

CAUSE NO. D-1-GN-14-004345

DAWN NETTLES	§	IN THE DISTRICT COURT OF
<i>Petitioner</i>	§	
	§	
V.	§	
	§	TRAVIS COUNTY, TEXAS
THE TEXAS LOTTERY COMMISSION and	§	
GTECH CORPORATION, <i>Respondents</i>	§	
	§	
	§	345 TH JUDICIAL DISTRICT
	§	
	§	
	§	

**PETITIONER’S REPLY TO THE TEXAS LOTTERY COMMISSION’S
PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES Petitioner, Dawn Nettles and, as a reply to the Texas Lottery Commission’s Plea to the Jurisdiction, would show the Court the following:

A Rule 202 Petition is not a “suit”.

1. The TLC argues that this Court is without jurisdiction to entertain a “suit” against the TLC absent a showing of a waiver of sovereign immunity. If this were a “suit” against the Texas Lottery Commission, Petitioner would agree with that general statement of the law. However, this is not a “suit” against the TLC because Rule 202 petitions are not “suits”.

2. The Austin Court of Appeals noted the following in *Combs v. The Texas Civil Rights Project*, 410 S.W.3d 529 (Tex. App. – Austin [3rd Dist.], 2013, pet. denied):

“[A] petition under *rule 202* is ultimately a petition that asserts no substantive claim or cause of action upon which relief can be granted.... We cannot agree that a *rule 202* petition is itself a ‘suit,’ nor can we agree that all *rule 202* proceedings involving

governmental entities are ‘suits’ that seek to control state action, as the State Defendants contend. Consequently, we conclude that pre-suit depositions of governmental entities under *rule 202* are not, in wholesale, barred by immunity.”

Id. at 534.

There is no sovereign immunity bar to pre-suit discovery if a potential suit may be brought against a non-immune party.

3. Under Texas law, sovereign immunity does not deprive a trial court of jurisdiction to order investigative depositions of governmental entities under Rule 202 of the Texas Rules of Civil Procedure where the potential claim under investigation may be brought against a non-immune party.

4. In *City of Houston v. U.S. Filter Wastewater Group, Inc.*, 190 S.W.3d 242 (Tex. App.—Houston [1st Dist.] 2006, no pet.) the court held as follows:

There is no requirement in Rule 202 that the person sought to be deposed be a potentially liable defendant in the claim under investigation.... Because a portion of the claim under investigation--a claim against Altivia--is under the jurisdiction of the state district court, the court did not err in denying the City’s plea to the jurisdiction.

Id. at 245.

5. In *Combs v. The Texas Civil Rights Project*, 410 S.W.3d 529 (Tex. App. – Austin [3rd Dist.] 2013, pet. denied), the Austin court cited, with approval, the holding of *City of Houston*, *supra*, that “a portion of the claim under investigation... [was] under the jurisdiction of the state district court” when rule 202 petitioner sought deposition testimony from City to investigate conspiracy claims against private party....” *Id.* at 535.

6. In the attached decision of *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Tcholakian*, 2012 Tex. App. LEXIS 8110, 7-8 (Tex. App. Houston 1st Dist. Sept. 27, 2012) the court found that the decision in *City of Houston*, *supra*, was dispositive and approved the trial court’s denial of a state

agency's plea to the jurisdiction where the potential claim under investigation may be brought against a non-immune party. The *Tcholakian* court noted that "[r]ule 202 does not require a petitioner to plead a specific cause of action [against a non-immune party]; instead, it requires only that the petitioner state the subject matter of the anticipated action, if any, and the petitioner's interest therein." *Id.*

7. Because a portion of Petitioner's potential claim under investigation – a claim against GTECH and possibly other private contractors – is under the jurisdiction of this court, this court has jurisdiction over the Rule 202 petition and should deny the Lottery Commission's plea to the jurisdiction.

Petitioner is investigating a potential claim against one or more non-immune parties.

8. Petitioner has pled sufficient facts to show that she is investigating a potential claim against one or more non-immune parties. Specifically, Petitioner has averred that respondent GTECH was awarded a nine-year contract to operate the Texas Lottery in 2010 and that the Texas Lottery Commission executed contracts in 2012 with Scientific Games International, Inc., Pollard Bank Note and GTECH Printing for instant ticket "manufacturing and services". Petitioner is attempting to discover which of those four entities, if any, was responsible for drafting the instructions for Game 5 of the Fun 5's game, which of those four entities, if any, was responsible for programming the computers to declare winning tickets to be "non-winners", and which of those entities, if any, printed tickets with three "5" symbols in single row, column, or diagonal but without a Money Bag symbol in contravention of the official rules of the game.

9. Because a portion of the claim under investigation is against one or more non-immune parties, the Rule 202 petition is within the jurisdiction of this Court. *See City of Houston, supra; Combs, supra; and Tcholakian, supra.*

The Texas Lottery Commission is not immune from actions under the Declaratory Judgment Act.

10. Even if Petitioner were not investigating a potential claim against one or more non-immune parties, this Court would have jurisdiction over this Rule 202 proceeding because the Texas Lottery Commission is not immune from a declaratory judgment action.

11. In *Texas Lottery Commission v. First State Bank of DeQueen, et al.*, 325 S.W.3d 628 (Tex. 2010) the Texas Supreme Court found that sovereign immunity does not prevent the Texas Lottery Commission from being made a party to a declaratory judgment action. *See also Tex. Educ. Agency v. Leeper*, 893 S.W. 2d 432, 446 (Tex. 1994) (“Governmental entities joined as parties may be bound by a court’s declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be—indeed must be—joined in suits to construe their legislative pronouncements.”).

12. Petitioner has alleged that the interpretation given by the Texas Lottery Commission to the official rules of the Fun 5’s game (rules that are pronounced by the Texas Lottery Commission and published in the Texas Register) is at odds with the plain language of the rules the Commission published. Accordingly, in addition to investigating a potential claim against one or more non-immune private parties, Petitioner is also investigating a potential declaratory judgment action against the Texas Lottery Commission to declare the meaning of the official game rules pronounced by the Commission. The Texas Lottery Commission would have no sovereign immunity from such a potential declaratory judgment action and, indeed, “must be

joined” in the suit to construe its pronouncement. *See Texas Lottery Commission, supra. See also Leeper, supra* at 446.

Conclusion

13. In conclusion, this Court has jurisdiction to hear Petitioner’s Rule 202 petition because Petitioner is investigating a claim against one or more non-immune private parties. As additional grounds to support this Court’s jurisdiction, Petitioner would show that she is also investigating a potential declaratory judgment action against the Texas Lottery Commission for which the Commission has no sovereign immunity.

Respectfully submitted,
LAGARDE LAW FIRM, P.C.



Richard L. LaGarde
SBN: 11819550
Mary Ellis LaGarde
SBN: 24037645
3000 Wesleyan Street, Suite 380
Houston, Texas 77027
Telephone: (713) 993-0660
Facsimile: (713) 993-9007
Email: richard@lagardelaw.com
mary@lagardelaw.com

COUNSEL FOR PETITIONER

MANFRED STERNBERG & ASSOCIATES, P.C.



Manfred Sternberg
SBN: 19175775
4550 Post Oak Place Dr. #119
Houston, TX 77027
Telephone: (713) 622-4300
Facsimile: (713)622-9899
Email: manfred@msternberg.com

CO-COUNSEL FOR PETITIONER