

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 and)	
Third-Party Plaintiffs,)	
)	
v.)	
)	
MILLS, POTOZAK & COMPANY,)	
)	
Third-Party Defendant.)	

**ERWIN & JOHNSON, LLP’S RESPONSE TO
MILLS, POTOZAK & COMPANY’S MOTION TO DISMISS
OR ALTERNATIVE MOTION TO QUASH SERVICE**

TO THE HONORABLE JORGE A. SOLIS:

Erwin & Johnson, LLP (“E&J”) and Christopher R. Erwin (“Mr. Erwin”) (collectively, Third-Party Plaintiffs), submit this Response to Mills, Potoczak & Company’s (“Mills”) motion to dismiss or quash service, and in support respectfully show the Court as follows:

I.

Mills’ sole complaint is that it was not served with a summons. A summons was subsequently issued by the Clerk and served, with a copy of the third-party complaint, on Mills’ registered agent for service in Texas within the 120 days for completing service.

Mills' answer deadline is Monday, May 5, 2008.¹ Service has thus been perfected, and the Court should therefore deny Mills' motion as moot.

II.

A. Dismissal Would be Inappropriate

"A district court faced with a Rule 12(b)(5) motion normally has discretion to either dismiss the action or simply to quash service." *Cross v. City of Grand Prairie*, No. 3-96-CV-0446-P, 1998 WL 133143, at *7 (N.D. Tex. March 17, 1998) (Solis, J.). Dismissal is not usually appropriate where there has been only one attempt at service of process. *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 554 (5th Cir. 1959); *Grant-Brooks v. Nationscredit Home Equity Services Corp.*, No. 3:01-CV-2327, 2002 WL 424566, at *4 (N.D. Tex. Mar. 15, 2002) (order adopting Magistrate Judge's findings, conclusions, and recommendation) (citing *Stanga*). When the deadline for service has not expired, a plaintiff is usually given an opportunity to cure ineffective service. *Grant-Brooks*, 2002 WL 424566, at *5.

B. Third-Party Plaintiffs have Effected Proper Service Under Rule 4

Federal Rule of Civil Procedure Rule 4(c)(1) states that "[a] summons shall be served together with a copy of the complaint." FED. R. CIV. P. 4(c)(1). Rule 4(h) permits service on a corporation to be effected by serving the corporation's registered agent. *See* FED. R. CIV. P. 4(h)(1) ("by delivering a copy of the summons and of the complaint to . . . any other agent authorized by appointment or by law to receive service of process"). Rule 4(m) allows 120 days from the filing of the complaint to effect service. FED. R. CIV. P. 4(m).

¹ Counsel for E&J and counsel for Mills discussed the remedied service, and Mills intends to file an answer in accordance with the May 5, 2008 deadline.

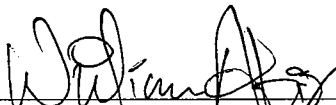
Mills acknowledged in affidavit attached to its motion that its registered agent for service in Texas is National Registered Agents, Inc. (Affidavit of William M. Potoczak, at 1). Priscilla Cardenas, an employee or agent of National Registered Agents, Inc., accepted and transmitted the initial service of the third-party complaint on Mills. (Mills' Ex. 1A). Priscilla Cardenas also accepted the current service of the summons and third-party complaint on April 15, 2008. (*See* Return of Service, attached hereto as Exhibit A). The Return of Service confirms that Mills has now been served with a copy of the third-party complaint *and the summons* within the time frame for service of the complaint.² (Ex. A).

There was only one attempt at service before Mills filed its motion to dismiss. Third-Party Plaintiffs subsequently cured their service error within their 120-day deadline. The Court should thus deny Mills' motion as moot. *See Ctr. for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1142 (S.D. Tex. 1996) (noting that an issue is moot if the challenged action has already taken place or an event occurs that prevents a court from granting any effectual relief).

WHEREFORE, PREMISES CONSIDERED, Erwin & Johnson, LLP, and Christopher R. Erwin respectfully request that the Court deny as moot Mills, Potoczak & Company's Motion to Dismiss Pursuant to Rule 12(b)(5) for Insufficient Service of Process, or Alternatively, Motion to Quash Service, and grant them any and all further relief to which they are entitled.

² Third-Party Plaintiffs filed their third-party complaint March 10, 2008; therefore, their 120 days to effect proper service under Rule 4(m) does not expire until approximately July 10, 2008.

Respectfully submitted,

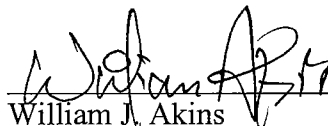


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**ATTORNEYS FOR DEFENDANTS, THIRD-
PARTY PLAINTIFFS**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 29th day of April 2008, to all known counsel of record as required by the Federal Rules of Civil Procedure.



William J. Akins