a non-resident defendant involves a two-step inquiry: (1) whether personal jurisdiction exists under Florida's long arm statute; and (2) whether that exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989); *Elandia Intern., Inc. v. Ah Koy*, 690 F. Supp. 2d 1317, 1327 (S.D. Fla. 2010).

i. The allegations in the Complaint satisfy Florida's Long Arm Statute.

Mr. Efrati participated in the conspiracies that targeted and caused AdventHealth's Florida office to suffer substantial financial losses. A person who personally or through an agent commits a tortious act within Florida is subject to the jurisdiction of the Florida courts. Fla. Stat. § 48.193(1)(a)(2). "If an individual successfully alleges that any member of a conspiracy committed tortious acts in Florida in furtherance of the conspiracy, then all of the conspirators are subject to personal jurisdiction in Florida." *Elandia Intern., Inc.*, 690 F. Supp. 2d at 1330. This is true even if one of the alleged conspirators over whom personal jurisdiction is sought individually committed no act in, or had no relevant contact with Florida. *Wilcox v. Stout*, 637 So. 2d 335, 337 (Fla. 2d DCA 1994); *Execu–Tech Bus. Sys., Inc. v. New Oji Paper*

Co., 752 So. 2d 582, 584–85 (Fla. 2000) (exercising personal jurisdiction over participant in a nationwide price-fixing conspiracy in which some co-conspirators, but not the defendant at issue, made sales into Florida).

a. AdventHealth alleges conspiracies to commit fraud and conversion.

First, AdventHealth sufficiently alleges the elements of civil conspiracy for each defendant and the elements of an underlying tort for at least one conspirator. *See Sonic Momentum B, LP v. Motorcars of Distinction, Inc*., No. 11-80591-CIV, 2011 WL 4738190, at *4 (S.D. Fla. 2011) (finding there is no requirement that each member of the conspiracy independently commit the underlying tort); *Allocco v. City of Coral Gables*, 221 F. Supp. 2d 1317, 1360-61 (S.D. Fla. 2002). A civil conspiracy requires: "(a) an agreement 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 done under the conspiracy." *Sonic Momentum B, LP*, 2011 WL 4738190, at *4 ("Plaintiff need not . . . allege the terms of the agreement, when it was entered, what benefit United expected to obtain from the conspiracy, or other particularities. It is sufficient to plead . . . facts which raise a reasonable expectation that discovery will reveal evidence of the agreement.").

AdventHealth alleges the elements of civil conspiracy. First, there was an agreement between all of the Defendants to engage in a scheme designed to deprive AdventHealth's Florida office of the Escrow Funds. (Doc. 19 ¶¶ 3-4, 54, 136, 153 & 154.); *Sonic Momentum B, LP*, 2011 WL 4738190, at *5 ("An agreement between Plaintiff and Navarro can be inferred from the allegations that United assisted Navarro in preparing and filing false documents and conducting a sham auction."). Specifically, the "Defendants conspired together to deprive

AdventHealth of its immediate possessory and ownership interest in the Escrow Funds," and "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." (Doc. 19 ¶¶ 136 & 154.) The "Defendants . . . actively worked together to conceal and retain the balance of the Escrow Funds for their own respective use and purposes." (Doc. 19 ¶ 54.)

Second, all Defendants committed unlawful acts when they retained the Escrow Funds for their own use and benefit, or transferred and concealed the Escrow Funds. (Doc. 19 ¶¶ 138, 143, 154, 160 & 169-71.) "The Defendants wrongfully asserted dominion over the Escrow Funds belonging to AdventHealth, and deprived AdventHealth of its ownership rights and dominion over the Escrow Funds." (Doc. 19 ¶ 149.) "Mr. Efrati . . . had actual knowledge the Escrow Funds did not and never could belong to anyone but AdventHealth." (Doc. 19 ¶¶ 151 & 172.) Yet, "Mr. Efrati was a recipient of a portion of the Escrow Funds," and refused to return the Escrow Funds despite demand. (Doc. 19 ¶¶ 147, 148 166, & 170.) Tomax retained these funds despite knowing it was not entitled to possession as it never fulfilled the conditions precedent outlined in the Agreement. (Doc. 19 ¶¶ 24-27.)

Third, Mr. Efrati, Tomax and their co-conspirators committed overt acts in furtherance of the conspiracy. Tomax, Mr. Weiss, and the Law Firm wrongfully accepted, concealed, and retained the funds knowing they had no right to possession of any portion of the Escrow Funds. (Doc. 19 ¶¶ 47, 51-54, 139-40, 141-42, & 161-64.) Mr. Efrati personally assisted the co-conspirators in their wrongful actions, made misrepresentations to AdventHealth, delayed the refund, received the funds, and prevented recovery of the funds. (Doc. 19 ¶¶ 143-47 & 165-66.) Finally, AdventHealth alleges its Florida operations suffered damages as a result of the

Defendants' misconduct. (Doc. 19 ¶¶ 148-50 & 170-71.) Therefore, the Complaint sufficiently alleges a civil conspiracy existed between all of the Defendants.

AdventHealth also alleges the elements of the underlying torts of conversion and fraud. *See Sonic Momentum B, LP*, 2011 WL 4738190, at *4. To state these claims, a plaintiff is only required to allege one co-conspirator committed the underlying tort. *Id.* AdventHealth has also asserted separate claims for conversion against the Law Firm (Count II), Weiss (Count IV), and Tomax (Count VII). The Law Firm has not moved to dismiss the conversion claim. Thus, AdventHealth has stated at least one claim for conversion against a co-conspirator.

Count VIII states a claim for conspiracy to commit conversion. The elements of conversion are: (1) specific and identifiable money; (2) possession or an immediate right to possess that money; (3) an unauthorized act which deprives plaintiff of that money; and (4) a demand for return of the money and a refusal to do so. *U.S. v. Bailey*, 288 F. Supp. 2d 1261, 1264 (M.D. Fla. 2003); *Beach Cmty. Bank v. Disposal Serv., LLC*, 199 So. 3d 1132, 1134 (Fla. 1st DCA 2016). AdventHealth alleges that the missing portion of the Escrow Funds is specific and identifiable. *See Belford Trucking Co. v. Zagar*, 243 So. 2d 646, 648 (Fla. 4th DCA 1970) ("Money is capable of identification where it is delivered at one time, by one act and in one mass."); *Columbia Bank v. Turbeville*, 143 So. 3d 964, 969 (Fla. 1st DCA 2014). AdventHealth wired $57,500,000 to the Law Firm's trust account to hold in escrow, and received a refund that was short $2,000,000. (Doc. 19 ¶¶ 18 & 48.) The amount owed to AdventHealth's Florida headquarters is a separate and ascertainable amount from a single transaction pursuant to the Paymaster Agreement. (Doc. 19 ¶¶ 18 & 48.)

AdventHealth has an immediate right to possess the funds. The conditions precedent to

the transfer of the Escrow Funds were never fulfilled. (Doc. 19 ¶¶ 24-27.) Under those circumstances, the Law Firm was required to notify AdventHealth and refund its money within five (5) business days. (Doc. 19 ¶¶ 26-28 & Ex. A ¶ 8.) However, the Law Firm transferred the funds to Tomax and Mr. Efrati – both of which controlled or possessed the missing $2,000,000. "Tomax . . . accepted and retained the Escrow Funds even though it had not performed its obligations under the Paymaster Agreement." (Doc. 19 ¶ 142.) Mr. Efrati represented, "The full balance will be wire[d] Monday morning, it's about $2M." (Doc. 19 ¶ 145.) Mr. Efrati possessed or controlled AdventHealth's funds. (Doc. 19 ¶¶ 4, 27, 40, 52, 143-47.) His May 15, 2020 "email indicates he had control over the Escrow Funds and knew where the funds were deposited." (Doc. 19 ¶ 145) The taking and retention of the funds by Tomax, Mr. Efrati, the Law Firm, and Mr. Weiss was an unauthorized act as none of those Defendants were entitled to any portion of the Escrow Funds. (Doc. 19 ¶¶ 51-52 & 149-50 & Ex. A ¶ 8.) At the motion to dismiss stage, all of these allegations are accepted as true.

AdventHealth demanded the Defendants return the funds, and Defendants refused to issue a full refund. (Doc. 19 ¶¶ 30, 32, 36, 42, 45, 46 & 148.) Specifically, Ms. Farabaugh asked Mr. Efrati, "When will the remaining funds be returned?" (Doc. 19 ¶ 42.) Furthermore, "AdventHealth sent demands to the Law Firm, Mr. Weiss, and Tomax to request the remaining balance of the Escrow Funds." (Doc. 19 ¶ 45); *see also* (Doc. 19 ¶¶ 30, 32, & 36.) Thus, AdventHealth sufficiently alleges an action of conversion against Tomax, Mr. Weiss, and the Law Firm that caused harm to AdventHealth in Florida.

Furthermore, Count IX states a claim for conspiracy to commit fraud. At a minimum, AdventHealth has sufficiently alleged the elements of fraud against Tomax and the Law Firm,

which Mr. Efrati facilitated through his misconduct. "[I]f the plaintiff can demonstrate that the person promising future action does so with no intention of performing or with a positive intention not to perform, such a promise may also constitute a fraudulent misrepresentation." *Mejia v. Jurich*, 781 So. 2d 1175, 1177 (Fla. 3d DCA 2001). If a defendant "makes a future promise to perform with no intent of doing so, the requirement of a past or present fact does not apply." *Gemini Inv'rs III, L.P. v. Nunez*, 78 So. 3d 94, 97 (Fla. 3d DCA 2012).

Here, "the Defendants did not have any intention to perform their contractual obligations or, alternatively, Defendants intentionally refused to perform." (Doc. 19 ¶ 50.) "The Defendants knew the Masks were not available, and knew they could not perform the terms of the Paymaster Agreement." (Doc. 19 ¶ 159.) Tomax knowingly made several material misrepresentations, including: (i) "it would not receive or retain the Escrow Funds until the conditions of the Paymaster Agreement were satisfied;" and (ii) "it would supply and deliver the Masks." (Doc. 19 ¶ 155.) The Law Firm also made material misrepresentations it knew were false, including that "it would safeguard the Escrow Funds and would not transfer these funds until the conditions of the Paymaster Agreement were satisfied." (Doc. 19 ¶ 157.) The Defendants made these misrepresentations, which AdventHealth justifiably relied on, to induce AdventHealth to transfer the Escrow Funds. (Doc. 19 ¶¶ 167-68.)

As further evidence of their intention to never perform, Tomax and Mr. Efrati made multiple misrepresentations to AdventHealth regarding the timing of the refund and the location of the funds. (Doc. 19 ¶¶ 31, 33, 37-38, 43-44, & 47.) The date, time, method of communication, and person making each misrepresentation are detailed in the Complaint. *See, e.g.*, (Doc. 19 ¶¶ 31, 33, 37-38, 43-44 & 47.) Defendants made these misrepresentations to

induce AdventHealth to "refrain from taking further action to retrieve the funds." (Doc. 19 ¶¶ 167-68.) Thus, AdventHealth alleges with the requisite degree of specificity Tomax and the Law Firm never intended to fulfill their promises. *See Mejia*, 781 So. 2d at 1178 (reversing dismissal of a fraud claim where plaintiff "alleged that when the representations were made appellee knew they were false and that Lennar Homes had no intention of performing them.").

b. The intracorporate conspiracy doctrine does not apply.

The intracorporate conspiracy does not bar personal jurisdiction over Mr. Efrati because he participated in a criminal conspiracy and had an independent personal state in Tomax's actions. The intracorporate conspiracy doctrine does not apply when corporate agents act outside the scope of their employment or have an independent personal stake that is separate from the company's interests. *Helinautica Int'l, S.A. v. Engage Aviation LLC*, No. 8:11-CV-676-T-17TGW, 2011 WL 5553896, at *3 (M.D. Fla. Nov. 15, 2011). "[T]he intracorporate conspiracy doctrine does not apply to alleged intracorporate criminal conspiracies." *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038 (11th Cir. 2000); *State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr.*, Inc., 6:06-CV-1757-ORL-GJK, No. 2008 WL 11333443, at *12 (M.D. Fla. Dec. 24, 2008). "Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions." *Kirwin v. Price Communications Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004).

Mr. Efrati's and his co-conspirators' conduct constitutes a crime. The Defendants conspired to commit fraud and conversion – both of which have civil and criminal consequences. *See, e.g.,* Fla. Stat. § 812.014(1) (outlining the criminal penalties for theft); Fla. Stat. § 817.034 (outlining the criminal penalties for wire fraud); Fla. Stat. § 812.019 (defining

the criminal penalties for dealing in stolen property). Mr. Efrati's participation in these crimes precludes him from using this doctrine to shield himself from liability.

Furthermore, Mr. Efrati had a personal stake in this conspiracy because he was a recipient of a portion of the Escrow Funds. While Tomax may have also received some of the funds, Mr. Efrati separately received the Escrow Funds from the Law Firm. "[T]he Law Firm transferred the Escrow Funds to Tomax, Mr. Efrati, or Mr. Weiss without regard to the terms of the Paymaster Agreement." (Doc. 19 ¶ 52.) He also refused to issue a refund despite having "control over the Escrow Funds." (Doc. 19 ¶ 144.) The corporation received no benefit from Mr. Efrati profiting from this conspiracy. Thus, the intracorporate conspiracy doctrine does not apply and Plaintiff has stated claims against Mr. Efrati in Counts VIII and IX.

c. The co-conspirators committed tortious acts in Florida.

Third, the claims for conspiracy to commit fraud and conversion arise out of the Defendants' misconduct directed into Florida which caused injury to AdventHealth in Florida. AdventHealth is only required to allege one of the co-conspirators committed a tortious act in Florida in furtherance of the conspiracy to subject Mr. Efrati to this Court's personal jurisdiction. *See NHB Advisors, Inc. v. Czyzyk*, 95 So. 3d 444, 449 (Fla. 4th DCA 2012); *Elandia Intern., Inc.*, 690 F. Supp. 2d at 1330. This Court has personal jurisdiction over non-resident defendants, who "purposefully directed misrepresentations in furtherance of the conspiracy to [the plaintiffs] in Florida, with the intent that the [plaintiffs] rely on the misrepresentations." *Machtinger v. Inertial Airline Services, Inc.*, 937 So. 2d 730, 736 (Fla. 3d DCA 2006). "[U]nder Florida law, a nonresident defendant commits 'a tortious act within [Florida]' when he commits an act outside the state that causes *injury within Florida*." *Louis*

Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1353 (11th Cir. 2013).

Conversion and conspiracy to commit fraud or conversion "if adequately pled and proved prima facie, would satisfy the requirements of [§ 48.193(1)(a)2.] and confer personal jurisdiction over a defendant." *Energy Source, Inc. v. Gleeko Properties, LLC*, 10-21162-CIV, 2011 WL 3236047, at *3 (S.D. Fla. July 28, 2011); *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1250 (11th Cir. 2000) (exercising personal jurisdiction over a defendant, where "Plaintiff alleges that the defendant committed the tort of conversion by possessing the property of the plaintiff, without permission, for a period of several hours").

"The defendant's physical presence is not required if the tort causes an injury in Florida." *Brennan v. Roman Catholic Diocese of Syracuse New York, Inc.*, 322 Fed. Appx. 852, 854 (11th Cir. 2009); *Office Depot, Inc. v. Pelletier*, 16-81170-CIV, 2016 WL 10932510, at *3 (S.D. Fla. Sept. 8, 2016) ("Plaintiff has alleged that Defendant intentionally committed tortious acts outside of Florida that caused injury to Plaintiff in Florida . . . . Courts have found similar allegations to be sufficient to establish specific jurisdiction under Florida's long-arm statute."); *Machtinger v. Inertial Airline Services, Inc.*, 937 So. 2d 730, 735 (Fla. 3d DCA 2006) ("O'Donnell's fraudulent misrepresentations made from outside Florida by phone, fax, and in writing, directed to IAS officers in IAS Florida headquarters, constitute tortious acts committed within Florida under Florida's long-arm statute.").

Defendants directed their tortious acts into Florida and caused injury to AdventHealth in Florida. "The harm intended and caused by the Defendants' actions is occurring in Florida." (Doc. 19 ¶ 3.) Tomax, the Law Firm, and Mr. Weiss committed conversion by possessing AdventHealth's property without permission and refusing to return it. *See supra* Section

II.A.i.a. Mr. Efrati's actions and misrepresentations "suffice as a prima facie showing of his alleged participation in a scheme to allow his co-defendants to keep Plaintiff's funds." *See Energy Source, Inc*., 2011 WL 3236047, at *6.

Tomax and the Law Firm also committed fraud by promising to perform the Paymaster Agreement despite having no intention to fulfill those obligations and then knowingly making misrepresentations regarding the status of AdventHealth's funds. *See supra* Section II.A.i.a. The Defendants were supposed to perform their contractual obligations in Florida by ensuring delivery of the Masks to AdventHealth in Orlando, Florida. (Doc. 19 ¶ 15.) At a minimum, AdventHealth has stated a claim for the underlying tort of conversion against the Law Firm, which has not moved to dismiss that claim. *See* (Doc. 28.)

Each Defendant made misrepresentations to AdventHealth that induced AdventHealth to act to its detriment, and made further misrepresentations to hide and retain AdventHealth's funds. Defendants made these misrepresentations to AdventHealth's representatives in Florida. As a result, AdventHealth's Florida headquarters suffered damages. (Doc. 19 ¶¶ 3, 4, 30, 31, 33, 35, 37, 42, 43 & 47.) Mr. Efrati made misrepresentations by email to "Marisa Farabaugh (an AdventHealth representative, who resides in Florida and works at an AdventHealth office in Florida)" regarding the location and status of AdventHealth's money. (Doc. 19 ¶¶ 43 & 145.) Mr. Efrati also participated in phone calls with AdventHealth representatives in Florida. (Doc. 19 ¶¶ 4 & 35.) These torts could not have occurred but for Mr. Efrati's misrepresentations to AdventHealth's officers and representatives who reside, work, and control the company's finances in Florida. (Doc. 19 ¶ 4.)

AdventHealth alleges the existence of a conspiracy and Mr. Efrati's participation in it.

See supra Section II.A.i.a. The Defendants' misrepresentations in furtherance of the conspiracies were made in Florida, relied on in Florida, and caused an injury in Florida. (Doc. 19 ¶¶ 4, 168 & 169.) Thus, Florida's long-arm statute is satisfied. *NHB Advisors, Inc.*, 95 So. 3d at 449 ("Accordingly, because the plaintiff successfully alleged the existence of a conspiracy and Czyzyk's participation in it, and because the plaintiffs successfully alleged that other members of the conspiracy committed a tortious act in Florida, all of the conspirators are subject to the jurisdiction of Florida through its long-arm statute.").

ii. Mr. Efrati has sufficient minimum contacts with Florida.

"Directing a conspiracy toward Florida establishes sufficient minimum contacts to satisfy due process." *Machtinger*, 937 So. 2d at 736 (citing *Wendt*, 822 So.2d at 1258). "[I]t can be concluded that [the defendant] could reasonably anticipate being haled into a Florida court to answer for misrepresentations it made to a Florida resident to induce that resident to act." *Fletcher Jones W. Shara, Ltd., LLC v. Rotta*, 919 So. 2d 685, 687 (Fla. 3d DCA 2006) (finding the trial court "had personal jurisdiction over Jones because . . . [plaintiff] established minimum contacts with this forum based upon the intentional misrepresentations Jones directed toward [plaintiff] in this state in an effort to sell an automobile"). Mr. Efrati's involvement in the conspiracies alleged in Counts VIII and IX demonstrates he has minimum contacts with Florida. (Doc. 19 ¶¶ 43 & 145.); *see supra* Section II.A.i.a. & II.A.i.c. Mr. Efrati knowingly participated in conspiracies that caused harm to AdventHealth in Florida. Thus, Mr. Efrati has sufficient minimum contacts with Florida to satisfy due process.

iii. The Corporate Shield Doctrine does not protect Mr. Efrati.

The corporate shield doctrine does not protect employees, like Mr. Efrati, who engaged

in a conspiracy to commit an intentional tort that harms a Florida company. *NHB Advisors, Inc.*, 95 So. 3d at 449 n.2 ("Czyzyk cannot use the corporate shield doctrine against the plaintiff's intentional tort claims of aiding and abetting breach of fiduciary duty and conspiracy to breach fiduciary duty."). "[I]f an individual, nonresident defendant commits negligent acts in Florida, whether on behalf of a corporate employer or not, the corporate shield doctrine does not operate as a bar to personal jurisdiction. Jurisdiction properly applies to 'any person' who commits torts 'within this state.'" *Kitroser v. Hurt*, 85 So. 3d 1084, 1090 (Fla. 2012).

Mr. Efrati participated in two intentional torts as alleged in Counts VIII and IX. *See supra* Section II.A.i.a. Even if Mr. Efrati's actions were on behalf of Tomax, his conduct in furtherance of these intentional torts is not protected by the corporate shield doctrine. Thus, Mr. Efrati cannot rely on the corporate shield doctrine to bar personal jurisdiction against him.

iv. Mr. Efrati failed to meet his burden.

AdventHealth met its burden to plead sufficient facts that support long-arm jurisdiction over Mr. Efrati, and Mr. Efrati failed to challenge these allegations by affidavits or other pleadings. "[T]he plaintiff must allege sufficient facts in his complaint to initially support long-arm jurisdiction before the burden shifts to the defendant to make a prima facie showing of the inapplicability of the statute." *Bloom v. A. H. Pond Co., Inc.*, 519 F. Supp. 1162, 1168 (S.D. Fla. 1981) (citing *Electro Engineering Products Company v. Lewis*, 352 So.2d 862 (Fla. 1977)). "Once the plaintiff pleads sufficient material facts to form a basis for in personam jurisdiction, the burden shifts to the defendant to challenge plaintiff's allegations by affidavits or other pleadings." *Elandia Intern., Inc.*, 690 F. Supp. 2d at 1327. "The facts as alleged in the complaint are taken as true, to the extent they are uncontroverted by defendants' affidavits."

Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 845 (11th Cir. 1988).

AdventHealth sustained its burden of pleading prima facie allegations to establish personal jurisdiction over Mr. Efrati. *Elandia Intern., Inc.*, 690 F. Supp. 2d at 1331 ("Based on the prima facie allegations in the complaint, these other Defendants intentionally conspired with James Ah Koy to violate his fiduciary duties owed in Florida. Section 48.193(1)(b) clearly applies to that situation."). Mr. Efrati, however, failed to submit any evidence contradicting or challenging the allegations in the Complaint. The conclusory and unsworn statements in the Motion are insufficient to challenge personal jurisdiction or shift the burden back to AdventHealth. Thus, the facts as alleged in the Complaint are taken as true, and this Court should find that it has personal jurisdiction over Mr. Efrati.

B. The Allegations are Specific to Each Defendant.

Mr. Efrati fails to address the allegations specific to his own conduct, and instead focuses on the more general allegations applicable to all Defendants. Certainly there are some allegations common to all Defendants given the two conspiracy theories asserted against them. However, there are specific allegations for each Defendant defining their respective roles in these conspiracies that targeted AdventHealth's Florida operations. For example, Mr. Efrati communicated with AdventHealth representatives in Florida by phone and email. *See, e.g.*, (Doc. 19 ¶¶ 35 & 43.) AdventHealth "sent an email to Mr. Efrati that demanded the full balance of the Escrow Funds." (Doc. 19 ¶ 46.) Furthermore, Mr. Efrati personally benefitted from his conduct as he received a portion of the Escrow Funds. (Doc. 19 ¶¶ 4 & 143-47.)

There is no dispute Mr. Efrati was not a party to the Paymaster Agreement, and AdventHealth has not pursued any contract claims against him. However, Mr. Efrati – as

signatory to the Paymaster Agreement – knew the terms of the Paymaster Agreement, and understood that the money he received could not belong to anyone but AdventHealth. (Doc. 19 ¶¶ 151 & 172.) He was aware the receipt of the Escrow Funds received by him or Tomax violated the terms of the Paymaster Agreement. (Doc. 19 ¶ 142.) Thus, he had knowledge that AdventHealth was the only party entitled to the Escrow Funds. Yet, he received and retained these funds, and made misrepresentations to AdventHealth regarding the location and refund. As pled, Counts VIII and IX sufficiently define the Defendants' respective roles.

C. The Complaint alleges Mr. Efrati and Tomax engaged in a conspiracy.

AdventHealth stated claims against Tomax and Mr. Efrati for conspiracy to commit conversion (Count VIII) and fraud (Count IX). *See supra* Section II.A.i.a. Instead of addressing the well-pled allegations outlining their respective roles in the conspiracies, Tomax and Mr. Efrati attempt to deflect responsibility to the Law Firm or Mr. Weiss. AdventHealth details Tomax's and Mr. Efrati's respective actions in furtherance of the conspiracy that caused AdventHealth's Florida office to lose $2,000,000. AdventHealth does not allege Mr. Efrati made any representations in his capacity as CEO. Mr. Efrati's execution of the Paymaster Agreement is the only action AdventHealth alleges he took in his capacity as CEO. (Doc. 19 ¶¶ 151, 158 & 172.) Whether these statements were made in his capacity as CEO is not appropriate for consideration at this stage because the allegations in the Complaint are taken as true. As pled, these misrepresentations are attributed to Mr. Efrati – not Tomax.

Moreover, AdventHealth is only required to allege these Defendants had an agreement to commit fraud and conversion. There is no heightened pleading standard requiring AdventHealth to detail the date, time, and place these Defendants agreed to steal

AdventHealth's money. *See Sonic Momentum B, LP*, 2011 WL 4738190, at *4. The conspiracy began when the parties entered into the Paymaster Agreement and Tomax and the Law Firm never intended to perform. (Doc. 19 ¶¶ 50-55, 136 & 154.) The conspiracy continued until the Defendants received and refused to return AdventHealth's money. *See, e.g., id*; *supra* Section II.A.i.a. Thus, there are sufficient facts alleged that, if true, establish Tomax and Mr. Efrati participated in these conspiracies to defraud AdventHealth and convert its funds.

D. The allegations of fraud are sufficiently particular.

The particularized allegations against each Defendant satisfy Rule 9(b) and describe a scheme to defraud AdventHealth. "[G]eneral allegations about the nature of the conspiracy are sufficient, even under Rule 9(b), where information about the extent of the alleged conspiracy is within the defendants' exclusive control." *Trinity Graphic, USA, Inc. v. Tervis Tumbler Co.*, 320 F. Supp. 3d 1285, 1297 (M.D. Fla. 2018). It is sufficient for plaintiff "to detail the relevant aspects of the underlying fraud . . . to explain the factual basis for concluding that defendants were aware of the fraud; and, to explain the factual basis for determining that they substantially assisted in its commission." *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 881–82 (11th Cir. 2003). "[A]bsolute particularity is not required, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery." *Freeman v. Sharpe Res. Corp*., 2013 WL 2151723, at *10 (M.D. Fla. May 16, 2013).

AdventHealth is only required to allege the underlying tort of fraud for one co-conspirator. AdventHealth identifies: (1) the exact statements Tomax and the Law Firm made; (2) the time, place, and substance of each statement; (3) who made the statement; (3) how the statements misled AdventHealth; and (4) how Tomax and the Firm profited from their fraud

and conversion at AdventHealth's expense. *See supra* Section II.A.i.a. AdventHealth alleges Tomax and Mr. Efrati took several actions in furtherance of these conspiracies. *See supra* Section II.A.i.a. The misrepresentations made by Mr. Efrati, as pled, were made in his individual capacity. There is no reference to Mr. Efrati acting on behalf of Tomax when it told AdventHealth it would receive a refund on May 18, 2020. (Doc. 19 ¶ 43.) AdventHealth then sent a demand to Mr. Efrati to refund the Escrow Funds that he received. (Doc. 19 ¶ 46.)

AdventHealth also sufficiently pled specific intent. As Mr. Efrati concedes, AdventHealth may plead specific intent generally, and "specific intent can be inferred." (Doc. 25, pp. 20-21.) Tomax and Mr. Efrati knew the terms of the Paymaster Agreement were never satisfied, and they "had actual knowledge the Escrow Funds did not and never could belong to anyone but AdventHealth." (Doc. 19 ¶¶ 164-65 & 172.) Thus, when Mr. Efrati and Tomax received the Escrow Funds, they knew the funds belonged to AdventHealth, but refused to issue a refund and chose to keep the money. Mr. Efrati's specific intent is further evident in the knowingly false representations he made in an effort to conceal AdventHealth's funds. (Doc. 19 ¶ 43). AdventHealth details the time, method, and manner that each misrepresentation was made by Mr. Efrati in furtherance of the conspiracy to commit fraud. Tomax never had any intention to perform the Paymaster Agreement, which is evident in their breach and subsequent efforts to hide and retain AdventHealth's funds. *See supra* Section II.A.i.a. Thus, AdventHealth met Rule 9(b)'s requirements and stated a claim for conspiracy to commit fraud.

E. Tomax had control over and converted AdventHealth's funds.

AdventHealth sufficiently alleges Tomax controlled and deprived AdventHealth of the Escrow Funds. *See supra* Section II.A.i.a.; *Goodwin v. Alexatos*, 584 So. 2d 1007, 1011 (Fla.

5th DCA 1991) ("Goodwin also stated a cause of action against Alexatos in alleging that some of the allegedly wrongfully disbursed funds were disbursed to Alexatos."). Tomax's receipt of the funds was an unauthorized act as it knew only AdventHealth was entitled to the funds. AdventHealth is not required to establish this claim by a preponderance of evidence at this time as Tomax suggests. Absolute particularity is not required. *See Freeman*, 2013 WL 2151723, at *10. AdventHealth is simply required to plead sufficient facts to state a claim, which it has done. The Complaint details Tomax's control of the Escrow Funds. (Doc. 19 ¶¶ 51-52, 142 & 149-50.) As pled, Tomax has sufficient information to formulate its defense. Thus, Count VII states a claim for relief against Tomax for conversion.

F. Tomax's breach of the Paymaster Agreement caused damages.

AdventHealth alleges sufficient facts to state a claim for breach of contract in Count VI. There is no dispute the Paymaster Agreement is valid and binding. Tomax, however, breached the Paymaster Agreement in three ways: (i) failing to deliver the Masks; (ii) failing to provide documentation, including the redacted 3M distributor invoices; and (iii) retaining or receiving payment for services it never performed in violation of the Paymaster Agreement. (Doc. 19 ¶¶ 24-27 & 117-18.) Despite not fulfilling its contractual obligations, Tomax received payment for those contractual services. (Doc. 19 ¶ 27.) AdventHealth received a partial refund, but "Tomax failed to refund the full amount and retained for itself $2,000,000 in violation of the Paymaster Agreement." (Doc. 19 ¶ 120.) Thus, Tomax received $2,000,000 for services it never performed. AdventHealth incurred damages in the amount of $2,000,000 as a result of Tomax's breach. Accordingly, AdventHealth's breach of contract claim is sufficiently pled.

G. The Economic Loss Rule does not apply in this circumstance.

The Economic Loss Rule was abolished by the Florida Supreme Court, except in products liability cases. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc*., 110 So. 3d 399, 407 (Fla. 2013). Furthermore, the independent tort doctrine does not bar these tort claims. *See, e.g., Cowley v. Nero*, 693 So. 2d 120, 121 (Fla. 2d DCA 1997); *Wassall v. Payne*, 682 So. 2d 678, 681 (Fla. 1st DCA 1996) ("[Where] fraudulent misrepresentation and negligent misrepresentation in the formation of a contract are alleged, the economic loss rule does not bar the tort action based on such misrepresentations."); *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989) ("Fraud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered."). The existence of a contract does not preclude a finding of conversion. *See Trend Setter Villas of Deer Creek v. Villas on the Green, Inc*., 569 So. 2d 766, 767–68 (Fla. 4th DCA 1990) (finding plaintiff could maintain conversion and breach of contract claims where "the defendant lawfully obtained possession of the plaintiff's funds to set up the escrow fund and thereafter converted the funds for his own use"); *Gordon v. Omni Equities, Inc*., 605 So. 2d 538, 541 (Fla. 1st DCA 1992). The existence of the Paymaster Agreement does not preclude AdventHealth from pursuing the independent torts of fraud and conversion. AdventHealth has sufficiently alleged the Defendants falsely induced AdventHealth with the intent to deprive it of the Escrow Funds. AdventHealth alleges Tomax had separate felonious intent at the time of contract formation. *See supra* Section II.A.i.a. Thus, AdventHealth stated claims against Tomax in Counts VIII and IX.

WHEREFORE, AdventHealth respectfully requests this Court deny the Motion to Dismiss Amended Complaint (Doc. 25) filed by Tomax and Mr. Efrati.

Respectfully submitted this 3rd day of August, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 3, 2020, a true and correct copy of the foregoing was emailed to:

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