UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ADVENTIST HEALTH SYSTEM
SUNBELT HEALTHCARE CORPORATION.
A Florida not for profit corporation,

Plaintiff,

v.

Case No. 6:20-cv-00877-PGB-DCI

MICHAEL H. WEISS, P.C., a California Professional corporation; MICHAEL H. WEISS, Individually; and TOMAX CAPITAL MANAGEMENT, INC. a California corporation, and Yehoram Tom Efrati, individually.

Defendants

MOTION OF DEFENDANTS TOMAX CAPITAL MANAGEMENT, A CALIFORNIA CORPORATION, AND YEHORAM TOM EFRATI TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Tomax Capital Management, Inc., a California corporation (hereinafter "Tomax") and Yehoram Tom Efrati (hereinafter "Mr. Efrati"), by and through their undersigned counsel, hereby move to dismiss Plaintiff's Amended Complaint pursuant to *Federal Rule of Civil Procedure* 12(b)(2), 12(b)(6) and Local Rule 3.01 on the grounds that: (1) the Amended Complaint fails to establish that this Court has personal jurisdiction over Mr. Efrati; (2) the Amended Complaint fails to state a claim for which relief can be granted against either Mr. Efrati or Tomax; (3) Plaintiff's Amended Complaint fails to state a claim for civil conspiracy against either Mr. Efrati or Tomax; (4) the Amended Complaint fails to plead with particularity any allegations of fraud pursuant to *Federal Rule of Civil Procedure* 9(b); (5) Plaintiff's Amended Complaint fails to state a claim for civil conspiracy against either Mr. Efrati or Tomax; (6) Plaintiff's Amended Complaint fails to state a claim for breach of contract against Tomax;

and (7) Plaintiff's claims for civil conspiracy and conversion are barred by the Economic Loss Rule. In support thereof, Defendants Mr. Efrati and Tomax aver the following:

INTRODUCTION

Plaintiff filed an eleven (11) Count Amended Complaint against Mr. Efrati, Tomax, and Defendants Michael H. Weiss, P.C. (hereinafter "Law Firm") and Michael H. Weiss, individually (hereinafter "Weiss"), which purports to allege Breach of Contract Against Tomax (Count VI), Conversion against Tomax (Count VII), Civil Conspiracy to Commit Conversion Against all Defendants (Count VIII), and Civil Conspiracy to Defraud Against all Defendants (Count IX). Plaintiff's Amended Complaint, however, is patently flawed.

First, Plaintiff's Amended Complaint is devoid of any factual content that would allow this Court to draw a reasonable inference that Mr. Efrati, in his individual capacity, is liable for any of the misconduct alleged. Plaintiff does not plead with sufficient specificity any alleged action Mr. Efrati committed which would subject him to personal jurisdiction under Florida's long-arm statute and has not pled that Mr. Efrati had the required minimum contacts with the State of Florida to establish personal jurisdiction so as not to offend the Due Process Clause of the U.S. Constitution. Accordingly, Plaintiff's Amended Complaint fails to establish that this Court has personal jurisdiction over Mr. Efrati in his individual capacity and should thus be dismissed.

Second, Plaintiff's Amended Complaint does not contain sufficient alleged facts to plausibly state a cause of action against either Mr. Efrati or Tomax. Plaintiff does not properly distinguish between Mr. Efrati and Tomax as two separate legal persons, and Plaintiff does not explain how Mr. Efrati committed a tortious act *personally* by virtue of the alleged knowledge he gained from his *representative* capacity. Third, Plaintiff's Amended Complaint also fails to state

a claim for civil conspiracy against either Mr. Efrati or Tomax. This is because Plaintiff fails to provide sufficient facts to illustrate, as well as to explain, the conduct that transforms an alleged breach of contract claim into a civil conspiracy. Fourth, Plaintiff also fails to plead with particularity the circumstances that constitute fraud or mistake, pursuant to *Federal Rule of Civil Procedure* 9(b). Not only does Plaintiff fail to allege the specific statements that Mr. Efrati made in his individual capacity that illustrate his furtherance of a civil conspiracy to commit fraud, but also Plaintiff fails to clearly delineate between the Defendants at all. Instead, Plaintiff relies on conclusory allegations. Fifth, Plaintiff's Amended Complaint does not state a cause of action against Tomax for conversion because Plaintiff does not allege an unauthorized act that deprived Plaintiff of its funds. Plaintiff does not plead any facts that establish Tomax had or has control of any amount of the Escrow Funds. Sixth, Plaintiff's Amended Complaint fails to state a claim for breach of contract against Tomax because it does not contain any facts regarding damages resulting from the alleged material breach. Plaintiff addresses damages that result from its failure to recover the full amount of the Escrow Funds it wired to Defendants Weiss and/or the Law Firm, which are not properly directed at Defendants Tomax and Mr. Efrati. Seventh, finally, Plaintiff's claims for civil conspiracy and conversion are barred by the Economic Loss Rule. This is because the rule prevents plaintiffs from initiating tort actions for conduct allegedly illustrating a breach of contract. Accordingly, Plaintiff's Amended Complaint should be dismissed against Defendants Mr. Efrati and Tomax.

STANDARD OF REVIEW

A. Motion to Dismiss Standard.

The purpose of a motion to dismiss is to test the legal sufficiency of a complaint. *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985); *Fla. Bar v. Greene*, 926

So.2d 1195, 1199 (Fla. 2006). "Dismissal may be based on various grounds, including failure of the complainant to abide by the applicable rules of procedure." *Greene*, 926 So. at 1199. Under the rules, a pleading 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). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (*Id.*) A complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.*, and plead "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations, brackets and citation omitted).

After stripping away any conclusory statements in the complaint, the remaining factual allegations must do more than "creat[e] a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (internal quotation marks and brackets omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id. Federal Rule of Civil Procedure* 8 "does not empower [a party] to plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Iqbal*, 556 U.S. at 687. The Rule "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678.

A complaint that runs afoul of Rule 8(a)(2)—or the related Rule 10(b)—is "often disparagingly referred to as [a] 'shotgun pleading[ ].'" *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015) (quoting *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1544 n.14 (11th Cir. 1985) (Tjoflat, J., dissenting)). The Eleventh Circuit has roundly condemned such shotgun pleadings, both for the confusion they cause litigants and the havoc they wreak on the docket. *See id*. at 1320–23. Some examples of shotgun pleadings are complaints that are "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action," or that "assert [ ] multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." (*Id*. at 1322–23.) The Eleventh Circuit, in *Herssein Law Group v. Reed of Elsevier, Inc.*, No. 14-11945 (11th Cir. 2015), explicitly rejected complaint pleading which only included conclusory allegations as failing the pleading requirements set out by the Supreme Court of the United States. "[I]t is particularly important for district courts to undertake the difficult, but essential, task of attempting to narrow and define the issues from the earliest stages of the litigation. Absent such efforts, shotgun notice pleadings . . . would impede the orderly, efficient, and economic disposition of disputes." *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir. 1997).

B. <u>Personal Jurisdictional Standard.</u>

The Due Process Clause of the Fourteenth Amendment operates to limit the power of a state to assert *in personam* jurisdiction over a nonresident defendant. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 413–14 (1984); *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). "A plaintiff seeking to establish personal jurisdiction over a nonresident defendant 'bears

the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction.'" *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F. 3d 1339, 1350 (11th Cir. 2013) (quoting *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009)). Once a defendant challenges personal jurisdiction, "[t]he burden . . . shifts back to the plaintiff to produce evidence supporting jurisdiction." (*Id*.) (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990)).

"To assert personal jurisdiction over a nonresident defendant, federal courts must engage in a two-part analysis." *Alexander Proudfoot Co. World Headquarters L.P. v. Thayer*, 877 F.2d 912, 919 (11th Cir. 1989). When claims involve allegations of state law violation, federal courts must first analyze their jurisdictional authority by looking at and analyzing the applicable state long-arm statute, which is construed by the state's supreme court. *Lockard v. Equifax, Inc*., 163 F.3d 1259, 1265 (11th Cir. 1998); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1521 (11th Cir. 1985). Only then, if there is a basis for the assertion of personal jurisdiction under the state statute, can the court proceed to determine whether sufficient minimum contacts exist to satisfy the Due Process Clause of the Fourteenth Amendment so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990); *Wendt v. Horowitz*, 822 So. 2d 1252, 1257 (Fla. 2002). Thus, to establish personal jurisdiction, Plaintiff has the burden of proof of proving both the applicability of Florida's long-arm statute and the constitutional requirement to satisfy the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla. 1989). Florida's long-arm statute provides, in relevant part:

> (1)(a) *A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits*

> *himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:*
>
> *1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.*
>
> *2. Committing a tortious act within this state.*
>
> *3. Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.*
>
> . . .
>
> *6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either: (a) the defendant was engaged in solicitation or service activities within this state . . . .*
>
> *7. Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.*

Fla. Stat. § 48.193(1)(a).

Personal jurisdiction under the Due Process Clause can be satisfied in two forms: specific and/or general. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 564 U.S. at 919 (internal quotations omitted). Specific jurisdiction over a defendant can be found only where a defendant has certain minimum contacts with the forum state. *International Shoe Co.*, 326 U.S. at 316; *Caiazzo v. Am. Royal Arts Corp*., 73 So.3d 245, 251 (Fla. 4th DCA 2011). A defendant must purposefully avail himself of the privileges of conducting business within the forum state and, consequently, benefit from the protections of the forum state's laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228 (1958). A defendant must have the requisite minimum contacts whereby "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hailed into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

286, 297, 100 S. Ct. (1980). General jurisdiction over a defendant, on the other hand, can be found by the "showing of substantial, continuous and systematic business contacts." *International Shoe Co.*, 326 U.S. at 317. Furthermore,

> *. . . an exercise of jurisdiction that is unreasonable would offend due process. To determine whether an exercise of jurisdiction is reasonable, "a court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief" as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.*"

Caiazzo, 73 So.3d at 251 (quoting *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987)).

Except for limited circumstances, "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). While "alter ego serves as a theory to impose liability on an individual for the acts of a corporate entity," *Tara Prods., Inc. v. Hollywood Gadgets, Inc.*, Case No. 09-CV-61436, 2010 U.S. Dist. LEXIS 37889 at *25 (S.D. Fla. April 16, 2010), to pierce the corporate veil in this way, it is imperative that plaintiff prove "*both* that the corporation is a mere instrumentality or alter ego of the defendant, *and* that the defendant engaged in improper conduct in the formation or use of the corporation." *XL Vision, LLC v. Holloway*, 856 So.2d 1063, 1066 (Fla. 5th DCA 2003) (emphasis added). The conduct of the alleged alter ego must be such that "the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact nonexistent and the shareholders were in fact alter egos of the corporation." *Gasparini*, 972 So.2d at 1055 (citation omitted).

ARGUMENT

A. Plaintiff's Amended Complaint Fails to Establish that this Court has Personal Jurisdiction over Mr. Efrati.

i. Plaintiff's Amended Complaint fails to Establish that this Court has Personal Jurisdiction over Mr. Efrati under Florida's long-arm statute.

At all times relevant to this action, Mr. Efrati acted within his corporate capacity as CEO and agent of Tomax. Consequently, no action can be maintained against Mr. Efrati outside of his corporate capacity. Jurisdiction over a defendant may not be based on the defendant's representative capacity as a director or officer; it must be based on the defendant's individual contacts with the forum state. *See Doe v. Thompson*, 620 So.2d 1004, 1006 (Fla. 1993). Plaintiff not only fails to identify any action by Mr. Efrati, individually, that allegedly caused injury to persons or property within the State of Florida, but also Plaintiff fails to identify any action Mr. Efrati engaged in his individual capacity at all. Plaintiff does, however, try to allege Mr. Efrati was involved in a conspiracy. Yet Plaintiff fails to identify any overt act that Mr. Efrati, personally, took in furtherance of a conspiracy or any act regarding the underlying accompanying claim that forms the basis of the alleged conspiracy. Plaintiff fails to identify any act on behalf of Mr. Efrati, personally, that has a nexus or connection with the State of Florida. All of Plaintiff's allegations are baseless claims that are speculative at best, without pleading anything more substantial than the bare elements of its cause of action.

Plaintiff attempts to establish personal jurisdiction by paragraph 4 of Plaintiff's Amended Complaint. (*See* Doc. 19, ¶ 4). In paragraph 4, Plaintiff tries to illustrate paragraphs 35, 42,[1] 43, & 143–47 as examples of how this Court has personal jurisdiction over Mr. Efrati, personally.

[1] Irrespective of Plaintiff's contention, Plaintiff's paragraph 42 has no bearing on jurisdiction over Mr. Efrati, personally, whatsoever. It does not matter for jurisdictional purposes over a defendant that Plaintiff, in Florida, sent an e-mail to a party. Furthermore, Plaintiff does not plead that anyone in Florida received a response from Mr. Efrati. Plaintiff only pleads that the initial e-mail was sent from Florida.

(*Id.*) All such attempts, however, fail. Mr. Efrati is not a signatory to the Paymaster Agreement, which is evident by Plaintiff's Amended Complaint and accompanying Exhibit "A." (*See id.*, Ex. "A.") Plaintiff readily admits via its pleading that the subject matter of the e-mails in paragraphs 42–43 pertain to the Escrow Funds under the Paymaster Agreement, a contract to which Mr. Efrati was not a party. (*See id.* ¶ 42.) Furthermore, Mr. Efrati's e-mail response to Ms. Farabaugh was regarding a direct question from her inquiring about the Paymaster Agreement and contractual provisions to which *Tomax* was a party.[2] (*See id.*) Therefore, the e-mail was directed to Tomax, by way of Mr. Efrati as CEO and representative of Tomax. Plaintiff never pleads that the e-mail, or any e-mail from Mr. Efrati to Plaintiff, was from a *personal* account as opposed to a corporate e-mail address. This does not prove that Mr. Efrati "purposely availed" himself of Florida.

Furthermore, Plaintiff's implied contention that Mr. Efrati's communication was in his personal capacity is expressly contradicted in its next paragraph, as Plaintiff states "Tomax failed to transfer the remaining balance . . . as promised by Mr. Efrati." (*Id.* ¶ 44.) This dichotomy does not follow—if Plaintiff was talking to Mr. Efrati, personally, then Plaintiff cannot claim Tomax failed to transfer anything "as promised by Mr. Efrati." If Mr. Efrati was not acting in his representative capacity as CEO of Tomax, then he would not have had any authority to bind Tomax. As such, Mr. Efrati was acting solely in his *corporate* capacity as CEO, agent, and representative of Tomax, not in his individual capacity. Plaintiff attempts to establish that Mr. Efrati has contacts with Florida when he communicated via phone with Plaintiff, in Florida, yet Plaintiff readily admits that the purpose and subject matter of the conversation was to discuss matters involving Tomax. (*See id.* ¶ 35 ("Mr Efrati had a phone conversation to discuss

[2] Ms. Farabaugh's e-mail specifically mentions the "escrow amount" and the "contractually obligated" timeframe. Mr. Efrati, personally, was never in a contractual relationship with Plaintiff.

Tomax's" alleged breach (emphasis added)); (*id.* ¶ 144) ("Mr. Efrati participated in a phone call with AdventHealth representatives . . . *regarding Tomax's*" alleged breaches (emphasis added)).) Mr. Efrati's communications and contacts with the forum state were not on behalf of him, individually, but rather in his corporate capacity as CEO, agent, and representative of Tomax to discuss Tomax's matters. Plaintiff's Amended Complaint repeatedly treats Mr. Efrati and Tomax as though their conduct was inextricably linked and identical without establishing any differentiation between the two.

While Plaintiff tries to use an e-mail sent from Mr. Efrati (on behalf of Tomax) on May 15, 2020 to establish personal jurisdiction over him, Plaintiff never alleges the e-mail was *received* in Florida. (*See id.* ¶ 145.) Plaintiff omits key information, such as whether the e-mail came from a Tomax corporate account, as opposed to a personal account. (*Id.*) Nothing in Plaintiff's paragraph 145 shows how the communication, the subject of which was the Escrow Funds, was sent from Mr. Efrati, personally, or even received in Florida. Nothing in the communication gives credence to any inference this was not an e-mail sent on behalf of Tomax. The e-mail of May 15, 2020 does not show any furtherance of an alleged conspiracy, either. The e-mail does not lay out that Mr. Efrati or Tomax had control over the deposited funds or that the funds were in any account of Mr. Efrati or Tomax. The e-mail does not state that Mr. Efrati or Tomax had the authority to wire the funds. While Plaintiff may be correct in that it shows knowledge of the subject matter, Plaintiff extrapolates from this and assumes that Mr. Efrati's knowledge of the situation equals care, custody, or control by him or Tomax over the funds. (*See id.* ¶ 146.) The nature of all conversations Mr. Efrati had with Plaintiff revolved around, and pertained to, Tomax's activity pursuant to the Purchase Order, Paymaster Agreement, and transaction. Plaintiff never identifies how Mr. Efrati was acting on behalf of himself,

individually, or that Plaintiff believed they were dealing with Mr. Efrati, individually. Plaintiff never lays out any action Mr. Efrati took in his individual capacity to subject him to personal jurisdiction.

Plaintiff's Amended Complaint does not plead any factual allegations as to how Mr. Efrati was personally involved in any part of a civil conspiracy, some overt act of Mr. Efrati in furtherance of the alleged conspiracy, or how Plaintiff was damaged by Mr. Efrati, individually. While Plaintiff's Amended Complaint contains Counts alleging Mr. Efrati engaged in intentionally tortious conduct, Plaintiff does not plead any factual content that could allow this Court to draw any reasonable inference that Mr. Efrati was involved in an alleged conspiracy or that he is personally liable for any alleged misconduct. Where Plaintiff tries to make any such allegations, the Amended Complaint is riddled with internal contradictions and inaccurate pleadings. Plaintiff does not identify any business Mr. Efrati, personally, undertook in Florida. Plaintiff fails to identify any alleged act, omission, or tortious activity of Mr. Efrati that has a nexus or connection with the State of Florida. Plaintiff does not establish that Mr. Efrati, in his individual capacity, reached out and communicated with Plaintiff. Plaintiff does, however, try to allege general allegations of conspiracy. Plaintiff changes its narrative in its pleading as it sees fit in an attempt to try to establish personal jurisdiction over Mr. Efrati where none exists. Plaintiff brings a baseless claim of conspiracy as a further attempt to have this Court establish personal jurisdiction over Mr. Efrati. Plaintiff merely sprinkles conclusory accusations against all Defendants throughout the Amended Complaint as to possibilities of who had control of the Escrow Funds. (*See, e.g.*, Doc. 19, ¶ 52 ("the Law Firm transferred the Escrow Funds to Tomax, Mr. Efrati, *or* Mr. Weiss") (emphasis added); (*id.* ¶ 61) ("The Law firm transferred the Funds to Tomax and/or Mr. Weiss"); (*id.* ¶ 65) ("the Law Firm has not returned the full amount due to

[Plaintiff]"); (*id.* ¶ 72) ("[t]he Law Firm wrongfully transferred or retained a portion of the Escrow Funds *to Mr. Weiss or itself*") (emphasis added); (*id.* ¶ 94) ("Mr. Weiss wrongfully transferred or received a portion of the Escrow Funds *to himself*") (emphasis added); (*id.* ¶ 175) ("the Law firm transferred the Escrow Funds from its IOLTA account to itself, Mr. Weiss, Tomax, Mr. Efrati, *or another third party.*") (emphasis added).)

Plaintiff's allegations, while mentioning Mr. Efrati's name, do not make clear how Mr. Efrati was acting in his personal rather than professional capacity. Plaintiff fails to establish why the corporate activities he carried out on behalf of Tomax subject him to personal liability. All allegations that Mr. Efrati engaged in fraudulent activity are contained as conclusory recitals within the claims of the Amended Complaint and are not attached to specific factual allegations which would point to individual conduct by Mr. Efrati. The only relationship Mr. Efrati ever had with Plaintiff was that of a representative of Tomax. Mr. Efrati never directed his conduct to Florida on his behalf, personally, but rather as CEO and agent of Tomax.

Mr. Efrati can only speculate that Plaintiff is trying to allege the "personal stake" exception to the intra-corporate conspiracy doctrine. (*See* Doc. 19., ¶¶ 147, 166 ("Mr. Efrati took these steps and furthered this conspiracy because he had an independent, personal stake in the outcome of this conspiracy.").) "Florida courts recognize the 'personal stake' exception to the intra-corporate conspiracy doctrine." *Mancinelli v. Davis*, 217 So.3d 1034, 1036 (Fla. 4th DCA 2017). "Under this exception, where an agent has a 'personal stake in the activities separate from the principal's interest,' the agent can be liable for civil conspiracy." (*Id.*) (quoting *Richard Bertram, Inc. v. Sterling Bank & Trust*, 820 So.2d 963, 966 (Fla. 4th DCA 2002)). A corporate agent "must have acted in their personal interests, *wholly and separately from the corporation*." (*Id.*) (internal quotations omitted) (quoting *Microsoft Corp. v. Big Boy Distr. LLC*, 589 F. Supp.

2d 1308, 1323 (S.D. Fla. 2008)) (emphasis added). However, even if this were Plaintiff's contention and theory, Plaintiff's Amended Complaint does not establish the personal stake exception. All Plaintiff's Amended Complaint does is regurgitate certain buzz words from part of the standard without specifically naming any such theory of liability or establishing associating facts.

Plaintiff's Amended Complaint does not establish Mr. Efrati had a "personal stake" in any activity and does not make out the 'personal stake' exception to the intra-corporate conspiracy doctrine. Plaintiff's Amended Complaint, therefore, fails to establish personal jurisdiction over Mr. Efrati in this manner. While the corporate shield doctrine will not operate as a bar to personal jurisdiction in Florida over a nonresident defendant if he commits negligent acts in Florida irrespective of whether those acts occurred for the benefit of a corporate employer, *Kitroser v. Hurt*, 85 So.3d 1084, 1090 (Fla. 2012), Plaintiff's Amended Complaint fails to identify or allege how Mr. Efrati is liable in his individual capacity, and certainly fails to plead any acts Mr. Efrati undertook in his individual, rather than corporate, capacity. Without Plaintiff pointing to any substantial act Mr. Efrati took in furtherance of an alleged conspiracy, their whole attempt to establish personal jurisdiction in this manner fails.

Plaintiff's counts of civil conspiracy against Mr. Efrati are pled only to provide a means for the imposition of joint liability in an instance where, if not characterized as a co-conspirator, he would not be subject to Florida's long-arm statute. This, simply, does not hold water. *See Execu-tech Bus. Sys., Inc. v. New OJI Paper Co.*, 708 So.2d 599, 600 (Fla. 4th DCA 1998) (holding that assertion of the "conspiracy theory of jurisdiction" will be sustained only when plaintiff shows: (1) a conspiracy existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state;

(4) the defendant knew or should have known of the acts in or effects on the forum state; and (5) such acts or effects were "a direct and foreseeable result" of the actions in furtherance of the conspiracy). All allegations that Mr. Efrati engaged in fraudulent activity are contained as conclusory recitals within the claims of the Amended Complaint and are not attached to specific factual allegations which would point to individual conduct by Mr. Efrati. Plaintiff's Amended Complaint fails to establish this Court has personal jurisdiction over Mr. Efrati because all Plaintiff's allegations fail to establish any conduct committed by Mr. Efrati in his personal capacity, which would satisfy Florida's long-arm statute. *Federal Rule of Civil Procedure* 12(b)(2) requires dismissal of an action when the court lacks personal jurisdiction over the defendant. Therefore, this Court should dismiss all claims against Mr. Efrati in his individual capacity and dismiss Mr. Efrati from this action.

ii. Plaintiff's Amended Complaint fails to Establish Due Process Considerations of the United States Constitution for this Court to have Personal Jurisdiction over Mr. Efrati

Even assuming *arguendo* that Florida's long-arm statute is somehow applicable to Mr. Efrati, this Court lacks personal jurisdiction over Defendant Efrati as it violates his Due Process rights under the Fourteenth Amendment of the United States Constitution. In the present case, Mr. Efrati does not have minimum contacts in Florida, nor did he purposefully avail himself of the privileges of conducting business within Florida such that he could have anticipated being hauled into a Florida court in his individual capacity. Mr. Efrati is a California resident with no personal connections to Florida. Any dealings or transaction that may have a connection with the forum state were on behalf of Tomax and not attributable to him, individually. Plaintiff has not alleged Tomax is an "alter ego" of Mr. Efrati or in any way pled or alleged to "pierce the corporate veil." Plaintiff has not pled with specificity any action Mr. Efrati allegedly took which

would constitute minimum contacts with the State of Florida. Plaintiff does not plead any factual content that allows the court to draw the reasonable inference that Mr. Efrati is liable, personally, for the misconduct alleged. Plaintiff does not articulate any overt act Mr. Efrati allegedly took or how Plaintiff was injured by Mr. Efrati, individually. Plaintiff does not and cannot attribute any communication from Mr. Efrati, in his individual capacity, that was directed toward the forum state. Therefore, Plaintiff's Amended Complaint is insufficient to make out a prima facie case of personal jurisdiction.

Plaintiff's Amended Complaint fails to allege any substantial, continuous, and systematic business contacts Mr. Efrati has or maintained with Florida. Consequently, Plaintiff has no legally recognized basis for hauling Mr. Efrati into a Florida court. It would be both unreasonable and would offend due process to require Mr. Efrati to defend himself in a Florida court, a forum state where he has no contacts. Plaintiff does not plead any factual content that would allow the court to draw the reasonable inference that Mr. Efrati is personally liable for the misconduct alleged. Plaintiff does not plead in its Amended Complaint any contacts that would subject Mr. Efrati to personal jurisdiction under either the Florida long-arm statute or the Due Process Clause of the United States Constitution. Accordingly, dismissal is required for lack of personal jurisdiction over Mr. Efrati.

B. Plaintiff's Amended Complaint Fails to State a Claim upon Which Relief Can be Granted

Federal Rule of Civil Procedure 12(b)(6) warrants dismissal for failure to state a claim upon which relief can be granted. Plaintiff's Amended Complaint is riddled with contradictions and inconsistencies. Plaintiff alleges "[o]nce [Plaintiff] demanded return of the escrow Funds, the *Defendants* refused." (*See* Doc. 19, ¶ 54 (emphasis added).) Plaintiff used the blanket term "Defendants," yet it never pled it sent any demand to Mr. Efrati, personally. (*See id*. ¶ 45

("[Plaintiff] sent demand letters to *the Law Firm, Mr. Weiss, and Tomax*") (emphasis added).) Further, Plaintiff alleges that "Mr. Efrati (as the CEO of Tomax and signatory to the Paymaster Agreement) . . . had actual knowledge." (*See id.* ¶¶ 151, 172.) Plaintiff never makes a causal link as to how Mr. Efrati's having knowledge through his role as CEO of Tomax translates into a tortious act committed by Mr. Efrati, personally. Despite asserting claims against both Mr. Efrati and Tomax, Plaintiff's Amended Complaint fails to distinguish between each party's conduct and contains obvious inaccuracies. A further example is when Plaintiff alleges "[a]t the time the Defendants entered into the Paymaster Agreement." (*Id.* ¶ 50.) As enumerated, Mr. Efrati was not a party to the Paymaster Agreement.

The error here is substantial as it misplaces the actions of Mr. Efrati as agent of Tomax and misattributes them to Mr. Efrati, personally. It is extremely hard to ascertain from Plaintiff's Amended Complaint which allegations of fact are intended to support which claim(s) for relief against either Mr. Efrati or Tomax. In light of the Amended Complaint's conclusory language and mere reference to "Defendants," which intertwines the actions of all Defendants and at times is inaccurate, Plaintiff's Complaint does not give fair notice to either Mr. Efrati or Tomax. (*See Twombly*, 550 U.S. at 555.) The alleged misrepresentations and steps allegedly taken in furtherance of a conspiracy should be enumerated so that the Court and both Mr. Efrati and Tomax can evaluate the Amended Complaint without having to guess at which facts support which claims.

C. Plaintiff Does Not Establish Civil Conspiracy Against Either Mr. Efrati or Tomax.

i. Requirements for a Civil Conspiracy Pleading

"Florida does not recognize an independent action for conspiracy." *Allocco v. City of Coral Gables*, 221 F. Supp. 2d 1317, 1360-61 (S.D. Fla. 2002) (citing *Churruca v. Miami Jai-*

Alai, Inc., 353 So.2d 547, 550 (Fla. 1977). In Florida, a civil conspiracy claim must derive from the underlying claim that forms the basis of the alleged conspiracy. (*Id.* at 1361) (citing *Czarnecki v. Roller*, 726 F. Supp. 832, 840 (S.D. Fla. 1989). Therefore, pursuant to this rule, a claim that is found not to be actionable cannot serve as the basis for a conspiracy claim. (*Id.*) (citing *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1217 (11th Cir. 1999) (applying Florida law). "The gist of an action for civil conspiracy is not the conspiracy itself, but the civil wrong done pursuant to the conspiracy which results in damage to the plaintiff." *Dozier & Gay Paint Co., Inc. v. Dilley*, 518 So. 2d 946, 949 (Fla. 1st DCA 1988).

For Plaintiff to properly plead the essential elements of civil conspiracy, Plaintiff must plead there was: "(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 the plaintiff as a result of the acts done under the conspiracy." *Fla. Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam Cty.*, 616 So.2d 562, 565 (Fla. 5th DCA 1993). "An actionable conspiracy requires an actionable tort or wrong." *Primerica Fin. Servs., Inc. v. Mitchell*, 48 F. Supp. 2d 1363, 1369 (S.D. Fla. 1999) (internal citation and quotation omitted). Plaintiff "must provide some factual basis for the legal conclusion that a conspiracy existed." (*Id.*) Plaintiff "may not simply aver that a conspiracy existed; [Defendants] must be put on notice as to the nature of the conspiracy alleged." (*Id.*)

A cause of action for civil conspiracy should allege the scope of the conspiracy, its participants, and when the agreement was entered into. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009). A complaint may justifiably be dismissed because of conclusory, vague and/or general allegations of conspiracy. *Fullman v. Graddick*, 739 F.2d 553, 556–57 (11th Cir. 1984). A plaintiff's allegations must be factual and individualized as against each

defendant: "[G]eneralized allegations 'lumping' multiple defendants together are insufficient." *W. Coast Roofing & Waterproofing, Inc. v. Johns-Manville, Inc.*, 287 Fed. Appx. 81, 86 (11th Cir. 2008). A complaint that "fails to distinguish precisely what each defendant is alleged to have done sufficiently enough to give Defendants fair notice" does not satisfy this standard. *Yahav Enters. LLC v. Beach Resorts Suites LLC*, 2016 U.S. Dist. LEXIS 2905, 2016 WL 111361 (S.D. Fla. 2016).

ii. Plaintiff does not meet the pleading requirements to sustain a Civil Conspiracy action.

Plaintiff fails to identify how this is not a mere breach of contract claim between Plaintiff and Defendants Weiss and/or the Law Firm to return the Escrow Funds. Plaintiff sued to recover two-million dollars ($2,000,000) of the Escrow Funds it transferred to Defendants Weiss and/or the Law Firm pursuant to the Paymaster Agreement. Plaintiff failed to articulate how the failure of Defendants Weiss and/or the Law Firm to return all of the Escrow Funds amounts to Civil Conspiracy. Plaintiff does not allege enough factual matter to establish a conspiracy existed, allege any acts Mr. Efrati or Tomax did to further the alleged conspiracy, what roles Mr. Efrati or Tomax allegedly had, or any damages that resulted from their alleged actions. Plaintiff does not plead any facts supporting the contention Mr. Efrati, personally, "induced [Plaintiff] to transfer the Escrow Funds to the Law Firm." (Doc. 19, ¶ 136.) As laid out in greater detail, *infra*, Plaintiff's paragraphs 144 and 145 do not establish any act taken by Mr. Efrati, personally, but rather as corporate representative of Tomax. Additionally, not only does Plaintiff not adequately plead when an alleged agreement was entered into, but also Plaintiff pleads contradictory timeframes. (*See id.* ¶ 50 ("At the time Defendants *entered into the Paymaster Agreement* and . . . *after their respective breaches*.") (emphasis added).) Plaintiff has simply not pled enough facts to support an allegation that a conspiracy existed. As such, Plaintiff's Amended Complaint does

not plead the essential elements of civil conspiracy and does not establish or plead enough factual matter to make out the underlying claims for civil conspiracy for conversion and civil conspiracy to defraud. Therefore, Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and violates the Due Process rights of both Mr. Efrati and Tomax. Accordingly, all claims against Mr. Efrati and Tomax regarding conspiracy, both Counts VIII and IX must be dismissed.

D. Plaintiff's Count for Civil Conspiracy to Defraud Must Fail for Failure to Plead Pursuant to Federal Rule of Civil Procedure 9.

Claims for fraud in federal court are governed by *Federal Rule of Civil Procedure* 9(b). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P.* 9(b)*; see also United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1308 (11th Cir. 2002). While "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," *Fed. R. Civ. P.* 9(b), where the Rule's "heightened pleading standards" apply, "the pleading requirements do not extend merely to plausibility." *Miccosukee Tribe of Indians of Fla. v. Cypress*, 814 F.3d 1202, 1212 (11th Cir. 2015). The Eleventh Circuit has endorsed the dismissal of pleadings for failing to meet Rule 9(b)'s standards and requirement of particularity. *See, e.g.*, *Ziemba v. Cascade Int'l, Inc*., 256 F.3d 1194, 1210 (11th Cir. 2001) ("series of inferences is too tenuous" to meet the minimum pleading requirements of Rule 9(b)); *Hendley v. Am. Nat'l Fire Ins. Co*., 842 F.2d 267, 269 (11th Cir. 1988) (concluding that Rule 9(b) was not satisfied when plaintiff "steadfastly refused to offer specifics" and "never earmarked any facts as demonstrative of fraud"); *Friedlander v. Nims*, 755 F.2d 810, 813–14 (11th Cir. 1985); *Summer v. Land & Leisure, Inc*., 664 F.2d 965, 970–71 (5th Cir. Unit B 1981) (affirming Rule 9(b) dismissal because "the complaint includes only conclusory allegations of fraudulent concealment"). "If Rule 9(b) is to carry any water, it

must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged" in mere conclusory fashion. *United States ex rel. Clausen*, 290 F.3d at 1313. "[T]he particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without" properly adhering to the particularity requirement of Rule 9(b). (*Id.* at 1307.) While a plaintiff does not have to initially prove the allegations in its complaint, a plaintiff's complaint must answer the question of whether the pleading is mere conjecture or a specifically pleaded allegation on the essential elements of the lawsuit. (*Id*.)

Plaintiff alleges that "the Defendants" and "each Defendant" made statements and representations as outlined, yet Plaintiff fails to show any representations Mr. Efrati made in his individual capacity. (*See* Doc. 19, ¶¶ 155, 169.) Plaintiff also tries to allege that "all of the Defendants" made misrepresentations and "had no intention of returning the funds, confirmed by the fact that none of them fulfilled their promises." (*Id.* ¶ 169.) First, as outlined in section B, *supra*, Plaintiff never sent any demand to Mr. Efrati, personally. (*See id.* ¶ 45.) Second, as such, Mr. Efrati never made any "promises" in his individual capacity, and Plaintiff fails to establish so. Third, the statement is merely a conclusory assumption which does not show any intention.[3] Plaintiff tries to blanketly plead "Defendants acted in concert with . . . specific intent," but never establishes any act of Mr. Efrati, individually, showing specific intent or any act of Tomax establishing specific intent. (*See id.* ¶¶ 151, 172.) Plaintiff readily admits that Mr. Efrati was "CEO of Tomax and signatory to the Paymaster Agreement," (*id.* (internal brackets omitted)), yet never establishes or makes a connection as to how Mr. Efrati, obtaining knowledge as agent of Tomax, committed any alleged act with such knowledge. Plaintiff tries to establish that the

[3] While specific intent can be inferred, people act for a myriad of reasons, including outside forces and conditions outside of their control. To state this as "confirmation" is gross oversimplification and inference of intention.

representations Mr. Efrati made on behalf of Tomax would subject himself to an alleged conspiracy, (*see id.* ¶ 165), yet as laid out in further detail in section B, *supra*, any alleged representations would not be attributable to Mr. Efrati in his individual capacity. Plaintiff's generic allegations, inconsistencies, and blanket recitals in Plaintiff's Amended Complaint do not conform to the heightened pleading standards of *Federal Rule of Civil Procedure* 9(b).

Plaintiff's Amended Complaint is devoid of particularity, and instead, offers mere conclusory statements which are speculative at best. A complaint that fails to distinguish among the defendants and specify their respective role in the alleged fraud will not meet the standard set forth in *Federal Rule of Civil Procedure* 9(b). Plaintiff's Amended Complaint fails to conform with *Federal Rule of Civil Procedure* 9(b) regarding any allegations to defraud and therefore must be dismissed.

E. Plaintiff's Amended Complaint fails to State a Cause of Action for Conversion against Tomax.

Under Florida case law, conversion is defined as the wrongful dominion or control of another person's property, assets, or money. *Seymour v. Adams*, 638 So.2d 1044 (Fla. 5th DCA 1994). To properly establish a conversion claim, Plaintiff has the burden of proof to establish, by a preponderance of the evidence: (1) a specific and identifiable piece of property, asset, or money; (2) an immediate possessory right to the property, asset, or money; (3) an unauthorized act which deprives the Plaintiff of that property, asset, or money; (4) a demand for the return of the property, asset, or money; and (5) a refusal to return the property, asset, or money. Plaintiff's Amended Complaint fails, though, because Plaintiff does not plead an unauthorized act by Tomax which deprives Plaintiff of its funds. Plaintiff does not plead any facts establishing Tomax has or had any care, control, or possession of any amount of the Escrow Funds. Additionally, Plaintiff cannot rely on the e-mail reply of Mr. Efrati (as agent of Tomax) of May

19, 2020 stating that approximately two-million ($2,000,000) dollars of the Escrow Funds would be wired in the upcoming days. (*See* Doc. 19., ¶ 43.) The communication does not state the Escrow Funds were in the care, custody, or control of Tomax, or even that the wire transfer would be effectuated by Tomax. All that alleged statement could show is knowledge of the amount of Escrow Funds believed to be available at the time the statement was made. Furthermore, Plaintiff does not even know who has control of the Funds and readily admits that Defendant Law Firm could have transferred funds "to another third party." (*See id.* ¶ 175.) Plaintiff's Amended Complaint does not contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face regarding conversion against Defendant Tomax. Plaintiff does not plead any act on behalf of Tomax that deprived Plaintiff of their Escrow Funds, or that Tomax had control of the Escrow Funds. As such, Plaintiff's Conversion claim against Tomax (Count VII) must be dismissed.

F. Plaintiff's Amended Complaint fails to establish a Breach of Contract Against Tomax

The elements of an action for breach of contract are: (1) the existence of a contract, (2) a breach of the contract, and (3) damages *resulting from the breach*. *Rollins, Inc. v. Butland*, 951 So.2d 860, 876 (Fla. 2nd DCA 2006)(emphasis added). Plaintiff brings a breach of Contract claim (Count VI) against Tomax for breach of the Paymaster Agreement. (Doc. 19, ¶ 114.) Plaintiff asserts "Tomax materially breached the Paymaster Agreement by failing to deliver the Masks pursuant to the terms of the Purchase Order," (*see id.* ¶ 117), yet never alleges any damages resulting from that alleged breach. Plaintiff does allege damages arising from Plaintiff's failure to receive the full amount of the Escrow Funds it wired to Defendants Weiss and/or the Law Firm. Any claim for damages regarding an alleged failure of Plaintiff to receive the full amount of the Escrow Funds it wired Defendants Weiss and/or the Law Firm would be a

contractual claim against Defendants Weiss and/or the Law Firm for failure to return the Escrow Funds pursuant to the Paymaster Agreement, not a contractual claim against Tomax for failure to deliver the Masks. Any claim for the failure of Defendant Weiss and/or the Law Firm to return the Escrow Funds does not lie in contract against Tomax under the Paymaster Agreement.

Plaintiff does not plead in what manner or how Tomax failed "to provide timely, complete and accurate information and documentation to the Paymaster to enable the Paymaster to discharge its duties hereunder." (*See id.* ¶ 118(b)). While Plaintiff does lay out damages arising from and alleged breach whereby Defendants Weiss and/or the Law firm allegedly failed to return Plaintiff's funds, Plaintiff makes no link how that is connected to Tomax's alleged failure to deliver the Masks. Accordingly, Plaintiff's claim for breach of contract (Count VI) fails as it does not plead any damage attributable to Tomax for its alleged breach of the Paymaster Agreement to deliver Masks. As such, Plaintiff's claim for breach of contract (Count VI) should be dismissed.

G. Plaintiff's Conspiracy Claims are barred by the Economic Loss Rule

The prohibition against tort actions to recover damages for those in contractual privity "is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Am. Aviation*, 891 So.2d at 536 (citing *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 494 (Fla. 3d DCA 1994).[4] Under the economic loss rule, where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract. *Ferguson Transp., Inc. v. North Am. Van Lines, Inc.*, 687 So. 2d 821, 822, 823 (Fla. 1996). While the economic loss rule has not eliminated causes of action based upon torts independent of the

[4] ("Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort.")).

contractual breach, *see e.g. Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999), only under appropriate factual circumstances can certain allegations be successfully pled as an independent tort. *Pershing Indus., Inc. v. The Estate of Victoria Sanz*, 740 So. 2d 1246 (Fla. 3d DCA 1999). Accordingly, Florida courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract. *Am. Aviation*, 891 So. 2d at 536–37); *Weimar v. Yacht Club Point Estates, Inc*., 223 So.2d 100, 103 (Fla. 4th DCA 1969) ("[N]o cause of action in tort can arise from a breach of a duty existing by virtue of contract.").

Here, Plaintiff admits that there is a valid contract and subsequently alleges breach of contract against multiple defendants thereunder for failure to receive the masks under the Paymaster Agreement. Plaintiff would have you believe the underlying wrong was a scheme to defraud the Plaintiff, instead of a straightforward breach of contract. As such, Plaintiff's claims for conspiracy, Counts VIII and IX, are barred and must be dismissed.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the Plaintiff's Amended Complaint against Defendants Tomax and Mr. Efrati.

Respectfully submitted this 20th day of July, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 20, 2020, a true and correct copy of the foregoing was furnished to the Clerk of Court by using the CM/ECF system, which will send an electronic Notice of Electronic Filing to all counsel of record identified on the Service List.

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