

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

GRISEL ALONSO, as Receiver for  
Dimitrouleas  
Elm Tree Investment Advisors, et. al,  
  
Plaintiff,

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

v.

JAMES BENVENUTO, et. al  
  
Defendants.

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**MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION  
AND INCORPORATED MEMORANDUM OF LAW**

Defendant, TED GREENWALD, by and through the undersigned counsel and pursuant to *Fed. R. Civ. P.* Rule 12(b)(2) hereby files this Motion to Dismiss all counts of the Complaint filed by the Plaintiff, GRISEL ALONOSO, as Receiver for Elm Tree Investment Advisors, Elm Tree Investment Fund, LP, Elm Tre ‘e’Conomy Fund, LP and Elm Tree Motion Opportunity, LP (collectively “Elm Entities”) (hereinafter “Plaintiff”) and states as follows:

1. As noted in the Plaintiff’s Complaint [DE 6, ¶35], the Defendant TED GREENWALD is a resident of Ontario, Canada, who has been hauled into court in the Southern District of Florida.

2. Plaintiff has failed to carry its burden of establishing sufficient prima-facie allegations in support of such personal jurisdiction, as the two grounds which they have asserted are legally insufficient. First, the Plaintiff's claim of personal jurisdiction pursuant to the Securities and Exchange Act, 15 U.S.C. §78aa is inapplicable to the three state law claims asserted by the Plaintiff against Defendant Greenwald.

3. Second, the Plaintiff has failed to establish personal jurisdiction under the Florida Long Arm Statute, *Fla. Stat.* 48.193, which is the alternative grounds for jurisdiction asserted by the Plaintiff.

4. Finally, regardless of the statute pursuant to which the Plaintiff asserts jurisdiction over Defendant Greenwald, the allegations of the Amended Complaint are insufficient to demonstrate that the exercise of jurisdiction over Defendant Greenwald would comport with due process requirements.

5. For these reasons and as set forth in greater detail in the Memorandum of Law incorporated below, this action should be dismissed as to Defendant Ted Greenwald.

## **ARGUMENT**

### ***A. Legal Standard***

“A court must dismiss an action against a defendant over which it has no personal jurisdiction.” *Verizon Trademark Servs., LLC v. Producers, Inc.*, 810

F.Supp.2d 1321, 1323–24 (M.D.Fla.2011). To withstand a motion to dismiss, a plaintiff must plead sufficient facts to establish a prima facie case of jurisdiction over the non-resident defendant. “*Peruyero v. Airbus S.A.S.*, 83 F. Supp. 3d 1283, 1286 (S.D. Fla. 2014); *Virgin Health Corp. v. Virgin Enters. Ltd.*, 393 Fed.Appx. 623, 625 (11th Cir.2010). While allegations of fact made by the Plaintiff are generally considered to be true for purposes of a Motion to Dismiss, the Eleventh Circuit notes, “We do not, however, accept as true ‘unwarranted deductions of fact’ or legal conclusions.” *Castillo v. Allegro Resort Mktg.*, 603 F. App'x 913, 915 (11th Cir. 2015) (citing *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir.2005)).

To determine whether personal jurisdiction exists over an out-of-state defendant, courts undertake a two-step analysis. *Peruyero*, 83 F.Supp.3<sup>rd</sup> at 1287. First, a court must determine whether, pursuant to state law, the applicable state long-arm statute is satisfied. *Id.* (citing *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1361 (11th Cir. 2006)). Second, if the state long-arm statute is satisfied, the court must consider “whether the exercise of jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Melgarejo v. Pycsa Panama, S.A.*, 537 Fed.Appx. 852, 858–59 (11th Cir.2013). The Due Process Clause requires that the defendant have minimum contacts with the forum state so that the exercise of personal

jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. *Id.* “Both parts [of the test] must be satisfied for a court to exercise personal jurisdiction over a non-resident.” *Am. Fin. Trading Corp. v. Bauer*, 828 So.2d 1071, 1074 (Fla. 4<sup>th</sup> DCA 2002).

The Plaintiff’s Complaint fails these tests at each prong – it fails to satisfy either the long-arm statute or the requirements of the federal statute which it offers as a surrogate, and fails to allege sufficient minimum contacts with the State of Florida to support the exercise of jurisdiction.

***B. Allegations Against Defendant Greenwald***

The factual allegations against Defendant Greenwald (and most of the other Defendants) in this matter are sparse and non-specific. Plaintiff first asserts jurisdiction stemming from 15 U.S.C. §78aa and alleges, without elaboration that the “Defendants have sufficient minimum contacts with the United States to satisfy the Fifth Amendment’s due process requirements.” [DE 6, ¶9]

In the alternative, Plaintiff alleges personal jurisdiction over all the Defendants 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 contracts with

the State of Florida to satisfy due process requirements, such that the exercise of personal jurisdiction is fair and just.

***C. 15 U.S.C. §78aa Does not Provide for Jurisdiction over Greenwald.***

As other Defendants to this action have already noted<sup>1</sup>, the Securities Exchange Act's nationwide service of process provision, although effective as to out-of-state defendants alleged to have committed securities fraud or other violations of the Act, does not bestow pendent personal jurisdiction over defendants against whom a plaintiff has asserted state-law claims only. *Gill v. Three Dimension Sys., Inc.*, 87 F. Supp. 2d 1278 (M.D. Fla. 2000)

The Plaintiff has not asserted any claims against Greenwald or the other Defendants which arise from the Act or from federal law generally, instead seeking recovery to the receivership estate under state-law theories of fraudulent transfers and unjust enrichments. As the court noted in *Gill*, these state-law claims are subject to a traditional long-arm/due process analysis, because conferring personal jurisdiction under the national service of process provisions of 15 U.S.C. §78aa in the absence of a federal claim “raises serious constitutional questions regarding the requirements of due process inherent in the exercise of personal jurisdiction.” *Id.* (citing *Morley v. Cohen*, 610 F. Supp. 798, 823 (D. Md. 1985)).

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<sup>1</sup> Defendants Constantino Dos Santos and Eduardo Dos Santos, who are also residents of Canada, have already filed Motions to Dismiss this action for lack of personal jurisdiction [DE 20]. To the extent applicable, Defendant Greenwald joins in their Motion and adopts and incorporates its reasoning herein.

***D. Plaintiff's Allegations Fail to Satisfy the Requirements of Fla. Stat. §48.193 or Due Process***

There are legions of cases analyzing the Florida Long-Arm statute and its incorporated due process requirement which flatly reject the notion that the exchange of payment can form the basis for exercising personal jurisdiction over a non-resident defendant. *See 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.”) (citing *Venetian Salami v. Parthenais*, 554 So.2d 499 (Fla. 1989); *Group One Enters., Inc. v. Publishers' Representative, Inc.*, 899 So.2d 402 (Fla. 4th DCA 2005); *Hartcourt Cos., v. Hogue*, 817 So.2d 1067 (Fla. 5th DCA 2002); *deMco Techs., Inc. v. C.S. Engineered Castings, Inc.*, 769 So.2d 1128 (Fla. 3d DCA 2000).

In the majority of these cases, the Courts have rejected the notion that a Defendant simply sending payment to the State of Florida is insufficient to establish minimum contacts. *See e.g. Creekspath Sys., Inc. v. Rabrob Corp.*, 874 So. 2d 686, 687 (Fla. 4<sup>th</sup> DCA 2004) Florida’s Supreme Court has even noted “we do not believe that the mere failure to pay money in Florida, standing alone, would suffice to obtain jurisdiction over a nonresident defendant.” *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 503 (Fla.1989). The allegations against the Defendant are even more weak than those of the cases cited above, as the Defendant 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. Though less common, Florida courts have also reviewed and rejected the notion that simply receiving funds is inadequate to form the requisite minimum contacts in support of personal jurisdiction. *See e.g. DeMetra Hontzas v. Kaufman, Rossin & Co.*, , 513 So.2d 745 (1987)(holding Florida accounting firm's implicit understanding that Alabama clients would send payment to Florida, together with explicit understanding that agreement between parties was governed by Florida law, were insufficient to establish long-arm jurisdiction over clients.)

The Plaintiff's complaint thus fails to demonstrate that Defendant Greenwald's single receipt of funds from the Plaintiff is sufficient to satisfy either Florida's long arm statute, or the constitutional notions of due process which are required to support an exercise of personal jurisdiction. As such, the complaint against Mr. Greenwald must be dismissed.

### **Conclusion**

WHEREFORE, for the foregoing reasons, Defendant TED GREENWALD respectfully requests that this Court enter an Order dismissing all counts against him, and granting such further relief as the Court deems just and proper.

Respectfully Submitted,

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