

**UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
Miami Division**

CASE NO. 1:25-cv-20550-PCH

DRIVEN, P.S.C., as the Liquidation Receiver
for NODUS INTERNATIONAL BANK, INC.,

Plaintiff,

v.

TOMAS NIEMBRO CONCHA; MORELLA
RINCON DE NIEMBRO; JUAN FRANCISCO
RAMIREZ; MARIA GABRIELA VASQUEZ
DE RAMIREZ; NODUS FINANCE, LLC;
OCEANA KEY BISCAYNE CORPORATION;
and JOSE G. SUAREZ,

Defendants.

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**MORELLA RINCON DE NIEMBRO'S MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT**

Morella Rincon de Niembro moves to dismiss Driven, P.S.C.'s amended complaint under Federal Rule of Civil Procedure 12(b)(1) and (6). Driven brings a single count for conspiracy against Mrs. Rincon. However, Driven's amended complaint fails for multiple reasons. First, Driven has failed to allege complete diversity between it and all defendants. Therefore, the Court lacks subject matter jurisdiction over Driven's complaint. Second, Driven has not pled standing to maintain this action, and cannot sue on behalf of Nodus Bank because it has not alleged that Nodus Bank is an honest corporation entitled to recover for the acts alleged in this action. Third, Driven's conspiracy claim against Mrs. Rincon is conclusory and devoid of any allegations that Mrs. Rincon knew about the purported conspiracy and agreed to participate in it. Accordingly, Driven's amended complaint against Mrs. Rincon should be dismissed.

I. SUMMARY OF DRIVEN'S ALLEGATIONS AGAINST MRS. RINCON

Driven brings this action on behalf of Nodus Bank for the alleged misappropriation of Nodus Bank's funds by Tomas Niembro Concha and Juan Francisco Ramirez through two different schemes described in Driven's amended complaint. D.E. 127 ¶¶ 3-4. Driven alleges that Mrs. Rincon was involved in one of the two schemes, which Driven refers to as the "Our Microlending Scheme," that consisted of Mr. Niembro allegedly agreeing with non-party Our Microlending LLC to transfer \$7 million from Nodus Bank to Our Microlending in exchange for Our Microlending issuing two investment certificates to Nodus Bank, one for \$3 million and the other for \$4 million.¹ D.E. 127 ¶¶ 46, 48, 83. Driven alleges that, after Our Microlending issued the two investment certificates, "Tomas and Morella Niembro 'borrowed' approximately \$3.7 million from Our Microlending" through a promissory note signed in their individual capacities. *Id.* ¶¶ 50, 53.

According to Driven, "[a]t the time that she signed the promissory note, Morella Niembro knew or had reason to know that her husband, Tomas Niembro, owed a fiduciary duty of loyalty to Nodus Bank, that the cash used to fund this loan came from Nodus Bank, and that she and her husband, Tomas Niembro, had no right to use those Nodus Bank funds for their own benefit." *Id.* ¶ 55. Driven contends that Mrs. Rincon "conspired with her husband to breach his fiduciary duty of loyalty to Nodus Bank by executing the promissory note and receiving the funds via their company, Oceana." *Id.* Driven brings a single claim against Mrs. Rincon for conspiracy to breach the fiduciary duty of loyalty. *Id.* ¶ 83.

¹ For purposes of her motion to dismiss, Mrs. Rincon de Niembro does not challenge the factual allegations raised in Driven's amended complaint but will contest the allegations if the amended complaint is not dismissed.

II. LEGAL STANDARD

Mrs. Rincon moves to dismiss Driven’s amended complaint under Federal Rule of Civil Procedure 12(b)(1) and (6) for “lack of subject-matter jurisdiction” and “failure to state a claim upon which relief can be granted.” “A motion to dismiss under Rule 12(b)(1) challenges the court’s subject-matter jurisdiction, and . . . permits a facial or factual attack.” *Willett v. United States*, 24 F. Supp. 3d 1167, 1173 (M.D. Ala. 2014) (citing *McElmurray v. Consol. Gov’t of Augusta–Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007)). “On a Rule 12(b)(1) facial attack, the court evaluates whether the plaintiff ‘has sufficiently alleged a basis of subject matter jurisdiction’ in the complaint and employs standards similar to those governing Rule 12(b)(6) review.” *Id.* (quoting *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013)).

A Rule 12(b)(6) motion to dismiss tests the “facial sufficiency of a complaint.” *Ghee v. Comcast Cable Commc’ns, LLC*, No. 22-12867, 2023 WL 3813503, at *2 (11th Cir. June 5, 2023), *cert. denied*, 144 S. Ct. 1008 (2024) (internal quotations and citation omitted). A “formulaic recitation of the elements of a cause of action” will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that a pleading must provide “more than an unadorned, the-defendant-unlawfully-harmed-me-accusation”). Driven must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 547. Though the Court “must accept as true any factual allegation within a complaint, [it is] not so bound with legal conclusions masked in a veneer of facts [A] complaint need not include ‘detailed factual allegations’ . . . [b]ut surviving a Rule 12(b)(6) motion requires ‘more than an unadorned, the defendant unlawfully-harmed-me accusation.’” *Ghee*, 2023 WL 3813503, at *2 (citations omitted).

III. DISCUSSION

A. Driven Has Failed to Allege Subject Matter Jurisdiction, Standing, or That Nodus Bank Was an Honest Corporation on Whose Behalf Driven Can Seek Damages

Mrs. Rincon joins in and adopts Section III of Mr. Niembro's Motion to Dismiss Driven's Amended Complaint. *See* D.E. 134 at 4-10. Mr. Niembro moves to dismiss Driven's amended complaint based on Driven's failure to allege: (1) complete diversity between it and all defendants, (2) a legal basis for its standing to maintain this suit, and (3) that Nodus Bank was an honest corporation who is not imputed with the alleged wrongful acts of its principals and can therefore sue to recover damages for the acts alleged in the amended complaint. *See id.* The arguments raised in Mr. Niembro's motion are incorporated in this motion as if fully set out here.

B. Count III (Conspiracy to Breach Fiduciary Duty Claim) Fails as Conclusory

Under Florida law, to plausibly allege a civil conspiracy claim, Driven must allege "(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." *In re Bal Harbour Quarzo, LLC*, 623 B.R. 903, 921-22 (Bankr. S.D. Fla. 2020) (citations omitted).² "General allegations of conspiracy are inadequate." *GE Real Estate Services, Inc. v. Mandich Real Estate Advisors, Inc.*, 337 So. 3d 416, 420 (Fla. 3d DCA 2021) (quoting *World Class Yachts, Inc. v. Murphy*, 731 So. 2d 798, 799 (Fla. 4th DCA 1999)). Driven's complaint "must 'set forth clear, positive, and specific allegations of civil conspiracy.'" *Id.* (citation omitted). Additionally, allegations that co-conspirators were "engaged in the same scheme, alone, are insufficient to state a claim for civil conspiracy. Indeed, an allegation of parallel conduct and a bare assertion of conspiracy will not

² By basing this motion on Florida law, Mrs. Rincon does not waive the applicability of Puerto Rico law to this action.

suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”

Honig v. Kornfeld, 339 F. Supp. 3d 1323, 1345 (S.D. Fla. 2018) (cleaned up).

Driven’s allegations fall short of plausibly alleging Mrs. Rincon is liable for conspiracy. Regarding the Our Microlending Scheme in which Mrs. Rincon was allegedly involved, Driven asserts a series of events that took place prior to Mrs. Rincon’s purported involvement. First, according to Driven, “Niembro and Ramirez met with a representative of Our Microlending . . . and all three agreed to launder \$7 million from Nodus Bank through Our Microlending” D.E. 127 ¶ 45. Driven then alleges that “Niembro and Ramirez, acting as directors of Nodus Bank and with authorization from other members of the Board of Directors for the Bank, approved the acquisition of \$7 million in Our Microlending Investment Certificates” and “caused Nodus Bank to book the Investment Certificates as assets of Nodus Bank.” *Id.* ¶¶ 46, 49 (emphasis added). Furthermore, according to Driven, “Niembro, as CEO of Nodus Bank, [] granted Our Microlending a first priority security interest in the \$4 million of Nodus Bank depositor funds that were transferred to Our Microlending” *Id.* ¶ 52. Driven does not allege that Mrs. Rincon knew about, was involved in, or in any way agreed to participate in any of these acts.

Driven alleges that, once the alleged fraudulent transaction between Our Microlending and Nodus Bank had been executed as described above, Mrs. Rincon signed a promissory note in order to borrow \$3.7 million from Our Microlending. *Id.* ¶¶ 50, 53. This is the **only** action Mrs. Rincon is alleged to have taken. Every other act that allegedly occurred, both before and after Mrs. Rincon purportedly signed the promissory note, involves only Mr. Niembro, Mr. Ramirez, and Our Microlending. *See, e.g., id.* ¶ 52 (alleging that after Mrs. Rincon signed the promissory

note, **Mr. Niembro** instructed Our Microlending where to send the funds). Signing a promissory note and taking out a loan with her husband is not a wrongful or conspiratorial act. Without more, Driven’s allegation of the only overt act by Mrs. Rincon – purportedly signing a promissory note – is simply insufficient to state an actionable conspiracy claim against her. *See Springboard Media, LLC v. Augusta Hitech Soft Sols., LLC*, No. 22-20191-CIV, 2022 WL 18465128, *5 (S.D. Fla. June 14, 2022) (“Plaintiff’s Complaint states just one overt act taken in furtherance of the conspiracy The Court finds that Plaintiff fails to state an actionable civil conspiracy claim . . .”).

Furthermore, “a summary assertion that parties entered into an unlawful conspiratorial agreement is a legal conclusion and, as such, [is] not entitled to the assumption of truth.” *Sargeant v. Maroil Trading Inc.*, No. 17-81070-CIV, 2018 WL 3031841, at *5 (S.D. Fla. May 30, 2018) (internal quotations and citation omitted). To plead a conspiracy claim, Driven must allege that Mrs. Rincon knew about the alleged conspiracy in advance and intended to help achieve its objective. *Id.* at *12 (dismissing conspiracy claim and stating that “to survive [defendants’] Motions to Dismiss . . . Plaintiff must have pled a plausible claim that [defendants] knew *in advance* that the HS3 Material was to be obtained without proper authorization, and that [defendants] intended to help achieve that objective”) (emphasis in original).

Driven has utterly failed to allege that Mrs. Rincon was in any way knowingly involved and assisted in any conspiracy or agreement to commit an unlawful act, much less one to assist Mr. Niembro in breaching his fiduciary duty of loyalty to Nodus Bank. Driven does not allege that Mrs. Rincon knew about the purported deal between Nodus Bank and Our Microlending that allegedly “caused Nodus Bank to book the Investment Certificates as assets of Nodus Bank,” or that the alleged loan to Mrs. Rincon from Our Microlending was being made with funds from

Nodus Bank. Without allegations indicating that Mrs. Rincon knew about the alleged Our Microlending Scheme in advance and agreed to assist or participate in it, Count III of Driven's complaint against her must be dismissed. *See, e.g., Honig*, 339 F. Supp. 3d at 1346 (dismissing conspiracy claim where plaintiffs did not "plead facts showing that Defendants agreed to do any unlawful purpose or act," or "knew of the unlawful scheme"); *In re Bal Harbour Quarzo, LLC*, 623 B.R. at 922 (dismissing plaintiff's conspiracy to breach fiduciary claim against Amerant where "there are no plausible allegations that Amerant knew BHQ's managers were breaching their fiduciary duties" and "[e]ven assuming Amerant did know BHQ's managers were breaching their fiduciary duties, however, there certainly are no plausible allegations that Amerant entered into any conspiratorial agreement with BHQ to help them do so"); *GE Real Estate Services, Inc.*, 337 So. 3d at 421 ("Mandich cannot be found liable for civil conspiracy merely by passively accepting a finder's fee. To assume or speculate . . . that the [appellees] participated in a conspiracy . . . merely because they ultimately received some benefits from the [investments] is insufficient for the imposition of liability against them.") (internal quotations and citation omitted).

IV. CONCLUSION

For the reasons discussed in this Motion, Mrs. Rincon respectfully requests that the Court dismiss Driven's amended complaint against her.

Dated: September 12, 2025

Respectfully submitted:

RIVERO MESTRE LLP

Counsel for Morella Rincon de Niembro

2525 Ponce de Leon Blvd., Suite 1000

Coral Gables, Florida 33134

Telephone: (305) 445-2500

Facsimile: (305) 445-2505

E-mail: arivero@riveromestre.com

E-mail: ccl@riveromestre.com

E-mail: dtanjido@riveromestre.com

By: /s/ Andres Rivero
ANDRES RIVERO
Florida Bar No. 613819
CHRISTINA CEBALLOS-LEVY
Florida Bar No. 411965
DANIELA TENJIDO-ELJAIEK
Florida Bar No. 1031531

CERTIFICATE OF SERVICE

I CERTIFY that on September 12, 2025, I electronically filed this document with the Clerk of the Court using the CM/ECF system. I also certify that this document is being served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

By: /s/ Andres Rivero
Andres Rivero