

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

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

THE TEXAS LOTTERY COMMISSION'S PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES Respondent The Texas Lottery Commission ("TLC"), and by and through its attorneys of record the Texas Attorney General, Greg Abbott, and the undersigned Assistant Attorneys General, and files this its *Plea to the Jurisdiction* and would respectfully show the Court the following:

I. INTRODUCTION

1. Petitioner has challenged the TLC's determination of non-winning lottery tickets in the Texas Lottery *Fun 5's* scratch-off lottery game and now seeks depositions "to investigate a potential claim or suit" in an attempt to circumvent sovereign immunity. Because no waiver of sovereign immunity for Petitioner's potential claims exists, this Court does not have jurisdiction and the Petition must be dismissed.

II. ARGUMENT

2. A plea to the jurisdiction challenges the court's authority to determine the subject matter of a controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000), overruled on other grounds *Tex. Dep't of Parks & Wildlife v. Miranda*, 193 S.W.3d 217 (Tex. 2004). Subject-matter jurisdiction cannot be presumed and cannot be waived. *Tex. Ass'n of Bus.*

v. Tex. Air Control Bd., 852 S.W.3d 440, 444-45 (Tex. 1993). It is well established under Texas law that the petitioner in any lawsuit against a governmental unit bears the burden of demonstrating the court has subject-matter jurisdiction over the claims asserted against the government. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). TLC is a governmental unit. TEXAS GOV'T CODE ANN. §§ 466.002, *et seq.* Petitioner bears the burden to allege facts that affirmatively demonstrate the trial court's jurisdiction to hear a case. *Texas Ass'n of Bus.*, 852 S.W.3d at 446. If a trial court lacks subject-matter jurisdiction, it has no discretion and must dismiss the case or claims at issue. *Hampton v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 629 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

3. Absent showing a waiver of sovereign immunity, courts are without jurisdiction to entertain a suit against the State, its agencies, and its officials. *State v. Holland*, 221 S.W.3d 639 (Tex. 2007); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692 (Tex. 2003); *General Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591 (Tex. 2001); *Lowe v. Tex. Tech Univ.*, 540 S.W. 2d 297, 298 (Tex. 1976). The Texas Supreme Court has made clear that “[i]mmunity . . . bars a suit against the State unless the Legislature expressly consents to the suit.” *Texas Natural Resources Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002).

4. Petitioner has brought this petition to take the deposition of a corporate representative of TLC pursuant to Texas Rule of Civil Procedure 202.1(b). Petitioner bears the burden of alleging facts that affirmatively show the trial court has subject-matter jurisdiction and must establish the State's consent by either reference to statute or express legislative permission. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Petitioner has identified no statute waiving sovereign immunity for her Rule 202 petition, and none exists. Therefore, this court is without jurisdiction to hear the Petition.

5. Rule 202 does not mention, much less purport to waive, sovereign immunity. Waiving sovereign immunity is the Legislature's prerogative exclusively. See *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012). Waivers are effected by the statute or other Legislative permission—not by judicially-promulgated rules of civil procedure, which cannot enlarge or restrict litigants' substantive rights, TEX. R. CIV. P. 815, or extend trial courts' jurisdiction, *id.* R. 816.

6. No waiver of sovereign immunity exists for a Rule 202.1(b) petition because no “anticipated suit” exists to which the petition is ancillary. When a lawsuit is not “anticipated” within the meaning of Rule 202, the petition results in a final, appealable order. See *Ross Stores, Inc. v. Redken Labs., Inc.*, 810 S.W.2d 741, 742 (Tex. 1991) (per curiam) (holding that order authorizing pre-suit deposition under former Rule 737 was final and appealable when there was “no pending suit involving [the deponent] to which the present discovery action is ancillary, and no suit against [the deponent] [wa]s specifically contemplated”).¹ Indeed, a Rule 202.1(b) petition is predicated on the plaintiff's uncertainty as to whether he may have a claim at all, or against whom. Simply put, a Rule 202.1(b) deposition cannot be “in aid of and incident to” a lawsuit that may never be filed and is not “anticipated” within the meaning of Rule 202. Petitioner has brought this action specifically under Rule 202.1(b), and immunity bars the relief she seeks.

7. Furthermore, Petitioner's Rule 202.1(b) petition is barred by sovereign immunity because it seeks to control state action by forcing state officials to appear for depositions and

¹ Rule 202 “replace[d] and limit[ed]” former Rule 737, which had authorized equitable “bill of discovery” suits. See NATHAN L. HECHT & ROBERT H. PEMBERTON, A GUIDE TO THE 1999 TEXAS DISCOVERY RULES REVISIONS, at G-17 (1998), available at <http://www.supreme.courts.state.tx.us/rules/tdr/disccl37.pdf>. Specifically, Rule 737 had authorized “an independent action to obtain an order authorizing a deposition of any other person to investigate a potential claim or anticipated lawsuit.” *Id.*; see TEX. R. CIV. P. 737 (1940, repealed 1998).

answer questions. *See Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002) (explaining that suits seeking to control state action are barred absent a waiver of sovereign immunity). Such depositions impose the same costs and burdens upon state agencies as would depositions in any lawsuit, and they therefore trigger core justifications underlying sovereign immunity. *See, e.g., Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) (op. on reh’g) (noting that an absence of sovereign immunity hampers governmental functions by diverting tax resources into defending lawsuits); *see id.* at 382 (Brister, J., concurring) (citing the “distraction and expenses that would ensue if citizens could sue the government whenever they pleased”); *City of Galveston v. Gray*, 93 S.W.3d 587, 591 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (granting mandamus relief from trial court’s refusal to rule on plea to the jurisdiction, reasoning that the benefits of sovereign immunity are lost if the court “erroneously assumes jurisdiction and subjects the governmental unit to pre-trial discovery and the costs incident to litigation”). Petitioner’s assertion that she seeks to investigate potential claims does not reduce the burden that the proposed depositions would impose on Respondents, and thus does not prevent her Rule 202 petition from seeking to control state action.

8. Furthermore, petitions under Rule 202.1 are barred by sovereign immunity if the relevant governmental entity would be immune from the “anticipated” suit as contemplated by 202.1(a). *See Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 535 (Tex. App.—Austin, 2013, pet. denied) (“governmental entities are protected from pre-suit depositions to the same extent they would be protected from the same depositions in the contemplated suit underlying the proceedings”); *City of Dallas v. Dallas Black Fire Fighters Ass’n*, 353 S.W.3d 547, 554 (Tex. App.—Dallas 2011, no pet.); *City of Houston v. U.S. Filter Wastewater Grp.*, 190 S.W.3d 242,

245 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Here, any underlying action that Petitioner could bring against TLC would be barred by sovereign immunity. Importantly, Petitioner has not alleged any underlying cause of action as this petition is brought under 202.1(b). However, Petitioner cannot meet her burden to demonstrate that sovereign immunity has been waived for the anticipated, underlying suit when Petitioner makes no allegations at all relating to that suit. The burden is on the Petitioner to demonstrate that sovereign immunity has been waived, and that burden has not been met. See *Combs*, 410 S.W.3d at 536 (“When discovery from a governmental entity is sought under rule 202, the petition must also set forth specific facts demonstrating that, at least potentially, the petitioner has been injured by actions that would amount to a claim which would not be barred by sovereign immunity.”). Therefore, sovereign immunity bars the Petition, and it must be dismissed.

III. PRAYER

9. WHEREFORE, PREMISES CONSIDERED, TLC prays that the Court dismiss the Petition in its entirety for want of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2014, a true and correct copy of the foregoing Plea to the Jurisdiction was served on the following attorneys of record, via File & Serve Express service and/or as otherwise indicated below:

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