CAUSE NO. PR-16-04115-1

Estate of	**§**	**IN THE PROBATE COURT**
	§	
	§	
Brian U. Loncar	**§**	**OF**
	§	
	§	
DECEASED	**§**	**DALLAS COUNTY, TEXAS**

RESPONDENT'S OBJECTIONS AND OPPOSITION TO CLAY JENKINS' VERIFIED PETITION TO TAKE DEPOSITION BEFORE SUIT TO INVESTIGATE POTENTIAL CLAIMS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent Toby Toudouze ("Respondent") who respectfully objects to Petitioner **Clay Jenkins' ("Petitioner" or "Potential Petitioner") Verified Petition to take Deposition Before Suit to Investigate Potential Claims** ("Application") and, for cause, would respectfully show unto this Honorable Court as follows:

SUM AND SUBSTANCE OF RELIEF SOUGHT

1. Petitioner's request for pre-suit deposition is fatally deficient because it does not meet the requirements of Texas Rules of Civil Procedure Rule 202 and, as such, the Petitioner's Application must be dismissed as a matter of law.

2. Petitioner has failed to plead sufficient grounds and cannot prove that granting the Petition is necessary to: (1) perpetuate or obtain Respondent Toby Toudouze's testimony for an anticipated suit; or, (2) to investigate a potential claim or suit.

3. In this case, there is no credible risk that Toby Toudouze's testimony would be lost if not recorded immediately.

4. Moreover, while Rule 202 allows potential Plaintiff's to investigate potential claims, the Applicant must prove, and the court must find, 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 of the expense of the procedure. The Applicant in this case has not met, nor can it meet, its burden of proof to satisfy the prerequisites of Rule 202 such that the Court can lawfully grant a Rule 202 deposition.

5. In addition, Rule 202 requires Petitioner to give mandatory notice and service on potential parties. Applicant did not send notice or serve any potential parties. Potential parties in this case include, but are not limited to:

a. Clay Jenkins, Individually

b. The Law Firm of Jenkins & Jenkins

c. Stephen Daniel

d. Phil McCrory

e. The Law Firm of Kelly Hart

f. The Armino Accounting Firm

g. Dave Roberts

h. John Schweisberger

i. The Law Firm of Gibson Dunn & Crutcher

j. Plus, potentially other persons and entities, known by Clay Jenkins, who have: (1) committed wrongful acts; (2) caused monetary damages; and, (3) tortuously interfered with the business and operations--of the Estate, of Brian Loncar ("the Estate"); the Brian U. Loncar Revocable Trust ("the Trust"); the Loncar

Law Firm ("the Law Firm", the "Loncar Law Firm" or "Loncar & Associates"), and Respondent.

k. And, potentially others who have aided and abetted, acted in concert, and conspired with Clay Jenkins to: (1) commit statutory and common law violations; (2) tortuously interfere with the business and operations of Estate, the Trust, the Loncar Law Firm Respondent, and related and associated Brian Loncar Entities; and, (3) breach the fiduciary duties Jenkins owes to the Estate, the Trust, the Loncar Law Firm and Respondent, and related and associated Brian Loncar Entities.

l. Sue Loncar for the purposes of increasing her recovery under her Partition Agreement with Brian Loncar.

m. Abby Loncar for the purpose of increasing her inheritance.

n. Hailey Loncar for the purpose of increasing her inheritance.

Since the Petitioner has not given notice to any potential parties, Petitioner's Application is fatally defective and his request must be denied.

6. Rule 202 was not intended for routine use and the use of a Rule 202 deposition is not to be taken lightly. Petitioner's Application is frivolous, was not filed in good faith or for a proper purpose. To the contrary, Clay Jenkin's Petition was filed against Toby Toudouze to frighten Mr. Toudouze to keep him from exposing Clay Jenkin's "questionable activities" as Executor of Brian Loncar's Estate and the person running the Loncar law Firm. Accordingly, Applicant's request for Respondent's deposition should be denied.

FACTUAL BACKGROUND

1. Brian Loncar died on December 4, 2016, a week after Brian's daughter Grace committed suicide. That day, while all the Loncar's were mourning the two untimely deaths in their family, Clay Jenkins was thinking about Clay Jenkins. He saw Brian Loncar's death as an opportunity for himself, not as a tragedy.

2. Seven (7) days later, December 11, 2016, Clay Jenkins ("Jenkins") convened a meeting at the law firm of Loncar & Associates and, without any official title or authority took control of the Loncar Law Firm.

3. Since that time, Clay Jenkins' motives have become clear, he wants to own and operate the Loncar Firm for the purpose of enriching himself – his plan is succeeding.

4. Phil Loncar, Brian's Dad, was appointed Executor of Brian's Estate pursuant to Brian's Last Will and Testament. Clay Jenkins was the third alternate executor after Brian's Dad and Brian's personal financial advisor, Bill Sena.

5. Clay Jenkins took advantage of Brian's Dad during a time when Brian's Dad was mourning the tragic deaths of his son and grand-daughter. Jenkins began giving Brian's Dad "legal advice" relating to the Estate. Jenkins did this without consulting any of the people with the best knowledge about Brian's financial affairs and the Loncar Law Firm, including Michael Press, Brian's accountant, Bill Sena, Brian's financial advisor, and Toby Toudouze, Loncar & Associates' Chief Financial Officer. These people were the persons most familiar with Loncar's personal matters, business interests, and his law firm.

6. Instead of consulting with the people who had worked the most closely with Brian for years, Jenkins isolated and ignored these people and went in another direction.

He had his own "hand-picked guy", Phil McCrury ("McCrury"), installed as "the attorney for the Estate, the Trust, and L&A."

7. Phil Loncar had not previously known Phil McCrury before Clay Jenkins picked him to be the attorney for Brian's Estate. McCrury knew nothing about Loncar's history, personal matters, business affairs or the volume personal injury business. While Phil Loncar was Executor of Brian Loncar's Estate, McCrury had very little contact with Brian's Dad about customary probate matters – gathering assets and paying debts.

8. At that time, even though Phil Loncar was the Executor of the Estate, Clay Jenkins ran the ship. Unbeknownst to anyone, Jenkins had a secret plan: he wanted to buy and own L&A for his own personal gain; and, for political purposes, he wanted to keep all of this a secret.

9. Upon his death, Brian's plan was to liquidate L&A and distribute the proceeds to the beneficiaries. That's what Phil Loncar, as Executor of Brian's Estate, planned to do.

10. However, that was not Clay Jenkins' plan. Jenkins decided not to liquidate L&A, and to persuade Phil Loncar, while Phil was in his most defenseless and vulnerable state, to sell L&A to him. To that end, Jenkins persuaded Phil Loncar to sign an "Exclusive Letter of Intent" giving Clay Jenkin the exclusive right to purchase L&A.

11. On information and belief, there were other potential purchasers interested in buying the assets of the Loncar Firm and taking over L&A's clients' cases. These purchasers were willing to do their transactions legally, in the open, and in accordance with the Texas State Bar Rules. Unfortunately, neither Jenkins nor McCrury pursued any of the numerous interested prospective purchasers of L&A—some of whom were cash buyers and most, if not all, of whom offered more money and better terms than Clay

Jenkins. Notably, neither Clay Jenkins or Phil McCrury ever offered the assets of the Loncar Law Firm for sale publicly or put it out for bid when the value of the firm was at its highest (even after Jenkins and McCrury announced that there would be open bidding for the firm).

12. Instead, Jenkins prepared an Exclusive Letter of Intent for himself to purchase L&A on very soft terms favorable to Jenkins. Then, Jenkins and McCrury persuaded Phil Loncar to sign Jenkins' Letter of Intent representing to him that it was in the best interest of the Estate that he do so.

13. Jenkins's low-ball offer was never disclosed to or approved by the court and, in fact, on information and belief, it was an illusory offer for the purchase of L&A—it was for less than the true value of the law firm, no real money out of Jenkins's pocket, and no personal guaranty by Jenkins.

14. Upon information and belief, Jenkins's offer was also less than the cash on account in the practice and much less than the liquidation value of L&A's assets. Jenkins's offer was not the highest bid, not the best value for the practice, not the best deal for the Estate, and certainly not the best bargain for the beneficiaries. It was simply the best deal for Jenkins, who essentially made himself the primary beneficiary of Brian Loncar's Estate.

15. On information and belief, Jenkins ran L&A without specific court orders or permission from the State Bar. Jenkins spent huge sums of L&A money on advertising to generate new business (for Jenkins) without court oversight.

16. Jenkins did not notify all of L&A's clients that Brian had died, that other lawyers had taken over their cases, that no lawyer owned or was responsible for the Loncar Law Firm.

17. Even worse, Clay Jenkins continued to operate Loncar & Associates deceptively as if Brian Loncar were still alive, using Brian's name, likeness, voice, and image on L&A's website, on social media, on T.V. and in other promotional material. Brian's name is used in T.V advertisement, ads with Brian Loncar as the Law Firm's principal attorney are still played, Brian's name and image are still used to promote the Law Firm and attract clients. Moreover, to further deceive the public, Jenkins continued to use Brian Loncar's tag line, "The Strong Arm" but changed it slightly so it would look the same in advertising and sound the same to the uninformed. Now, Jenkins uses the tag line, "The Strong Arm**[y]**." it is confusingly similar to the "Strong Arm" which was Brian Loncar's brand.

18. On information and belief, this is also in the context of the several conflicts of interest that Jenkins has.

a. Jenkins, was a principal in the law firm of Jenkins & Jenkins and, now, Jenkins & Associates (Clay Jenkins' law firms) in Waxahachie, Texas. Those firms had cases that were referred to them by L&A before Brian Loncar's death.

b. Jenkins had an obligation to account for expenses incurred and as Executor of Brian Loncar's Estate, Jenkins is currently referring L&A cases to his own law firm. Jenkins owes the Estate an inventory and accounting of all of the cases that he has referred to himself and law firm, Jenkins & Jenkins and Jenkins & Associates, by L&A.

c. The Estate has never had and an accounting of all of the cases Jenkins has referred to his own law firm and all fees recovered on all the cases. The Estate is entitled to know that all the cases that Jenkins has referred to his

own law firm are accounted for and that Loncar's Estate and L&A have received the correct amount of referral fees from Jenkins, and that no fees were held, are being held, or have been diverted elsewhere.

d. There is a chance that Jenkins currently owes referral fees to Loncar and L&A or that the Estate may have claims against Jenkins for fees owed for tortious interference, negligence, breaches of fiduciary duty and other matters. Consequently, Jenkins may be acting without State Bar approval or oversight, and in the face of numerous clear conflicts of interest.

e. Disclosures are inadequate. Some clients responding to L&A's advertising think they are getting Brian Loncar as their attorney. They have no idea that Brian is deceased, and that no lawyer owns L&A or is ultimately responsible for their cases. Moreover, these clients don't know that if their cases have substantial value they will be referred to Jenkins & Associates.

19. On information and belief, Jenkins may have deferred payment of one or more referral fees to hide the money from Sue Loncar when Brian Loncar and Sue were collaborating about the division of their community estate so that Sue would not get the share of those fees she was lawfully entitled to. If so, Jenkins may have liability to the Estate, the Loncar Law firm and Sue Loncar for withholding payments to defraud Sue.

20. Even worse, upon information and belief, Jenkins has not fulfilled the duties and responsibilities imposed by the Texas Disciplinary Rules of Professional Conduct.

a. Jenkins does not have an attorney-client relationship with the former clients of L&A.

b. Brian Loncar ceased providing legal services upon Loncar's death in December, 2016.

c. Jenkins did not notify all of L&A's Clients that Brian Loncar had died, was no longer representing them, and given the Clients an opportunity to choose a new lawyer – inside or out of the Loncar Law Firm.

d. On information and belief, under certain circumstances, the law firm can be operated for a short period of time to wind down and transition the existing client matters to another lawyer or law firms.

e. Jenkins's duties include but are not limited to: notifying the State Bar, every L&A client, every court, every adverse party, and every other interested person of Loncar's death, that the law firm has no principal, that Brian Loncar has ceased providing legal services and the law firm is winding down, that the clients should seek new counsel, and such other pertinent information as each situation requires. (Some matters involve minors with next friends and next of kin, some matters involve wrongful death with many beneficiaries, some matters have multiple addresses for each identified client, and some matters may be involved in probate court and guardianship proceedings and may require notice and approval of the Court.). On information and belief, these notifications were not made by Clay Jenkins or by L&A under his control.

f. Jenkins and his law firm have no attorney-client relationship with the clients of L&A and are not permitted to solicit L&A's clients.

g. Jenkins is not allowed to solicit new clients in the name of L&A or any deceased lawyer.

h. Lawyers are not allowed to solicit clients on behalf of any deceased lawyer or any firm that is not owned and operated by a living lawyer.

i. It is entirely possible that all of L&A's clients that have retained L&A after Brian Loncar's death on December 4, 2016 have "void" contracts with the firm because they signed up to be represented by a deceased lawyer. If so, Jenkins has a duty to notify those clients that their contracts are "void".

21. On information and belief, Jenkins has fiduciary duties to the Estate.

a. He has fiduciary duties to the consumers of legal services he has solicited under the L&A name.

b. Jenkins has a duty to disclose all material facts to them, to the beneficiaries of the Estate, and a duty to disclose all current and potential conflicts of interest.

c. Jenkins also has a duty to disclose potential claims against Jenkins and his law firms. The Estate, the Beneficiaries, the Trust, Loncar & Associates, Phil Loncar, Sue Loncar, putative L&A clients, et al. may have claims against Jenkins and his law firms; and, at the very least, Jenkins is a potential adverse party or a fact witness in certain contested matters adverse to the Estate, the Beneficiaries, the Trust, Loncar & Associates, Phil Loncar, Sue Loncar, putative clients of L&A and other people/entities or related matters.

22. That being said, upon information and belief, Jenkins has engaged in various activities that involve L&A and other companies owned by Loncar that are assets of the Loncar Estate, potentially exposing those companies to liabilities to the detriment of the Loncar Estate and the beneficiaries of the Estate.

Unfortunately, the Respondent is an individual that Jenkins is attempting to blame for his own questionable acts. The Respondent was a loyal and integral part of L&A and the operations of other Loncar entities. However, when Jenkins took control of L&A and the Loncar Entities he never had a substantive conversation with Respondent, and he specifically did not have any substantive communications with Respondent about L&A or another other Loncar entity.

In fact, Jenkins specifically excluded the Respondent, placed him on administrative leave then terminated him without cause. Now in an effort to protect his questionable acts from being exposed, Jenkins is attempting to frighten Respondent and isolate him.

OBJECTIONS

23. Texas Rule of Civil Procedure 202.2 sets forth the required contents of a Rule 202 Petition, and failure to comply with this Rule mandates dismissal of the petition. TEX. R. CIV. P. 202.2 (stating "The petition must...." and listing the required contents) (emphasis added). Accordingly, the Respondent objects to the Petition for failing to comply with the requirements of Rules 202.2 (g), specifically as set forth below:

THE PETITION PRESENTS NO EVIDENCE TO MEET ITS BURDEN

24. The law is clear that a petitioner seeking a pre-suit deposition must present evidence to meet its burden to establish the facts necessary to obtain the deposition. *See, e.g., In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 115 S.W.3d at 796; *see also In re Dallas Cnty. Hosp. Dist.*, No. 05-14-00249-CV, 2014 Tex. App. LEXIS 3542, 2014 WL 1407415, at *2 (Tex. App.-Dallas Apr. 1, 2014, orig. proceeding) (mem. op.). In examining this evidentiary requirement, we are cognizant that sworn, verified pleadings are generally not considered competent evidence to prove the facts asserted in the pleading. *See Laidlaw*

Waste Sys. (Dallas), Inc. v. City of Wilmer, 904 S.W.2d 656, 660 (Tex. 1995). Moreover, the argument of counsel is not evidence. *See Love v. Moreland,* 280 S.W.3d 334, 336 n. 3 (Tex. App.-Amarillo 2008, no pet.); *Potter v. GMP, L.L.C.*, 141 S.W.3d 698, 704 (Tex. App.-San Antonio 2004, pet. dism'd). *In re E.*, 476 S.W.3d 61, 68 (Tex. App. 2014).

25. In this case, the Petition contains no competent evidence whatsoever. Accordingly, this Honorable Court must deny the Petitioner's request in its entirety.

THE PETITION DOES NOT CONTAIN SUFFICIENTLY DETAILED RECITATIONS TO SATISFY THE BURDEN OF PROOF

26. The Dallas, Tyler, and Amarillo courts of appeals have rejected the assertion that a verified petition constitutes competent evidence in support of a pre-suit deposition. *See, e.g., In re Dallas Cnty. Hosp. Dist*, 2014 Tex. App. LEXIS 3542, 2014 WL 1407415, at *2; *In re Noriega*, 2014 Tex. App. LEXIS 3462, 2014 WL 1415109, at *2; *In re Contractor's Supplies, Inc.*, 2009 Tex. App. LEXIS 6396, 2009 WL 2488374, at *5; *In re Rockafellow*, 2011 Tex. App. LEXIS 5495, 2011 WL 2848638, at *4. *In re E.*, 476 S.W.3d 61, 69 (Tex. App. 2014).

27. In this case, the Petition contains no competent evidence whatsoever. The Petition's sole allegation which is conclusory, baseless and set forth without any evidence is that, "The Estate seeks to depose Toby Toudouze to investigate potential claims against Mr. Toudouze regarding financial issues arising during his employment with the Firm that may have a bearing on the value of the Estate." Accordingly, this Honorable Court must deny the Petitioner's request in its entirety.

28. Toby Toudouze was employed for approximately 8 months after Brian Loncar's death. Clay Jenkins ran L&A during that time. Not once did he ask Toby Toudouze any substantive questions about L&A matters. This constitutes a waiver.

THE PETITION IS VAGUE AND CONCLUSORY

29. The Petition is vague and conclusory insofar as it merely tracks the language of the statute and does not include any explanatory facts regarding why allowing the depositions would prevent an alleged failure or delay of justice in an anticipated suit, or why the benefit of allowing the depositions outweighs the burden or expense of the procedure. A petition that merely tracks the language of Rule 202 in averring the necessity of a pre-suit deposition, without including any explanatory facts, is insufficient to meet the petitioner's burden. *See In re Does*, 337 S.W.3d at 865 (noting that the petitioner "made no effort to present the trial court with a basis for the [Rule 202] findings" where the allegations in its petition and motion to compel were "sketchy"); *In re Reassure Am. Life Ins. Co.*, 421 S.W.3d at 173 (stating that the petition must do more reiterate the language of the rule and must include explanatory facts). It is not sufficient to articulate a "vague notion" that evidence will become unavailable by the passing of time without producing evidence to support such a claim, *See In re Hochheim Prairie Farm Mut Ins. Ass'n*, 115 S.W.3d at 795-796; *see also In re Dallas Cnty. Hosp. Dist.*, 2014 Tex. App. LEXIS 3542, 2014 WL 1407415, at *2. *In re E.*, 476 S.W.3d 61, 69 (Tex. App. 2014).

30. In this case, the Petition contains no competent evidence whatsoever. The Petition's sole allegation which is conclusory, baseless and set forth without any evidence is that, "The Estate seeks to depose Toby Toudouze to investigate potential claims against Mr. Toudouze regarding financial issues arising during his employment with the Firm that may have a bearing on the value of the Estate." Accordingly, this Honorable Court must deny the Petitioner's request in its entirety.

ARGUMENT AND AUTHORITIES

31. The Petition should be denied because it fails to plead essential facts. In other words, a petition must rise and fall on the grounds pleaded. *In re Denton*, 2009 WL 471524 (Tex. App.–Waco, no pet.) ("The language of the rule is clear-the trial court's finding must coincide with the reason requested for the Rule 202 deposition.") (emphasis added). If the Petitioner does not plead and prove facts supporting his basis for seeking a deposition, then the petition must be denied. *Id.* (holding that a court may only grant a Rule 202 petition for the grounds pleaded and may not take an "either/or" approach, finding the trial court abused its discretion for granting petition on unpled grounds).

32. The two grounds for a Rule 202 petition are as follows. First, if the petitioner anticipates suit, he must plead and prove the deposition will "prevent failure or delay of justice." *See* TEX. R. CIV. P. 202.4(a)(1); *In re Legate*, 2011 WL 4828192, at *1-2 (Tex. App.–San Antonio 2011, orig. proceeding). Second, if the petitioner is investigating a claim, he must plead and prove that "investigating the potential claim outweighs the burden or expense of the procedure." *See* TEX. R. CIV. P. 202.4(a)(2); *In re Legate*, 2011 WL 4828192, at *2.

33. In this case, it appears that the Petitioner's Petition's defective. Petitioner has sought a petition "to investigate potential claims;" however, he has failed to plead and prove the prerequisites under Rule 202 that would justify a pre-suit deposition. Moreover, Petitioner has failed to plead and prove that "investigating the potential claim outweighs the burden or expense of the procedure." Accordingly, this Honorable Court must deny the Petitioner's request in its entirety.

PRAYER

For the foregoing reasons, Respondent Toby Toudouze requests that the Court DENY Petitioner's Rule 202 Petition and grant any and all further relief at law or equity to which Respondent has shown himself entitled.

Respectfully submitted,

/s/ Lawrence J. Friedman

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Lawrence J. Friedman, Esq.
State Bar No. 07469300
lfriedman@fflawoffice.com

FRIEDMAN & FEIGER, L.L.P.
5301 Spring Valley Road, Suite 200
Dallas, Texas 75254
(972) 788-1400 (Telephone)
(972) 788-2667 (Telecopier)

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served in compliance with the Texas Rules of Civil Procedure upon all counsel of record on this 30th day of October, 2017.

/s/ Lawrence J. Friedman
Lawrence J. Friedman