

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

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

**CHRISTOPHER R. ERWIN’S MOTION FOR RECONSIDERATION  
OF FEBRUARY 20, 2008 ORDER**

Christopher R. Erwin (“Mr. Erwin”) respectfully moves for reconsideration of the Court’s February 20, 2008 Order (“Order”), and in support respectfully show the Court as follows:

**I.  
SUMMARY**

The Court should reconsider its Order for two reasons. First, as the Court stated, the applicable decisional framework required consideration of uncontroverted allegations in the complaint and the resolution of factual conflicts posed by affidavits. (Order at 5). In his response brief, Michael J. Quilling’s (“Plaintiff”) merely made *arguments* which are not evidence,. Plaintiff’s argument that Mr. Erwin *may* have received funds from ABC Viaticals, Inc. (“ABC”) through Erwin & Johnson, LLP (“E&J”) is pure speculation unsupported by any evidence. Ultimately, there is no evidence showing that Mr. Erwin personally received *any* receivership estate funds paid to E&J.

Second, the Court based much of its Order on the misunderstanding that Mr. Erwin provided “legal services” to ABC. (Order at 6-7). At no time did E&J or Mr. Erwin operate as ABC’s attorneys. As set forth below, the relationship was strictly that of a grantor (ABC) and trustee/escrow agent (E&J). The Court should reconsider its Order in accordance with these points.

## **II.** **SPECIFIC GROUNDS FOR RECONSIDERATION**

### **A. Standard for Reconsideration of Interlocutory Order**

The Court retains the power to reconsider any interlocutory order at any time before the entry of judgment. *See* FED. R. CIV. P. 54(b); *see also St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). The Court should reconsider its ruling when it concerns a jurisdictional issue, such as Mr. Erwin’s motion to dismiss for lack of personal jurisdiction. *See, e.g., Johnston v. Multidata Systems Intern. Corp.*, No. G-06-3132007, WL 3998804, at \*1 (S.D. Tex. Nov. 14, 2007) (defendants’ motions to dismiss for, *inter alia*, lack of personal jurisdiction constituted a threshold issue that presented a close call for which there could be a difference of opinion). Specifically, the Court should reconsider its Order due to Plaintiff’s lack of evidence and the mischaracterization of the relationship between E&J, Mr. Erwin, and ABC as an attorney-client relationship.<sup>1</sup>

### **B. Plaintiff’s Arguments and Suppositions are Not Evidence**

Plaintiff, as the party seeking to establish jurisdiction, bears the burden of presenting a prima facie case of personal jurisdiction. *Caldwell v. Palmetto State Sav. Bank of S. Car.*, 811 F.2d 916, 917 (5th Cir. 1987). When a court rules on a motion to

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<sup>1</sup> The standard for reconsideration is set out fully in Defendants’ Motion for Reconsider of the Court’s February 25, 2008 Order.

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. See *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999); see also *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 418 (5th Cir. 1993) (“When alleged jurisdictional facts are disputed, we must resolve all conflicts in favor of the party seeking to invoke the court's jurisdiction.”).

Plaintiff's counsel's *arguments* that Mr. Erwin received funds from ABC through E&J certainly do not constitute uncontroverted allegations in his Complaint, nor do they appear in his declaration. Indeed, they cannot be evidence. See, e.g., *Gullion v. JLG Serviceplus, Inc.*, 2007 WL 294174, at \*11 n.10 (S.D. Tex. Jan. 29, 2007) (recognizing that arguments cannot substitute for allegations in petition or production of evidence in a response to motion to dismiss for lack of personal jurisdiction) (citing *Advanced Software, Inc. v. Datapharm, Inc.*, No. CV 98-5943 DDP, 1998 WL 35151366, at \*1 (C.D. Cal. Nov. 6, 1998) (“[B]riefs are not sources of evidence that a court can properly consider on a motion to dismiss for lack of personal jurisdiction.”); *Hartford Fire Ins. Co. v. Hutchinson*, No. H-05-2078, 2006 WL 903715, at \*2 (S.D. Tex. Apr. 6, 2006) (“A plaintiff may present a prima facie case by producing admissible evidence which, if believed, would suffice to establish the existence of personal jurisdiction.”)). Moreover, it is a long-standing rule that counsel's arguments are not evidence in other contexts where evidence is necessary. See, e.g., *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F. Supp. 2d 775, 847 (W.D. Tex. 2007) (recognizing that arguments and statements of counsel are not evidence); *Dunn v. Stewart*, 235 F. Supp. 955, 964 (S.D. Miss. 1964), *rev. on other grounds*, 363 F.2d 591 (5th Cir. 1966) (“Statements of counsel

during arguments, unsupported by any record evidence, are, of course, not evidence and therefore cannot be proof.”). Plaintiff’s counsel’s arguments that Mr. Erwin received money from ABC through E&J, simply by virtue of his position at E&J, is unsupported by any factual jurisdictional allegations or evidence presented in response to Mr. Erwin’s motion.

The Court stated that the \$150,000.00 withdrawals (referenced in the bank account statements) could have gone to Mr. Erwin. (Order at 6). In doing so, the Court seemingly shifted the burden to Mr. Erwin to refute that he received this money from ABC through E&J. Absent Plaintiff’s factual allegations or evidence otherwise, this was not Mr. Erwin’s burden to bear. Nevertheless, Mr. Erwin satisfied the burden by producing evidence stating that he does not have any receivership property. (Exhibit A to Mr. Erwin’s Rule 12(b)(2) motion). The Court recognized that this evidence was uncontroverted. (Order at 6). Thus, any question about Mr. Erwin’s possession, custody, or control should have been resolved in Mr. Erwin’s favor given that Plaintiff failed to produce any conflicting evidence. The Court should reconsider its Order and decide that Plaintiff failed to provide uncontroverted factual allegations in his Complaint or any other evidence showing that Mr. Erwin received receivership estate property.

**C. Mr. Erwin was Not ABC’s Attorney**

The Court should also reconsider its Order to clarify that the relationship between E&J and ABC was strictly that of a trustee/escrow agent and a grantor. At no time did E&J or Mr. Erwin act as ABC’s legal counsel.<sup>2</sup> To the extent that the Court’s Order is

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<sup>2</sup> Mr. Erwin’s and Erwin & Johnson, LLP’s arguments and evidence demonstrating the lack of an attorney-client relationship and the existence of a trustee/escrow agent and grantor relationship is more fully set out in Defendants’ Motion for Reconsideration of the February 25, 2008 Order. For the sake of judicial economy, Mr. Erwin would refer the Court to those arguments, rather than repeat verbatim them here.

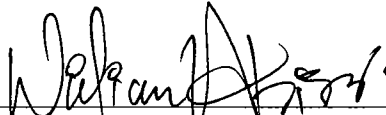
based on a mistaken belief that Mr. Erwin provided legal services to ABC, it is improper. The Court should reconsider its Order to remove any mention of the nonexistent attorney-client relationship.

### **III. CONCLUSION**

The Court should reconsider its Order and rule that the only evidence before the Court shows that Plaintiff has no receivership property. Thus, Plaintiff's motion to dismiss should be granted. Alternatively, the Court should reconsider its Order to remove any characterization of an attorney-client relationship between ABC and Mr. Erwin. The Court should then reconsider Mr. Erwin's motion in the context of the trustee/escrow agent relationship created by the trust and escrow agreements.

**WHEREFORE, PREMISES CONSIDERED**, the Court should grant Christopher R. Erwin's Motion for Reconsideration, Dismiss Plaintiff's Complaint as to Mr. Erwin, and enter judgment for Christopher R. Erwin.

Respectfully submitted,



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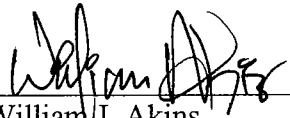
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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served on this 10<sup>th</sup> day of March, 2008, to all known counsel of record as required by the Federal Rules of Civil Procedure.

  
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William J. Akins