

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

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,

Case No. 16-62603-CIV-DIMITROULEAS  
Proceeding Ancillary to  
No. 15-CV-60082-Dimitrouleas/Snow

Plaintiff,

v.

JAMES BENVENUTO, an individual,  
NGU INVESTORS, LLC, a Florida limited  
liability company; JEAN BENVENUTO, an  
individual, SURJIT WALIA, an individual,  
S.W. EQUITIES CORP., a New York corporation,  
TIMOTHY HARTMANN, an individual,  
ALEXANDER BUKHSHTABER, an individual,  
MVS MEDIA GROUP, LLC, a Florida limited  
liability company, HARRY TAWIL, an individual,  
EDUARDO DOS SANTOS, an individual,  
FILOMENA CALABRIA, an individual,  
JOSE ROFFE, an individual, MIREILLE ROFFE,  
an individual, SOMESWARI NUKALA, an individual,  
Yael TAPIERO, an individual, LAAS W. TURNBULL,  
an individual, OMRI TINTPULVER, an individual,  
CONSTANTINO DOS SANTOS, an individual,  
ARMAND DELMAR, an individual, AHMAD NAQVI,  
an individual, MERCEDES ELMALEH, an individual,  
ELIA BLUMIN, an individual, TED GREENWALD,  
an individual, ALINA TALSKEY, an individual,  
ELVIS PERVAN, an individual,  
ANGELO ISMIRNIOGLOU, an individual, and  
JONATHAN VERK, an individual.

Defendants.

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**ORDER DENYING MOTION TO DISMISS FOR  
LACK OF PERSONAL JURISDICTION**

THIS CAUSE is before the Court on Defendant Ted Greenwald's Motion to dismiss for Lack of Person Jurisdiction [DE 27]. The Court has carefully reviewed the Motion, the briefs, and is otherwise fully advised in the premises. *See* [DEs 42, 45].

## I. Background

This case arises out of fraudulent transfers made to multiple Defendants and orchestrated by Frederick Elm, who purported to send investment returns to Defendants resulting from their investments in Receivership Entities. Pursuant to Orders of this Court, the Receiver instituted this action to recover funds improperly transferred to Defendants through the Receivership Entities. *See Securities and Exch. Comm'n v. Elm.*, Case 15-CV-60082 [DE 13] (the “Receivership Action”).

Defendant Ted Greenwald “resides in Thornhill, Ontario, Canada.” ¶35. The Amended Complaint details the specifics of fraudulent transfers to the various Defendants including: \$110,000 to Ted Greenwald. ¶ 124. The Receiver alleges three state-law causes of action against Greenwald: (1) Fraudulent Transfer under Section 726.105<sup>1</sup>, Florida Statutes; (2) Fraudulent Transfers under Section 726.106, Florida Statutes<sup>2</sup>; and (3) Unjust Enrichment<sup>3</sup>.

The Receiver contends that

[t]he Court has personal jurisdiction over Defendants pursuant to the Securities and Exchange Act, 15 U.S.C. §78aa, because this action arises from the Commission Proceeding, which provides for nationwide service of process under the Federal Securities Laws, and because Defendants have sufficient minimum contacts with the United States to satisfy the Fifth Amendment's due process requirements. Alternatively, the Court has personal jurisdiction over Defendants pursuant to Section 48.193, Florida Statutes, because: (i) Defendants voluntarily participated and engaged in a business venture in this State, which is the Fraudulent Scheme from which the Receiver's claims arise; and (ii) Defendants have sufficient minimum contacts with the State of Florida to satisfy due process requirements, such that the exercise of personal jurisdiction over them is fair and just.

[DE 1 ¶ 10].

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<sup>1</sup> Count 64 (Greenwald).

<sup>2</sup> Count 65 (Greenwald).

<sup>3</sup> Count 66 (Greenwald).

Greenwald moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. For the reasons stated below, the Court finds the Receiver has adequately alleged a basis for personal jurisdiction, so the Motion is denied.

## **II. Standard of Review**

Both the state long-arm statute and the Due Process Clause of the Fourteenth Amendment must be satisfied in order for a federal court to have personal jurisdiction over a nonresident defendant. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 (11th Cir. 1999). First, the Court must determine whether the Florida long-arm statute provides a sufficient basis for personal jurisdiction. *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996). After deeming jurisdiction appropriate under Florida law, the Court must then ascertain whether “sufficient minimum contacts exist between the defendant[] and the forum state so as to satisfy ‘traditional notions of fair play and substantial justice’ under the Due Process Clause of the Fourteenth Amendment.” *Id.* (internal quotation and citation omitted).

The burden is on the plaintiff to allege a prima facie case; the plaintiff must do so by affidavit only if the challenging defendant provides his own affidavits in support. *Posner*, 178 F.3d at 1214. To the extent not contradicted by the defendant’s affidavits, the court should accept the facts alleged in the complaint as true. *Id.* In the event of a conflict, all reasonable inferences should be made in favor of the plaintiff. *See Landia Int’l, Inc. v. Ah Koy*, 690 F. Supp. 2d 1317, 1327 (S.D. Fla. 2010).

When a federal court uses a state long-arm statute, because the extent of the statute is governed by state law, the federal court is required to construe it as would the state’s supreme court.” *Diamond Crystal Brands, Inc. v. Food Movers Int’l, Inc.*, 593 F.3d 1249, 1258 (11th Cir. 2010) (quoting *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1265 (11th Cir.1998)). Moreover, the Eleventh Circuit has noted that the statute should be strictly construed. *See Oriental Imports and Exports, Inc. v. Maduro & Curiel’s Bank*, 701 F.2d 889, 891 (11th Cir.1983) (internal citations

omitted). Florida's long-arm statute provides for two theories of jurisdiction: (1) specific jurisdiction, if the suit that arises out of or is related to a defendant's contacts with Florida in one of a number of enumerated ways, Fla. Stat. § 48.193(1)(a); or (2) general jurisdiction, if the defendant engages in "substantial and not isolated activity" in Florida, *id.* § 48.193(2).

*Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1203-04 (11th Cir. 2015).

### **III. Discussion**

Greenwald argues that personal jurisdiction is improper under the Securities and Exchange Act, 15 U.S.C. § 78aa because it is inapplicable to state-law claims. Greenwald also argues that the Receiver cannot establish personal jurisdiction under Florida's Long Arm Statute, Fla. Stat. 48.193 and that the exercise of personal jurisdiction would not comport with due process requirements.

#### **a. 15 U.S.C. § 78aa Does Not Confer Personal Jurisdiction Over Defendants**

The Securities Exchange Act's nationwide service of process provision, 15 U.S.C. §78aa, is effective as to out-of-state defendants alleged to have committed securities fraud or other violations of the Act, but it does not bestow personal jurisdiction over defendants against whom a plaintiff has asserted only state-law claims. *See Gill v. Three Dimension Sys., Inc.*, 87 F. Supp. 2d 1278, 1284 (M.D. Fla. 2000) (finding that conferring personal jurisdiction under the national service of process provisions of 15 U.S.C. §78aa in the absence of a federal claim "raises seriously constitutional questions."). (internal citations omitted).

#### **b. Florida Long-Arm Specific Jurisdiction<sup>4</sup>**

The Receiver asserts that Greenwald has conducted business in Florida sufficient to subject him to specific jurisdiction under the Florida long-arm statute. The statute states, in relevant part, that:

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<sup>4</sup> It is not necessary to determine whether there is General Personal Jurisdiction.

(1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action *arising from* any of the following acts:

1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

Fla. Stat. § 48.193(1)(a)(1)(emphasis added).

“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 (11th Cir. 2005) (quoting *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir.2000)).

Greenwald’s allegations contradict the Receiver’s allegations. In the event of a conflict, all reasonable inferences should be made in favor of the plaintiff. *See Landia Int’l, Inc. v. Ah Koy*, 690 F. Supp. 2d 1317, 1327 (S.D. Fla. 2010). Greenwald alleges that he “was not even committed to direct funds to Florida, but instead had the misfortune of *receiving* funds which, without his knowledge or control, originated from Florida.” [DE 27 at 7].<sup>5</sup> The Declaration of Christopher Cavallo, Esq. (counsel for Receiver) [DE 42-1] (the “Declaration”) attached to the Response contradicts Greenwald’s contention that he did not know the funds originated from Florida. The Declaration explains that Greenwald met with Cavallo on January 6, 2017 at Cavallo’s Miami office, after Greenwald was served with the Amended Complaint. [DE 42-1]. While there, Greenwald indicated that “he believed he owned a residential property in Ft. Lauderdale with Frederic Elm from approximately 2005 to 2014 (the “Property”), from which

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<sup>5</sup> Greenwald has cited a dearth of cases standing for the proposition that the exchange of payment is inadequate to exercise personal jurisdiction over a non-resident defendant. *See, e.g., Bohlander v. Robert Dean & Assocs. Yacht Brokerage, Inc.*, 920 So. 2d 1226, 1228 (Fla. Dist. Ct. App. 2006)(“The 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 payment must be made in Florida.”). The facts in the case against Greenwald are distinguishable from the cases where Court denied personal jurisdiction based only on receipt of payment.

rental proceeds were collected” and “he believed ownership of the Property was technically in the name of a company[.]” *Id.* Furthermore, he told Cavallo that “he visited the Property with Frederic Elm” and “he believes the buy-out of his ownership in the Property is the transfer he received from the Receivership Entities, which transfer forms the basis for the causes of action against him.” *Id.*

Drawing reasonable inferences in favor of the Receiver, as the Court must do, Greenwald was the recipient of a fraudulent transfer; the vehicle for the fraudulent transfer was the buy-out of Greenwald’s interest in a Florida property, which Greenwald visited with Frederic Elm. Under these facts, Greenwald knew the money from the buy-out of his interest in the Property originated in Florida.

As to Greenwald, the Receiver alleges the following facts (which are not contained in the Amended Complaint)<sup>6</sup>: (1) Greenwald had a beneficial ownership in a company, along with Frederic Elm, that owned a property in Florida between 2005-2014; (2) rental proceeds were collected from the property; (3) Greenwald may have been included on the mortgage for the property; (4) Greenwald visited the property with Frederic Elm; and (5) the transfer Greenwald received from the Receivership Entities was believed, by Greenwald, to be Frederic Elm’s buyout of his ownership in the Property. [DEs 42, 42-1].

Specific personal jurisdiction must be asserted in connection with a cause of action which arises from the enumerated contacts. Here, the Receiver’s cause of action arises out of the fraudulent transfer associated with the buyout of Greenwald’s interest in the Property, which was

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<sup>6</sup> While the Court can consider the Declaration and information outside the pleadings on a Motion to Dismiss for Lack of Personal Jurisdiction, the Court does not allow the Receiver to amend the Amended Complaint with its Response to the Motion to Dismiss. The following facts were alleged by the Receiver, which do not impact the Court’s analysis of personal jurisdiction: (1) Greenwald rents a condo in Florida and stays there part of the year; and (2) Greenwald was involved with Frederic Elm in a separate Florida corporation named Crarit International Investments, LLC, which seemingly has no stated relation to these proceedings. [DEs 42, 42-1].

based in Florida and, before the buyout, was an ongoing business dealing with Frederic Elm which generated rental proceeds.<sup>7</sup>

Greenwald claims that his “single receipt of funds” is insufficient for personal jurisdiction, [DE 27], but the receipt of the buyout payment is not the only contact Greenwald had with the state of Florida in his business dealings with Frederic Elm. “By itself, ownership of property is insufficient to subject a nonresident defendant to the jurisdiction of the courts of this state, unless the cause of action arose out of such ownership.” *See Nichols v. Paulucci*, 652 So.2d 389, 392 n. 5 (Fla. 5<sup>th</sup> DCA 1995)). Here, the cause of action, the fraudulent transfer, arose out of Greenwald’s sale of his interest in the Property; that is sufficient to confer specific jurisdiction. *See Fla. Stat. § 48.193(1)(a)* (engaging in a business venture in this state is sufficient to confer specific jurisdiction).<sup>8</sup>

**a. Due Process**

Next, the Court must determine whether the exercise of personal jurisdiction will comport with due process. This analysis requires the Court to consider whether: (1) the plaintiff’s claims “arise out of or relate to” at least one of the defendant’s contacts with the forum; (2) the nonresident defendant “purposefully availed” itself of the privilege of conducting activities within the forum state; and (3) the exercise of personal jurisdiction comports with “traditional notions of fair play and substantial justice.” *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013). (citations omitted). “The plaintiff bears the burden of establishing the first two prongs, and if the plaintiff does so, ‘a defendant must make a compelling case that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice.’” *Id.* (quoting *Diamond Crystal*, 593 F.3d at 1267).

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<sup>7</sup> The Court notes that the Receiver states its theories for personal jurisdiction in Response to the Motion, not in the Amended Complaint.

The Receiver's claims arise out of the fraudulent transfer made to Greenwald through the sale of this interest in the Property; it can also be said that the cause of action arises out of Greenwald's business dealings with Frederic Elm, including the ownership of rental property which involved visits to the Property in Florida. Greenwald "purposely availed" himself of conducting business in Florida. There is a direct causal relationship between Greenwald's actions aimed at Florida and the harm suffered by Plaintiff in Florida (the fraudulent transfer). Finally, traditional notions of fair play and substantial justice are not offended by the Court's exercise of personal jurisdiction over Greenwald. The burden on Greenwald of defending the action in Florida is light, as Florida is practically his second home, *see infra*, and the interest of the judicial system in Florida resolving this dispute is significant.

#### **IV. Conclusion**

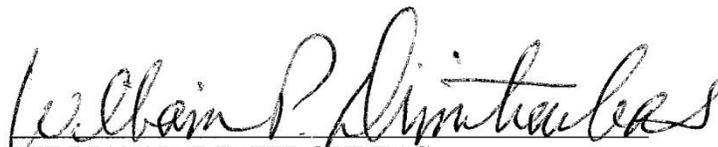
For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Motion to Dismiss for Lack of Personal Jurisdiction [DE 27] is **DENIED**
2. "It is axiomatic that a plaintiff cannot amend the complaint by arguments of counsel made in opposition to a motion to dismiss." *Kuhn v. Thompson*, 304 F. Supp. 2d 1313, 1321 (M.D. Ala. 2004) Accordingly, should Plaintiff seek to amend the Amended Complaint to include allegations against Greenwald discussed herein which were raised in filings relevant to the determination of personal jurisdiction, but were not otherwise included in the Amended Complaint, such Second Amended Complaint must be filed on or before **April 20, 2017**.

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<sup>8</sup> His interest in the property may also be sufficient under Fla. Stat. § 48.193(1)(c) which confers specific jurisdiction in a dispute involving "[o]wning, using, possessing, or holding a mortgage or other lien on any real

**DONE AND ORDERED** in Chambers in Fort Lauderdale, Florida this 10th day of  
April, 2017.

  
WILLIAM P. DIMITROULEAS  
United States District Judge

Copies furnished to:  
Counsel of record