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possess personal property rights in their respective choses in action against Erwin. This Court, therefore, has statutory personal jurisdiction over Erwin under 28 U.S.C. § 754.

## **II.** **ARGUMENTS AND ANALYSIS**

### **A. STANDARD FOR PLEADING LACK OF JURISDICTION**

When a non-resident defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the Court's jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The Court may decide the matter without an evidentiary hearing, in which case the plaintiff can meet his burden by presenting a prima facie case for personal jurisdiction. *Wilson*, 20 F.3d at 648; *Thompson v. Chrysler Motors Corporation*, 755 F.2d 1162, 1165 (5th Cir. 1985). In so doing, the Court takes as true all allegations in the Complaint, except where they are controverted by opposing affidavits. *Wilson*, 20 F.3d at 648. All factual conflicts are resolved in the plaintiff's favor. *Id.*

### **B. THIS COURT HAS PERSONAL JURISDICTION OVER ERWIN UNDER 28 U.S.C. § 754**

#### **1. In Federal Receivership Proceedings, 28 U.S.C. § 754 Extends This Court's Personal Jurisdiction Over All Defendants That May Possess Assets Traceable To The Entity In Receivership**

Personal jurisdiction may be predicated on a federal statute that allows for nationwide service of process. *Order* [Dkt. No. 81] at 3 (3:06-CV-2136); *Quilling v. Stark*, 2006 WL 1683442, \*2 (N.D. Tex. June 19, 2006). In this case, the Court's jurisdiction is predicated on 28 U.S.C. § 754 and § 1692. Section 754 addresses the Court's *in rem* jurisdiction over receivership assets located nationwide:

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. (emphasis added)

Section 1692 authorizes the Receiver to serve defendants located anywhere in the United States and have them appear before the Court in these proceedings:

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.  
(emphasis added)

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Together, these statutes give the Court both *in rem* jurisdiction and personal jurisdiction in all districts where property of the receivership estate (be it real, personal, or mixed) may be located. *Order* [Dkt. No. 81] at 4 (3:06-CV-2136); *Stark*, 2006 WL 1683442 at \*3; *see also Haile v. Henderson Nat. Bank*, 657 F.2d 816, 826 (6th Cir. 1981) (in the context of federal equitable receivership cases, “the minimum contacts analysis, as a limitation on state extra-territorial power, is simply inapposite”); *Am. Freedom Train Found. v. Spurney*, 747 F.2d 1069, 1073 (2d Cir. 1984). Through those statutes, Congress has effectively extended this Court’s territorial jurisdiction to “any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754.” *Haile*, 657 F.2d at 823.

In accordance with 28 U.S.C. § 754, the Receiver filed proper notice of his appointment in the Central District of California on November 22, 2006. (Receiver’s Decl., Ex. A at ¶ 2.) Accordingly this Court took exclusive jurisdiction and possession over all “assets, monies, securities, choses in action, and properties” located there. *Order Appointing Receiver* [Dkt. No. 8] at ¶ 1 (3:06-CV-2136); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136). The Receiver now brings this suit to recover all funds and/or assets that ABC and the ABC Investor Trusts transferred to E&J—including any proceeds that E&J shared

or forwarded to Erwin—and to pursue any choses in action that ABC and the ABC Investor Trusts have against Erwin.

**2. Under 28 U.S.C. § 754, This Court Has Jurisdiction Over Proceeds Of Funds From ABC Or The ABC Investor Trusts That Erwin Received Through E&J**

Erwin’s primary challenge to personal jurisdiction is that he did not receive any transfers “directly traceable” to the receivership estate.<sup>1</sup> (Mot. to Dismiss [Dkt. No. 9] at 2.) The Court’s jurisdiction, however, is not limited to direct transfers from ABC. Rather, the Receiver may recover any proceeds traceable to ABC or the ABC Investor Trusts—even if they were originally paid to E&J and then later shared with or forwarded to Erwin. Erwin does not and cannot deny receiving from E&J at least a portion of the funds and/or assets of ABC and the ABC Investor Trusts sent to E&J. (Mot. to Dismiss [Dkt. No. 9] at 2.) At the very least, the Receiver should be allowed to conduct discovery regarding this issue.

The Order Appointing Receiver expressly asserts this Court’s jurisdiction over any party who received “funds” or “proceeds” of funds that can be traced to ABC:

The Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to persons or entities who received assets or funds or proceeds traceable to investor monies. All such actions shall be filed in this Court. The Receiver is specifically authorized to pursue such actions on behalf of and for the benefit of the constructive trust beneficiaries, including without limitation any and all investors who may be the victims of the fraudulent conduct alleged herein by the Commission. (emphasis added)

*Order Appointing Receiver* [Dkt. No. 8] at ¶ 14 (3:06-CV-2136); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136). By allowing the Receiver to pursue both funds and proceeds traceable to investor money, this Court maintains a powerful

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<sup>1</sup>When Erwin refers to funds “traceable to the receivership estate,” the Receiver presumes that he means funds transferred out of ABC or the ABC Investor Trusts before those entities went into receivership.

tool in recovering fraudulent transfers that have been laundered through an intermediate party. For example, in *Quilling v. McDuff, et al.*, Case No. 3:06-CV-0959 (N.D. Tex. Dec. 13, 2006), this Court exercised its personal jurisdiction over an individual who washed the proceeds of investor funds through two accounts held by other entities. *Findings and Recommendation* [Dkt. No. 39] at 5 (3:06-CV-0959); *Order* [Dkt. No. 40] (3:06-CV-0959); *see also Sholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) (court exercised personal jurisdiction over ex-wife who received proceeds of funds fraudulently transferred to her husband).

This Court's Order entered against Donald Kaplan on August 9, 2007, underscores the fact that it has personal jurisdiction over individuals receiving "proceeds" traceable to ABC. *Order* [Dkt. No. 81] (3:06-CV-2136). That Order correctly denied the personal jurisdiction challenge of Donald Kaplan because "Congress's grant of nationwide jurisdiction over persons and property relating to receivership cases stresses the importance of having a single court responsible for accessing, protecting, and distributing the assets of a company in receivership." *Id.* at 6. Erwin attempts to distinguish that ruling by claiming that "the situation presented here is notably distinct [because] Kaplan received direct monetary commissions from ABC." (Mot. to Dismiss [Dkt. No. 9] at 2.) Kaplan, however, presented the exact same defense now put forth by Erwin—i.e., the direct transfers from ABC went to his company, not to him personally. *See Brief in Support of Motion of Donald S. Kaplan to Dismiss* [Dkt. No. 60] at 6-7 (3:06-cv-2136). To accept Erwin's contention would allow any Ponzi scheme to thwart Congressional intent and cripple receivers' efforts to recover fruits of fraud by simply transferring funds or assets through intermediaries. This Court ought to deny Erwin's motion to dismiss for the same reason it denied Kaplan's.

**3. Under 28 U.S.C. § 754, This Court Has Jurisdiction Over ABC's Choses In Action And Those Of The ABC Investor Trusts Against Erwin**

This Court also has personal jurisdiction over Erwin as the subject of a chose in action belonging to the receivership estate. A chose in action is a personal property right to bring an action to recover a debt, money, or thing. BLACK'S LAW DICTIONARY (8th ed.2004). Without question, both ABC and the ABC Investor Trusts have viable choses in action against Erwin or any other party who received funds, assets, or their proceeds transferred from the receivership entities prior to the receivership. *Order Appointing Receiver* [Dkt. No. 8] at ¶¶ 1, 14 (3:06-CV-2136); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136).

The Court took possession of the choses in action against Erwin when it appointed a receiver for ABC and the ABC Investor Trusts. *See Order Appointing Receiver* [Dkt. No. 8] at ¶ 1 (3:06-CV-2136); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136). The Court then acquired personal jurisdiction over Erwin when the Receiver filed timely notice of his appointment in the Central District of California under 28 U.S.C. § 754. (Receiver's Decl., Ex. A at ¶ 2.) As a result, the Court now properly exercises its extraterritorial jurisdiction over Erwin according to federal statute. *Haile*, 657 F.2d at 823.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

A true and correct copy of this motion shall be served on all interested parties through the Court's electronic filing system.

/s/ Michael J. Quilling