

RECEIVED AND FILED FOR RECORD At \_\_\_\_\_ O'Clock \_\_\_\_\_ M.

CAUSE NO.(s) 09-11-11474

Karen McPeters

VS.

Barbara Gladden

Adamick, Dist. Clerk of Montgomery Co, Texas

§  
§  
§  
§  
§

IN THE DISTRICT CLERK OF BARBARA GLADDEN ADAMICK DISTRICT CLERK MONTGOMERY COUNTY, TEXAS 9th JUDICIAL DISTRICT COURT

MAR 26 2010  
ADAMICK  
DISTRICT CLERK  
MONTGOMERY COUNTY, TEXAS

DEPUTY REPORTER STATEMENT

Pursuant to Rule 13.5 of the Texas Rules of Appellate Procedure, Appointing Deputy Reporter, I hereby certify the following:

A. The judge of the above-trial court designated the undersigned as a deputy reporter in the above cause(s).

B. The judge presiding over the above cause(s) was:  
Bob Wortham

C. I, undersigned deputy reporter, worked the following date in the above court and on the above case.

SIGNED on this the 26 day of March of 2010.

Arturia V. Salas  
Signature

Leticia V. Salas  
Print Name

7424 Azalea Street  
Address

Houston, Tx 77023  
City/State/Zip

Phone: 281-917-9803

CSR # 5950 CSR Expires: 12/31/2011

Firm Registration No. \_\_\_\_\_ (if applicable)

I, Barbara Gladden Adamick, do hereby certify 1 pages in Cause # 09-11-11474 as being a true and correct copy of the original records now on file in the District Clerk's Office of Montgomery County, Texas.

Witness My Official Seal at Office in Conroe, Texas On this the 21 day of April, 2010

By Ellen Blakeney Deputy

COPY

EXHIBIT 5

Cause No. 09-11-11474-CV

MAR 26 2010

KAREN McPETERS

§

BARBARA GLADDEN ADAMICK  
IN THE DISTRICT CLERK'S OFFICE  
MONTGOMERY COUNTY, TEXAS  
By \_\_\_\_\_ Deputy

V.

§

MONTGOMERY COUNTY, TEXAS

BARBARA GLADDEN ADAMICK,  
DISTRICT CLERK OF MONTGOMERY  
COUNTY, TEXAS

§

§

9TH JUDICIAL DISTRICT

ORDER DENYING TEX. R. CIV. P. 202 DEPOSITION

BE IT REMEMBERED that on this day came on to be considered the Petition of Karen McPeters pursuant to Tex. R. Civ. P. Rule 202 requesting the Court to authorize the taking of a deposition on oral examination duces tecum of Barbara Gladden Adamick, District Clerk of Montgomery County, Texas. The Court, having considered the evidence presented and the arguments of counsel, finds that no failure or delay of justice in an anticipated suit will occur if the deposition is not taken and finds that the burden and expense of the requested procedure outweighs the likely benefit of allowing Karen McPeters to take the requested deposition. It is, therefore,

ORDERED by the Court that the request of Karen McPeters to take the oral deposition of Barbara Gladden Adamick, District Clerk of Montgomery County, Texas, be, and is hereby, DENIED.

SIGNED on March 26<sup>TH</sup>, 2010.

I, Barbara Gladden Adamick, do hereby  
Certify 2 pages in Cause # 09-11-11474  
as being a true and correct copy of the  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.

[Signature]  
JUDGE PRESIDING

Witness My Official Seal of Office in Conroe, Texas  
On This The 21 Day of April, 2010

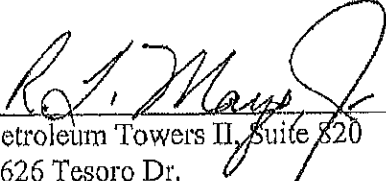
By [Signature], Deputy

SCANNED

E-FILE  
3070402.1

APPROVED AS TO FORM:

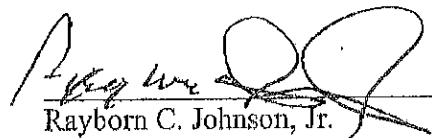
ROBERT L. MAYS, JR.

  
\_\_\_\_\_  
Petroleum Towers II, Suite 820  
8626 Tesoro Dr.  
San Antonio, TX 78217  
Telephone (210) 657-7772  
Telecopier (210) 657-7780  
Email: mays [7772@gmail.com](mailto:7772@gmail.com)  
TBN: 13308200

ATTORNEY FOR PETITIONER  
KAREN McPETERS

APPROVED:

DAVID K. WALKER  
Montgomery County Attorney

By:   
\_\_\_\_\_  
Rayborn C. Johnson, Jr.  
Assistant County Attorney  
207 W. Phillips, First Floor  
Conroe, TX 77301  
Telephone (936) 539-7828  
Telecopier (936) 760-6920  
E-mail [ray.johnson@mctx.org](mailto:ray.johnson@mctx.org)  
S.B.O.T. # 10820500

ATTORNEY FOR RESPONDENT  
BARBARA GLADDEN ADAMICK

"Certified as to certification  
on signature page"

Your transaction has been successfully submitted to LexisNexis File & Serve. Your transaction information appears below. To print this information for your records, click anywhere on the transaction information, then click the browser Print button.  
 For a formatted copy of this information, obtain a [transaction report](#).  
 To perform another transaction, click **Begin a New Transaction**.  
 To exit File & Serve, click **Return to My File & Serve**.

**TIP:** Receive notifications of new Filing & Service activity that match your search criteria. Click on the Alerts tab.

### LexisNexis File & Serve Transaction Receipt

**Transaction ID:** 30704021  
**Submitted by:** Ellen Blakeway, TX Montgomery 410th District Court  
**Authorized by:** Fred E Edwards, TX Montgomery 9th District Court  
**Authorize and file on:** Apr 21 2010 2:58PM CDT

**Court:** TX Montgomery 9th District Court  
**Division/Courtroom:** N/A  
**Case Class:** Civil  
**Case Type:** Other Civil  
**Case Number:** 09-11-11474  
**Case Name:** McPeters, Karen vs Barbara Gladden Adamick

**Transaction Option:** File and Serve  
**Billing Reference:**

**Documents List**

1 Document(s)

Attached Document, 2 Pages Document ID: 29297326 [PDF Format](#) | [Original Format](#)

**Document Type:** Order **Access:** Public **Statutory Fee:** \$0.00 **Linked:**

**Document title:**  
 SIGNED ORDER DENYING TEX. R. CIV. P. 202 DEPOSITION - SIGNED BY JUDGE BOB WORTHAM ON MARCH 26, 2010 SITTING AS NINTH DISTRICT COURT

[Expand All](#)

**Sending Parties (1)**

Party	Party Type	Attorney	Firm	Attorney Type
N/A	N/A	Edwards, Fred E	TX Montgomery 9th District Court	Primary Judge

**Recipients (2)**

**Service List (2)**

Delivery Option	Party	Party Type	Attorney	Firm	Attorney Type	Method
Service	Adamick, Barbara Gladden	Defendant	Johnson, Rayborn C	County Attorneys Office-Montgomery-TX	Attorney in Charge	E-Service
Service	McPeters, Karen	Plaintiff	Mays, Robert	Mays, Robert L Jr	Attorney in Charge	E-Service

**Additional Recipients (0)**

**Case Parties**

I, Barbara Gladden Adamick, do hereby certify 2 pages in Cause # 09-11-11474 CV as being a true and correct copy of the Original Record now on file in the District Clerk's Office of Montgomery County, Texas.

Witness My Official Seal of Office in Conroe, Texas  
 On This The 21 Day of April, 2010

By: Ellen Blakeway

[Begin a New Transaction](#)

[Return to My File & Serve](#)

[Clerk Review this Transaction](#)



About LexisNexis | Terms & Conditions | Privacy | Customer Support - 1-866-293-3957  
Copyright © 2010 LexisNexis®, a division of Reed Elsevier Inc. All rights reserved.

**"Certified as to certification  
on signature page"**

CAUSE NO. 09-11-11474

KAREN MCPETERS

IN THE DISTRICT COURT OF

VS.

MONTGOMERY COUNTY, TEXAS

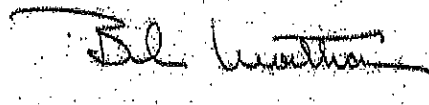
BARBARA GLADDEN ADAMICK,  
DISTRICT CLERK OF MONTGOMERY  
COUNTY, TEXAS

9<sup>TH</sup> JUDICIAL DISTRICT

NOTICE OF HEARING

**PLEASE BE ADVISED** that a hearing on Plaintiff's Petition to Investigate Potential Claims Pursuant to Tex. R. Civ. P. is scheduled for **Friday, March 26, 2010, at 1:30 p.m.** in the Ancillary Courtroom (Suite 222) of Montgomery County, Texas.

SIGNED this 5<sup>th</sup> day of March 2010.



BOB WORTHAM, JUDGE  
58<sup>TH</sup> DISTRICT COURT

I, Barbara Gladden Adamick, do hereby certify 2 pages in Cause # 09-11-11474 as being a true and correct copy of the Original Record now on file in the District Clerk's Office of Montgomery County, Texas.  
Witness My Official Seal of Office in Conroe, Texas  
On This the 21 Day of April, 2010  
By: Oliver Blackwell, Deputy

FILED  
30215793  
3/24/10

SCANNED

**LexisNexis File & Serve Transaction Receipt**

**Transaction ID:** 30215793  
**Submitted by:** Lindsey Kane, TX Montgomery 9th District Court  
**Authorized by:** Fred E Edwards, TX Montgomery 9th District Court  
**Authorize and file on:** Mar 24 2010 10:22AM CDT

**Court:** TX Montgomery 9th District Court  
**Division/Courtroom:** N/A  
**Case Class:** Civil  
**Case Type:** Other Civil  
**Case Number:** 09-11-11474  
**Case Name:** Mcpeters, Karen vs Barbara Gladden Adamick

**Transaction Option:** File and Serve  
**Billing Reference:**

**Documents List**

**1 Document(s)**

**Attached Document, 1 Pages Document ID: 28592648** [PDF Format](#) | [Original Format](#)

<b>Document Type:</b>	<b>Access:</b>	<b>Statutory Fee:</b>	<b>Linked:</b>
Order	Public	\$0.00	

**Document title:**  
 Order Settling Hearing Signed by Judge Wortham

[Expand All](#)

**Sending Parties (1)**

<b>Party</b>	<b>Party Type</b>	<b>Attorney</b>	<b>Firm</b>	<b>Attorney Type</b>
N/A	N/A	Edwards, Fred E	TX Montgomery 9th District Court	Primary Judge

**Recipients (2)**

**Service List (2)**

Delivery Option	Party	Party Type	Attorney	Firm	Attorney Type	Method
Service	Adamick, Barbara Gladden	Defendant	No Answer on File	Firm TBD.	Attorney In Charge	U.S. Mail
Service	McPeters, Karen	Plaintiff	Mays, Robert	Mays, Robert L Jr	Attorney In Charge	E-Service

**Additional Recipients (0)**

**Case Parties**

Close



About LexisNexis | Terms & Conditions | Privacy | Customer Support - 1-866-293-3957  
 Copyright © 2010 LexisNexis®, a division of Reed Elsevier Inc. All rights reserved.

\*Certified as to certification on signature page\*





SIGNED on this the \_\_\_\_ day of December, 2009.

\_\_\_\_\_  
JUDGE PRESIDING

APPROVED AS TO FORM:

\_\_\_\_\_  
Robert L. Mays, Jr.  
Petroleum Towers II, Ste. 820  
8626 Tesoro Drive  
San Antonio, TX 78217  
Phone: 210-657-7772  
Email: rlmays@swbell.net  
TBN: 13308200  
Attorney for Plaintiff Karen McPeters

I, Barbara Gladden Adamlok, do hereby  
Certify 2 pages in Cause # 0911-11474  
as being a true and correct copy of the CV  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.

Witness My Official Seal of Office in Conroe, Texas  
On This 11 Day of April, 2010

By: Barbara Gladden Adamlok Deputy

CAUSE NO. 09-11-11474

RECEIVED AND FILED  
FOR RECORD  
At 8 O'clock A.M.  
NOV 24 2009

BARBARA GLADDEN ADAMICK  
DISTRICT CLERK  
MONTGOMERY COUNTY, TEXAS  
IN THE DISTRICT COURT  
9th JUDICIAL DISTRICT  
FILE  
28299709

KAREN McPETERS  
Plaintiff

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

vs.

BARBARA GLADDEN ADAMICK,  
DISTRICT CLERK OF MONTGOMERY  
COUNTY, TEXAS  
Defendant

MONTGOMERY COUNTY, TEXAS

**PETITION TO INVESTIGATE POTENTIAL CLAIMS  
PURSUANT TO TEX. R. CIV. P. 202**

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes Karen McPeters ("McPeters"), hereinafter also referred to as "Petitioner," and files this Petition, pursuant to *Tex. R. Civ. P. 202*, copy attached, requesting the Court to authorize the taking of a deposition on oral examination duces tecum of Barbara Gladden Adamick, District Clerk of Montgomery County, Texas, also sometimes referred to herein as "Respondent," and states:

1. Petitioner Karen McPeters is an individual involved in litigation in Montgomery County, and seeks to investigate potential claims against Respondent.
2. **Barbara Gladden Adamick, District Clerk of Montgomery County, Texas,** is the Respondent in her capacity as the District Clerk of Montgomery County, a sub-division of a governmental entity.
3. Venue is anticipated to lie in a District Court of Montgomery County, Texas, subject to a transfer of venue based upon a conflict-of-interest.

"Certified as to certification  
on signature page"

SCANNED

**SUBJECT MATTER OF THE ANTICIPATED ACTION**

4. Karen McPeters is a plaintiff in Cause No. 07-09-09142, styled "Karen McPeters v. Montgomery County, Texas" in the 9<sup>th</sup> District Court of Montgomery County, Texas. As a party to a civil lawsuit, she has been required to use Lexis Nexis, an on-line electronic filing service, to file and serve documents and pleadings in her lawsuit. She has been required to pay filing fees and service charges to Lexis Nexis, and documents tendered to the District Clerk for filing have been either refused or returned with an admonition that the file-stamp is void.
5. The purpose of this petition is to investigate, pursuant to *Tex. R. Civ. P.* 202.2(d):
  - (a) whether or not the charges are authorized,
  - (b) the amounts of permissible charges, if any,
  - (c) the authority of the Montgomery County District Clerk to refuse to file documents tendered to her,
  - (d) the financial benefit to Montgomery County from requiring parties to lawsuits to use Lexis Nexis fileandserve, and
6. The substance of the testimony that petitioner expects to elicit, pursuant to *Tex. R. Civ. P.* 202.2(g), is that:
  - (a) Lexis Nexis is acting as respondent's agent;
  - (b) the charges by Lexis Nexis are not authorized by law, *Tex. Gov't Code* §101.061, and *Tex. Gov't Code* §51.317;
  - (c) the District Clerk is required by statute to accept and file documents tendered to her, *Tex. Gov't Code* § 51.303(a) and *Texas Rule of Civil Procedure* 21;
  - (d) Montgomery County, Texas has financially benefitted by its agreement with Lexis Nexis;
  - (e) numerous parties have been charged the filings fees and service charges, and
  - (f) the frequency with which the District Clerk refuses to accept documents.

"Certified as to certification  
on signature page"

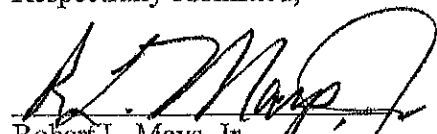
Petitioner wishes to obtain the testimony to investigate potential claims regarding unauthorized filing fees and service charges. See *Tex. Gov't Code* §101.061.

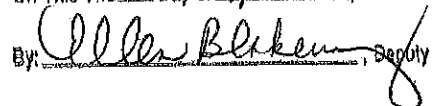
7. The person to be deposed is **Barbara Gladden Adamick, District Clerk of Montgomery County, Texas**. Her address is 301 N. Main Street, Suite 103, Conroe, Texas. Her telephone number is 936-539-7855. Petitioner can schedule the deposition at any time during January 2010, and anticipates that the deposition will take no longer than ninety (90) minutes.

**RELIEF REQUESTED**

8. Karen McPeters requests an order authorizing her to take the oral deposition duces tecum of **Barbara Gladden Adamick, District Clerk of Montgomery County, Texas**. A proposed order meeting the requirements of *Tex. R. Civ. P.* 202 is attached.

Respectfully submitted,

  
Robert L. Mays, Jr.  
8626 Tesoro Drive, Suite 820  
San Antonio, Texas 78217  
Phone: 210-657-7772  
FAX: 210-657-7780  
TBN: 13308200  
Attorney for Petitioner Karen McPeters

I, Barbara Gladden Adamick, do hereby  
Certify 8 pages in Cause # 09-11-11474  
as being a true and correct copy of the CV  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.  
Witness My Official Seal of Office in Conroe, Texas  
On This The 21 Day of April, 2010  
By:  Deputy

VERIFICATION


STATE OF TEXAS    )  
                          )  
COUNTY OF BEXAR    )

BEFORE ME THIS DAY personally appeared Karen McPeters, the undersigned Affiant,  
who being by me duly sworn, deposed and stated as follows:


“My name is Karen McPeters; I am over the age of eighteen (18) years and am fully  
competent to make this Verification. I have personal knowledge of all of the facts recited in this  
Petition, and they are true and correct.”

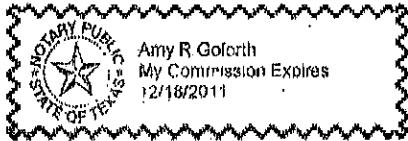
This concludes my testimony.

SIGNED on this the 20<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Karen McPeters, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this the 20<sup>th</sup> day of November,  
2009, to certify which witness my hand and official seal of office.

  
\_\_\_\_\_  
Notary Public  
State of Texas  
My Commission Expires: 12/18/2011



“Certified as to certification  
on signature page”

is a good  
at the time.  
1, 1999.

the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

(b) *Content of Notice.* The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

### 200.2. Compelling Witness to Attend

A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

### 200.3. Questions and Objections

(a) *Direct Questions.* The direct questions to be propounded to the witness must be attached to the notice.

(b) *Objections and Additional Questions.* Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve recross questions on all other parties. Objections to recross questions must be served within five days after the earlier of when recross questions are served or the time of the deposition on written questions.

(c) *Objections to Form of Questions.* Objections to the form of a question are waived unless asserted in accordance with this subdivision.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

### 200.4. Conducting the Deposition Upon Written Questions

The deposition officer must take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when

necessary to summon and swear an interpreter to facilitate the taking of the deposition.

Added Aug. 5, 1998 and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

#### Historical Notes

The Order dated December 31, 1998, made technical corrections.

### Rule 201. Depositions in Foreign Jurisdictions for Use in Texas Proceedings; Depositions in Texas for Use in Foreign Proceedings

#### Comments—1999

1. Rule 201.1 sets forth procedures for obtaining deposition testimony of a witness in another state or foreign jurisdiction for use in Texas court proceedings. It does not, however, address whether any of the procedures listed are, in fact, permitted or recognized by the law of the state or foreign jurisdiction where the witness is located. A party must first determine what procedures are permitted by the jurisdiction where the witness is located before using this rule.

2. Section 20.001 of the Civil Practice and Remedies Code provides a nonexclusive list of persons who are qualified to take a written deposition in Texas and who may take depositions (oral or written) in another state or outside the United States.

3. Rule 201.2 is based on Section 20.002 of the Civil Practice and Remedies Code.

#### Historical Notes

Former rule 201 was repealed by order effective January 1, 1999. For subject matter of former rule 201, see, now, rules 176.6, 199.

### 201.1. Depositions in Foreign Jurisdictions for Use in Texas Proceedings

(a) *Generally.* A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by:

- (1) notice;
- (2) letter rogatory, letter of request, or other such device;
- (3) agreement of the parties; or
- (4) court order.

(b) *By Notice.* A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken.

(c) *By Letter Rogatory.* On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining

the deposition is impractical or inconvenient. The letter must:

(1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;

(2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and

(3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.

(d) *By Letter of Request or Other Such Device.* On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must:

(1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and

(2) must state the time, place, and manner of the examination of the witness.

(e) *Objections to Form of Letter Rogatory, Letter of Request, or Other Such Device.* In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.

(f) *Admissibility of Evidence.* Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.

(g) *Deposition by Electronic Means.* A deposition in another jurisdiction may be taken by telephone, videoconference, teleconference, or other electronic means under the provisions of Rule 199.<sup>1</sup>

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

<sup>1</sup> Vernon's Ann. Rules Civ. Proc., rule 199.1 et seq.

#### Historical Notes

Source:

Former rule 188.

## 201.2. Depositions in Texas for Use in Proceedings in Foreign Jurisdictions

If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

## Rule 202. Depositions Before Suit or to Investigate Claims

### Comments—1999

Comments to 1999 change:

1. This rule applies to all discovery before suit covered by former rules governing depositions to perpetuate testimony and bills of discovery.

2. A deposition taken under this rule may be used in a subsequent suit as permitted by the rules of evidence, except that a court may restrict or prohibit its use to prevent taking unfair advantage of a witness or others. The bill of discovery procedure, which Rule 202 incorporates, is equitable in nature, and a court must not permit it to be used inequitably.

### Historical Notes

Former rule 202 was repealed by order effective January 1, 1999. For subject matter of former rule 202, see, now, rules 199.1, 203.6.

### 202.1. Generally

A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

(b) to investigate a potential claim or suit.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

### Historical Notes

The order of Nov. 9, 1998 provides that the rule applies to proceedings filed on or after Jan. 1, 1999, but a court may use the rules for guidance in previously filed proceedings.

### 202.2. Petition

The petition must:

(a) be verified;

(b) be filed in a proper court of any county:

(1) where venue of the anticipated suit may lie, if suit is anticipated; or

(2) where the witness resides, if no suit is anticipated;

(c) be in the name of the petitioner;

(d) state either:

(1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or

(2) that the petitioner seeks to investigate a potential claim by or against petitioner;

(e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;

(f) if suit is anticipated, either:

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or

(2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons;

(g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and

(h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

#### Historical Notes

The order of Nov. 9, 1998 provides that the rule applies to proceedings filed on or after Jan. 1, 1999, but a court may use the rules for guidance in previously filed proceedings.

### 202.3. Notice and Service

(a) *Personal Service on Witnesses and Persons Named.* At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing—in accordance with Rule 21a—on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) *Service by Publication on Persons Not Named.*

(1) *Manner.* Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed; or if no such newspaper exists, in the newspa-

per of broadest circulation in the nearest county where a newspaper is published.

(2) *Objection to Depositions Taken on Notice by Publication.* Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) *Service in Probate Cases.* A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 38(D)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) *Modification by Order.* As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

#### Historical Notes

The order of Nov. 9, 1998 provides that the rule applies to proceedings filed on or after Jan. 1, 1999, but a court may use the rules for guidance in previously filed proceedings.

### 202.4. Order

(a) *Required Findings.* The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

(b) *Contents.* The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199<sup>1</sup> or 200.<sup>2</sup> The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

<sup>1</sup> Vernon's Ann. Rules Civ. Proc., rule 199.1 et seq.

<sup>2</sup> Vernon's Ann. Rules Civ. Proc., rule 200.1 et seq.



**Historical Notes**

The order of Nov. 9, 1998 provides that the rule applies to proceedings filed on or after Jan. 1, 1999, but a court may use the rules for guidance in previously filed proceedings.

**202.5. Manner of Taking and Use**

Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule. Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

**Historical Notes**

The order of Nov. 9, 1998 provides that the rule applies to proceedings filed on or after Jan. 1, 1999, but a court may use the rules for guidance in previously filed proceedings.

**Source:**

Former rule 187, 737.

**Rule 203. Signing, Certification and Use of Oral and Written Depositions****Historical Notes**

Former rule 203 was repealed by order effective January 1, 1999. For subject matter of former rule 203, see, now, rules 176.8, 215.

**Source:**

Former rules 205, 206, 207.

**203.1. Signature and Changes**

(a) *Deposition Transcript to be Provided to Witness.* The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.

(b) *Changes by Witness; Signature.* The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.

(c) *Exceptions.* The requirements of presentation and signature under this subdivision do not apply:

- (1) if the witness and all parties waive the signature requirement;
- (2) to depositions on written questions; or
- (3) to nonstenographic recordings of oral depositions.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

**203.2. Certification**

The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or nonstenographic recording of an oral deposition a certificate duly sworn by the officer stating:

(a) that the witness was duly sworn by the officer and that the transcript or nonstenographic recording of the oral deposition is a true record of the testimony given by the witness;

(b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted, whether the witness returned the transcript, and if so, the date on which it was returned.

(c) that changes, if any, made by the witness are attached to the deposition transcript;

(d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;

(e) the amount of time used by each party at the deposition;

(f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and

(g) that a copy of the certificate was served on all parties and the date of service.

Added Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

**203.3. Delivery**

(a) *Endorsement; To Whom Delivered.* The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return:

(1) the transcript to the party who asked the first question appearing in the transcript, or

(2) the recording to the party who requested it.

(b) *Notice.* The deposition officer must serve notice of delivery on all other parties.

(c) *Inspection and Copying; Copies.* The party receiving the original deposition transcript or nonstenographic recording must make it available upon

# Request for Assignment of Judge

Second Administrative Judicial Region of Texas

Honorable Olen Underwood, Presiding

Please return to Nathan Jensen by Fax (936) 538-8167 or email to [njensen@co.montgomery.tx.us](mailto:njensen@co.montgomery.tx.us)

REQUESTING JUDGE (Elected Judge): Edwards

Court: 9th County: Montgomery

Date(s) Needed: \_\_\_\_\_

VISITING JUDGE REQUESTED: \_\_\_\_\_ Contacted  YES  NO  
(NAME)

REGIONAL OFFICE TO ASSIGN VISITING JUDGE  
(If a specific VISITING JUDGE is not requested, the Regional office will assign VISITING JUDGE by rotation, if possible)

Type of docket (CR, CV, FAMILY, JURY, NON JURY, GENERAL DOCKET) \_\_\_\_\_

OR

Request for Judge to hear specific case: Cause Number: 09-11-11474

Style of Case: McPeters VS. Barbara Adamick

Nature of Suit: \_\_\_\_\_

Estimated time to try case: \_\_\_\_\_

Attorney/Pro Se: \_\_\_\_\_ Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Attorney/Pro Se: \_\_\_\_\_ Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Please attach list of any additional parties.

I, Barbara Gladden Adamick, do hereby  
Certify 4 pages in Cause # 09-11-11474  
as being a true and correct copy of the CV  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.

## REASON FOR REQUEST (Please check one)

Capital Case Cause No. \_\_\_\_\_; Style \_\_\_\_\_

Witness My Official Seal of Office in Conroe, Texas  
On This The 21 Day of April, 2010

Voluntary Recusal (explain) \_\_\_\_\_

by: Ellen Blake, Deputy

Attorney Contempt, Election Contest or Suit to Remove Local Official \_\_\_\_\_

Disqualification \_\_\_\_\_

Educational Responsibilities or Judicial Conference \_\_\_\_\_

Assistance with Heavy Docket  Ancillary Responsibilities

Vacation  Illness/Personal Emergency

Other \_\_\_\_\_

*Admiss. Note*

[Signature]  
Signature of Judge or Coordinator

[Date]  
Date of request

7866  
Phone Number

X 8381  
Fax Number

2<sup>nd</sup> Administrative Judicial Region Use Only: Assignment # \_\_\_\_\_ Date sent \_\_\_\_\_ Updated Feb 2007

TRANSACTION REPORT

P. 01

DEC-08-2009 TUE 12:02 PM

FOR: MONTGOMERY CTY-9TH DIST 9367888381

SEND

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	MF	DP
DEC-08	12:01 PM	91938638816707088#	32"	1	FAX TX	OK		337

TOTAL : 32S PAGES: 1

Request for Assignment of Judge

Second Administrative Judicial Region of Texas      Honorable Olen Underwood, Presiding  
 Please return to Nathan Jensen by Fax (936) 838-8167 or email to njensen@cc.montgomery.tx.us

REQUESTING JUDGE (Elected Judge): Edwards  
 Court: 9TH County: Montgomery  
 Date(s) Needed: \_\_\_\_\_

VISITING JUDGE REQUESTED: \_\_\_\_\_ Contacted  YES  NO  
 REGIONAL OFFICE TO ASSIGN VISITING JUDGE  
 (If a specific VISITING JUDGE is not requested, the Regional office will assign VISITING JUDGE by rotation, if possible)

Type of docket (CR, CV, FAMILY, JURY, NON-JURY, GENERAL DOCKET) \_\_\_\_\_  
 OR

Request for Judge to hear specific case: Cause Number: 09-11-11474  
 Style of Case: McPeters vs. Barbara Adamick  
 Nature of Suit: \_\_\_\_\_

Estimated time to try case: \_\_\_\_\_  
 Attorney/Pro Se: \_\_\_\_\_ Address: \_\_\_\_\_  
 Phone: \_\_\_\_\_ Fax: \_\_\_\_\_  
 Attorney/Pro Se: \_\_\_\_\_ Address: \_\_\_\_\_  
 Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Please attach list of any additional parties.  
 REASON FOR REQUEST (Please check one)  
 Capital Case Cause No. \_\_\_\_\_; Style \_\_\_\_\_  
 Voluntary Recusal (explain) \_\_\_\_\_  
 Attorney Contempt, Election Contest or Suit to Remove Local Official \_\_\_\_\_  
 Disqualification \_\_\_\_\_  
 Educational Responsibilities or Judicial Conference \_\_\_\_\_  
 Assistance with Heavy Docket  Ancillary Responsibilities  
 Vacation  Illness/Personal Emergency  
 Other \_\_\_\_\_

Signature of Judge or Coordinator: [Signature] Date of request: 12/8/09 Phone Number: 838 Fax Number: 838

2nd Administrative Judicial Region Use Only: Assignment # \_\_\_\_\_ Date sent: \_\_\_\_\_ Updated Feb 2007

Certified as to certification on signature page

Your transaction has been successfully submitted to LexisNexis File & Serve. Your transaction information appears below. To print this information for your records, click anywhere on the transaction information, then click the browser Print button. For a formatted copy of this information, obtain a [transaction report](#). To perform another transaction, click **Begin a New Transaction**. To exit File & Serve, click **Return to My File & Serve**.

**TIP:** Receive notifications of new Filing & Service activity that match your search criteria. Click on the Alerts tab.

### LexisNexis File & Serve Transaction Receipt

**Transaction ID:** 28299709  
**Submitted by:** Ellen Blakeway, TX Montgomery 410th District Court  
**Authorized by:** Barbara Gladden Adamick, TX Montgomery 410th District Court  
**Authorize and file on:** Dec 2 2009 9:14AM CST

**Court:** TX Montgomery 9th District Court  
**Division/Courtroom:** N/A  
**Case Class:** Civil  
**Case Type:** Other Civil  
**Case Number:** 09-11-11474  
**Case Name:** Mcpeters, Karen vs Barbara Gladden Adamick

**Transaction Option:** File Only  
**Billing Reference:**

#### Documents List

1 Document(s)

**Attached Document, 10 Pages Document ID: 25996191**

PDF Format | Original Format

**Document Type:** Petition  
**Access:** Public  
**Statutory Fee:** \$0.00  
**Linked:**

**Document title:**  
PETITION TO INVESTIGATE POTENTIAL CLAIMS PURSUANT TO TEX. R. CIV. P. 202 AND ORDER ALLOWING DEPOSITION TO INVESTIGATE POTENTIAL CLAIMS PURSUANT TO TEX. R. CIV. P. 202 CONVENTIONALLY FILED NOVEMBER 24, 2009

Expand All

**Sending Parties (1)**

**Recipients (0)**

**Service List (0)**

**Delivery Option Party Party Type Attorney Firm Attorney Type Method**  
No selections made.

**Additional Recipients (0)**

**Case Parties**

I, Barbara Gladden Adamick, do hereby  
Certify 1 pages in Cause # 09-11-11474  
as being a true and correct copy of the  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas. *CV*

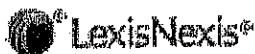
Witness My Official Seal of Office in Conroe, Texas  
On This The 21 Day of April, 2010

By: Ellen Blakeway Deputy

[Begin a New Transaction](#)

[Return to My File & Serve](#)

[Clerk Review this Transaction](#)



About LexisNexis | Terms & Conditions | Privacy | Customer Support - 1-866-293-3957  
Copyright © 2009 LexisNexis®, a division of Reed Elsevier Inc. All rights reserved.

RECEIVED AND FILED  
FOR RECORD

At \_\_\_\_\_ O'clock \_\_\_\_\_ M.

FEB 10 2003

Cause No. 09-11-11474-CV

9<sup>th</sup> JUDICIAL DISTRICT COURT  
MONTGOMERY COUNTY, TEXAS

BARBARA GLADDEN ADAMICK  
District Clerk  
MONTGOMERY COUNTY, TEXAS  
By \_\_\_\_\_ Deputy

### ORDER REGARDING E-FILE DESIGNATION AND LIVE DATE

As of January 1, 2000, all civil cases filed in the 9th District Court of Montgomery County will be electronically filed as described and governed by the Local Rules Regarding Electronic Filing. Consequently, the Court, sua sponte, hereby designates the cause number, \_\_\_\_\_, 09-11-11474 in the Ninth District Court of Montgomery County, Texas, as such an e-file case. Accordingly, the Court orders that in this cause the District Clerk implement fully the Local Rule Regarding Electronic Filing, approved by the Supreme Court on September 16, 1997. A copy of the Local Rule Regarding Electronic Filing can be obtained in the office of Judge Edwards or the Montgomery County District Clerk's Office.

**What Must be Filed Electronically.** No pleadings or party-generated documents may be filed in paper form, but must be filed electronically through the e-file system, unless a document meets one of the exceptions named below.

**All answers must be filed electronically.** Answers filed in paper form will not be accepted.

**Documents That Need Not be Filed Electronically.** Documents may still be filed conventionally if 1) a party has leave of Court to do so, 2) the document is the Original Petition or a Return of Service, or 3) the document is an exhibit, appendix, or "image" document exceeding 50 pages in length (see explanation below). Actions brought by the State of Texas or Child Protective Services as well as Adoption Actions are exempt from e-filing.

**Exhibits.** Original exhibits to documents filed electronically must be "scanned in" and filed electronically as well if the *exhibits* number less than fifty pages. If the exhibits total over fifty pages in length, they may be **marked clearly** as to which motion they pertain and filed with the District Clerk.

A party wishing to file voluminous exhibits conventionally should 1) electronically file a notice indicating that there are conventional "paper" exhibits on file in the District Clerk's Office, 2) file the exhibits in the District Clerk's Office, and 3) serve other parties with copies of the conventionally-filed exhibits as normally required by the Texas Rule of Civil Procedure.

Please note that according to the Local Rule for E-filing, any original signature page on affidavits, verifications, or other sworn documents that is not filed with the Clerk in paper form "shall be maintained and made available, upon reasonable notice and during business hours, to other counsel and to the court."

"Certified as to certification  
on signature page"

**ROBERT L. MAYS, JR.**

**ATTORNEY AT LAW**

8626 TEBBARD DRIVE, SUITE 820  
PETROLEUM TOWERS II  
SAN ANTONIO, TEXAS 78217

PHONE: 210-657-7772  
FAX: 210-657-7780

November 20, 2009

09-11-11474-CV

g th

Barbara Gladden Adamick  
Montgomery County District Clerk  
301 N. Main, Suite 103  
Conroe, Texas 77301

Re: Enclosed Petition to Investigate Potential Claims  
Pursuant to *Tex. R. Civ. P. 202*

Dear Ms. Adamick:

Please file the enclosed Petition. I have enclosed a check  
fee. I do not need a citation at this time. I have enclosed a self-ad  
envelope for you to mail me a conformed copy of the filed petition

If you have any questions, please feel free to give me a call

RECEIVED AND FILED  
FOR RECORD  
At \_\_\_\_\_ O'clock \_\_\_\_\_ M.  
NOV 24 2009  
BARBARA GLADDEN ADAMICK  
District Clerk  
MONTGOMERY COUNTY, TEXAS  
By \_\_\_\_\_

Montgomery County  
District Clerk  
From the Office of  
Barbara Adamick  
District Clerk  
Conroe, TX 77301

Since

Robe

09-11-11474-CV Filed on: 11.25.09  
KAREN MCPETERS  
VS.  
BARBARA GLADDEN ADAMICK

09-11-11474-CV Filed on: 11.25.09  
KAREN MCPETERS  
VS.  
BARBARA GLADDEN ADAMICK

09-11-11474-CV Filed on: 11.25.09  
KAREN MCPETERS  
VS.  
BARBARA GLADDEN ADAMICK

Date: 11-25-2009  
Time: 10:05AM  
Cause: 09-11-11474  
Style: MCPETERS,K vs. ADAMICK,BA  
Receipt: 28211B  
Trans. No.: 1  
Paid \$237.00

Pymt Type: CHECK  
Check #: 5869  
Tendered: \$237.00  
Chg. Due: \$0.00  
CIVIL SUIT \$237.00  
Remitter: MAYS JR, ROBERT L.  
8626 TEBBARD DRIVE, SUITE 82  
SAN ANTONIO, TX 78217  
Operator: Joyce Collins

I, Barbara Gladden Adamick, do hereby  
Certify 1 pages in Cause # 09-11-11474  
as being a true and correct copy of the  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.

Witness My Official Seal of Office in Conroe, Texas  
On this 21 Day of April 2010

*Barbara Gladden Adamick*  
Deputy

Clerk's Check List  
Regarding Notice of Court's Standing Orders

Cause No. 09-11-11474 CV

Court 9th

1. Family Outreach Packet  
Date and Initial

- Copy given to party at time of filing  
(Included copy for respondent/waiver divorce)
- Copy mailed to petitioner/petitioner's attorney  
(Included copy for respondent/waiver divorce)
- Copy attached to citation for respondent

2. 9th District Court E-file Packet

(Includes order regarding E-file designation and live date, order regarding electronic filing dated Feb. 10, 2003)

410th District Court E-file Packet

(Includes order regarding E-file designation and live date, order regarding electronic filing dated Dec. 12, 2006)

- Copy given to party at time of filing  
(Included copy for respondent /attached to Pkt/Atty's copy of petition)
- 11-25-09 Copy mailed to petitioner/petitioner's attorney *by PR* *PZ*  
(Included copy for respondent /attached to Pkt/Atty's copy of petition)
- Copy attached to citation for respondent

3. Order/Packet Regarding Mediation for the following  
(20th, 34th, 38th, 44th, 221st and 410th Courts)

- Copy attached to citation for respondent/defendant *Betha Gladden Adamok, do hereby certify that the pages in Cause # 09-11-11474 CV are being a true and correct copy of the Original Record now on file in the District Clerk's Office of Montgomery County, Texas.*

4. Child Support Packet

- Copy given to party at time of filing  
(Included copy for respondent/waiver divorce)
  - Copy mailed to petitioner/petitioner's attorney  
(Included copy for respondent/waiver divorce)
- Witness My Official Seal of Office in Conoco, Texas  
On this the 21st Day of April, 2010  
By *[Signature]* Deputy

5. Divorce Checklist for Pro Se Litigants

- Copy given to Pkt at counter
- Copy mailed to Pkt

- 6. PRO-COURTS STANDING ORDER
- Copy given at counter for Pkt/Atty (copy for resp)
- Copy mailed to Pkt/Atty (copy for resp)
- Copy attached by atty (for resp/pkt)
- Copy attached to cit for resp







**D I S T R I C T C L E R K**  
**T O**  
**R E T U R N**

**RETURN**  
**TO**  
**DISTRICT**  
**CLERK**

I, Barbara Gladden Adamick, do hereby  
Certify 2 pages in Case # 09M-11474CW  
as being a true and correct copy of the  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.

Witness My Official Seal of Office in Conroe, Texas  
on this 21 Day of April, 2010

Ellen Blake Deputy



**PLAINTIFF ATTORNEY:**

ROBERT L. MAYS JR  
8626 TESORO DRIVE, SUITE 820  
SAN ANTONIO TX 78217  
210-657-7772

**DEFENSE ATTORNEY:**

I, Barbara Gladden Adamlak, do hereby  
Certify 1 pages in Cause # 09-11-11474  
as being a true and correct copy of the  
Original Record now on file in the District  
Clerk's Office of Montgomery County, Texas.

Witness My Official Seal of Office in Conroe, Texas

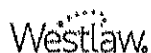
On This The 21 Day of April 2010

By: Ellen Blakeney, Deputy

**INTERVENOR'S ATTORNEY**

09-11-11474-CV Filed on: 11.25.09  
KAREN McEFFERS  
VS.  
BARBARA GLADDEN ADAMIAK

4 7 4 1 1 CV 8



Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

Page 1



Only the Westlaw citation is currently available.

United States District Court,  
S.D. Texas, Brownsville Division.  
PAN AMERICAN MARITIME, INC., Plaintiff,  
v.  
ESCO MARINE, INC., et al. Defendants.  
No. C.A. B-04-188.

May 10, 2005.

Lynne C. Rentfro, Dallas, TX, for Plaintiff.

Jose Rolando Olvera, Jr., Brownsville, TX, for Defendants.

#### OPINION AND ORDER

TAGLE, J.

\*1 BE IT REMEMBERED that on May 10, 2005, the Court GRANTED Defendant's Motion to Dismiss [Dkt. No. 14]; and DENIES Defendant's Motion to Reconsider the Court's order granting Plaintiff leave to file a late response to Defendants' Motion to Dismiss.

#### I. Factual Background

Plaintiff brings this civil action under 18 U.S.C. § 1962(a) and (c) <sup>FN1</sup> of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). See 18 U.S.C. § 1961, *et seq.* The sole basis for federal jurisdiction rests with Plaintiff's RICO claims, see 18 U.S.C. § 1964(a), and neither diversity jurisdiction nor any other form of jurisdiction exists that would grant this Court authority to hear this action. Plaintiff additionally brings state causes of action for conversion and tortious interference with contracts. See Pl's Cmplt. ¶¶ 48-57. Accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, see *Baker v. Putnal*,

75 F.3d 190, 196 (5<sup>th</sup> Cir.1996), the Court provides the following factual recitation. <sup>FN2</sup> Plaintiff Pan American Maritime, Inc. ("Plaintiff" or "Pan American"), is a Texas corporation that leases and uses land at the Port of Brownsville ("the Port") for the salvaging and breaking-up of barges and other vessels. Pan American subleases the land from Gulmar, Inc. Gulmar, in turn, leases the land from the Brownsville Navigational District ("BND"). Defendant Esco Marine, Inc. ("Defendant" or "Esco") is also a Texas corporation. Esco leases from the BND the land adjacent to Pan American's land. Defendants Richard Jaross, Andrew Jaross, and Emilio Sanchez are employees of Esco.

FN1. Plaintiff's complaint references 18 U.S.C. §§ 1964(a) and (c). Section 1964(a) grants this Court jurisdiction to entertain violations of section 1962, and 1964(c) enumerates the remedies available for violations of RICO and grants any injured person the right to bring a private cause of action against the alleged offender(s).

FN2. Plaintiff mentions in its response that Defendants provide an alternative factual recitation. In this opinion, the Court only considers Plaintiff's allegations contained in its complaint and attached letter exhibits.

Plaintiff alleges that in mid 2004, Esco began to deposit substantial amounts of soil on its land, which it subleased from Gulmar. Plaintiff contends Defendant Andrew Jaross trespassed on Gulmar's land in an attempt to threaten Gulmar and Plaintiff. This alleged trespass was apparently part of Defendants' efforts to warn Plaintiff against interfering with Esco's business and expansion onto the land leased by Gulmar and subleased by Pan American. According to Plaintiff, Defendants sent surveyors onto its land who placed markers delineating the land boundaries. Andrew Jaross informed Gulmar that Esco owned light poles, two buildings that were liv-

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

ing quarters, and other materials located on the land occupied by Gulmar and Pan American.

Plaintiff attaches three fax letters as exhibits to its complaint. In essence, these letters outline a dispute between the parties concerning both the land boundaries between the tenants and the ownership of personal property located on the disputed land. According to these fax letters, Esco took over the 8.56 acres of land adjoining the western section of Plaintiff's land. The letters attached to Plaintiff's complaint explain Esco's position on the land dispute and state Esco expanded onto Plaintiff's land after the Port of Brownsville provided notification to Plaintiff or Gulmar and after the Board of Directors approved the expansion. *See* Ex. A. Esco indicated in its second fax letter that BND had previously asked Plaintiff, or Gulmar, to remove certain items from the property. These items, according to Esco, were never removed, and Esco understood that everything on the property would convey to them. Esco indicated that several items, such as pieces of iron, were removed from Esco's property and placed on Pan American's property, and conversely that pieces of fiber glass and other waste were moved from Pan American's side of the property and placed on Esco's property. Esco indicated in the letters that it would allow Plaintiff to remove two modules <sup>FN3</sup> if Plaintiff removed them within 10 days, gave Esco the option to buy the modules at \$15,000.00 each, with the offer remaining open for 12 months, and removed all other materials and debris from Esco's property. In a final fax letter, Esco requested that Plaintiff immediately stop removing the light towers located on the 8.56 acres of land adjoining Plaintiff's property. Esco stated the towers are fixed improvements that cannot be removed under the terms of Gulmar's former lease with the Port of Brownsville. Esco understood that when Gulmar abandoned the property, the land and all the improvements reverted to the Port of Brownsville, and Esco is now the legal tenant of both the land and the property affixed to it.

FN3. The Court presumes these two mod-

ules are the same modules referenced in Plaintiff's complaint as living quarters valued at \$100,000.00. *See* Pl's Cmplt. ¶¶ 2(i) and (ii).

\*2 In response to the above described controversy, Pan American filed suit alleging five causes of action under the RICO statute. Plaintiff cites seven predicate acts as the basis of its RICO suit: (1) theft of the living quarter modules and light poles in violation of Texas Penal Code §§ 31.03(e)(6) and (e)(5); (2) the intentional and knowing operation of heavy equipment dangerously close to an occupied building warehouse, which caused damages of \$1,000,000.00 in violation of Texas Penal Code § 28.03; (3) the knowing and intentional digging in an area known to have water lines and intentional destruction of water lines on the property in violation of Texas Penal Code § 28.03; (4) the attempted assault of Plaintiff's employee by using a bulldozer as a deadly weapon in an attempt to kill, maim, or seriously injure the employee in violation of Texas Penal Code § 15.01(b)(d); (5) the knowing and intentional flooding of Plaintiff's land by elevating Esco's land, causing damage in the amount of \$2,000,000.00 in violation of Texas Penal code § 28.03; (6) the intentional acting in concert and conspiring to carry on criminal activities in violation of Texas Penal Code § 71.01(a)(b); and (7) the intentional acting in concert and conspiring to engage in deadly conduct by attempting assault on Plaintiff's employee with a bulldozer in violation of Texas Penal Code § 71.02(a)(1). *See* Pl's Cmplt. ¶¶ 2-8.

## II. Rule 12(b)(6) and 12(b)(1) Standards

A motion to dismiss for failure to state a claim is "viewed with disfavor and is rarely granted." *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5<sup>th</sup> Cir.2000); *Lowrey v. Texas A & M University System*, 117 F.3d 242, 247 (5<sup>th</sup> Cir.1997), quoting *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5<sup>th</sup> Cir.1982). Fifth Circuit law dictates that a district court must accept all well-

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

pleaded facts as true and view them in the light most favorable to the plaintiff. *See Baker v. Putnal*, 75 F.3d 190, 196 (5<sup>th</sup> Cir.1996); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5<sup>th</sup> Cir.2000). A complaint will not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *See also Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5<sup>th</sup> Cir.1986). The Fifth Circuit has held, however, that dismissal is appropriate “if the complaint lacks an allegation regarding a required element necessary to obtain relief.” *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5<sup>th</sup> Cir.1995) (citation omitted).

The standard governing a motion to dismiss under Rule 12(b)(1) is similar to that of 12(b)(6). Pursuant to 12(b)(1), district courts have “the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Williamson v. Tucker*, 645 F.2d 404, 413 (5<sup>th</sup> Cir.1981). *See also Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5<sup>th</sup> Cir.2001); *Kelly v. Syria Shell Petroleum Development*, 213 F.3d 841, 845 (5<sup>th</sup> Cir.2000) (citations omitted); *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5<sup>th</sup> Cir.1996).

### III. Parties' Arguments-Failure to State a Claim and Lack of Subject Matter

#### Jurisdiction

\*3 Defendant asserts this Court lacks subject matter jurisdiction because Plaintiff fails to allege facts that constitute racketeering activity, nor has Plaintiff pled facts listed as offenses in 18 U.S.C. §

1961. Additionally, Defendant argues Plaintiff’s causes of action are centered on disputes related to real and personal property to which Plaintiff believes it is entitled because it is a sublessee of a prior tenant. Moreover, Defendant argues the Plaintiff lacks standing because its failure to allege conduct constituting racketeering activity means Plaintiff also cannot allege an injury stemming from a violation of RICO. Alternatively, Defendant argues Plaintiff failed to state a claim for which relief may be granted because it has not alleged facts supporting the elements of a RICO claim. Furthermore, any statements made in the complaint alleging racketeering activity are legally conclusory, and do not sufficiently allege a pattern of racketeering.

Plaintiff’s response addresses Defendant’s arguments in a cursory manner. Rather than respond to Defendant’s arguments, Plaintiff simply states 18 U.S.C. § 1964(c) provides district courts jurisdiction to hear civil RICO actions. Plaintiff does not, for example, address whether the predicate acts it alleges qualify as underlying state offenses for the purpose of a RICO claim. Plaintiff merely cites to various sections of its complaint for support that Defendant’s alleged illegal actions have damaged its business. Plaintiff neglects, however, to address whether based on the factual allegations made, its claims fail as a matter of law. For example, if the predicate acts alleged do not constitute criminal offenses for the purpose of a RICO claim, the complaint must be dismissed.

#### IV. Standard for Alleging a RICO Claim

Congress enacted RICO to eliminate the infiltration of organized crime and racketeering activities into legitimate business. *See Beck v. Prupis*, 529 U.S. 494, 496, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) (“Congress enacted ... RICO ... for the purpose of seek[ing] the eradication of organized crime in the United States.”) (internal quotations omitted); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C.Cir.1990) (providing legislative history).

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

"[E]very act of corruption or petty crime committed in a business setting" does not give rise to a claim under RICO. *Yellow Bus Lines*, 913 F.2d at 954. Instead, the RICO statute was intended to address criminal activity that is repetitive and long-term such as the use of force, threats, enforcement of illegal debts, and corruption in the operation of business. *Id.*

Plaintiff asserts violations of §§ 1962(a), (c), and (d) of RICO. The Fifth Circuit "reduced th[ese] subsections to their simplest terms:"

(a) a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise;

...

(c) a person who is employed by or associated with an enterprise cannot conduct the affairs of the enterprise through a pattern of racketeering activity; and

\*4 (d) a person cannot conspire to violate subsections (a), (b), or (c).

*St. Paul*, 224 F.3d at 439 (citing *Crowe v. Henry*, 43 F.3d 198, 203 (5<sup>th</sup> Cir.1995)).

RICO imposes civil and criminal liability on persons who use or invest income derived from, acquire or maintain control of, or engage in the conduct of an enterprise through a pattern of racketeering activity, or who conspire to do any of these acts. See 18 U.S.C. § 1962. "To state a civil RICO claim under section 1962, a Plaintiff must allege: (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5<sup>th</sup> Cir.1998) (citing *Elliot v. Foufas*, 867 F.2d 877, 880 (5<sup>th</sup> Cir.1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)).

Preliminarily, however, a Plaintiff must establish standing by alleging a violation of the RICO statute, an injury to its business or property and a caus-

al connection to the injury by the violation of section 1962. See 18 U.S.C. § 1964(c); See also *Price*, 138 F.3d at 606 (citing *In re Taxable Mun. Bond Sec. Litig. v. Kutak*, 51 F.3d 518, 521 (5<sup>th</sup> Cir.1995)) ("The standing provision of civil RICO provides that '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor ... and shall recover threefold the damages he sustains.'"). Only persons injured "by reason of" the commission of certain predicate acts have standing to bring suit. See *Sedima*, 473 U.S. at 496. Additionally, in the Fifth Circuit, a person is considered injured "by reason of" a RICO violation if the predicate acts constitute factual (but for) causation and legal (proximate) causation of the alleged injury. See *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5<sup>th</sup> Cir.1989).

"Racketeering activity includes the commission of specified state-law crimes, conduct indictable under various provisions within Title 18 of the United States Code, including mail and wire fraud, and certain other offenses." *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 101 F.3d 900, 903-04 (2d Cir.1996). Section 1961(1) enumerates the various state offenses that qualifying as predicate acts to a RICO claim: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene material, or drug offenses. See 18 U.S.C. § 1961(1). Thus, only crimes prohibited in state statutes and listed in section 1961(1) can serve as predicate offenses for the purpose of a RICO claim. See *Ennis v. Edwards*, 2003 WL 1560113, at \*4 n. 16 (E.D.La. Mar.25, 2003). Moreover, "[a] pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity." See *In re Mastercard Int'l, Inc.*, 313 F.3d 257, 261 (5<sup>th</sup> Cir.2002) (quoting *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5<sup>th</sup> Cir.2000)) (other citations omitted).

#### V. Analysis



Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

\*5 Plaintiff's complaint fails for two main reasons. First, the predicate acts alleged do not involve one of the predicate acts listed in the RICO statute. *See S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (holding that standing to sue under RICO only exists if Plaintiff's business or property has been injured by specified predicate acts, and Plaintiff may only recover to the extent he has been injured by the conduct constituting the violation). Second, Plaintiff does not adequately allege a pattern of racketeering activity.

#### A. Racketeering Activity-Predicate Acts

Plaintiff alleges various violations of state law as predicate offenses to its RICO claim: theft of living quarters modules and light poles, *see* Tex. Penal Code §§ 31.03(e)(5) & (e)(6); criminal mischief for the damage, destruction, and tampering of property, *see* Tex. Penal Code § 28.03; criminal attempt to commit an aggravated offense, *see* Tex. Penal Code § 15.01(b); and conspiracy to commit a criminal offense, *see* Tex. Penal Code § 71.01(b). Defendant argues that none of these offenses constitute predicate acts under RICO, and thus Plaintiff has failed to state a claim upon which relief may be granted. The Court agrees.

Predicate acts for racketeering purposes must involve certain specified crimes. As previously mentioned, section 1961(1) enumerates the various state offenses that can serve as predicate offenses for the purpose of a RICO claim. A racketeering activity means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or drug offenses. *See* 18 U.S.C. § 1961(1). Plaintiff provides no response to Defendant's argument that the alleged acts do not qualify as racketeering activity, except to state "[t]he two or more criminal acts that constitute a pattern of racketeering activity within the meaning of RICO are outlined in ¶¶ 2-8 of the Original Complaint." Pl's Response, at p. 4 [Dkt. No. 17].

Courts have consistently held that "acts that consti-

tute theft under state law are not predicate acts for racketeering activity." *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995, 1002 (S.D.Tex.1995) (citing *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F.Supp. 1114, 1136 (E.D.N.Y.1992)); *Jordan v. Berman*, 758 F.Supp. 269, 274 (E.D.Pa.1991); *see also Toms v. Pizzo*, 4 F.Supp.2d 178, 183 (W.D.N.Y.1998) ("[s]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *United States v. Napoli*, 54 F.3d 63, 68 (2d Cir.1995). Plaintiff's other allegations of criminal mischief, attempted assault, and conspiracy to commit these acts also do not constitute predicate offenses for the purpose of establishing racketeering activity. Nor do Plaintiff's allegations involve bribery or extortion. "A Plaintiff may not convert state law claims into a federal treble damage action simply by alleging that wrongful acts are a pattern of racketeering activity related to an enterprise." *Bonton*, 889 F.Supp. at 1002 (citing *King v. Lasher*, 572 F.Supp. 1377, 1382 (S.D.N.Y.1983)). Without any predicate acts, Plaintiff cannot establish a pattern of racketeering activity.

#### B. Pattern of Racketeering Activity

\*6 Notwithstanding the fact that Plaintiff has failed to allege any qualifying predicate acts to support its RICO claim, the Court discusses whether Plaintiff has adequately alleged a pattern of racketeering activity. As stated, a "pattern of racketeering activity" requires the Plaintiff to establish at least two predicate acts of racketeering that are related and pose a threat of continued criminal activity. *See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Although two predicate acts are the minimum number of acts required to demonstrate a pattern of racketeering activity, two acts may not be sufficient. *See Sedima*, 473 U.S. at 496 n. 14. Additionally, "[t]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

amount to or pose a threat of continued criminal activity." *HJ*, 492 U.S. at 239.

Of the two requirements, relatedness and continuity, the former is the least cumbersome. A Plaintiff must simply show that predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. The continuity requirement is more difficult to define.

In *H.J., Inc. v. Northwestern Bell Telephone*, the Supreme Court held the Plaintiff sufficiently stated a RICO claim when it alleged Northwest Bell sought to influence, in the performance of their duties, members of a state board responsible for determining the rates Northwestern Bell could charge. Plaintiff alleged that over a period of six years, Northwestern Bell in fact caused the commissioners on the board to approve rates for the company in excess of a fair and reasonable amount by making cash payments, and paying for parties, meals, tickets to sporting events, etc. Plaintiff alleged these actions constituted predicate acts under the state's anti-bribery statute and state common law. *See H.J., Inc.*, 492 U.S. at 250. The Supreme Court held the alleged acts, if proven, could satisfy the relationship and continuity requirements of a RICO claim. The Court elaborated:

The acts of bribery alleged are said to be related by a common purpose, to influence commissioners in carrying out their duties in order to win approval of unfairly and unreasonably high rates for Northwestern Bell. Furthermore, petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise....

*Id.* at 250.

Thus, continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. "The term 'pattern' itself requires the showing of a relationship' between the predicates, ... and of 'the threat of continuing activity.'" *H.J., Inc.*, 492 U.S. at 240 (citations omitted). "It is this factor of *continuity plus relationship* which combines to produce a pattern." *Id.* (citations omitted). As illustrated in the quoted excerpt above, at least three examples of activity that would establish a threat of continued racketeering are: (1) predicate acts inherently involving a distinct threat of long-term criminal activity; (2) an entity that exists for the purpose of engaging in the criminal activity; or (3) predicate acts that constitute the regular way of conducting an ongoing legitimate business. *Id.* at 242-43.

\*7 In the present case, Plaintiff mentions in a conclusory manner that the relevant time frame for this action is "on or about 2003 through on or about October 26, 2004." Pl's Cmplt. ¶ 16. Plaintiff does not, however, specify when the predicate acts occurred during that time. Plaintiff has alleged only predicate acts or offenses that were discrete acts or isolated events related to a specific property dispute with no threat of continuity. Nor does Plaintiff present any facts that allude to continued, repeated conduct forming the basis for its RICO claim. In fact, the three fax letters Plaintiff attaches to its complaint only reference the property disputes between the parties in October 2004. Nor does Plaintiff allege the predicate acts repeatedly occurred during a closed period of time. The alleged theft of the living quarter modules and light poles occurred once, and the alleged act was completed. As for the other predicate acts, Plaintiff has not adequately alleged they occurred over the course of a period of time or that they are sufficiently related to one another to constitute a pattern of racketeering. "Short-term criminal conduct is not the concern of RICO." *Cal-*

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

*casieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1464 (5<sup>th</sup> Cir.1991); *see also, e.g., H.J.*, 492 U.S. at 241 ("Predicate acts extending over a few weeks or months do not satisfy [the continuity] requirement."); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139-40 (5<sup>th</sup> Cir.1992).

Thus, even assuming Plaintiff has sufficiently alleged "racketeering activity," it has failed to allege the second essential element of a RICO claim—a *pattern* of racketeering activity. The Court finds Plaintiff's allegations of a pattern of racketeering activity, all of which involve Defendants' actions surrounding their alleged taking of certain personal property and assaults, to lack the element of continuity and threat of future criminal activity.

#### C. Fraud

Plaintiff alleges a scheme to defraud separate from the predicate acts discussed in this opinion and divorced from the causes of action listed in the complaint. In essence, Plaintiff alleges Defendants devised and participated in "a scheme and artifice to defraud and to steal, and for obtaining property by means of false and fraudulent pretenses, representations, and theft, and to conceal thefts by false and fraudulent pretenses, representations, false declarations, obstructions or justice and perjury." Pl's Cmplt. ¶ 17.

If Plaintiff intends to assert a generic fraud claim as a predicate act to its RICO claim, it has failed; "[i]n all averments of fraud, or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). Rule 9(b)'s particularity requirement applies with equal force to a predicate act in a RICO claim. *See Tel-Phonic Servs.*, 975 F.2d at 1138; *Elliot*, 867 F.2d at 880. Plaintiff must allege at a minimum the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby." *Tel-Phonic Servs.*, 975 F.2d at 1139 (quoting 5 C. Wright & A. Miller, *Federal Practice and Proced-*

*ure* § 1297, at 590 (1990)).

\*8 Plaintiff's allegations utterly fail to meet the particularity requirements of Rule 9(b).

#### D. Conspiracy

Plaintiff alleges in its first and second causes of action that Defendants violated 18 U.S.C. § 1962(d), which is a conspiracy violation of RICO. A conspiracy to violate RICO has three elements: "(1) knowledge by the defendant of the essential nature of the conspiracy; (2) the defendant's objective manifestations of an agreement to participate in the conduct of the affairs of an enterprise; and (3) an overt act, which need not be a crime, in furtherance of the conspiracy." *Bonton*, 889 F.Supp. at 1005 (citing *United States v. Sutherland*, 656 F.2d 1181, 1187 n. 4 (5<sup>th</sup> Cir.1981)).

Plaintiff has failed to adequately allege a violation of 18 U.S.C. § 1962(c), which makes it unlawful for "a person ... employed by or associated with an enterprise [to] conduct the affairs of the enterprise through a pattern of racketeering activity." "[I]njury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO ... is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)." *Beck v. Prupis*, 529 U.S. 494, 505, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). Plaintiff's failure to allege a violation of § 1962(c) is fatal to Plaintiff's conspiracy claim under section 1962(d). Moreover, Plaintiff fails to allege there was an agreement to commit the predicate acts, which is a core element of a RICO civil conspiracy claim. *See Tel-Phonic Servs.*, 975 F.2d at 1140 (citations omitted).

#### VI. Lack of Subject Matter Jurisdiction-Standing

Standing is generally a threshold consideration for the court to consider before addressing the merits of a motion to dismiss. As some courts have discussed, however, the RICO standing provision is unique because a "civil plaintiff has standing to as-

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
(Cite as: 2005 WL 1155149 (S.D.Tex.))

sert a civil cause of action only if a violation of § 1962 proximately caused his injuries." *In re Mastercard Int'l, Inc.*, 132 F.Supp.2d 468, 495 (E.D.La.2001). Section 1964(c) lays out the civil Rico standing requirement and provides that only persons who have been injured "by reason of" the commission of predicate acts have standing to bring suit. *See Sedima*, 473 U.S. at 496. In the Fifth Circuit, an injury "by reason of" a RICO violation can only exist if the predicate act constitutes a factual (but for) causation of the alleged injury and the legal (proximate) causation of the alleged injury. *See Price*, 138 F.3d at 607 (holding plaintiffs failed adequately to allege the causation element of RICO standing because "[s]ection 1964(c) requires that a compensable injury be 'by reason of' the defendant's substantive violations ..."); *Ocean Energy II*, 868 F.2d at 744; *Whalen v. Carter*, 954 F.2d 1087, 1091 (5<sup>th</sup> Cir.1992) ("a plaintiff has statutory standing to bring a claim so long as the defendant's predicate acts constitute both a factual and proximate cause of the plaintiff's alleged injury.").

\*9 Normally, whether the Court has subject matter jurisdiction and whether the Plaintiff has failed to state a claim upon which relief may be granted are separate and distinct matters for the Court to decide. *See, e.g., Employers Ins. of Wausau v. Swansee River Spa Lines, Inc.*, 866 F.2d 752, 759 (5<sup>th</sup> Cir.1989). Moreover, where the Plaintiff has clearly presented claims based in federal law and the allegations are not "clearly concocted for the sole purpose of obtaining federal jurisdiction" or "wholly insubstantial and frivolous," the Court has subject matter jurisdiction over the claims, even if the Court dismisses the claims for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). Many courts, however, have determined that "lack of RICO standing does not divest the district court of jurisdiction over the action, because RICO standing, unlike other standing doctrines, is sufficiently intertwined with the merits of the RICO claim that such a rule would turn the un-

derlying merits questions into jurisdictional issues." *Lerner v. Fleet Bank*, 318 F.3d 113, 116-17 (2d Cir.2003) (affirming "the district court's dismissal of plaintiffs' civil RICO claim because the alleged pattern of racketeering activity was not the proximate cause of plaintiffs' injuries," but doing so "not under Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction, ... but rather under Fed.R.Civ.P. 12(b)(6), for failure to state a claim.").

In light of the above standard, it was more expeditious for the Court to first determine whether a § 1962 violation occurred. Plaintiff failed to state a cause of action under §§ 1962(a), (c), and (d) because it did not allege predicate acts supporting an injury "by reason of" a RICO violation. Without such predicate acts leading to an injury, Plaintiff lacks standing to bring this RICO claim. Although this deficiency would normally lead the Court to determine it lacks subject matter jurisdiction to entertain the claim, the Court will instead dismiss the RICO claim under Federal Rule of Civil Procedure 12(b)(6).

## VII. Supplemental Jurisdiction

Judicial economy, convenience, fairness to litigants, federalism, and comity are all factors the district court must consider in determining whether it should exercise supplemental jurisdiction over remaining state claims. *See Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5<sup>th</sup> Cir.1992) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (citations omitted). Dismissing state claims after federal claims are dismissed is the general rule. *See id.* at 585.

In *Parker & Parsley Petroleum Co. v. Dresser Indus.*, the Fifth Circuit held a district court abused its discretion when it dismissed federal RICO claims, but refused to surrender jurisdiction over supplemental state claims. 972 F.2d 580 (5<sup>th</sup> Cir.1992).

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)  
 (Cite as: 2005 WL 1155149 (S.D.Tex.))

There, the district court reasoned that "dismissal would be a tremendous financial drain to all the parties as well as a waste of judicial resources." *Id.* at 584. Despite substantial development in the case, the district court's ruling on a number of discovery matters, and a trial that was only weeks away, the Fifth Circuit determined the district court should not have exercised supplemental jurisdiction because discovery had not been completed, they were not on the eve of trial, and the parties were not ready for trial. *Parker & Parsley Petroleum Co.*, 972 F.2d at 587. The Fifth Circuit noted that "when the single federal-law claim is eliminated at an 'early stage' of the litigation, the district court has a 'powerful reason to choose not to continue to exercise jurisdiction.'" *Parker & Parsley Petroleum Co.*, 972 F.2d at 585 (citing *Carnegie-Mellon*, 484 U.S. at 351).

\*10 In *Newport Ltd. v. Sears, Roebuck, and Co.*, the Fifth Circuit determined a district court abused its discretion in not retaining jurisdiction after the federal Rico claims were dismissed. In that case, "after four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a hundred depositions, and according to counsel nearly two hundred thousand pages of discovery production, the declining to hear [that] case on the eve of trial constituted an abuse of discretion." 941 F.2d 302, 307-08 (5<sup>th</sup> Cir.1991).

In the present case, the Court is dismissing Plaintiff's only federal claim, and no diversity jurisdiction exists. At such an early stage of the proceedings-the Court has not held an initial pretrial conference, nor has it entered a scheduling order-the Court should dismiss without prejudice the state law claims, and thus not exercise its supplemental jurisdiction over the state law claims.

#### VIII. Conclusion

Plaintiff has failed to sufficiently plead the requisite predicate acts or a pattern of racketeering activity

as a basis of its RICO claim. Moreover, Plaintiff failed to plead a conspiracy claim under the RICO statute. As a result, the Court DISMISSES Plaintiff's claims under 18 U.S.C. §§ 1962(a), (c), & (d), and thus GRANTS Defendant's Motion to Dismiss [Dkt. No. 14]. Additionally, the Court DENIES Defendant's Motion to Reconsider the Court's order granting Plaintiff leave to file a late response to Defendants' Motion to Dismiss.

S.D.Tex.,2005.  
 Pan American Maritime, Inc. v. Esco Marine, Inc.  
 Not Reported in F.Supp.2d, 2005 WL 1155149  
 (S.D.Tex.)

END OF DOCUMENT



Date of Printing: Apr 30, 2010

**KEYCITE**

**© Pan American Maritime, Inc. v. Esco Marine, Inc., 2005 WL 1155149 (S.D.Tex., May 10, 2005) (NO. C.A. B-04-188)**

**History**

**Direct History**

=> 1 **Pan American Maritime, Inc. v. Esco Marine, Inc., 2005 WL 1155149 (S.D.Tex. May 10, 2005) (NO. C.A. B-04-188)**

**Court Documents**

**Trial Court Documents (U.S.A.)**

**S.D.Tex. Trial Pleadings**

2 **PAN AMERICAN MARITIME, INC., Plaintiff, v. ESCO MARINE, INC.; Richard Jaross; Andrew Jaross (a/k/a Andy Jaross); and Emilio A. Sanchez, Defendants., 2004 WL 2882771 (Trial Pleading) (S.D.Tex. Oct. 27, 2004) Complaint (Organized Crime Control Act of 1970, 18 U.S.C. | 1964 (a) (c) (Racketeer Influenced and Corrupt Organizations)) (NO. B-04-188)**

**Dockets (U.S.A.)**

**S.D.Tex.**

3 **PAN AMERICAN MARITIME, INC. v. ESCO MARINE, INC. ET AL, NO. 1:04cv00188 (Docket) (S.D.Tex. Oct. 27, 2004)**

© 2010 Thomson Reuters. All rights reserved.