UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ADVENTIST HEALTH SYSTEM
SUNBELT HEALTHCARE
CORPORATION,

Plaintiff,

v. Case No: 6:20-cv-877-Orl-40DCI

MICHAEL H. WEISS, P.C,
MICHAEL H. WEISS, TOMAX
CAPITAL MANAGEMENT, INC. and
YEHORAM TOM EFRATI,

Defendants.
_____/

ORDER

This cause comes before the Court on the following:

1. Defendants Tomax Capital Management and Yehoram Tom Efrati's Motion to Dismiss (Doc. 25), filed July 20, 2020;
2. Defendants Michael H. Weiss, P.C., and Michael H. Weiss's Motion to Dismiss (Doc. 28), filed July 28, 2020; and
3. Plaintiff's respective Responses in Opposition (Docs. 29, 31).

Upon consideration, the Motions are due to be denied.

I. BACKGROUND

Plaintiff Adventist Health System Sunbelt Corporation ("**Plaintiff**" or "**AdventHealth**") brings this action against 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.

This action arose when AdventHealth sought to acquire personal protective equipment for medical workers combatting the ongoing COVID-19 pandemic. (Doc. 19, ¶ 12). Tomax represented to AdventHealth that it could supply 3M N95 1860 ventilator masks ("**N95 Masks**"), which Tomax could arrange to ship from its California facility to AdventHealth in Orlando, Florida. (*Id.* ¶ 13).

On April 8, 2020, AdventHealth entered into a contract for the purchase of 10,000,000 N95 Masks from Tomax at a unit cost of $5.75—or $57,500,000 total (the "**Purchase Order**"). (*Id.* ¶ 14). The Purchase Order required Tomax to deliver the N95 Masks by April 18, 2020. (*Id.* ¶ 15).

On April 9, Tomax, AdventHealth, and the Law Firm executed a Paymaster Agreement that incorporated the terms of the Purchase Order. (*Id.* ¶ 16). Pursuant to the Paymaster Agreement, AdventHealth wired $57,500,000 into the Law Firm's Interest on Lawyer Trust Account ("**IOLTA**"), to be held in escrow by the Law Firm (the "**Escrow Funds**"). (*Id.* ¶¶ 17–19). Once AdventHealth transferred the Escrow Funds, Tomax was required to provide AdventHealth with a redacted 3M distributor invoice with certificates via email. (*Id.* ¶ 20). Upon AdventHealth's acceptance of the 3M distributor invoice, the Law Firm was required to pay the Escrow Funds, less the escrow agent fee, to Tomax. (*Id.* ¶ 21). If these conditions

were not timely satisfied, the Law Firm was required to notify the parties and return the Escrow Funds to AdventHealth. (*Id.* ¶ 22).[1]

Tomax failed to provide AdventHealth with a redacted 3M distributor invoice, and otherwise failed to deliver the N95 Masks. (*Id.* ¶ 25). On May 6, AdventHealth's Associate Chief Legal Officer, Desmond Jordan ("**Jordan**"),[2] emailed the Law Firm to request a return of the Escrow Funds. (*Id.* ¶ 30). Weiss replied that the Escrow Funds would be returned by May 13. (*Id.* ¶ 31). On May 13, Jordan emailed Weiss again, and Weiss confirmed that the Escrow Funds would be sent that day. (*Id.* ¶¶ 32–33). AdventHealth did not receive any of the Escrow Funds. (*Id.* ¶ 34).

On May 14, Jordan emailed Weiss to remind him of his "fiduciary duty as holder of escrow, which includes [his] obligation to abide by the terms of the agreement, including the return of [AdventHealth's] funds pursuant to [its] notice of cancellation." (*Id.* ¶ 36). Weiss replied, "My bank just told me that the wire will be cleared for payment tomorrow [May 15]." (*Id.* ¶ 37).

On May 15, AdventHealth received a partial transfer of $55,500,000. (*Id.* ¶ 39). According to Weiss, the remaining $2,000,000 was in Tomax's possession.

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[1] The Paymaster Agreement provided that, "If the conditions herein are not completely fulfilled within ten (10) business days following the receipt of the funds in the Account, the Paymaster [*i.e.*, the Law Firm] shall notify all Parties. Within five (5) business days following the transmission of such notice, subject to a change authorized by the Parties, the Paymaster will return said funds by bank wire to the bank account from which the deposits were received, less its Paymaster Fees incurred up to that date and previously authorized disbursements." (*Id.* ¶ 26).

[2] Jordan resides and works in Florida. (*Id.* ¶ 30).

(*Id.* ¶ 47). An AdventHealth representative, Marisa Farabaugh ("**Farabaugh**"),[3] emailed Efrati to advise him that AdventHealth "received partial payment of the total escrow amount due . . . . As you are aware, this is seven business days after the contractually obligated five business days." (*Id.* ¶ 42). Efrati replied, "The full balance will be wire [sic] Monday [May 18] morning, it's about $2M." (*Id.*). Efrati knew this statement was false. (*Id.*).

To date, AdventHealth has not received the remaining balance of the Escrow Funds. (*Id.* ¶ 48). AdvantHealth initiated this action, alleging: (1) breach of contract against the Law Firm and Tomax (Counts I and VI); (2) conversion against the Law Firm, Weiss, and Tomax (Counts II, IV, and VII); (3) breach of fiduciary duty against the Law Firm and Weiss (Counts III and V); (4) civil conspiracy to commit conversion against all Defendants (Count VIII); (5) civil conspiracy to defraud against all Defendants (IX); and civil theft against the Law Firm and Weiss (Counts X and XI). (Doc. 19).

Defendants now move to dismiss. (Docs. 25, 28).

II. STANDARDS OF REVIEW

A. Failure to State a Claim

To survive a motion to dismiss made pursuant to Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim

[3] Farabaugh resides and works in Florida. (*Id.* ¶ 42).

is plausible on its face when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Legal conclusions and recitation of a claim's elements are properly disregarded, and courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam). In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 67.

B. Personal Jurisdiction

A court must dismiss an action against a defendant over which it lacks personal jurisdiction. *Smith v. Trans-Siberian Orchestra*, 689 F. Supp. 2d 1310, 1312 (M.D. Fla. 2010). On a motion to dismiss for lack of personal jurisdiction, a plaintiff bears the burden to allege sufficient facts to establish that the court has personal jurisdiction over the defendant and to rebut a defendant's assertion that personal jurisdiction over him is improper. *Id.* at 1313 (citing *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000)).

District courts in the Eleventh Circuit apply a two-prong analysis when determining whether personal jurisdiction exists over a defendant. *Mutual Serv.*

Ins. v. Frit Indus., Inc., 358 F.3d 1312, 1319 (11th Cir. 2004); *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 855 (11th Cir. 1990). First, the court must determine whether the plaintiff has alleged sufficient facts to subject the defendant to the forum state's long-arm statute. *See Future Tech. Today*, 218 F.3d at 1249.[4] Second, if the court determines that the forum state's long-arm statute has been satisfied, the court must then decide whether exercise of jurisdiction comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* In determining whether jurisdiction comports with the Due Process Clause, the court must ask "(1) whether [the] defendant has established sufficient 'minimum contacts' with the [forum state]; and (2) whether the exercise of this jurisdiction over [the] defendant would offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

III. DISCUSSION

Defendants first challenge the adequacy of Plaintiff's civil conspiracy claims, from the underlying torts of conversion and fraud to the conspiracy itself. Next, Weiss and Efrati argue that they cannot be subject to personal liability and that the Court lacks personal jurisdiction. Finally, Tomax challenges Plaintiff's breach of contract claim. The Court addresses each of these arguments in turn.

4. In examining this first prong, the district court must construe the state's long-arm statute in the same manner as the state's supreme court. *See Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1265 (11th Cir. 1998).

A. Civil Conspiracy Claims

Defendants challenge the sufficiency of Plaintiff's allegations of a civil conspiracy to commit conversion and fraud. Under Florida law, 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." *Hogan v. Provident Life & Accident Ins.*, 665 F. Supp. 2d 1273, 1285 (M.D. Fla. 2009).[5] When one conspirator engages in tortious behavior, the plaintiff can then hold all other conspirators liable without alleging that they each proximately caused the harm. *See Beck v. Prupis*, 162 F.3d 1090, 1099 n.18 (11th Cir. 1998). Thus, Plaintiff must allege that each Defendant agreed to commit conversion and fraud, and at least one Defendant actually succeeded in doing so.

The Court will first address the sufficiency of Plaintiff's underlying tort allegations, and then consider the plausibility of an overarching conspiracy.

1. Conversion

Counts VII, II, and IV allege conversion against Tomax, the Law Firm, and Weiss, respectively. In Florida, conversion is defined as the wrongful dominion or

[5] Note that, unlike criminal conspiracies, civil conspiracies require actual damage to the victim. This is because criminal and civil conspiracy laws serve different functions. On the one hand, agreements to engage in criminal activity are considered dangerous to society in and of themselves. *See* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.4(c) (2d ed. 1986). Therefore, defendants may be punished simply for the act of agreement, regardless of the outcome. *Id.* at § 6.4(d). On the other hand, civil conspiracy claims serve to impute liability—to make X jointly liable with D for what D did to P. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 46 (5th ed. 1984). Therefore, a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; only then can the plaintiff hold other members of the conspiracy liable for that injury.

control of another person's property, assets, or money. *Seymour v. Adams*, 638 So. 2d 1044, 1046–47 (Fla. 5th DCA 1994). To state a claim for conversion of money, a plaintiff must allege: (1) a specific and identifiable sum of money; (2) the plaintiff's possession or an immediate right to possess the money; (3) an unauthorized act which deprives the plaintiff of the money; and (4) a demand for return of the money and a refusal to do so. *United States v. Bailey*, 288 F. Supp. 2d 1261, 1264 (M.D. Fla. 2003); *but see Tambourine Comercio Internacional SA v. Solowsky,* 312 F. App'x 263, 272 (11th Cir. 2009) (suggesting that demand and refusal are not required elements for a conversion claim). An "unauthorized act" can include the wrongful retention of property to which another has the right of possession. *Seymour*, 638 So. 2d at 1047.

Tomax argues that the conversion claim against it must fail because the Amended Complaint fails to establish that Tomax ever had possession of the Escrow Funds. (Doc. 25, p. 22). Tomax points to language stating that the Law Firm "transferred the Escrow Funds from its IOLTA account to itself, Mr. Weiss, Tomax, Mr. Efrati, or another third party." (Doc. 19, ¶ 175). However, Plaintiff's uncertainty regarding the exact chain of possession does not negate the possibility that Tomax obtained the Escrow Funds at some point. Indeed, Plaintiff explicitly alleges that Tomax "accepted and retained the Escrow Funds even though it had not performed its obligations under the Paymaster Agreement." (*Id.* ¶ 142). Furthermore, the Amended Complaint also alleges communications from both Efrati and Weiss indicating that Tomax had possession of the Escrow Funds. On

May 15, 2020, Efrati wrote, "It was a huge issue since yesterday the bank compliance sto[p]ped the transfer [of the Escrow Funds]. The[y] flag[ged] the account and didn't release it till almost 2pm. The full balance will be wire[d] Monday morning, it's about $2M." (*Id.* ¶ 145). On May 19, 2020, Weiss confirmed to Plaintiff that the remaining balance of the Escrow Funds was in Tomax's possession. (*Id.* ¶ 47).

Viewed in the light most favorable to Plaintiff, these allegations are enough to conclude that Tomax obtained possession of the Escrow Funds. The Amended Complaint further alleges that "Tomax had actual knowledge that the Escrow Funds did not and never could belong to it as Tomax failed to fulfill its contractual obligations." (Doc. 19, ¶ 133). Therefore, Tomax's possession—and retention—of the Escrow Funds constitutes an unauthorized act that deprived Plaintiff of its property rights. *Cf. Goodwin v. Alexatos*, 584 So. 2d 1007, 1011 (Fla. 5th DCA 1991) ("The recipient of converted property is liable to the rightful owner in an action for conversion."). Accordingly, Plaintiff states a claim for conversion against Tomax.

Turning next to Weiss and the Law Firm, neither party challenges the sufficiency of Plaintiff's conversion claims against them. (*See generally* Doc. 28).[6] The Court notes that an attorney can be held liable for conversion by wrongfully retaining or disbursing escrow funds in contravention of an escrow agreement, which is what Plaintiff alleges here. *See Goodwin*, 584 So. 2d at 1011 (holding the

[6] Weiss challenges the conversion claim indirectly by arguing that the Court lacks personal jurisdiction over him. (*Id.* at p. 20). The Court addresses this argument below.

same). Regardless, in the absence of a dispute on this issue, the Court concludes that Plaintiff adequately alleges conversion by Weiss and the Law Firm.

2. Fraud

The Amended Complaint does not plead fraud as a distinct count, but rather alleges fraud only in the context of Count IX's conspiracy claim.[7] To state a claim for fraud in the inducement, plaintiffs must allege: (1) a false statement of material fact; (2) the maker of the false statement knew or should have known of the falsity of the statement; (3) the maker intended that the false statement induce another's reliance; and (4) the other party justifiably relied on the false statement to its detriment. *Rose v. ADT Sec. Servs. Inc.*, 989 So. 2d 1244, 1247 (Fla. 1st DCA 2008).

Claims for fraudulent inducement are government by Rule 9(b)'s heightened pleading standard. FED. R. CIV. P. 9(b); *see also Oginsky v. Paragon Props. of Costa Rica LLC*, 784 F. Supp. 2d 1353, 1368 (S.D. Fla. 2011). A complaint satisfies Rule 9(b)'s particularity requirements by alleging: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statements; (3) the content and manner in which the statements misled plaintiff; and (4) what the defendants gained from the alleged fraud. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006).

[7] Civil conspiracy law requires plaintiffs to prove that the underlying tort occurred, but does not appear to require pleading the tort as a separate cause of action. *Cf. Hogan*, 665 F. Supp. 2d at 1285; *Raimi v. Fulong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) (noting that the underlying tort or wrong must be "actionable").

"When considering a motion to dismiss for failure to plead fraud with particularity, the Court must be careful to harmonize the directives of [Rule 9(b)] with the broader policy of notice pleading." *United States ex rel. Childress v. Ocala Heart Inst., Inc.*, No. 5:13-CV-470, 2015 WL 10742765, at *2 (M.D. Fla. Nov. 23, 2015). "While the circumstances of fraud must be alleged with specificity, absolute 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.*, No. 6:12-cv-1584, 2013 WL 2151723, at *10 (M.D. Fla. May 16, 2013). "[Plaintiffs] are not expected to specify the exact time and the particular place of each factual omission or misrepresentation, but they must provide a sufficiently narrow time frame from which defendants could derive notice as to when the misrepresentations were made." *Flamenbaum v. Orient Lines, Inc.*, No. 03-22549-CIV, 2004 WL 1773207, at *6 (S.D. Fla. July 20, 2004).

The Court finds that Plaintiff pleads fraudulent inducement with sufficient particularity to satisfy Rule 9(b). The Amended Complaint alleges: (1) Tomax represented that it would supply and deliver the N95 Masks; (2) the Law Firm represented that it would safeguard the Escrow Funds and would not transfer those funds until Tomax delivered the N95 Masks; (3) both Tomax and the Law Firm knew those representations were false; (4) these representations induced Plaintiff to transfer $57,500,000 to the Law Firm; and (5) Defendants retained[8]

[8] An exact breakdown of how the missing Escrow Funds were diverted to each Defendant is a matter for discovery.

$2,000,000 of the Escrow Funds despite Tomax's failure to deliver the N95 Masks. (Doc. 19, ¶¶ 156–160). These allegations are particular enough to alert Defendants of the precise misconduct with which they are charged. *See Freeman*, 2013 WL 2151723, at *10 ("At [the pleading] stage, it is enough that [the plaintiff] has alleged with particularity what he lost and how he lost it.").

Furthermore, Plaintiff alleges that each Defendant made specific misrepresentations to conceal the location of the missing funds. (*See* Doc. 19, ¶¶ 31, 33, 37, 43, 47). The Court recognizes that fraudulent inducement claims are premised upon a party's "pre-contractual fraudulent behavior." *Badger Auctioneers, Inc. v. Ali*, No. 6:16-cv-572, 2017 WL 3438224, at *3 (M.D. Fla. Aug. 10, 2017). Still, Defendants' post-contractual obfuscations bolster the inference that their pre-contractual representations were intended to defraud.

Accordingly, Plaintiff adequately alleges an underlying fraud.

3. Conspiracy

Having found viable claims for conversion and fraud, the Court must now consider whether Plaintiff adequately alleged an overarching conspiracy.

Weiss and the Law Firm argue that the conspiracy claims should be dismissed under the intracorporate conspiracy doctrine. (Doc. 28, pp. 24–25). Under the doctrine:

> acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. Simply put, under the doctrine, a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves. The doctrine is based on

> the nature of a conspiracy and the legal conception of a corporation. It is by now axiomatic that a conspiracy requires a meeting of the minds between two or more persons to accomplish a common and unlawful plan. However, under basic agency principles, the acts of a corporation's agents are considered to be those of a single legal actor. Therefore, just as it is not legally possible for an individual person to conspire with himself, it is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself.

McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036 (11th Cir. 2000). Therefore, Weiss argues that he cannot have conspired with the Law Firm. The Court agrees.

However, the Amended Complaint also alleges that Weiss and the Law Firm conspired with Tomax and Efrati. The intracorporate conspiracy doctrine applies only to "agreement[s] between or among agents of *the same legal entity*." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1867 (2017) (emphasis added). In contrast, the doctrine does not bar allegations of a conspiracy between two *separate* entities. *McDermott v. Brevard Cnty. Sheriff's Office*, No. 6:07-cv-150, 2007 WL 788377, at *4 (M.D. Fla. 2007). The Law Firm and Tomax are separate entities, so the doctrine does not preclude allegations of a conspiracy between them.

Defendants respond that the Law Firm acted as an "agent" for Tomax by virtue of its role under the Paymaster Agreement, and this agency relationship triggers the intracorporate conspiracy doctrine. "The Law Firm can no more conspire with one of its principals (Tomax), than the Law Firm can conspire with its agent (Weiss)." (Doc. 28, p. 25). They cite no authority in support of this

proposition. However, when faced with a similar argument, another court in this district held:

> [The doctrine] cannot be read to mean . . . that a corporation can enter into a conspiratorial agreement with a separate corporation (that is not its *alter ego* or a subsidiary) and escape civil liability under the intra-corporate conspiracy doctrine simply because the second corporation has become the "agent" of the first corporation in relation to the object of the agreement. If that was the law, then no corporation could ever be held responsible for a conspiracy. By definition, a conspiracy involves a combination in which every member of the scheme becomes the agent of every other member for purposes of carrying out the object of the agreement. Clearly the intra-corporate conspiracy doctrine—that a corporation, like any other person, cannot conspire with itself—does not stretch that far.

Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc., 990 F. Supp. 2d 1254, 1275 (M.D. Fla. 2013).[9]

The Court is persuaded by this reasoning. Defendants' interpretation stretches the doctrine beyond the bounds of reason. After all, every party in this case is connected to another by an agency relationship—Weiss acted as an agent for the Law Firm, Efrati acted as an agent for Tomax, and the Law Firm (as Paymaster) acted as an agent for both Tomax and Plaintiff. Under Defendants' preferred reading, each of these disparate parties could be considered a single legal actor. That cannot be right. In the absence of clear precedent from Florida courts, the Court declines to accept an interpretation of the intracorporate conspiracy doctrine with such far-reaching implications. Accordingly, the Court holds that the

[9] The court in that case applied Michigan's conspiracy law, but this Court finds its analysis equally applicable to Florida's conspiracy law.

doctrine does not preclude a finding that the Law Firm (and its agents) conspired with Tomax (and its agents).

Turning now to the substance of Plaintiff's conspiracy allegations, the Court finds that the Amended Complaint is adequately pled. Plaintiff alleges that: (1) Defendants made false representations that induced Plaintiff to transfer the Escrow Funds to the Law Firm; (2) Defendants had no intention of performing their obligations under the Paymaster Agreement; (3) Defendants were aware that the conditions precedent to the transfer of Escrow Funds to Tomax had not been satisfied; (4) Defendants wrongfully retained, received, and/or transferred the Escrow Funds despite knowing that the funds belonged to Plaintiff; (5) Defendants made specific false representations (via telephone and email) to Plaintiff to conceal the location of the Escrow Funds; and (6) Defendants still possess approximately $2,000,000 of Plaintiff's money. (Doc. 19, pp. 23–30). Accepting these factual allegations as true, the Court can infer that Defendants agreed—and worked in concert—to defraud Plaintiff and convert the Escrow Funds. At this stage, Plaintiff need not "allege the terms of the agreement, when it was entered, what benefit [each Defendant] expected to obtain from the conspiracy, or other particularities. It is sufficient to plead, as Plaintiff has done, facts which raise a reasonable expectation that discovery will reveal evidence of agreement." *Sonic Momentum B, LP v. Motorcars of Distinction, Inc.*, No. 11-80591-CIV, 2011 WL 4738190, at *5 (S.D. Fla. 2011). Accordingly, Defendants' Motions to dismiss the conspiracy claims are denied.

4. Economic Loss Rule

Tomax's final argument is that Plaintiff's conspiracy claims are barred by the economic loss rule. (Doc. 25, p. 24). The rule prohibits tort actions to recover solely economic damages where the parties are in contractual privity, thereby preventing plaintiffs from circumventing the allocation of losses already set forth in a contract. *See Indemnity Ins. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004). However, Tomax neglects to mention that the Florida Supreme Court has limited the rule to apply "only in the products liability context." *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 407 (Fla. 2013). This case does not involve products liability, so the economic loss rule is irrelevant.

In any event, the economic loss rule does not preclude tort claims that are independent of an alleged breach of contract. "[F]raudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract; thus actions of fraudulent inducement into a contract and a breach of that contract are not mutually exclusive." *Johns v. Ponto*, 684 So. 2d 830, 831 (Fla. 2d DCA 1996). Likewise, a defendant can be liable for "a civil theft and a conversion as well as a breach of contract." *Masidal v. Ochoa*, 505 So. 2d 555, 556 (Fla. 3d DCA 1987) (rejecting "argument that no civil theft or conversion occurred . . . because there was a contractual relationship between the parties"). Accordingly, Tomax's argument is overruled.

B. Personal Liability

Weiss and Efrati argue that they are shielded from individual liability due to their agency relationships with the Law Firm and Tomax, respectively. In general, "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). However, there is "substantial authority" for the proposition that corporate officers may be sued for tortious acts in which they are alleged to have "personally participated." *White-Wilson Med. Ctr. v. Dayta Consultants, Inc.*, 486 So. 2d 659, 661 (Fla. 1st DCA 1986) (collecting cases). "Individual officers or agents of a corporation are personally liable where they have committed a tort even if such acts are performed within the scope of their employment or as corporate officers or agents." *Id.* (citing *Littman v. Com. Bank & Trust Co.*, 425 So. 2d 636, 640 (Fla. 3d DCA 1983)).[10] "A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his representative character, even though the corporation might be insolvent or irresponsible." *Orlovsky v. Solid Surf, Inc.*, 405 So. 2d 1363, 1364 (Fla. 4th DCA 1981).

Here, Plaintiff does not sue Weiss and Efrati *qua* agents of their respective employers, but as direct and personal participants in a civil conspiracy to commit

[10] "This is so even if no argument is advanced that the corporate form should be disregarded." *Id.* (citing *Adams v. Brickell Townhouse*, 388 So. 2d 1279, 1280 (Fla. 3d DCA 1980).

conversion and fraud. Accordingly, the corporate veil cannot protect Weiss and Efrati from personal liability. [11]

C. Personal Jurisdiction

1. Long-Arm Statute

Florida's long-arm statute permits the state's courts, as well federal district courts, to exercise two categories of personal jurisdiction over nonresident defendants: general and specific. *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006); FLA. STAT. § 48.193. General jurisdiction exists where a defendant engages in "substantial and not isolated activity" within the state. FLA. STAT. § 48.193(2). Specific jurisdiction, on the other hand, "is founded on a party's activities in the forum that are related to the cause of action alleged in the complaint." *Stubbs*, 447 F.3d at 1360, n.3.

As is relevant to this case, the statute confers specific jurisdiction whenever a claim "arises from" a defendant "committing a tortious act within this state." FLA. STAT. § 48.193(1)(a)(1)–(2). In analyzing whether tortious conduct has occurred within Florida, courts do not require a defendant's physical presence. *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002). "[U]nder Florida law, a nonresident defendant commits 'a tortious act within [Florida]' when he commits an act *outside*

[11] Defendants also cite to the related "corporate shield doctrine," which concerns personal jurisdiction rather than personal liability. (Doc. 28, p. 13; Doc. 25, p. 14). When a corporation commits a tortious act in Florida, corporate officers are not subject to personal jurisdiction "by virtue of [their] position." *Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993). However, this doctrine also excludes corporate officers accused of "fraud or other intentional misconduct." *Id.* at 1006 n.1.

the state that causes *injury within Florida*." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1353 (11th Cir. 2013).

"[F]raudulent misrepresentations made from outside Florida by phone, fax, and in writing, directed to [plaintiffs] in Florida, constitute tortious acts committed within Florida under Florida's long-arm statute." *Machtinger v. Inertial Airline Servs., Inc.*, 937 So. 2d 730, 735 (Fla. 3d 2006); *Wendt*, 822 So. 2d at 1257–58 (holding that communications into Florida may form the basis of personal jurisdiction under the long-arm statute if the cause of action arises from those communications). Here, Weiss and Efrati allegedly made written and verbal misrepresentations to Plaintiff—located in Florida—regarding the location and return of the missing Escrow Funds (*Id.* ¶¶ 31–34, 37, 143–146). These misrepresentations helped Defendants conceal the converted funds, which prolonged the wrongful deprivation of Plaintiff's property.

Furthermore, "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 Int'l, Inc. v. Ah Koy,* 690 F.Supp.2d 1317, 1330 (S.D. Fla. 2010); *NHB Advisors, Inc. v. Czyzyk*, 95 So. 3d 444, 448 (Fla. 4th DCA 2012). As discussed above, Plaintiff sufficiently pleads facts supporting the existence of a civil conspiracy that caused injury in Florida. In particular, the Amended Complaint alleges specific actions taken by Weiss and Efrati in furtherance of the conspiracy. For example, Plaintiff alleges that Weiss wrongfully disbursed—and Efrati wrongfully retained—

the Escrow Funds in contravention of the Paymaster Agreement. (Doc. 19, ¶¶ 139, 143). Likewise, Weiss and Efrati's alleged misrepresentations to Plaintiff "suffice as a prima facie showing of [their] alleged participation in a scheme to allow [their] co-defendants to keep Plaintiff's funds." *Energy Source, Inc. v. Gleeko Props., LLC*, No. 10-21162-CIV, 2011 WL 3236047, at *6 (S.D. Fla. July 28, 2011). Thus, even if Weiss and Efrati otherwise had no connection to the state, their alleged participation in the civil conspiracy giving rise to this action satisfies Florida's long-arm statute.

2. Due Process

The Due Process Clause of the Fourteenth Amendment constrains a state's authority to bind a nonresident to a judgment of its courts. *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). A nonresident's physical presence in the state is not required, but the nonresident must have "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

Minimum contacts concern "the relationship among the defendant, the forum, and the litigation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984). "[T]he defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). This connection must arise out of contacts the "defendant himself" creates with the state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis omitted). In general, a "unilateral activity of another party or a third person is not

an appropriate consideration[.]" *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). However, "Directing a conspiracy toward Florida establishes sufficient minimum contacts to satisfy due process." *Machtinger*, 937 So. 2d at 736.

A state's jurisdiction comports with traditional notions of fair play and substantial justice if the state's exercise of jurisdiction over the defendant is reasonable. *Burger King,* 471 U.S. at 477–78. If a defendant who purposefully directed his activities at the state seeks to defeat jurisdiction, he must present a compelling case that some other consideration would render jurisdiction unreasonable. *Id.* at 477. Factors pertinent to reasonableness are: "the burden on the defendant" weighed against "the forum state's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "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." *World–Wide Volkswagen*, 444 U.S. at 292.

Here, Weiss and Efrati's suit-related conduct establishes minimum contacts with Florida. As Plaintiff explains, "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. 31, p. 12) (citing

Doc. 19, ¶¶ 3, 31, 33, 37 & 47). Indeed, the alleged torts of conversion and fraud "could not have occurred but for Mr. Efrati's [and Mr. Weiss's] misrepresentations to AdventHealth's officers and representatives who reside, work, and control the company's finances in Florida." (Doc. 29, p. 12).[12] Most importantly, all Defendants—including Weiss and Efrati—were part of an alleged conspiracy directed toward Florida. *See Machtinger*, 937 So. 2d at 736.

The Court further finds that the exercise of jurisdiction over Weiss and Efrati will not offend traditional notions of fair play and substantial justice. Although Weiss and Efrati will be burdened by having to travel to Florida for mediation and trial, the Court notes that such travel is probably already baked into the cake. After all, Weiss is the president and manager of the Law Firm, and Efrati is the CEO of Tomax. Neither business disputes the Court's exercise of jurisdiction, so Weiss and Efrati are likely to attend trial anyway, either as witnesses or in their official capacities. Moreover, the burden on Defendants is counterbalanced by Florida's strong interest in adjudicating the alleged torts against Plaintiff—a Florida corporation with its principal place of business in Altamonte Springs. Overall, the *World–Wide Volkswagen* factors tip squarely in favor of exercising jurisdiction.

Thus, having found sufficient minimum contacts and no affront to fair play and substantial justice, the Court holds that exercising jurisdiction does not violate

[12] A person can "reasonably anticipate being haled into a Florida court to answer for misrepresentations it made to a Florida resident." *Machtinger*, 937 So. 2d at 736.

Weiss or Efrati's due process rights. Their Motions to Dismiss for lack of personal jurisdiction are denied.

D. Breach of Contract

Finally, Tomax argues that Plaintiff's breach of contract claim fails to allege damages. (Doc. 25, p. 23).[13] The Court disagrees. 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). Plaintiff alleges that: (1) "Tomax entered into the Paymaster Agreement" (Doc. 19, ¶ 115); (2) "Tomax materially breached the Paymaster Agreement by failing to deliver the [N95] Masks pursuant to the terms of the Purchase Order" (*Id.* ¶ 117); and (3) "Tomax failed to refund the full amount [paid by Plaintiff] and retained for itself $2,000,000 in violation of the Paymaster Agreement" (*Id.* ¶ 120). These allegations are enough to state a plausible claim for breach of contract.

IV. CONCLUSION

For the aforementioned reasons, it is **ORDERED** and **ADJUDGED** that Defendants Tomax Capital Management and Yehoram Tom Efrati's Motion to Dismiss (Doc. 25) and Defendants Michael H. Weiss, P.C., and Michael H. Weiss's Motion to Dismiss (Doc. 28) are **DENIED**.

DONE AND ORDERED in Orlando, Florida on February 22, 2021.

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[13] 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).

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties