

CAUSE NO. 1-10-251

HI-LINE SUPPLY, INC.,

Petitioner,

V.

COMMUNITY BANK, INC.,

Respondent.

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IN THE DISTRICT COURT OF

ROCKWALL COUNTY, TEXAS

382nd JUDICIAL DISTRICT

COMMUNITY BANK'S RESPONSE TO PETITIONER'S RULE 202 PETITION

TO THE HONORABLE JUDGE:

Respondent, Community Bank, Inc. ("Community Bank") files this response to Hi-Line Supply, Inc.'s ("Hi-Line") request for Rule 202 pre-suit deposition(s) and, in support of same, would respectfully show the Court:

I.

INTRODUCTION

This matter arises from acts of cyber-fraud perpetrated on Hi-Line's computer system. When Hi-Line opened its account with Community Bank in July 2009, Hi-Line signed Community Bank's On-line Banking Agreement and a Commercial Customer Automated Clearing House Participation Agreement ("Agreements"). Under the terms of the Agreements, Hi-Line was responsible for all transfers and payments authorized using its specific user identification (known as "NetTeller ID") and personal identification number ("PIN"). On August 20, 2009, Hi-Line accessed Community Bank's online banking system and instructed Community Bank to issue an automated payment for company payroll in the amount of \$24,957.33. Later that day, Hi-Line accessed the online banking system twice more and instructed Community Bank to issue separate automated payments for company payroll in the amounts of \$24,737.86 and \$24,737.86. Since all three payments were requested using

Hi-Line's NetTeller ID and secret PIN, Community Bank's computer system honored all three requests. Unbeknownst to Community Bank, and most likely Hi-Line, online hackers had breached Hi-Line's computer system, obtained Hi-Line's ID and PIN using shadow software, and instructed the second and third payroll requests. After Community Bank was informed of the situation, it immediately attempted to collect or stop payment on the second and third payment requests, but was unsuccessful. Community Bank responded to all of Hi-Line's inquiries regarding criminal breach of Hi-Line's computer systems and the aforementioned transfers.

Hi-Line requested Rule 202 pre-suit deposition(s) allegedly to investigate a potential claim against Community Bank. However, Hi-Line is not entitled to a Rule 202 deposition because it fails to support the allegation that a pre-suit deposition may prevent a failure or delay of justice.

II. ARGUMENT

This response is supported by the Affidavit of Scott Ramsey, Community Bank's Executive Vice President, attached hereto as Exhibit "A".

Texas Rule of Civil Procedure 202 allows an entity to petition the court to authorize a pre-suit deposition in two distinct and separate circumstances: (1) to perpetuate or obtain testimony for use in anticipated suit; or (2) to investigate a potential claim or suit.¹ Whichever direction the petitioner chooses dictates whether the requested relief is available. Here, Hi-Line requests permission to take the deposition of Community Bank's corporate representative(s) under Rule 202(d).

¹ *In re Denton*, 2009 WL 471524, *1 (Tex. App. -Waco, 2009).

A. Petitioner's Requested Deposition Will Not Prevent a Failure or Delay of Justice.

If a petitioner requests a deposition to obtain testimony for use in an anticipated suit, the trial court must find that allowing the petitioner to take the requested deposition may prevent a failure or delay of justice.² However, if the petitioner requests a deposition to investigate a potential claim, the trial court must find that 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.³ Because petitioner's request for a Rule 202 deposition specifically states the deposition may prevent a failure or delay of justice, the petition is actually brought under Rule 202.1(b), i.e., the need to obtain testimony for use in an anticipated suit.

Even though the burden is on Hi-Line to make the required showing,⁴ Hi-Line has pled no facts or arguments in the petition to suggest how or why a pre-suit deposition may prevent a failure or delay of justice. Scott K. Ramsey, Executive Vice-President for Community Bank since 1997, explains Community Bank has fully cooperated with Hi-Line in investigating the matter (Affidavit ¶2 and ¶¶10-14). For example, Mr. Ramsey and Gary Evans, President of Hi-Line, personally responded to all of Hi-Line's questions about the hacking incident (Affidavit ¶12). Additionally, Mr. Ramsey provided Hi-Line all the information he was able to gather regarding the hacking of Hi-Line's computer system and subsequent bank requests, including the dates and times of the requested transactions, the number of requests, and the IP addresses. (Affidavit ¶12). Community Bank has filed a criminal complaint with the Federal Bureau of Investigation, and is currently cooperating with that investigation. (Affidavit ¶12). Community Bank has been pro-active in its investigation and displayed a willingness to help

² TEX. R. CIV. P. 202.4(a)(1); see also *In re Denton*, 2009 WL 471524 at *2.

³ TEX. R. CIV. P. 202.4(a)(2); see also *In re Denton*, 2009 WL 471524 at *2.

⁴ Petitioner Dell failed to meet its burden, conditionally granting mandamus relief and ordering trial court to vacate its order granting Rule 202 petition).

Hi-Line in its investigation. For that reason alone, there is no reason to conduct pre-suit deposition(s).

Notably, Community Bank is an established business in Rockwall, existing for more than 40 years. (Affidavit ¶14). Community Bank has no intentions of moving, closing or being unavailable for later examination should a lawsuit be filed. (Affidavit ¶14). Similarly, Mr. Ramsey, the likely witness for a deposition, has no plans to leave Community Bank or his community. (Affidavit ¶14). Because Community Bank and all persons with knowledge of the hacking incident plan to be available to appear or testify in the future (Affidavit ¶14), denial of the petition for pre-suit discovery will not result in any delay or failure of justice.⁵

It is clear from the face of the Rule 202 Petition that if the Court allows Hi-Line to conduct a pre-suit deposition of a Community Bank corporate representative, Community Bank will run the risk of having to present the same deponent for deposition a second time because of the breadth and scope of information Hi-Line intends to elicit from a witness and the potential joinder of additional parties. Having to produce the same witness twice for deposition will result in a significant, unnecessary burden upon Community Bank and will give Hi-Line "two bites at the apple." That is not the intent of Rule 202. The risk of multiple depositions can be completely avoided should Petitioner file suit and then request a deposition of a corporate representative of Community Bank.

Based on the lack of factual support or allegation, there is no reason why Petitioner's situation is so unique as to require special remedy above and beyond the standard discovery rules that apply to all litigants. Petitioner has identified no exigent circumstances, such as a witness

⁵ See *In re Hocheim Prairie Farm Mut. Ins. Ass'n*, 115 S.W.3rd 793, 796 (Tex. App.—Beaumont 2003, orig. proceeding) (vacating a trial court's granting of a petition for pre-suit deposition in part because the Petitioner adduced no evidence of the imminent loss of the witnesses' testimony); *In re Campos*, 2007 WL 2013057 (Tex. App.—Fort Worth, orig. proceeding) (holding that trial court abused its discretion in ordering pre-suit deposition in absence of requisite showing of failure or delay of justice or that the benefit outweighs the burden).

who will be unavailable for deposition or trial, which would trigger the need to perpetuate testimony through a Rule 202 pre-suit deposition. Accordingly, the Court should deny the petition for pre-suit deposition.

B. The Breadth and Scope of Information Sought in Pre-Suit Deposition by Petitioner is Unwarranted and Outside the Intent of Rule 202.

When a petitioner requests a pre-suit deposition to obtain testimony for use in an anticipated suit, the trial court may only grant such testimony as would be necessary to prevent a failure or delay of justice.⁶ Consequently, the purpose and intent of Rule 202 is not to allow a petitioner to conduct full-blown discovery but rather to "peek under the tent" of the respondent's defenses to the extent necessary to prevent a failure or delay of justice.

Hi-Line's Rule 202 Petition exceeds the intent of Rule 202. In Section IV of its Rule 202 Petition, Hi-Line lists seven categories of information it expects to elicit from Community Bank's witness during deposition, each with 2 to 5 subcategories. Consequently, at a minimum, Hi-Line intends to question the deponent about *at least* 14 to 35 topics, including information that has already been given by Community Bank to Hi-Line, such as: (1) the IP information of each person who accessed Hi-Line's accounts; (2) the date and time each person accessed Hi-Line's accounts; (3) information concerning Community Bank's investigation of the hacked transactions; and (4) Community Bank's attempts to stop or reverse these transactions. Other information expected to be elicited during pre-suit deposition testimony includes confidential and/or trade secret information, such as: (1) information about Community Bank's security system; (2) Community Bank's training materials for on-line banking; and (3) information about previous security breaches at Community Bank. Such broad areas of inquiry were not intended within the scope of Rule 202.

⁶ TEX. R. CIV. P. 202.4(a)(1); *see also In re Denton*, 2009 WL 471524 at *2.

III.
CONCLUSION AND PRAYER

Hi-Line's Rule 202 Petition should be denied with regard to all pre-suit discovery sought from Community Bank because Hi-Line has not articulated any imminent threat there may be a failure or delay of justice if pre-suit discovery is not allowed or that there is a compelling need to perpetuate any testimony pre-suit. Additionally, Hi-Line has not shown any danger that the discovery it seeks would not be available in litigation. Finally, the information intended to be elicited by Hi-Line during pre-suit deposition has either already been divulged or is overly broad, confidential, and unrelated to the matter at hand.

For these reasons, Respondent Community Bank, Inc. respectfully requests that the Court deny Petitioner Hi-Line Supply Inc.'s Rule 202 Petition with regard to all pre-suit discovery sought from Respondent and for such other and further relief to which Respondent is justly entitled.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

By: 

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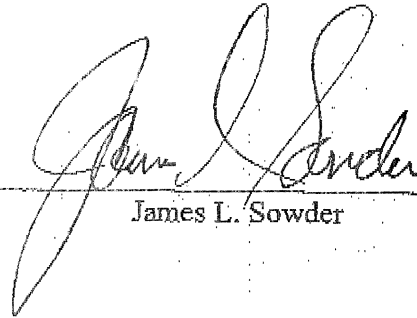
E-Mail: jsowder@thompsoncoe.com

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the foregoing has been delivered on this the 20th day of April, 2010, to the following counsel of record via facsimile:

Michael P. Lyons, Esq.
Deans & Lyons, LLP
325 N. Saint Paul Street, Suite 1500
Dallas, Texas 75201
(214) 985-8505 [fax]



James L. Sowder

Exhibit A

CAUSE NO. 1-10-251

HI-LINE SUPPLY, INC.,
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V.

COMMUNITY BANK, INC.,
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IN THE DISTRICT COURT OF

ROCKWALL COUNTY, TEXAS

382ND JUDICIAL DISTRICT

AFFIDAVIT OF SCOTT K. RAMSEY

STATE OF TEXAS

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COUNTY OF ROCKWALL

Before me, the undersigned notary public, on this day personally appeared Scott K. Ramsey, who, having been by me duly sworn according to law, deposed and states as follows:

1. "My name is Scott K. Ramsey. I am over eighteen (18) years of age, of sound mind, and capable of making this affidavit. All statements herein are within my personal knowledge and are true and correct."

2. "I am currently Executive Vice President for Community Bank, Inc. ("Community Bank"). I have held that position for approximately eight (8) years and have been employed by Community Bank since 1997. Community Bank is headquartered in Granbury, Texas, and has a branch bank facility located at 201 E Kaufman, Rockwall, Texas."

3. "In my capacity as Executive Vice President, I have knowledge of Community Bank's banking practices and procedures."

4. "In approximately June 2009, Hi-Line Supply, Inc. ("Hi-Line") opened a commercial business account at Community Bank's Rockwall location and requested on-line banking services. In addition, Hi-Line sought to use automated clearing house ("ACH") transactions specifically for its payroll. Using these features, Hi-Line was allowed to conduct banking instructions electronically and without the need for employee assistance. In conjunction

with these services, Hi-Line agreed to the terms of Community Bank's On-Line Banking Agreement and a Commercial Customer Automated Clearing House Participation Agreement."

5. "To facilitate the on-line banking transactions, Hi-Line was provided an identification number known as the "NetTeller ID Number". Hi-Line was also issued an initial personal identification number ("PIN"). After Hi-Line made its initial sign-on to the on-line banking system, Hi-Line was prompted to immediately change its PIN to a number of its choice. Only Hi-Line had access to the designated PIN. In addition, Hi-Line was provided a Cash Management User ID and password and was required to set up secret questions and answers to comply with the banks' multi-factor authentication program."

6. "Under the terms of the On-Line Banking Agreement, Hi-Line agreed that it would not give its PIN or make it available to any other person. Further, Hi-Line was responsible for all transfers and payments authorized using the NetTeller ID Number and its PIN. Hi-Line also agreed to utilize a reputable anti-virus software on its equipment and that such software would be updated."

7. "On August 20, 2009, Hi-Line accessed the on-line banking system for the purpose of its initial automated payment to employees in the amount of \$24,957.33. Hi-Line's instructions were based on the previously assigned NetTeller ID Number and its specially designated PIN, as well as the Cash User ID and password and the multi-factor authentication questions and answers."

8. "On August 20, 2009, an instruction was made in the on-line banking system for payroll in the amount of \$24,737.86, with an effective date of August 21, 2009, using Hi-Line's identical NetTeller ID Number and specially-designated PIN, Cash User ID and password and multi-factor authentication questions and answers. Community Bank's computer system

honored this instruction consistent with the On-Line Banking Agreement and Clearing House Participation Agreement.”

9. “Again, on August 20, 2009, another instruction was made on the on-line banking system for payroll in the amount of \$24,737.86; with an effective date of August 24, 2009, using Hi-Line’s NetTeller ID Number and specially-designated PIN, Cash user ID and password and multi-factor authentication questions and answers. Community Bank’s computer system honored this transaction.”

10. “Gary Evans, President of Hi-Line, contacted Community Bank on August 24, 2009, to inquire about what appeared to him to be a double-payment for payroll based on Hi-Line’s first account instructions. It was determined that there had been no erroneous duplicate ACH transaction and that Hi-Line’s NetTeller ID Number and PIN were used for the second and third transaction orders. However, it was discovered that Hi-Line’s computer system had been breached. Using information obtained directly from Hi-Line’s computer systems, criminal hackers made the instructions for the second and third transfer of payments.”

11. “Community Bank immediately contacted the banks to which moneys were sent in order to collect or stop payment. However, the banks reported that persons had been prompt in withdrawing the money and that they had no ability to identify the person responsible.”

12. I personally conferred with Mr. Evans both in a meeting and in response to e-mails to respond to all Hi-Line’s questions. I provided all information with respect to the hackers’ use of information obtained from Hi-Line’s banking account to include the dates and times of the requested transactions, the number of requests, and the IP addresses. Mr. Evans and I discussed the consequences of the persons who had the ability to breach Hi-Line’s computer security systems to perpetuate this crime. I responded to all of Mr. Evans’ inquiries and

questions. I explained to Mr. Evans that there was nothing further the bank could pursue to recapture the transferred funds of approximately \$49,000."

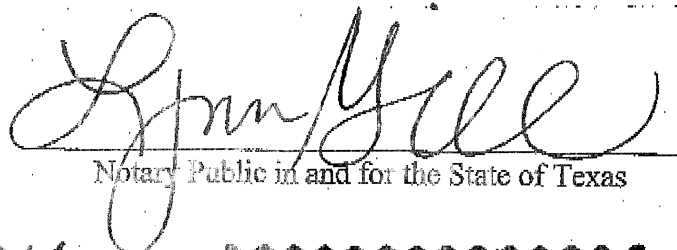
13. Community Bank filed a criminal complaint with the Federal Bureau of Investigation and is cooperating in that investigation."

14. "Community Bank has been in existence since January 1970. There are no intentions of the bank moving, closing, or being unavailable for later examination should a lawsuit be brought. Further, I anticipate that because I have personal knowledge of the bank's operations, investigation of the criminal activity directed toward Hi-Line's computer systems, and my knowledge of banking systems, that I will be the person likely to be questioned or examined. I have no plans to leave the bank or move from my community. I am unaware of any circumstances where I or Community Bank would be unavailable to appear or testify in the future. Community Bank has not destroyed any documents relating to the incident described above or in the investigation of the criminal conduct."

"Further affiant sayeth not."


SCOTT K. RAMSEY

Subscribed and sworn to before me on April 19, 2010.


Notary Public in and for the State of Texas

My commission expires: 4-29-2014

