

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC	§	
VIATICALS, INC., and Related Entities	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 3:07-CV-1153-P
	§	
ERWIN & JOHNSON, LLP, and	§	
CHRISTOPHER R. ERWIN,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is Defendant Christopher R. Erwin’s (“Defendant” or “Erwin”) Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction, filed September 24, 2007. Plaintiff Micheal J. Quilling (“Plaintiff” or “Receiver”) filed his Response on October 25, 2007. Defendant then filed its Reply on November 9, 2007. After reviewing Defendant’s Motion, the evidence, and the applicable law, the Court DENIES Defendant’s Motion to Dismiss.

I. Background and Procedural History

On November 17, 2006, the Securities and Exchange Commission (“SEC”) filed suit alleging that ABC Viaticals, Inc. (“ABC”) and other defendants fraudulently sold life settlement policies and made numerous misrepresentations to investors. ABC represented to investors that their contributions would be tied to a particular insurance policy; however, according to Plaintiff, from the beginning, ABC commingled investor contributions in order to pay premiums and expenses on numerous policies. Additionally, the commingled accounts were allegedly

underfunded, so that ABC had to solicit funds from additional investors in order to cover its obligation to the initial investors. (*Id.*)

On November 17, 2006, this Court appointed Michael J. Quilling as Receiver for ABC, in order to protect the interests of those who had invested with ABC. (Order Appointing Receiver (“Order”).) In accordance with that Order, Plaintiff has examined the business records of ABC and determined that, as ABC was insolvent and required new investments to honor obligations made to earlier investors, it was operating as a *Ponzi* scheme.

The scheme involved the services of an independent trustee/escrow agent that handled all investor funds. One of the trustees was Defendant Erwin & Johnson, LLP, who allegedly conducted its services through Defendant Erwin. Investors were instructed to send their funds directly to Erwin & Johnson, LLP, where those funds were held in the law firm’s trust account and disbursed in accordance with the investor’s purchase agreement with ABC. Plaintiff alleges that ABC paid Erwin \$500,000 directly to ensure continued participation in ABC’s scheme. (Compl. at ¶ 16.) In addition, in his affidavit, Plaintiff states that Defendants accepted at least \$1.3 million from ABC and the ABC investor trusts to act as their legal counsel and trustee. (App. Resp. to Def.’s Mot. to Dismiss for Lack of Standing at 2.)

Defendant Erwin now moves the Court to dismiss Plaintiff’s Complaint as it pertains to him for lack of personal jurisdiction. Specifically, Defendant argues that he has never directly received nor does he possess any receivership property. Thus, Defendant concludes, that “the receivership *in personum* jurisdictional statutes fail to establish personal jurisdiction over Mr.

Erwin.” (Reply at 7.) Plaintiff argues that even if Defendant did not receive funds directly from ABC, Defendant cannot deny receiving a portion of ABC’s funds sent to Erwin & Johnson, LLP.

II. Rule 12(b)(2) Legal Standard

The Court may exercise personal jurisdiction over a nonresident defendant only if (1) the defendant is subject to service of process under the forum state’s long-arm statute and (2) the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment of the United States Constitution. *See Colwell Realty Investments, Inc. v. Triple T Inns, Inc.*, 785 F.2d 1330, 1333 (5th Cir. 1986). Because the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042 (Vernon 1986), “reaches as far as the federal constitutional requirements of due process will permit,” the Court need only determine whether the exercise of personal jurisdiction satisfies the United States Constitution’s due process requirements. *See Kawasaki Steel Corp. v. Middleton*, 669 S.W.2d 199, 200 (Tex. 1985); *U-Anchor Advertising v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977).

The Supreme Court has held that a due process inquiry in this context requires two determinations: (1) whether the nonresident defendant purposely established “minimum contacts” with the forum state and, if so, (2) whether the assertion of personal jurisdiction would comport with traditional notions of “fair play and substantial justice.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

“However, the due process analysis is different when personal jurisdiction is predicated on a federal statute that allows for nationwide service of process.” *Quilling v. Stark*, No.

3:05-CV-1976-L, 2006 WL 1683442, at *2 (N.D. Tex. June 19, 2006) (not reported in F. Supp.

2d). In this instance, the Court's jurisdiction is predicated on 28 U.S.C. § 754 and 28 U.S.C. §

1692. Section 754 provides:

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.

28 U.S.C. § 754. Section 1692 works in conjunction with Section 754 by authorizing service of process in any district where section 754 filings are made.

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. 28 U.S.C. § 1692. "Together, these statutes give a receivership court both in rem and in personam jurisdiction in all districts where property of the receivership estate may be located." *Stark*, 2006 WL 1683442, at *3; *see also Haile v. Henderson Nat. Bank*, 657 F.2d 816, 826 (6th Cir. 1981) ("The appointment court's process extends to any judicial district where receivership property is found. As such, 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) (adopting the Sixth Circuit's holding and language in *Haile*).

In a dispute over personal jurisdiction, "the party who seeks to invoke the jurisdiction of the district court bears the burden of establishing contacts by the nonresident defendant sufficient to invoke the jurisdiction of the court." *Bullion v. Gillespie*, 895 F.2d 213, 216–17 (5th Cir.

1990). “[W]hen the jurisdictional issue is to be decided by the court on the basis of facts contained in affidavits, a party need only present facts sufficient to constitute a prima facie case of personal jurisdiction.” *Id.* at 217. “Proof by a preponderance of the evidence is not required.” *Id.* Furthermore, “[w]hen a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, it must accept as true the uncontroverted allegations in the complaint and resolve in favor of the plaintiff any factual conflicts posed by the affidavits.” *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999). “However, only the well pled facts of plaintiff’s complaint, as distinguished from mere conclusory allegations, must be accepted as true.” *Wenz v. Memery Crystal*, 55 F.3d 1503 (10th Cir. 1995); *see also Burchfield v. Stein*, No. 3:01-CV-2529-G, 2002 U.S. Dist. LEXIS 3233, at *19 (N.D. Tex. 2002) (“[M]ere allegations of fraud by an out of state defendant without a showing of minimum contacts will not confer jurisdiction.”).

III. Discussion

Plaintiff has offered evidence, that if believed, would show that Defendant received or is in possession or custody of property belonging to the receivership. In the Complaint, Plaintiff alleges that Defendant received a payment of \$500,000 from ABC and that Defendant also accepted \$1 million death benefit ownership interest in a viatical policy from the LaMondas. (Compl. at ¶ 16.) In addition, Plaintiff states that even if Defendant did not receive funds directly from ABC, Defendant cannot deny receiving a portion of ABC’s funds sent to Erwin & Johnson, LLP. Specifically, Plaintiff states that Defendants accepted at least \$1.3 million from ABC and the ABC investor trusts to act as their legal counsel and trustee. There are no other allegations of

receivership property received or in possession of Defendant. Along with Defendant's Motion to Dismiss, Defendant offers his own affidavit in which he swears that he has not received or is in possession of any receivership property. In addition, Defendant offers a bank statement showing a \$500,000 deposit in the account of Defendant Erwin & Johnson, LLP. (Def.'s Mot. Ex. C.) Defendant's own affidavit and the bank statement are uncontroverted by Plaintiff. Instead, Plaintiff claims in his Response that Erwin must have received funds from Erwin & Johnson, LLP that ABC had paid to Erwin & Johnson, LLP.

The Court finds that there is sufficient evidence in the record to constitute a prima facie case of personal jurisdiction. Though it is clear from the record that Defendant never received a payment directly from ABC as alleged by Plaintiff, it is also clear to the Court that Defendant received fees for legal services rendered from ABC via E&J. With respect to the \$500,000 payment at issue, the bank record itself shows that withdrawals of \$150,000 were made. (Def.'s Mot. Ex. C.) Defendant does not provide the Court with any information on those withdrawals. However, it is uncontroverted that the \$500,000 payment at issue was made as a retainer fee to E&J. These funds were deposited in E&J's Attorney/Client Trust Account. (*Id.*) The point of a retainer fee is to pay for legal fees rendered by a law firm. In this case, E&J comprised of 2 attorneys, one of which was Defendant who was responsible for rendering legal services to ABC. These facts taken together, combined with the fact that Defendant does not state that he never received fees from E&J for services rendered to ABC from funds paid to E&J by ABC for legal services, lead the Court to conclude that Defendant received funds from E&J that were paid to


E&J by ABC for legal services rendered by Defendant.¹ “[W]hen the jurisdictional issue is to be decided by the court on the basis of facts contained in affidavits, a party need only present facts sufficient to constitute a prima facie case of personal jurisdiction.” *Id.* at 217. “Proof by a preponderance of the evidence is not required.” Therefore, the Court concludes that based on the record, Plaintiff has offered enough evidence, that if believed, show that Defendant has received or is in possession of receivership property. Thus, the Court DENIES Defendant’s Motion to Dismiss.

IV. Conclusion

For the reasons stated herein, the court hereby DENIES Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction.

IT IS SO ORDERED.

Signed this 20th day of February 2008.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

¹See Escrow Accounts Agreement (Ex. A Def.’s Mot. to Dismiss for Lack of Standing) in which Paragraph 2 states that “Escrow Agent shall be compensated in accordance with the provisions of the Engagement Letter.”