

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

CASE NO. 16-CV-62603-WPD

GRISEL ALONSO, AS RECEIVER FOR	)
ELM TREE INVESTMENT ADVISORS,	)
LLC, ELM TREE INVESTMENT FUND,	)
LP, ELM TREE 'E'CONOMY FUND, LP,	)
and ELM TREE MOTION	)
OPPORTUNITY, LP,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JAMES BENVENUTO, ET AL.,	)
	)
Defendants.	)
	)

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**DEFENDANTS CONSTANTINO DOS SANTOS AND EDUARDO DOS SANTOS'  
REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND IN  
OPPOSITION TO PLAINTIFF’S REQUEST FOR JURISDICTIONAL DISCOVERY**

Defendants, Constantino Dos Santos (“Constantino”) and Eduardo Dos Santos (“Eduardo”) (collectively, “Defendants”), by and through undersigned counsel, respectfully submit this Reply Memorandum in support of their Motion to Dismiss [D.E. 20] and in opposition to the Omnibus Response to Defendants’ Motions to Dismiss the Amended Complaint or, in the Alternative, Request for Jurisdictional Discovery (the “Response”) filed by Plaintiff, Grisel Alonso (the “Plaintiff”), as Receiver for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree ‘e’Conomy Fund, LP, and Elm Tree Motion Opportunity, LP. [D.E. 42].

## **PRELIMINARY STATEMENT**

Even under the most generous reading of Plaintiff’s Amended Complaint and Response, there is no basis for this Court to reach out from Florida to exercise personal jurisdiction over Defendants in Ontario, Canada. Plaintiff has not met her burden of establishing a prima facie case of personal jurisdiction under *both* the Florida long-arm statute *and* the Due Process Clause of the Fourteenth Amendment, Peruyero v. Airbus S.A.S., 83 F. Supp. 3d 1283, 1286–87 (S.D. Fla. 2014), either as originally pled in the Amended Complaint or under the alternative theories proposed in the Response. Jurisdictional discovery would be inappropriate here, where (1) Plaintiff has not formally moved for leave to seek jurisdictional discovery, and (2) Defendants do not dispute Plaintiff’s specific factual allegations, but rather the legal value of those jurisdictional allegations. See id. at 1289–90.

## **ARGUMENT**

### **A. DEFENDANTS’ PROPERLY CHALLENGED THE LEGAL SUFFICIENCY OF PLAINTIFF’S JURISDICTIONAL ALLEGATIONS, AND NO NEW FACTS SHOULD BE CONSIDERED.**

Plaintiff’s allegation that Defendants “engaged in a business venture in this State,” Compl. ¶ 10, would be legally insufficient on its own for the purposes of compliance with Fla. Stat. § 48.193(1)(a)(1) and due process, and is properly subject to challenge: federal courts “are not bound to accept as true a legal conclusion couched as a factual allegation” as to jurisdiction. Pearson Educ., Inc. v. Hotfile Corp., No. 14-CIV-20200, 2014 WL 5494680, at \*1 (S.D. Fla. Oct. 30, 2014) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, (2007)). Jurisdictional allegations that merely provide legal conclusions tracking the text of a long-arm statute do not withstand a motion to dismiss for lack of personal jurisdiction. Ellis v. Celebrity Cruises, Inc.,

No. 10-20541-CIV, 2010 WL 6730808, at \*1 (S.D. Fla. July 15, 2010) (citing Ashcroft v. Iqbal, 556 U.S 662, 667 (2009)). Plaintiff's statement that Defendants "engaged in a business venture in this State" does not establish a prima facie case of personal jurisdiction under Fla. Stat. § 48.193(1)(a)(1), but is instead qualified and contradicted by Plaintiff's specific allegations.

Defendants properly demonstrated the legal insufficiency of Plaintiff's jurisdictional allegations and were not required to submit an affidavit as to additional facts. When a complaint is facially deficient as to jurisdictional facts, "a defendant wishing to properly challenge such a 'legally insufficient' assertion of jurisdiction need not 'do anything more than file a simple (unsupported) motion.'" See Borislow v. Canaccord Genuity Grp. Inc., No. 14-80134-CIV, 2014 WL 12580259, at \*5 (S.D. Fla. June 27, 2014) (quoting Elmex Corp. v. Atl. Fed. Sav. & Loan Ass'n of Ft. Lauderdale, 325 So. 2d 58, 61 (Fla. 4th DCA 1976)). "[W]hen a complaint 'fails to allege sufficient facts to support the allegations of jurisdiction,' its jurisdictional claims fail to meet the required threshold, making it 'unnecessary ... for the parties to submit additional materials concerning the jurisdiction issue.'" Id. (quoting Martinec v. Party Line Cruise Co., No. 07-80098-CIV-RYSKAMP, 2007 WL 3197610, at \*2 (S.D. Fla. Oct. 29, 2007)).

Since Defendants' Motion to Dismiss was thus properly directed at the legal insufficiencies in Plaintiff's Amended Complaint and did not dispute Plaintiff's specific factual allegations, "[t]he determination of the motion is based on a consideration of the facts reflected in the Pleadings or apparent from the face of the record." Elmex Corp., 325 So. 2d at 62. The Court should not consider additional factual allegations put forward in Plaintiff's Response, since a plaintiff is only permitted a second opportunity to submit jurisdictional facts after a defendant's affidavit injects factual matters which do not appear on the face of the record. See id.

**B. PLAINTIFF HAS NOT ESTABLISHED A PRIMA FACIE CASE OF PERSONAL JURISDICTION AS TO CONSTANTINO DOS SANTOS**

Even considering Plaintiff's additional allegations and submitted documentation, Plaintiff still has not established a prima facie case of specific or general personal jurisdiction over Constantino under any provision of the Florida Long Arm Statute or the Due Process Clause of the Fourteenth Amendment.

***1. Specific Jurisdiction***

The details of the promissory note Constantino entered into with Elm Tree 'e'Conomy Fund, LP ("ETEF") on or about December 23, 2013 (the "Note"), Haslam Decl. Ex. 2 [D.E. 42-2], would not improve Plaintiff's position under the only Florida long-arm statute plead in the Amended Complaint. Even reading the Note's Florida choice of law provision, provisions concerning ownership of entities in Florida, and statement that the Note "was signed at Fort Lauderdale, Florida," Haslam Decl. at ¶¶ 8–10, in the light most favorable to Plaintiff, Plaintiff still has not made a prima facie case of specific personal jurisdiction under Fla. Stat § 48.193(1)(A)(1) where Constantino made a single investment and is not alleged to have exercised any control over a receivership entity. See Uible v. Landstreet, 392 F.2d 467, 470–71 (5th Cir. 1968) (finding investors had not engaged in a business venture under the Florida long-arm statute where the investors executed a promissory note, travelled to Florida to close a deal, transferred funds to Florida, and owned stock in a Florida corporation, but the investors did not exercise control over the corporation). An agreement to transfer stock is not a basis for the exercise of long-arm jurisdiction when the transfer is not required to occur in Florida. Consol. Energy Inc. v. Strumor, 920 So. 2d 829, 831 (Fla. Dist. Ct. App. 2006).

The Note would not support a finding of specific personal jurisdiction under § 48.193(1)(A)(9) and Fla. Stat § 685.102, which provide for jurisdiction over causes of action arising from or relating to entering into contracts that (1) contain a Florida choice of law provision under § 685.101 and (2) contain a Florida choice of forum provision. However, the Note does not comply with either requirement. Section 685.101 only applies to contracts with consideration of at least \$250,000, but the Note is in the amount of \$30,000, and Plaintiff alleges Constantino was repaid \$39,000. Haslam Decl. ¶ 7, Compl. ¶ 108. The Note *does not contain a choice of forum provision* agreeing to jurisdiction in Florida or any other state. See Haslam Decl. Ex. 2.

Even considering all of these additional allegations together with the factual allegations in the Amended Complaint, there is no prima facie case of specific personal jurisdiction over Constantino – the alleged conduct simply does not amount to engaging in a business venture under Fla. Stat. § 48.193(1)(A)(1). Further, the separate due process requirement of minimum contacts is not satisfied by a showing that a party has entered into a contract with a non-resident, or a showing that funds will be transferred in Florida. Bohlander v. Robert Dean & Assocs. Yacht Brokerage, Inc., 920 So. 2d 1226, 1228 (Fla. Dist. Ct. App. 2006); Voorhees v. Cilcorp, Inc., 837 F. Supp. 395, 399 (M.D. Fla. 1993), as clarified (Nov. 16, 1993).

## **2. General Jurisdiction**

Similarly, there is no prima facie case of general personal jurisdiction over Constantino – Plaintiff’s additional factual allegations, if considered, do not support the conclusion that he has “engaged in substantial and not isolated activity” in Florida. The only additional factual basis for jurisdiction that Plaintiff alleges is Constantino’s status as Vice President of 23640 Hickory Inc., a Florida corporation. See Haslam Decl. ¶ 11. 23640 Hickory Inc.’s principal address is in

Ontario, Canada, c/o Prismatic Designs Ltd., Constantino's business in Canada. Haslam Decl. ¶ 13–14. “In order for a defendant to fall within Florida's general jurisdiction, a defendant's contacts must be so extensive to be tantamount to the defendant being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in the forum state's courts in any litigation arising out of any transaction or occurrence taking place anywhere in the world.” Carmouche v. Carnival Corp., 36 F. Supp. 3d 1335, 1341 (S.D. Fla. 2014), aff'd sub nom. Carmouche v. Tamborlee Mgmt., Inc., 789 F.3d 1201 (11th Cir. 2015). On its own, however, status as an officer of a Florida corporation is not sufficient to establish even specific personal jurisdiction over a nonresident. Doe v. Thompson, 620 So. 2d 1004, 1006 (Fla. 1993) (“While [a corporation] could be haled into court because of its minimum contacts, its . . . officer is not by virtue of his position subject to personal jurisdiction). There is no suggestion in Plaintiff's additional allegations that Constantino has the same kind of extensive involvement in a corporation doing business in Florida *and* a related Florida corporation as the court in Pearson Educ., Inc., 2014 WL 5494680 at \*2, 4, found sufficient for general jurisdiction.

**C. PLAINTIFF HAS NOT ESTABLISHED A PRIMA FACIE CASE OF PERSONAL JURISDICTION AS TO EDUARDO DOS SANTOS**

While this motion should be decided on the face of the Amended Complaint, see Elmex Corp., 325 So. 2d at 62, Plaintiff's additional allegation as to Eduardo does not establish a prima facie case of personal jurisdiction over him. Even if the court considered the allegation that Eduardo made two investments in a non-Receivership entity used as an investment vehicle by Frederic Elm, Haslam Decl. ¶ 16, he still did not engage in a business venture in Florida under Fla. Stat. § 48.193(1)(A)(1) and does not have sufficient minimum contacts to be subjected to personal jurisdiction in Florida.

Plaintiff does not allege any activity beyond passive investment that might fall under the Florida long-arm statute. Compare Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 892 (11<sup>th</sup> Cir. 1983) (holding “a nonresident’s passive investment of money in Florida” was not “conducting business in Florida”) with Am. Fin Trading Corp. v. Bauer, 828 So. 2d 1071, 1074 (Fla. Dis. Ct. App. 2002) (finding a nonresident “clearly availed himself of the privilege of conducting business in Florida” when he initiated over 120 commodities transactions through a broker in Florida). “In order to establish that a defendant is ‘carrying on business’ for the purposes of the long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit.” Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A., 421 F.3d 1162, 1167 (11<sup>th</sup> Cir. 2005). Plaintiff has not alleged such a general course of business activity, so Defendants’ Motion to dismiss for lack of personal jurisdiction should be granted.

**D. PLAINTIFF’S REQUEST FOR JURISDICTIONAL DISCOVERY SHOULD BE DENIED**

Plaintiff’s request for jurisdictional discovery is both procedurally improper and unwarranted.<sup>1,2</sup> A plaintiff opposing a motion to dismiss for lack of personal jurisdiction must formally move the court for jurisdictional discovery rather than incorporate the request into a

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<sup>1</sup> As articulated in Defendants’ Memorandum of Law in Support of their Motion to Dismiss, [D.E. 20-1], 15 U.S.C. § 78aa is not a basis for personal jurisdiction over Defendants when Plaintiff does not assert any federal securities claims against them. See Gill v. Three Dimension Sys., Inc., 87 F. Supp. 2d 1278, 1283 (M.D. Fla. 2000). Plaintiff has cited no law or fact to rebut this argument despite requesting jurisdictional discovery for Defendants’ contacts with the whole United States in the event she is [somehow] “able to proceed through pleading jurisdiction under a receivership statute with nationwide service of process.” Response at 15 fn. 10.

<sup>2</sup> Plaintiff has also requested irrelevant jurisdictional discovery for information as to any mortgages on property owned by 23640 Hickory, Inc. See Response at 11, fn. 8. As Fla. Stat. § 48.193(1)(A)(3) only provides specific jurisdiction, this information is irrelevant to establishing personal jurisdiction for Plaintiff’s unrelated claims.

brief in opposition to the defendant's motion. Peruyero, 83 F. Supp. 3d at 1289–90; United Techs. Corp. v. Mazer, 556 F.3d 1260, 1280–81 (11th Cir. 2009) (denying jurisdictional discovery where “plaintiff never formally moved the district court for jurisdictional discovery, but, instead, buried such requests in its briefs as a proposed alternative to dismissing defendant on the state of the current record”). Since Plaintiff submitted the request for jurisdictional discovery in her response papers rather than formally making a motion, the request should be denied.

Jurisdictional discovery is unwarranted “in the absence of a genuine dispute on a material jurisdictional fact.” Peruyero, 83 F. Supp. 3d at 1290 (denying jurisdictional discovery when a party did not submitted evidence challenging its opponent's jurisdictional allegations). There is no dispute as to a material jurisdictional fact here – Defendants' challenge is to the legal conclusions to be drawn from the facts alleged in the Amended Complaint, and Defendants have not submitted affidavits introducing contradictory jurisdictional facts. Accordingly, Defendants' Motion should be determined on the face of the Amended Complaint. See Elmex Corp., 325 So. 2d at 62. In both cases Plaintiff cites where courts granted jurisdictional discovery to a receiver, the defendants had submitted affidavits in support of their motions to dismiss, and the receivers sought jurisdictional discovery to counter the defendants' affidavits. Steinberg v. Barclay's Nominees (Branches) Ltd., No. 04-60897-CIV, 2007 WL 4287662, at \*1 (S.D. Fla. Dec. 5, 2007) (responding to a formal motion by the receiver for jurisdictional discovery); Steinberg v. A Analyst Ltd., No. 04-60898-CIV, 2007 WL 4287665, at \*1 (S.D. Fla. Dec. 5, 2007). Since Plaintiff is not tasked with responding to additional facts alleged by Defendants, this case is distinguishable from Barclay's Nominees and A. Analyst. Accordingly, Plaintiff's request for jurisdictional discovery should be denied.



**CONCLUSION**

For the reasons discussed above, Defendants Constantino Dos Santos and Eduardo Dos Santos respectfully request that this Court grant their Motion to Dismiss for Lack of Personal Jurisdiction, deny Plaintiff's request for jurisdictional discovery, and enter an order dismissing the Amended Complaint as to each of them, together with such further relief as to this Court is just and proper.

DATED: March 28, 2017

RESPECTFULLY SUBMITTED,

/s/ Elizabeth Lee Beck

By: Elizabeth Lee Beck

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 2017, I electronically filed the foregoing

*DEFENDANTS CONSTANTINO DOS SANTOS AND EDUARDO DOS SANTOS' REPLY  
MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND IN  
OPPOSITION TO PLAINTIFF'S REQUEST FOR JURISDICTIONAL DISCOVERY*

with the Clerk of the Court using CM/ECF. I also certify that the foregoing document(s) are being served this day on all counsel of record or pro se parties identified on the following Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Elizabeth Lee Beck  
Elizabeth Lee Beck

**SERVICE LIST**

*Alonso v. Benvenuto, et al.*

**CASE NO. 16-CV-62603-WPD**

**United States District Court, Southern District of Florida**

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