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 FOR PARTIAL SUMMARY JUDGMENT

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 for Summary Judgment pursuant to *Federal Rule of Civil Procedure 56* on the grounds that the evidentiary and documentary record is both uncontroverted and incontrovertible that the (1) Plaintiff cannot establish that this Court has personal jurisdiction over Mr. Efrati, individually, (2) Plaintiff cannot establish its claim for conversion against Tomax (Count VII), (3) Plaintiff cannot establish Civil conspiracy to commit conversion against Tomax or Mr. Efrati, (Count VIII), and Plaintiff cannot establish Civil Conspiracy to Defraud (Count IX). As such, Mr. Efrati should be dismissed from this action and Summary Judgment should be entered in favor of Defendants Tomax and Efrati as to Counts VII, VIII, and IX of Plaintiff's First Amended Complaint. Furthermore, Mr. Efrati should be dismissed from this

action as the only remaining claim Plaintiff would have remaining against the moving Defendants would be a breach of contract claim against Tomax (Count VI).

I. INTRODUCTION

This story is not complex, nor hard to ascertain. It is a classic example of an actor robbing Peter to pay Paul. Defendants Weiss and/or the Law Firm were faced with the sticky situation of having a shortfall of funds in Defendant Law Firm's IOLTA account. The Law Firm was acting as Paymaster and escrow agent for several Minnesota hospitals in connection with deals the Minnesota hospitals entered into with Tomax for the purchase and sale of much needed personal protective equipment (PPE). After the deals between Tomax and other third parties to source the PPE fell through, Defendants Weiss and/or the Law Firm took money from Plaintiff's Escrowed Funds in order to cover the refunds owed to the Minnesota hospitals for their deposits.

Defendants Weiss and/or the Law Firm put themselves in such a situation where there was a shortfall in the allocation of funds to refund Minnesota hospitals in connection with separate prior deals between Tomax and Minnesota Hospitals because Defendants Weiss and/or the Law Firm had distributed funds from the Minnesota Hospitals before the transactions completed. Unfortunately, the deals between Tomax and Minnesota Hospitals fell through, as Tomax's suppliers could not source the necessary products. Defendants Weiss and/or the Law Firm did not know how, or were not well enough equipped, to handle the situation. Instead, Defendants Weiss and/or the Law Firm took money from Plaintiff's Escrowed Funds in order to cover the refund, anticipating that, if all worked well, no one would be the wiser. Unfortunately, even the best-laid plans can and often do go awry. As the Covid-19 pandemic ramped up, and the country braced for unprecedented uncertainty, PPE was scarce, and the ability to source it became almost futile. Despite Tomax exhausting its options to obtain PPE to meet clients

demands, Tomax was left among the countless other entities unable to secure much needed PPE for clients.

Defendants Weiss and/or the Law Firm, knowing it had paid out money from Plaintiff's Escrowed Funds to other party(ies), increasingly tried to delay payment back to Plaintiff in hope that either the deal with Tomax would materialize, or that somehow the Law Firm would have the necessary funds to fully refund Plaintiff. Defendants Weiss and/or the Law Firm gave Plaintiff excuses as to why the funds were not promptly, and fully, returned. When it became apparent that Defendants Weiss and/or the Law Firm could no longer hide its breaches, both contractually and fiduciarily, Defendants Weiss and/or the Law Firm transferred the remaining balance of the Escrowed Funds in the Law Firm's IOLTA account. Defendants Weiss and/or the Law Firm then hoped it could avoid liability by proposing an alternative solution, namely, proposing that Defendants Weiss and/or the Law Firm could secure PPE for Plaintiff and cover the deficiency in Funds with a discount or credit to Plaintiff.

II. BACKGROUND

The story begins prior to Plaintiff ever entering into a contract with Tomax and Defendant Law Firm. Early in the spring of 2020, Tomax had secured several pending transactions for the purchase and sale of personal protective equipment (PPE) with certain Minnesota medical centers, namely, Allina Health System, Upper Midwest Consolidated Service Center (UMCSC) LLC, and the Mayo Foundation for Medical Education (hereinafter collectively "Minnesota Hospitals"). On or around April 7, 2020, the Minnesota Hospitals had collectively wired to Defendant Law Firm, as escrow agent and Paymaster, an amount of fifty-two million, seventy-eight thousand dollars ($52,078,000) relating to pending transactions for the

purchase of PPE between Tomax and said entities. (A true and Correct copy of the bank wires of certain Minnesota Hospitals to Defendant Law firm is attached hereto as Exhibit "B").

That same day, the Law Firm sent correspondence to Sandy Lazo of Union Bank outlining the amount of money that would be deposited into the Law Firm's IOLTA account along with Purchase Orders from several Minnesota Hospitals for the purchase of PPE masks. (A true and correct copy of the April 7, 2020 correspondence from the Law Firm to Sandy Lazo is attached hereto as Exhibit "C"). Tomax requested from Defendant Law Firm that two million dollars ($2,000,000) be taken from those incoming payments from the Minnesota Hospitals for "logistics" necessary to evaluate the product to consummate and fulfil the transactions Tomax had with the Minnesota Hospitals. (A true and correct copy of the April 7, 2020 e-mail from Tomax to Defendant Michael H. Weiss, P.C. with wiring instructions is attached hereto as Exhibit "D"). In fact, in the e-mail response sent from Defendant Weiss or the Law Firm, the attachment headings specifically mention the Alina[sic] wire, Mato[sic] wire, Captsis wire, and Mag Consulting wire. *Id.* There is no reference to Plaintiff's deal because there was no deal between or among Plaintiff with either Tomax or Defendant Law Firm at that time.

Later that same day, Defendant Law Firm wired two million dollars ($2,000,000) to Tomax and eight-million four hundred eighty-thousand dollars ($8,480,000) to Mag-Consulting Ltd., for their role in securing PPE for the Minnesota Hospital transactions. (A true and correct copy of the April 7, 2020, wires to Tomax and Mag Consulting are attached hereto as composite Exhibit "E"). The Law Firm, in fact, has confirmed the date and the amount as correct as it has stated in California litigation against both Tomax and Mr. Efrati that the Law Firm sent a wire for two-million dollars to Tomax on April 7, 2020. (*See* Defendant Law Firm's California Complaint against Tomax and Mr. Efrati at ¶¶ 18, 22, a true and correct copy of the Complaint

in case 20STCV20698 in the Superior Court of the State of California for the County of Los Angeles, is attached hereto as Exhibit "F").

The last transfer of any money from Defendants Weiss and/or the Law Firm to Tomax occurred a day before Tomax even entered into a contract/Purchase Order with Plaintiff for Plaintiff to purchase masks from Tomax, and two full days before Plaintiff wired any money to the Law Firm pursuant to that anticipated transaction. (*See* Doc. 19 ¶¶ 14, 16, 23). The Purchase Order between Plaintiff and Tomax was not entered into until April 8, 2020. The Paymaster Agreement between Plaintiff and Defendant Law Firm was not entered into until April 9, 2020. Plaintiff's own records show that they did not wire the Escrowed Funds to the Law Firm until the evening of April 9, 2020 for a receipt date from the Law Firm of April 10, 2020. (A true and correct copy of the Bank of America wire is attached hereto as Exhibit "G"). Defendants Weiss and/or the Law Firm has never sent money, or any consideration, to Mr. Efrati, personally.

On or around April 9, 2020, Defendant Law Firm received an e-mail from Martin Diaz, Vice President Branch Service Manager of the Beverly Hills Branch of Union Bank, stating that the wire that Defendant Law Firm sent to Mag-Consulting Ltd. for eight million four hundred eighty thousand dollars ($8,480,000) was returned due to "incorrect beneficiary information." (A true and Correct Copy of the April 9, 2020 e-mail for Mr. Diaz is attached hereto as Exhibit "H"). On April 11, 2020, Defendant Weiss sent an e-mail to Mr. Efrati stating that he was holding fifty-seven million five-hundred thousand dollars ($57, 500,000) in the Law Firm's IOLTA Account for Plaintiff. (A true and correct copy of the April 11, 2020 e-mail is attached hereto as Exhibit "I"). It was as early as April 11, 2020, that Defendant Law Firm was requesting the return of the two million dollars ($2,000,000) from Tomax from the Mag-Consulting deal falling through – all while the Law Firm was explicitly affirming and showing in subsequent

correspondences that the Law Firm had the full amount of the Escrowed Funds in its IOLTA account. More importantly, the Law Firm had not sent any money to either Tomax or Mr. Efrati with respect to the transaction with Plantiff AdventHealth; the request of Defendant Law Firm for two million dollars ($2,000,000) from Tomax was specifically for the April 7, 2020 wire transfer Defendant Law Firm sent to Tomax for the Minnesota Hospitals transaction.

On April 14, 2020, Martin Diaz sent an e-mail to Defendant Law Firm that the funds for the wire to Mag-Consulting for eight million four hundred eighty thousand dollars ($8,480,000) were credited back to Defendant Law Firm's IOLTA account as of that day. (A true and correct copy of the April 14, 2020 e-mail from Martin Diaz to the Law Firm is attached hereto as Exhibit "J"). On April 16, 2020, Defendant Weiss sent a communication to Mr. Efrati that the Law Firm had $107,580,938.70 in the Law Firm's IOLTA account, of which 107,570,000 was for Tomax Capital transactions. (A true and correct copy of the April 16, 2020 letter is attached hereto as Exhibit "K").

On April 18, 2020, Defendant Weiss sent a communication to Mr. Efrati that the Law firm had $107,591,075.04 in the Law Firm's IOLTA account, of which $107,570,000 was for Tomax Capital transactions. (A true and correct copy of the April 18, 2020 letter is attached hereto as Exhibit "L"). On April 22, 2020, Defendant Weiss sent a communication to Tomax that the Law Firm had $107,613,770.70 in the Law Firm's IOLTA account, of which $107,570,000 was for Tomax Capital transactions. (A true and correct copy of the April 22, 2020 letter is attached hereto as Exhibit "M"). On April 25, 2020, Defendant Law Firm sent a communication to Tomax that the Law Firm was holding $107,580,938.70 in its IOLTA account, of which $107,570,000 was for Tomax Capital transactions. (A True and correct copy of the April 25, 2020, correspondence is attached hereto as Exhibit "N"). On April 25, 2020 and April 27, 2020,

Defendant Weiss sent a communication to 3M (or authorized distributor) stating that the Law Firm was holding $107,580,938.70 in its IOLTA account, of which $107,570,000 was for Tomax Capital transactions. (A true and correct copy of the April 27, 2020 letter is attached hereto as Exhibit "O").

On April 27, 2020 Allina Health sent a request to the Law Firm for a full return of their ten million four hundred thousand-dollar ($10,400,00) deposit Allina Health made to Law Firm for a mask deal with Tomax that did not materialize. Later that same day, Defendant Weiss sent an e-mail to Tomax requesting the two million dollars ($2,000,000) which had been paid to Tomax from the Law Firm's IOLTA account from funds for the deal with Allina Health, or other Minnesota Hospital deposits, and notably not from the Plaintiff's deposits. (A true and correct copy of the April 27, 2020 e-mail from Defendant Weiss to Tomax is attached hereto as Exhibit "P"). The next Day, April 28, 2020, Defendant Law Firm sent correspondence to Tomax requesting the two million dollars ($2,000,000) which had been paid to Tomax from the Law Firm's IOLTA account "[n]ow that the Minnesota Hospitals have demanded return of the funds…" (A true and correct copy of the April 28, 2020 correspondence is attached hereto as Exhibit "Q").

On May 5, 2020, The Law Firm, in refunding the full amount of the Minnesota Hospitals deposits, covered the two million-dollar ($2,000,000) shortfall which had been paid to Tomax from Plaintiff's Escrowed Funds. In fact, on May 5, 2020, the Law Firm then sent correspondence attesting that it only had $55,721,278.70 in its IOLTA account, of which only $55,500,000 was for deals regarding Tomax. (A true and correct copy of the May 5, 2020 correspondence from the Law Firm to Nah Young Lee is attached hereto as Exhibit "R"). Simply, Defendant Law Firm left its IOLTA account short two million dollars ($2,000,000) by

dipping into Plaintiff's Escrowed Funds in order to pay one or more of the Minnesota Hospitals. Defendant Weiss and/or the Law Firm stated to Plaintiff that he/it "can explain why" the Law Firm didn't have the full amount of the Escrowed Funds, but that "it's too long for a text." (A true and correct copy of the May 19, 2020 communication between Defendant Weiss and/or the Law Firm and Plaintiff is attached hereto as Exhibit "S").

In fact, since Weiss and the Law Firm knew it had robbed from Peter to pay Paul (took Plaintiff's Escrowed Funds to pay off another deposit, that of Minnesota Hospitals), the Law Firm and/or Weiss was scrambling to find any alternative solution to obscure the truth from Plaintiff regarding the whereabouts of the full amount of the Escrowed Funds. Defendants Weiss and/or the Law Firm suggested to Plaintiff that a family friend could sell ten million (10,000,000) masks to Plaintiff and give Plaintiff a one-million seven-hundred twelve thousand dollar ($1,712,500) "credit on the first order to cover the Tomax shortfall." *Id*. In fact, an inspection of Defendant Law Firm's financials will show that the Law Firm has never transferred a dime to Tomax or Mr. Efrati since transferring the two million dollars ($2,000,000) from the Minnesota Hospital transactions.

While Defendant Law Firm avers that "the Law Firm transferred $2 million related to the Escrow Funds to Tomax for logistics and expenses on or about April 7, 2020 or April 8, 2020." (*See* Defendant Law Firms' Response to Tomax and Efrati's Request for Admissions, a true and correct copy of which is attached hereto as Exhibit "U"), Defendant Law Firm admitted "that the Law Firm received a wire transfer of $57.5 million from Plaintiff on or about April 9, 2020 or April 10, 2020. *Id*.

While Defendant Law Firm attempted to deny that the transfer of two-million dollars ($2,000,000) to Tomax was money not associated with, or part of, the Escrow Funds or Plaintiff,

See Exhibit "U" at ¶ 17, this denial is in stark contrast with the simple, pure chronology. If the Law Firm did not receive any deposits from Plaintiff until April 9, 2020, or April 10, 2020, the Law firm could not have transferred to Tomax any part of the Escrowed Funds on April 7, 2020 or April 8, 2020 – *before* the Law Firm ever had the Escrowed Funds. Defendants Weiss and/or the Law Firm further admitted in its pleading in California state court that the transfer of two-million dollars occurred on April 7, 2020. (*See* Exhibit "F"). Such funds were clearly separate and distinct from Plaintiff's, and no evidence or documents can reflect otherwise. Further, Defendant Law Firm skirted the request that the Law Firm admit that it did not transfer any money to either Mr. Efrati or to Tomax from the date it received the Escrow Funds until present; instead, providing a non-responsive answer to what is an obvious conclusion (*See* Exhibit U ¶ 16): i.e. that Defendants Weiss and/or the Law Firm dipped into Plaintiff's Escrowed Funds to make Minnesota Hospitals whole, a conclusion consistent with the documentary record.

III. STANDARD

Federal Rule of Civil Procedure 56 states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. *Celotex*, 477 U.S. at 323-324. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-51 (1986). Which facts are material depends on the substantive law applicable to the case. *Id.* at 248.

The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). To prevail, the moving party must demonstrate the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to show that there is a dispute for trial. *Id*. The nonmoving party, however, "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986), but must identify specific facts in evidentiary materials revealing a genuine issue for trial. *Celotex*, 477 U.S. at 323. Summary judgment is then appropriate when the movant can show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007)).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. *Porter v. Ray*, 461 F.3d 1315, 1320–1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value."). The nonmovant must "go beyond the pleadings" to demonstrate that there is evidence "upon which a jury could properly proceed to find a verdict" in its favor. *Anderson*, 477 U.S. 242, 251 (Internal quotation marks and citations omitted.) A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted).

The court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Communication, Inc*., 849 F.2d 570, 575 (11 Cir. 1988).

"If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it." Fed. R. Civ. P. 56(e). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249 (citations omitted); accord *Spence v. Zimmerman*, 873 F.2d 256 (11 Cir. 1989)."[A] party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact. Advisory Committee Notes on 2010 Amendments to Fed. R. Civ. P. 56. "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56. (c)(4).

IV. ARGUMENT

a. Plaintiff has not established that this Court has Personal Jurisdiction over Mr. Efrati.

Plaintiff has not produced, nor can it produce, any evidence that Mr. Efrati, personally, has sufficient minimum contacts with the State of Florida 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); *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990)). Plaintiff has not produced, nor can it produce, any evidence that Mr. Efrati committed a tortious act *personally* by virtue of the

alleged knowledge he gained from his *representative* capacity. In fact, Plaintiff readily admits that the only written contact Plaintiff had with Mr. Efrati was conducted through corporate e-mails. (A true and correct copy of "Plaintiff's Response to Tomax Capital Management, a California Corporation, and Yehorem Tom Efrati's Request for Admissions" is attached hereto as Exhibit "A". See Exhibit "A" at 28-29.) Furthermore Plaintiff readily admits in its Amended Complaint that the purpose and subject matter of all conversation Plaintiff had with Mr. Efrati was to discuss matters involving Tomax, whether it be securing PPE under the Purchase Order or inquiring the whereabouts of the Escrowed Funds under the Purchase Order and Paymaster Agreement. (*See* Doc. 19 at ¶ 35 ("Mr Efrati had a phone conversation to discuss *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)). Plaintiff readily admits that Mr. Efrati was "CEO of Tomax and signatory to the Paymaster Agreement (*See* Doc 19. ¶¶ 151, 172)

None of Mr. Efrati's communications and contacts with the forum state were on his behalf, individually, but rather in his corporate capacity as CEO, agent, and representative of Tomax to discuss Tomax's matters. 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). "Jurisdiction over the representatives of a corporation may not be predicated on jurisdiction over the corporation itself, and jurisdiction over the individual officers and directors must be based on their individual contacts with the forum state." *Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1527 (10th Cir. 1987). Plaintiff fails to establish why the corporate activities he carried out on behalf of Tomax subject him to personal liability.

Plaintiff has not produced, nor can it produce, any evidence to establish Mr. Efrati has any conduct with the forum in his individual capacity, rather than corporate, capacity. Plaintiff has not produced, nor can it produce, any evidence to establish conduct committed by Mr. Efrati in his personal capacity which would satisfy Florida's long-arm statute for jurisdiction or the due process clause of the United States Constitution. Therefore, this Court must grant Summary Judgment in favor of Mr. Efrati that this Court has no personal jurisdiction over him in his individual capacity and dismiss Mr. Efrati from this action.

b. Plaintiff cannot establish 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 cannot establish any unauthorized act on behalf of Tomax which deprived Plaintiff of any part of the Escrowed Funds. The nearly two million-dollar ($2,000,000) shortfall from the Escrowed Funds stems from Defendants Weiss and/or the Law Firm dipping into Plaintiff's funds to cover the return of deposits which Defendants Weiss and/or the Law Firm remtted to Minnesota Hospitals, parties not involved in this law suit, nor involved in the transaction with Plaintiff AdventHealth. Defendants Weiss and/or the Law Firm transferred two million-dollar ($2,000,000) to Tomax on April 7, 2020, days before ever receiving any money from Plaintiff. Tomax never received any money from Defendants Weiss and/or the Law Firm

after April 7, 2020. Therefore, Tomax cannot be found to have possessed any of Plaintiff's Funds. Simply, Tomax could not possess any of the Escrowed Funds of Plaintiff because on April 7, 2020, the Law Firm itself did not possess Plaintiff's Escrowed Funds. Accordingly, Plaintiff cannot make out a case for conversion against Tomax, and Summary Judgement must be entered in favor for Tomax with respect to Count VII of Plaintiff's Complaint.

c. <u>Plaintiff cannot establish civil conspiracy to commit conversion against Tomax or Mr. Efrati</u>

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); *see also Gellert v. Richardson*, 1995 U.S. Dist. LEXIS 11254, 1995 WL 856715, at *2 (M.D. Fla. July 24, 1995) ("(1) an agreement or concerted action between two or more persons;

(2) to participate in an unlawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and (4) which overt act was done in furtherance of the common scheme.") "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). 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 conspiracy requires the mutual combination of two or more parties – "a meeting of two independent minds intent on one purpose." *Merchant One, Inc. v. TLO, Inc.,* 2020 WL 248608, at *8. Under the intracorporate conspiracy doctrine, it is not legally possible for an individual to conspire with himself or for a single legal entity consisting of the corporation and its agent to conspire with itself. *Id.* "According to the intracorporate conspiracy doctrine . . . a civil conspiracy claim will not succeed where the only members of the alleged conspiracy are a corporation and/or its officers. . . . This is because the actions of corporate agents, acting within the scope of their employment, are attributed to the corporation itself, thereby negating the multiplicity of actions needed for a conspiracy." *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, 302 F. Supp. 3d 1319, 1325-26 (M.D. Fla. 2016); *see also Lipsig v. Ramlawi,* 760 So. 2d 170, 180 (Fla. 3d DCA 2000) ("Generally speaking, neither an agent nor an employee can conspire with his or her corporate principal or employer.").

"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). "[T]he personal stake exception (of the intracorporate conspiracy doctrine) requires more than some incidental personal benefit – the exception applies only 'where the corporate employees are shown to have been motivated ***solely*** by personal bias.'" *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, 302 F. Supp. 3d 1319, 1325-26 (M.D. Fla. 2016). "The mere fact that one or two individuals own and control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud or that it is necessarily the alter ego of its stockholders to the extent that the debts of the corporation should be imposed upon them personally." *Advertects v. Sawyer Indus., Inc.*, 84 So. 2d 21, 23 (Fla. 1955).

Since civil conspiracy alone is not an independent tort, Plaintiff must properly prove both the elements of civil conspiracy and the elements for conversion in order to state an actionable claim for civil conspiracy to commit conversion. As laid out, *supra*, Plaintiff cannot make out a conversion claim against Tomax, as Tomax never held any part of Plaintiff's Escrowed Funds or hindered their return. Plaintiff does not, then, have any legal basis to support Plaintiff's claim for conversion, as Plaintiff does not have an underlying claim that can form the basis of an alleged conspiracy. Furthermore, Plaintiff has not, and cannot, produce any evidence of actions Mr. Efrati undertook in his individual, rather than corporate, capacity. Plaintiff has admitted that it only corresponded with Mr. Efrati via Tomax e-mail addresses. The subject of all phone communications Plaintiff had with Mr. Efrati directly pertained to the deal that Plaintiff had with Tomax for PPE, namely, the Purchase Order and corresponding Paymaster Agreement. To the

extent Mr. Efrati may have taken any actions, he did so solely as a CEO of Tomax, and thus, for the purpose of considering conspiracy liability, Tomax and Mr. Efrati are treated as one entity. Finally, Plaintiff cannot produce facts to establish the scope of any alleged conspiracy, its participants, and when any alleged agreement was entered into. At best, all Plaintiff can possibly prove is a breach of contract claim against Tomax. Therefore, since Plaintiff cannot make out a claim for conversion, cannot make out a claim for conspiracy, and additionally cannot produce any evidence that Mr. Efrati took any action in his individual capacity, Summary judgment must be entered in favor of Tomax and Mr. Efrati with respect to Plaintiff's claim for civil conspiracy to commit conversion, Count VIII.

d. Plaintiff cannot establish civil conspiracy to defraud against Tomax or Mr. Efrati

"Fraud is an intentional tort, and a plaintiff must demonstrate that defendant had a specific intent to deceive or mislead and cause damage to that plaintiff through the defendant's fraudulent misrepresentations." *Cruise v. Graham*, 622 So.2d 37, 40 (Fla. 4th DCA 1993) (fraud is an intentional tort); *Dresser v. HealthCare Servs., Inc*., No. 8:12–cv–1572–T–24–MAP, 2013 WL 82155, at *4 (M.D. Fla. Jan. 7, 2013) ("[I]t is not necessary that the false statement be made directly to the injured party, 'provided [that the statement is] made with the intent that it shall reach . . . and be acted on by the injured party.'" While "the intracorporate conspiracy doctrine does not apply to alleged intracorporate criminal conspiracies" *McAndrew v. Lockheed Martin Corp*., 206 F.3d 1031, 1038 (11th Cir. 2000), this is purely a civil matter. Furthermore, not only has Plaintiff not brought any charges for civil theft, Plaintiff could not establish facts to make out such a claim even if Plaintiff had alleged so.

As set forth, *infra*, Florida law does not recognize an independent cause of action for civil conspiracy. A valid claim must allege an underlying illegal act or tort on which the conspiracy is

based. However, Plaintiff cannot prove sufficient facts to bring a claim for civil conspiracy to defraud. Plaintiff cannot establish that Tomax and Efrati – on the one hand – and the Law Firm and Weiss on the other hand – had a meeting of the minds to convert money or defraud Plaintiff. Defendant Law Firm last wired money to Tomax prior to any deal with Plaintiff. Yet, Defendant Law Firm did not know about its deficiency in funds with respect to the Minnesota Hospitals until after Plaintiff had executed the deal with Tomax and deposited the Escrowed Funds into Defendant Law Firm's account.

Since civil conspiracy alone is not an independent tort, Plaintiff must properly prove both the elements of civil conspiracy and the elements for fraud in order to state an actionable claim for civil conspiracy to defraud. Plaintiff has not produced, nor can it produce, any evidence that Tomax or Mr. Efrati gained from any alleged fraud of Plaintiff. Plaintiff has not produced, nor can it produce, any evidence that Tomax or Mr. Efrati acted in bad faith. Plaintiff has not, and cannot, earmark any facts as demonstrative of fraud for either Tomax or Mr. Efrati with relation to Plaintiff. Plaintiff has not produced, nor can it produce, any evidence that Plaintiff has any damages as a result from any alleged fraud, only breach of contract. Plaintiff has only produced, and can only produce, damages related to breach of contract.

Plaintiff has not produced, nor can it produce, circumstances constituting an alleged conspiracy to defraud. Plaintiff has not produced, nor can it produce, any evidence of a tacit agreement between and among Tomax and Efrati – on the one hand – and the Law Firm and Weiss on the other hand – whereby the parties had a meeting of the minds to convert money or defraud Plaintiff. Plaintiff has not produced, nor can it produce, any facts showing some overt act in pursuance of an alleged conspiracy. Plaintiff cannot prove any facts that "Tomax . . . accepted and retained the Escrow Funds even though it had not performed its obligations under the

Paymaster Agreement," (Doc. 19 ¶ 142), because Tomax, in fact, never accepted or retained any part of the Escrowed Funds. That is because, in fact, Tomax and Efrati never had care, custody, or control of any part of the Escrowed Funds.

Therefore, since Plaintiff cannot make out a claim for fraud and cannot make out a claim for conspiracy, Summary judgment must be entered in favor of Tomax and Mr. Efrati with respect to Plaintiff's claim for civil conspiracy to commit fraud, Count IX.

V. RELIEF REQUESTED

For all the reasons set forth herein, and despite any civil disputes Defendants Tomax and Mr. Efrati may have against Defendants Weiss and the Law Firm with respect to the Minnesota Hospitals transaction, what is clear from the uncontroverted and incontrovertible evidentiary and documentary record is that Plaintiff has not established and cannot advance any evidentiary grounds whatsoever for supporting Counts VII, VIII and IX of its First Amended Complaint. As such, Tomax and Mr. Efrati respectfully request this Court grant its Motion for Partial Summary Judgment and enter Summary Judgment in favor of Tomax and Mr. Efrati and against Plaintiff with respect to Counts VII, VIII and IX of Plaintiff's First Amended Complaint. Additionally, Mr. Efrati respectfully requests this Court dismiss him, personally, from this action for lack of personal jurisdiction.

Respectfully submitted this 13th day of October, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 13, 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.

/s/ Laurence J. Pino
Counsel for Defendants Tom Efrati and Tomax Capital Group

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

Plaintiff,

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

v.

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

DECLARATION OF YEHORAM TOM EFRATI IN SUPPORT OF DEFENDANTS TOMAX CAPITAL MANAGEMENT, A CALIFORNIA CORPORATION, AND YEHORAM TOM EFRATI FOR PARTIAL SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. My name is Yehoram Tom Efrati. I am an adult individual over the age of eighteen (18), fully competent to execute this Declaration.

2. I make this Declaration based on my own personal knowledge.

3. I am a resident and citizen of the State of California.

4. I am the CEO, principal, and sole owner of Tomax Capital Management, Inc., a California corporation.

5. I have reviewed Plaintiff's First Amended Complaint and all material produced so far in this action.

6. I have reviewed the Motion of Defendants Tomax Capital Management, A California Corporation, and Yehoram Tom Efrati For Partial Summary Judgment.

7. By virtue of my position as owner and CEO of Tomax, I am personally familiar with Tomax's business, services, practices and procedures, and records and operations, as they relate to the facts set forth in this Declaration and in the Motion.

8. In the spring of 2020, Tomax had several pending transactions for the purchase and sale of personal protective equipment (PPE) with certain Minnesota medical centers, namely, Allina Health System, Captis (a collaborative healthcare organization), and the Mayo Foundation for Medical Education (hereinafter collectively "Minnesota Hospitals").

9. On April 7, 2020, the Minnesota Hospitals wired to Defendant Law Firm, serving as Paymaster under agreements with each individual Minnesota Hospital, the requisite money needed to consummate each contract and purchaser order with Tomax. The collective amount wired to Defendant Law Firm, as Paymaster, on April 7, 2020 approximated a collective amount of fifty-two million dollars ($52,000,000).

10. That same day, April 7, 2020, Defendant Law Firm wired two million dollars ($2,000,000) to Tomax upon my request for logistics necessary and related to securing and evaluating the (PPE) necessary to fulfill the several transactions Tomax had with the Minnesota Hospitals.

11. That same day, April 7, 2020, Defendant Law Firm wired eight-million four hundred eighty-thousand dollars ($8,480,000) to Mag-Consulting, Ltd., for their role in securing PPE for the Minnesota Hospital transactions.

12. The deals between the Minnesota hospitals and Tomax were separate and distinct from Plaintiff's Purchase Order and Paymaster Agreement with Tomax.

13. All deals between the Minnesota Hospitals and Tomax all took place prior to any contract between Tomax and Plaintiff.

14. The two million dollars ($2,000,000) Defendant Law Firm wired to Tomax was solely from funds deposited to Defendant Law Firm, as Paymaster and escrow, from the Minnesota Hospitals.

15. No part of the two million dollars ($2,000,000) Defendant Law Firm wired to Tomax was from Plaintiff's Escrowed Funds, as Plaintiff's Escrowed funds did not clear/were not available to the Law firm until April 10, 2020.

16. Plaintiff did not wire their Escrowed Funds to Defendant Law Firm until April 9, 2020 and did not clear/were not available to the Law firm until April 10, 2020 - after Tomax had already received the two million dollars ($2,000,000) from Defendant Law Firm from the Minnesota Hospital funds.

17. The money Defendant Law Firm wired to Mag-Consulting, Ltd. from the Minnesota Hospital funds was returned by the bank to Defendant Law Firm for an improper beneficiary in the wire.

18. Mag-Consulting, Ltd. was never able to provide any PPE to fulfill the orders for the Minnesota hospitals.

19. As such, Defendant Law Firm, as Paymaster under agreements with each individual Minnesota hospital, was required to return the funds each Minnesota hospital had wired to the Law Firm.

20. On or about April 8, 2020, Plaintiff contracted with Tomax to purchase 10,000,000 3M N95 1860 ventilator masks for $57,500,000. The parties incorporated the terms of the Purchase Order into a Paymaster Agreement dated April 9, 2020, attached to the First Amended Complaint as Exhibit "A."

21. Neither Tomax, nor I, have received any money or consideration, in any form, from Defendant Law Firm since April 7, 2020

22. Neither Tomax, nor I, have received any money or consideration, in any form, ever, from Defendant Weiss, personally; nor has Tomax, nor I, received any money or consideration, in any form, ever, from Plaintiff AdventHealth, directly or indirectly.

23. The parties to the Paymaster Agreement are: (1) AdventHealth; (2) Tomax; and (3) the Law Firm, as Paymaster

24. I am not a party to the Paymaster Agreement in my individual capacity.

25. All services I provided and actions I took in connection with the Purchase Order and/or Paymaster Agreement referenced in Plaintiff's First Amended Complaint were on behalf of Tomax, from California.

26. I, personally, provided no services and took no actions in connection with the Paymaster Agreement or Purchase Order.

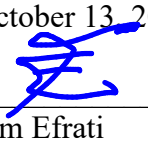
27. I, personally, provided no services and took no actions in connection with the Paymaster Agreement or Purchase Orde in the State of Florida.

28. I have no connection with the State of Florida outside of any business dealings on behalf of Tomax.

29. Furthermore, the facts contained in the Motion of Defendants Tomax Capital Management, A California Corporation, and Yehoram Tom Efrati For Partial Summary Judgment are true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: October 13, 2020



Yehoram Tom Efrati