



### PROCEDURAL HISTORY AND BASIS FOR MOTION

1. On March 10, 2008, Erwin & Johnson and Erwin each filed an answer to the complaint filed by Plaintiff Michael J. Quilling, Receiver for ABC Viaticals, Inc. and Related Entities alleging a counterclaim against the plaintiff and a third-party complaint against Mills Potoczak.

2. Mills Potoczak's registered agent in the State of Texas received a copy of the pleadings on March 19, 2008, which was then forwarded to Mills Potoczak. *See* Affidavit of William M. Potoczak ("Potoczak Aff.") attached to the Appendix filed contemporaneously herewith as **Exhibit "1"** (App. 1-2). A true and correct copy of the entire packet received by Mills Potoczak is attached to the Potoczak Aff. as **Exhibit "1(A)"** (App. 3-33).

3. The packet sent by Erwin & Johnson and Erwin to Mills Potoczak did not contain a summons. *See* Potoczak Aff. at ¶ 4 (App. 2) and Exhibit 1(A) to the Potoczak Aff. (App. 3-33). Because Federal Rule of Civil Procedure 14(a)(1) requires a defending party who wishes to bring in a third party to serve a summons and complaint on a non-party, Mills Potoczak has not been properly served. Accordingly, the third-party complaints should be dismissed under Federal Rule of Civil Procedure 12(b)(5). Alternatively, Mills Potoczak moves this Court to quash the insufficient service and require Erwin & Johnson and Erwin to re-serve Mills Potoczak in accordance with Federal Rule of Civil Procedure 14(a)(1).

### EVIDENCE IN SUPPORT OF THE MOTION

4. This Motion is supported by and is based upon the following evidence attached to the Appendix filed contemporaneously herewith, all of which is incorporated herein by reference:<sup>2</sup>

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<sup>2</sup> The pages of the Appendix are consecutively numbered and are referenced in this Motion and supporting Brief as "App. 1" through "App. 33."

a. The Affidavit of William M. Potoczak (App. 1-2), with the following exhibit:

- (1) National Registered Agents, Inc. Service of Process Summary Transmittal Form (Original and Acknowledgment Copy) with attached correspondence from Cynthia Nagle dated March 10, 2008, and enclosures (App. 3-33).

### **ARGUMENT AND AUTHORITIES**

#### **A. The Form of Process and the Manner of Service Are Insufficient as a Matter of Law.**

5. Mills Potoczak moves the Court to dismiss the third-party complaints or, alternatively, to quash service upon Mills Potoczak because the third-party complaints were not served on Mills Potoczak in the form or manner required by law. *See* FED. R. CIV. P. 12(b)(5) & 14(a)(1). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) turns on the legal sufficiency of the service of process. Because Mills Potoczak contests the validity of service of process, Erwin & Johnson and Erwin bear the burden of establishing its validity. *See Carimi v. Royal Caribbean Cruise Line, Inc.*, 959 F.2d 1344, 1346 (5<sup>th</sup> Cir. 1992) (The party making service has the burden of demonstrating its validity when an objection to service is made.). Here, Mills Potoczak objects to service because a summons was not included with the service copy of the third-party complaints. *See* App. 3-33. Lack of effective service deprives the Court of personal jurisdiction. *See Mid-Continent Wood Prod., Inc. v. Harris*, 936 F.2d 297, 301 (7<sup>th</sup> Cir. 1991). Actual notice of litigation will not cure defects in service or accord personal jurisdiction when none otherwise exists. *See Way v. Mueller Brass Co.*, 840 F.2d 303, 306 (5<sup>th</sup> Cir. 1988). “[I]f the court has no jurisdiction over a defendant, the defendant has an unqualified right to have an order entered granting its motion to dismiss.” *Read v. Ulmer*, 308 F.2d 915, 917 (5<sup>th</sup> Cir. 1962). Indeed, “when the failure of effective service may be ascribed to the [third-party

plaintiff's] 'dilatatoriness or fault' or 'inaction,' the case may be properly dismissed." *Holly v. Metropolitan Transit Auth.*, 213 Fed. Appx. 343, 344 (5<sup>th</sup> Cir. 2007) quoting *Rochon v. Dawson*, 828 F.2d 1107, 1109-10 (5th Cir. 1987).

6. As established by the affidavit of William M. Potoczak, Erwin & Johnson and Erwin failed to serve Mills Potoczak with a summons as mandated by Federal Rule of Civil Procedure 14(a)(1) (App. 1-2). Additionally, the Court's docket sheet demonstrates that no summons directed to Mills Potoczak has been issued by the clerk.<sup>3</sup> Accordingly, under Federal Rule of Civil Procedure 12(b)(5), Mills Potoczak requests the Court dismiss the third-party complaints filed against Mills Potoczak. Alternatively, Mills Potoczak requests that the service attempted by Erwin & Johnson and Erwin be quashed and that Erwin & Johnson and Erwin be ordered to re-serve Mills Potoczak.

#### CONCLUSION

7. Erwin & Johnson and Erwin have failed to effect service of process on Mills Potoczak in the manner prescribed by the Federal Rules of Civil Procedure. Thus, this Court should dismiss the third-party complaints. In the alternative, the Court should quash service of process upon Mills Potoczak and order Erwin & Johnson and Erwin to re-serve Mills Potoczak.

**WHEREFORE**, Third Party Defendant Mills, Potoczak & Company respectfully requests that this Court dismiss the third-party complaints filed against it by Erwin & Johnson, LLP and Christopher R. Erwin, or, in the alternative, quash service upon Mills Potoczak; and for such other and further relief, general and special, at law or in equity, as this Court deems just and proper.

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<sup>3</sup> Pursuant to Federal Rule of Evidence 201, Mills Potoczak requests that the Court take judicial notice of the docket sheet for this matter, which demonstrates the absence of a summons directed to Mills Potoczak.

Respectfully submitted,

**BELL NUNNALLY & MARTIN LLP**

/s/

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**ATTORNEYS FOR THIRD PARTY  
DEFENDANT MILLS, POTOCZAK &  
COMPANY**

**CERTIFICATE OF SERVICE**

I certify on April 8, 2008, that a true and correct copy of the foregoing was sent via the Court's ECF filing system to the following:

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