

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

SHANNON C. MCGRATH, AND THE  
SHANNON C. MCGRATH 2005 TRUST,

PLAINTIFFS,

V.

THOMAS J. MCGRATH, TD AMERITRADE,  
INC., E\*TRADE SECURITIES, LLC AND  
E\*TRADE CLEARING, LLC,

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS  
)  
) FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-10-000893

) ORDER GRANTING DEFENDANT  
) THOMAS J. MCGRATH'S  
) MOTION TO DISMISS FOR LACK  
) OF PERSONAL JURISDICTION

FILED  
MAY - 8 PM 4:12  
CLERK OF COURT  
THOMAS J. PARSONS

THIS MATTER came before the Court on Defendant Thomas J. McGrath's Motion to Dismiss. The Court held a hearing on the Motion on March 5, 2014 in which all parties were represented by counsel. Upon consideration of the arguments of counsel, memoranda of law, affidavits, and other materials submitted by the parties, the Court grants the Motion and dismisses Defendant Thomas J. McGrath from this case for lack of personal jurisdiction and improper service.

#### FACTUAL BACKGROUND

##### A. Substantive Allegations

This case involves the Shannon C. McGrath 2005 Trust (the "Trust"). (Compl. at ¶ 2) Under the Trust instrument, the Trust was created in and is governed by the laws of the State of New Jersey. (*Id.*) Plaintiff's father, Michael McGrath ("Michael"), who is currently in federal prison for mortgage fraud, is the settlor of the Trust (known as the "Grantor" under New Jersey law). (*Id.*) The Original Trustees were Janet Rinaldi and Karina Coehlo. (*Id.*) Plaintiff is the

primary beneficiary of the Trust. (Trust Instrument art. II.) The Trust was purportedly funded with deposits of funds into the Trust's TD Ameritrade bank account (the source of these funds is not discussed in Plaintiff's Complaint). (Compl. at ¶ 12.) In 2009, the Original Trustees resigned, and Defendants Thomas J. McGrath ("Thomas"), Michael's brother and Plaintiff's uncle, agreed to serve as a Successor Trustee. (*Id.* at ¶ 11.)

Plaintiff alleges in her Complaint that in 2010, Thomas gave Michael the online name and password for the Trust's TD Ameritrade account. (*Id.* at ¶ 13.) According to Plaintiff, Michael then opened an account with E\*Trade Clearing and wired approximately \$400,000 from the Trust's TD Ameritrade account to the new E\*Trade account. (*Id.* at ¶¶ 14-15.) It is alleged that from this time until April 2011, Michael misappropriated virtually all of the Trust's assets. (*Id.* at ¶ 17.) Plaintiff brings breach of fiduciary duty, fraud, and South Carolina Securities Act claims against Thomas concerning his alleged role in the dissipation of Trust assets.

 **B. Thomas's Contacts with South Carolina**

Thomas is a resident of New Jersey. (Affidavit of Thomas J. McGrath at ¶ 2). Based on the evidence submitted by the parties, it is clear that his connections to South Carolina are effectively non-existent:

- (1) He has never lived, worked, or maintained an office in South Carolina;
- (2) He has only passed through South Carolina while driving to Florida;
- (3) He has never owned any real or personal property in South Carolina;
- (4) He has never held a bank account or other assets in South Carolina;
- (5) He has never conducted or operated any business in South Carolina, or engaged in any business venture here;
- (6) He has never had any employees in South Carolina;
- (7) He has never sued anyone or, other than in this case, been sued in South

Carolina; and

- (8) He has never been a shareholder, investor, officer, or director of any business that transacted business in South Carolina.

(*Id.* at ¶¶ 2-8.) In addition, Thomas has never consented to an exercise of jurisdiction by any court in South Carolina and was not served with process in this case in South Carolina. (*Id.* at ¶¶ 22-23.) Likewise, as it relates to this case, all of the Trust assets managed by Thomas were located in New Jersey, and Thomas administered the Trust exclusively from New Jersey. (*Id.* at ¶ 17.)

Plaintiff's submissions do nothing to undercut these basic facts. As Plaintiff herself admits, during Thomas's tenure as Successor Trustee, the only connection between the Trust and South Carolina was that Plaintiff happened to attend college in South Carolina, and the Trust made payments for Plaintiff's tuition and other expenses, as expressly contemplated by the Trust instrument. (Affidavit of Shannon McGrath ¶¶ 4, 6.) Indeed, Plaintiff's affidavit focuses on *her own* contacts with South Carolina, not Thomas's. (*Id.*) As to Thomas, these coincidental contacts are not meaningful. Under the Trust instrument, Thomas would have made payments to Plaintiff and whatever educational institution Plaintiff attended, regardless of where Plaintiff and the institution were located. (Thomas Aff. ¶ 19.)

#### LEGAL STANDARD

Rule 12(b)(2), SCRCF, permits the Court to dismiss a nonresident defendant for lack of personal jurisdiction. "The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of jurisdiction." *Int'l Mariculture Resources v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct. App. 1999); *see also Allen v. Columbia Fin. Mgmt., Ltd.*, 297 S.C. 481, 484, 377 S.E.2d 352, 354 (Ct. App. 1988) (holding because the defendant challenged personal jurisdiction, the plaintiff bore the burden of showing the existence of personal

jurisdiction). Before trial, the plaintiff must "make a prima facie showing by pleadings and affidavits that the trial court should exercise personal jurisdiction" over the defendants. *Allen*, 297 S.C. at 484, 377 S.E.2d at 354.

"When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Power Prods. & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). Here, the Court has carefully examined the affidavits and other evidence submitted by the parties and has relied on such evidence in determining that personal jurisdiction is lacking. Indeed, even if all of Plaintiff's evidence is credited as true, the Court concludes that it lacks personal jurisdiction over Thomas.


#### ANALYSIS

Traditionally, courts conducted a two-step inquiry to determine, first, whether personal jurisdiction would lie under applicable long-arm statute, and, second, whether the assertion of personal jurisdiction comported with constitutional due process. In South Carolina, however, the long-arm statute reaches to the limits of due process, so "the sole question [is] whether the exercise of personal jurisdiction would violate due process." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005).

A plaintiff may attempt to demonstrate personal jurisdiction by two distinct avenues—general and specific jurisdiction. General jurisdiction is premised on a defendant's overall contact with the forum state, and depends on a defendant maintaining "continuous and systematic" contacts with the state that are "so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities." *Cribb v. Spatholt*, 382 S.C. 475, 482, 676 S.E.2d 706, 710 (Ct. App. 2009) (citing

*Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). Specific jurisdiction, on the other hand, arises from the defendant having sufficient contact with the forum *related to the claims at issue* that it has purposefully availed itself of the privilege of conducting business in the forum. *Pitts v. Fink*, 389 S.C. 156, 164-65, 698 S.E.2d 626, 630-31 (Ct. App. 2010).

In this case, the Court concludes that Thomas does not have the “continuous and systematic” contacts with South Carolina required to establish general jurisdiction, and he likewise has done nothing related to this case to purposefully avail himself of the privilege of conducting business in South Carolina. As a result, personal jurisdiction is lacking, and the claims against him must be dismissed.

 **A. Thomas Lacks the Continuous and Systematic Contact with South Carolina Required to Establish General Jurisdiction**

General jurisdiction arises when a defendant has contact with the forum that are “substantial, continuous, and systematic.” *Coggershall v. Reproductive Endocrine Assocs. of Charlotte*, 376 S.C. 12, 17, 655 S.E.2d 476, 479 (2007). South Carolina courts have held even relatively substantial contacts with South Carolina – including serving as many as 3,000 South Carolina customers, doing business with multiple South Carolina vendors, and certifying products that are routinely sold in South Carolina – are insufficient where the defendant does not have a regular and sustained practice of directing its activities at South Carolina. *See, e.g., Cockrell*, 363 S.C. at 495, 611 S.E.2d at 510 (certifying products regularly sold in South Carolina not enough); *Coggershall*, 376 S.C. at 17, 655 S.E.2d at 479 (selling to 3,000 South Carolina customers and doing business with multiple South Carolina vendors not enough).

In this case, the Court concludes that Thomas has no significant contacts with South Carolina. Indeed, the only contact that Plaintiffs argues is that, in 2009, Thomas’s employer registered him in South Carolina and other states as a securities broker. (Registration

Documents.) Thomas, however, was only registered for a period of three (3) months, during which time he did not utilize the registration, did not transact any business in South Carolina, and did not even recall that he was registered here. (*Id.*; Thomas Aff. ¶ 9.) Under these circumstances, the Court concludes that merely obtaining the securities registration is insufficient to establish jurisdiction. *See, e.g., Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971).

**B. Thomas Lacks the Minimum Contacts to Establish Specific Personal Jurisdiction, and Exercising Jurisdiction over Him Would Violate Traditional Notions of Fair Play and Substantial Justice**

For specific jurisdiction, due process requires that a non-resident defendant have sufficient minimum contacts with the forum and that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. A defendant has sufficient minimum contacts with the forum state if its contact are such that it could "reasonably anticipate being haled into court there." *Id.* at 492, 611 S.E.2d at 508. Even if a plaintiff makes the required showing of sufficient minimum contacts, personal jurisdiction will not lie if its exercise would be unreasonable and contrary to concepts of fair play and substantial justice. *Id.*

**1. Thomas Has No Substantial Contacts with South Carolina**

To demonstrate sufficient minimum contacts, the plaintiff must prove that "the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Cribb*, 382 S.C. at 484, 676 S.E.2d at 711. Here, the Court concludes that Plaintiff has failed to show that her cause of action against Thomas arose from Thomas's activities in South Carolina.

It appears to the Court that the only real connection between the Trust and South Carolina

is that Plaintiff happens to live in South Carolina. This does not create personal jurisdiction, as the *plaintiff's* residence alone cannot establish that the *defendant* has sufficient contact with the forum. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997). Rather, there must be evidence that the defendant intentionally directed his activities at the forum; otherwise, "jurisdiction would depend on a *plaintiff's* decision about where to establish residence," instead of on the *defendant's* contacts. *Id.* (emphasis in original). In similar cases, courts – including the Supreme Court of the United States – have held that the happenstance of where a trust beneficiary chooses to live does not, without some purposeful availment, establish personal jurisdiction over a non-resident trustee. *See, e.g., Hanson v. Denckla*, 357 U.S. 235, 254-55 (1958) (beneficiary's residence in forum insufficient to establish personal jurisdiction over trustee); *Conn v. ITT Aetna Fin. Co.*, 252 A.2d 184, 190-91 (R.I. 1969) (same); *Dreher v. Smithson*, 986 P.2d 721, 725 (Or. Ct. App. 1999 (same); *see also Walden v. Fiore*, 134 S.Ct. 1115, 1122 (2014) (emphasizing that "the plaintiff cannot be the only link between the defendant and the forum"). In this case, the Courts finds no evidence of Thomas purposefully directing any activities at South Carolina. To the contrary, South Carolina is nothing more than where Plaintiff chose to live. Plaintiff, therefore, falls short of establishing that Thomas has sufficient contacts with South Carolina to justify the exercise of personal jurisdiction over him.

2. **Forcing Thomas to Litigate in South Carolina Would Be Unreasonably Burdensome and Fundamentally Unfair**

Not only does Thomas not have sufficient minimum contacts with South Carolina under the law, the Court also concludes that exercising jurisdiction over him would violate traditional notions of fair play and substantial justice. In considering the fairness of exerting jurisdiction over an individual, courts consider:

- (1) the duration of the activity of the nonresident within the state;

- (2) the character and circumstances of the commission of the nonresident's acts;
- (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and
- (4) the State's interest in exercising jurisdiction.

*Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508.

Here, the Court concludes that each factor weighs in favor of the dismissal of Plaintiff's Complaint. *First*, as set forth in Thomas's affidavit, he did not engage in any substantial activity in South Carolina. *Second*, concerning the character and circumstances of Thomas's alleged acts, any connection to South Carolina appears to be pure happenstance. The Trust instrument does not mention South Carolina or require any action by the trustee in South Carolina. It merely requires that the trustee pay benefits to Plaintiff, wherever she may choose to live.

*Third*, the bulk of the parties, evidence, and witnesses appear to be located in New Jersey, where the Trust was formed and maintained and where the key players resided at the time the alleged actions set forth in the Complaint took place. In addition, the evidence regarding the source of the money used to fund the trust (which may have been fraudulent) is also located in New Jersey. The only tie this matter appears to have to South Carolina is Plaintiff's alleged status as a new South Carolina resident. Plaintiff's residence should not trump the gross inconvenience to all other parties in litigating what is plainly a New Jersey dispute in South Carolina. Moreover, the inconvenience to Thomas of having to litigate in South Carolina would be extreme. As set forth in his affidavit (and not rebutted by Plaintiff), he is a man of modest means with three young children and substantial child care responsibilities. He does not have the means or ability to participate in protracted litigation this far away from home, and, given the matter's more than substantial connections to New Jersey, he should not be forced to do so.

*Fourth*, South Carolina has no significant interest in this matter. It involves claims

arising from the alleged dissipation of trust funds obtained in New Jersey, allegedly taken from a New Jersey trust, by a New Jersey resident, from New Jersey bank accounts, because of the purported negligence of a New Jersey successor trustee administering the Trust in New Jersey. "South Carolina's interest in providing redress for its citizens was diminished when 'nothing which [was] the subject of this litigation ha[d] taken place in South Carolina.'" *Cribb*, 382 S.C. at 489, 676 S.E.2d at 714. Moreover, as set forth in the Trust Agreement and as alleged by Plaintiff in the Complaint, the Trust – and therefore this case – is governed by New Jersey Law. (Complaint at ¶ 2, Ex. 1.) Our Supreme Court has held that choice of law provisions are "relevant in deciding whether to exercise personal jurisdiction," *Coggeshall*, 376 S.C. at 20-21, 655 S.E.2d at 480, because it often makes little sense for a South Carolina court to decide a foreign dispute under foreign law. In short, New Jersey has the superior interest in this case.

In light of the minimal and coincidental connection between this matter and South Carolina, the substantial prejudice to Thomas in forcing him to litigate in South Carolina, and South Carolina's lack of any interest in deciding this New Jersey dispute, the Court concludes that it would be fundamentally unfair and contrary to Thomas's due process rights to force him to litigate in South Carolina.<sup>1</sup>

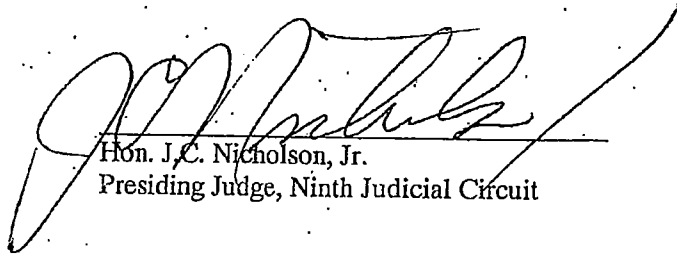
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<sup>1</sup> Because personal jurisdiction is lacking, the Court also concludes that Plaintiff failed to effect proper services on Thomas, and the Complaint is therefore dismissed as against Thomas under Rule 12(b)(5), SCRPC, as well. Service of process on a defendant located beyond the territorial limits of the state is permitted only when a statute so provides. Rule 4(f), SCRPC. Pursuant to S.C. Code Ann. § 36-2-804, service may be made outside the State of South Carolina, only when there is personal jurisdiction over a non-resident defendant as set forth in S.C. Code Ann. §§ 36-2-802 and 803. Because there is no personal jurisdiction over Thomas as set forth above, service of process upon him by certified mail, return receipt requested, was improper.

**CONCLUSION**

For the reasons set forth above and all others present in the record, the Court GRANTS Defendant Thomas J. McGrath's Motion to Dismiss and hereby DISMISSES all causes of action as against him.

AND IT IS SO ORDERED.



Hon. J.C. Nicholson, Jr.  
Presiding Judge, Ninth Judicial Circuit

This 5 of May, 2014

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013- CP-10-0893

Shannon C. McGrath, et al.  
 PLAINTIFF(S)

Thomas J. McGrath, et al.  
 DEFENDANT(S)

Submitted by: \_\_\_\_\_ Attorney for :  Plaintiff  Defendant  
 or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_ This order ends the case only as to Defendant Thomas J. McGrath.

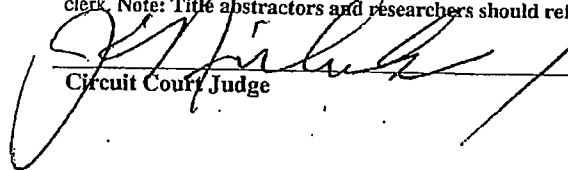
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
 Circuit Court Judge

2117  
 Judge Code

5/15/14  
 Date

FILED  
 2014 MAY -8 PM 4:12  
 CLERK OF COURT  
 JULIE J. ARMSTRONG