

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

L&C INVESTMENT CORP., a Florida
corporation, derivatively on behalf of
ARC DIALYSIS OF MIAMI LAKES, LLC,
a Florida limited liability company,

CASE NO.: 2022-011215-CA-01

Nominal Plaintiff,

v.

ARC DIALYSIS, LLC, a Florida limited
liability company, YOSMANY PAEZ, an
individual, DIALYSIS CONSULTING, LLC,
a Florida limited liability company, N&R
DIALYSIS LLC, a Florida limited liability
company, LA MINA MULTISERVICES CORP.,
a Florida corporation and GLOMACOR MEDICAL
SERVICES CORP., a Florida corporation,

Defendants.

and

ARC DIALYSIS OF MIAMI LAKES, LLC,
a Florida limited liability company,

Nominal Defendant.

NOTICE OF APPEAL

NOTICE IS GIVEN that ARC Dialysis, LLC (“Arc Dialysis”) appeals to the Third District Court of Appeals the Order on ARC Dialysis’s Motion to Dismiss Plaintiff’s Amended Complaint or, in the Alternative, Compel Arbitration (the “Order”) entered by the honorable Vivianne Del Rio on November 17, 2024, in the above-captioned matter. A copy of the Order is attached hereto as **Exhibit “A”**. The Order is appealable under Fla. R. App. P. 9.130.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail on this 17th day of December, 2024, upon all counsel of record.

/s/ Peter F. Valori
Peter F. Valori, Esq.

STATE OF FLORIDA, COUNTY OF MIAMI-DADE
I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN THIS OFFICE 12-18 AD 20 24
JUAN FERNANDEZ-BARQUIN, Clerk of the Court and Comptroller, Miami-Dade County
Deputy Clerk [Signature] 12662



Exhibit “A”

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2022-011215-CA-01

SECTION: CA05

JUDGE: Vivianne Del Rio

L&C Investment Corp. et al

Plaintiff(s)

vs.

ARC Dialysis LLC et al

Defendant(s)

**ORDER ON DEFENDANT ARC DIALYSIS LLC'S MOTION TO DISMISS, OR IN THE
ALTERNATIVE, COMPEL ARBITRATION AND RESPONSE IN OPPOSITION TO
DEFENDANTS, YOSMANI PAEZ, N&R DIALYSIS CONSULTING LLC, LA MINA
MULTISERVICES CORP. AND GLOMACOR MEDICAL SERVICES CORP., MOTION
TO DISMISS SECOND AMENDED COMPLAINT**

THIS CAUSE came before the Court on October 23, 2024 on ARC Dialysis LLC's Motion to Dismiss Plaintiff's Amended Complaint or, in the Alternative, Compel Arbitration ("Motion to Compel Arbitration") filed by ARC Dialysis LLC ("ARC Dialysis"). This Court also heard Defendants, Yosmani Paez ("Paez"), N&R Dialysis Consulting LLC ("N&R Dialysis"), La Mina Multiservices Corp. ("La Mina") and Glomacor Medical Services Corp.'s ("Glomacor") Motion to Dismiss Second Amended Complaint ("Motion to Dismiss"). L&C Investment Corp. ("Plaintiff" or "L&C"), derivatively on behalf of ARC Dialysis of Miami Lakes, LLC filed her respective Responses in Opposition to Defendant's Motions to Dismiss and Compel Arbitration on August 28, 2024. The hearing before this Court on the Motions to Dismiss and Motion to Compel Arbitration was held on October 23, 2024. At the hearing, this Court requested the parties file supplemental authority as to the issue of arbitration to submit competing orders on the issues of arbitration and dismissal.

The Court has reviewed the Motion to Compel Arbitration, Motion to Dismiss, and

Responses to each, Plaintiff's Notice of Supplemental Authority in Support of its Response in Opposition to each, the argument of counsel and being otherwise duly advised in the premises, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. ARC Dialysis' Motion to Compel Arbitration is hereby **DENIED**.
2. Further, Defendants, Paez, N&R Dialysis, La Mina, and Glomacor's *ore tenus* request to compel arbitration is hereby **DENIED**.^[1]
3. Pursuant to the factors decided by the Eleventh Circuit in *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018), the trial court must undergo a two-part inquiry: first to consider "under the totality of the circumstances" whether the party attempting to invoke arbitration acted inconsistently with the arbitration right and second, if a party has done so, whether the party's conduct has prejudiced the other party.
4. "The key ingredient in the waiver analysis is fair notice to the opposing party and the District Court of a party's arbitration rights and its intent to exercise them. If the court and the opposing party have such notice to the opposing party and the District Court of a party's arbitration rights and its intent to exercise them. If the court and the opposing party have such notice at an early stage in litigation, they can manage the litigation with this contingency in mind . . . Accordingly, fair notice at a relatively early stage of litigation is a primary factor in considering whether a party has acted inconsistently with its arbitration right." *Id.* at 1236-37.
5. The record evidence shows that the Defendants have acted inconsistently with the right to arbitrate as follows:
 - a. Plaintiff filed a Motion to Transfer Case to Complex Business Litigation Section on August 18, 2022. [DE 34]. ARC Dialysis, Paez, Dialysis Consulting, La Mina, and Glomacor filed Responses and Objections to Plaintiff's Motion to Transfer Case on August 30, 2022. [DE 37-38]. Notably, no Defendants cite to the arbitration clause

provision of ARC Dialysis Miami Lake's Operating Agreement.

- b. On September 2, 2022, ARC Dialysis thereafter filed its Motion to Dismiss Plaintiff's Complaint. [DE 39]. Again, notably, ARC Dialysis's first Motion to Dismiss does not reference or request arbitration.
- c. On September 30, 2022, ARC Dialysis filed its Motion to Stay Proceedings Pending Fair Market Value Determination of Plaintiff's Interest. [DE 43]. ARC Dialysis did not request, nor mention, its right to arbitrate as a basis for the Motion to Stay.
- d. On December 19, 2022, ARC Dialysis Miami Lakes filed its Motion to Set Final Hearing to Determine Fair Market Value of Plaintiff's Interest in ARC Dialysis Miami Lakes (filed by Counsel Dumenigo). [DE 50]. The requested relief within this Motion shows an inconsistency in the right to arbitrate, as it specifically requests a hearing to determine the fair market value of Plaintiff's interest in ARC Dialysis Miami Lakes, rather than to arbitrate.
- e. Defendant La Mina participated in discovery by filing Responses to Plaintiff's First Request for Production on September 12, 2022. *See School Bd. Of Orange County v. Southeast Roofing & Sheet Metal, Inc.*, 489 So. 2d 886 (Fla. 5th DCA) (holding contractor waived its right to arbitration by filing action and participating in discovery).
- f. On November 8, 2022, Defendants Paez, Dialysis Consulting, La Mina, and Glomacor filed their Motion to Dismiss Complaint, not requesting or commenting on its right to arbitrate. [DE 48].
- g. Defendants Paez, Dialysis Consulting, La Mina, and Glomacor filed their Notice of Joinder in ARC Dialysis' Motion to Stay Proceedings, and likewise did not request or mention arbitration on November 4, 2022. [DE 45].

h. On March 19, 2024, Defendants Paez, Dialysis Consulting, La Mina and Glomacor filed a Motion in Limine Concerning Business Valuation Hearing request Plaintiff and its witnesses by prohibited from testifying or presenting certain evidence. [DE 56].
See Id.

a. Thereafter, on June 25, 2024, Defendants Paez, Dialysis Consulting, La Mina and Glomacor also filed the Notices of Taking Deposition of Claudia Santos, and the Corporate Representative of L&C, and the Corporate Representative of Oroz Contractor Corp. [DE 60 – 63, 71 – 72]. *See Id.*

6. Plaintiff filed its initial Complaint on June 17, 2022 [DE 2]. Pursuant to Defendants' respective representations within the procedural process of this case, it is clear that within the twenty-five (25) months of this case, Defendants' goal is to have a Final Hearing on Business Valuation pursuant to Florida Statute § 605.0706(2). To compel arbitration and change course mid-journey is inconsistent with one's arbitration right and would prejudice Plaintiff.

7. Defendant, ARC Dialysis, Motion To Dismiss Plaintiff's Amended Complaint is **DENIED Without Prejudice** as follows:

a. Plaintiff correctly filed its Amended Complaint in Accordance with the Rules of Civil Procedure. Plaintiff, under Rule 1.190, has a right to amend the Complaint prior to Defendant's filing of a responsive pleading. *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 567 (Fla. 2005) ("A motion to dismiss is not a 'responsive pleading' because it is not a 'pleading.'"). The record is clear Plaintiff filed its initial Complaint [DE 2], which was followed by ARC Dialysis' first Motion to Dismiss [DE 39]. Plaintiff thereafter correctly filed its Amended Complaint.

b. The Court has discretion to equitably set aside the Defendants' Election to Purchase under Fla. Stat. § 605.0706(2). *See also Fierro v. Templeton*, 857 So. 2d 931 (Fla. 4th DCA 2003) ("section 607.1436 . . . gives the court the discretion to set aside or modify

an election to purchase for equitable reasons.”). This Court finds that to continue with the election to purchase and final hearing would be inequitable, as the remaining counts in the Amended Complaint ultimately affect the true and actual valuation of ARC Dialysis Miami Lakes.

c. Defendants have not violated Section 605.0802, Florida Statutes, as demand on the other members or managers would have been futile. *Orlando Orange Groves Co. v. Hale*, 107 Fla. 304 (Fla. 1932); *First Am. Bank and Trust v. Frogel*, 726 F. Supp. 1292, 1298 (S.D. Fla. 1989) (demand excused as futile when directors are alleged to have “participated in the wrongs complained of and could not be expected to institute a lawsuit.”). The Amended Complaint alleges ARC Dialysis engaged in self-dealing behavior and other behavior to the detriment of ARC Dialysis Miami Lakes.

a. A review of the pleadings identifies the allegations are ordered chronologically, organized, and with no “guesswork” required by the Defendants as to the claims asserted against it and the relief sought. *Kyle K. v. Chapman*, 208 F.3d 940, 944 (11th Cir. 2000) (“The fact that defendants are accused collectively does not render the complaint deficient. The complaint can be fairly read to aver that all defendants are responsible for the alleged conduct.”).

b. Count I, Breach of Fiduciary Duty, is properly pled as it is not dependent on the Operating Agreement between the parties. The Operating Agreement, attached to the Amended Complaint and therefore within the four corners of this Court’s review, explicitly imposes certain fiduciary duties on the members, such as “duty of good faith and fair dealing.” Further, allegations within Count I, such as Defendants’ invoices and costs without disclosing the alleged conflict of interest are not dependent upon the existence of the Operating Agreement. Without the Operating Agreement, Plaintiff would still have a valid cause of action against the Defendant. *See Tillis v. United Parts, Inc.*, 395 So. 2d 618 (Fla. 5th DCA 1981).

c. Count II, Breach of Operating Agreement, is properly pled as the Operating Agreement does not negate Plaintiff's allegations. Count II alleges at least (4) different breaches of the Operating Agreement which show no clear conflict between the allegations and the Operating Agreement.

d. Count III, Equitable Accounting, is properly pled as the Amended Complaint conveys and describes a complex business relationship dating back to 2019 between the parties, constituting an intentional scheme to solicit "investors:" whereby Defendants would establish and open new dialysis clinics throughout south Florida; claim the center unprofitable by passing falsified and inflated costs through the company while routing patients to other clinic, further depressing revenues; the Defendants would later demand additional capital contributions or funds from investors, where after being depleted, Defendants offer to buy out the investor at a fraction of the investment or permit the investor to disassociate. The damages at issue are extensive and complex, and require full documentation of the invoices, both authentic and potentially fraudulent, as well as the ledgers and other financial documents to determine the accurate amount of damages. *See Tracfone Wireless, Inc. v. Simply Wireless, Inc.*, F. Supp. 3d 1332, 1343 (S.D. Fla. 2017).

a. Plaintiff has not waived its right to a trial by jury. Questions as to the right to a trial by jury should be resolved in favor of the party seeking jury trial. *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65, 71 (Fla. 1975). Plaintiff had little to no ability to negotiate the Operating Agreement or jury trial waiver, was not represented by counsel, and as a corporation with experience in the construction industry, had little familiarity in the dialysis arena. The majority of the other Defendants, at best, have had a longer standing business relationship and joint ventures in other companies. *Amquip Crane Rental, LLC v. Vercon Const. Mgmt., Inc.*, 60 So. 3d 536, 540 (Fla. 4th DCA 2011) (noting waiver must be entered into knowingly, voluntarily, and intelligently).

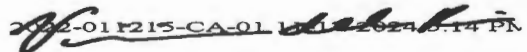
8. Defendants, Paez, N&R Dialysis, La Mina and Glomacor's Motion To Dismiss Second Amended Complaint is **DENIED Without Prejudice** for the reasons stated above in Paragraphs 7a – 7d, including the joint arguments made by ARC Dialysis in Sections C through F of their July 26, 2024 Motion to Dismiss.

9. Defendants shall respond to Plaintiff's Amended Complaint within ten (10) days of the entry of this Order.

10. The parties are ordered to comply with the terms of this Order. The Court reserves jurisdiction over the subject matter and the parties to enter further orders to enforce the terms of this Order.

[1] It is noted Defendants, Paez, N&R Dialysis, La Mina, and Glomacor's Motion to Dismiss Second Amended Complaint specifically states it joins the arguments made by ARC Dialysis in "Sections C through F of the Motion to Dismiss filed on July 26, 2024 requesting dismissal with prejudice of the "Amended" Complaint." Section G of ARC Dialysis' Motion to Dismiss alternatively requests the Court compel the parties to attend arbitration.

DONE and ORDERED in Chambers at Miami-Dade County, Florida on this 17th day of November, 2024.

 2022-011215-CA-01 11-17-2024 5:14 PM

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Hon. Vivianne Del Rio

CIRCUIT COURT JUDGE

Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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