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No. 05-14-00782-CV

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IN THE COURT OF APPEALS  
FIFTH JUDICIAL DISTRICT OF TEXAS  
DALLAS, TEXAS

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Clerk

EBAY INC.

*Appellant,*

v.

MARY KAY INC.,

*Appellee.*

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On Appeal from the 101st Judicial District Court  
Dallas County, Texas  
Trial Court No. DC-14-03318  
Hon. Martin Lowy, Presiding

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## STATEMENT OF THE CASE

<b>Nature of the Case</b>	eBay Inc. (“eBay”) appeals from the trial court’s order granting Mary Kay Inc.’s (“Mary Kay”) petition for a pre-suit deposition under Rule 202 of the Texas Rules of Civil Procedure (“Order”). The trial court’s Order requires non-resident eBay to submit to deposition on written questions in Dallas, during which eBay will be required to provide the names and contact information of 48 anonymous eBay users who might be selling Mary Kay products in violation of contract, copyright, or trademark law. According to Mary Kay, this information will be used in anticipated suits against one or more of these anonymous eBay sellers, although Mary Kay does not specify which claims it intends to assert against which anonymous users, or whether these users are subject to personal jurisdiction in Texas.
<b>Parties</b>	Respondent/Appellant is eBay Inc.  Petitioner/Appellee is Mary Kay Inc.
<b>Trial Court</b>	101st Judicial District Court, Dallas County, Texas, Hon. Martin Lowy, Presiding.
<b>Trial Court Disposition</b>	The trial court granted Mary Kay’s Verified Rule 202 Petition by Order signed on May 20, 2014.
<b>Course of Proceedings</b>	After hearing argument and considering the parties’ filings and affidavits, the trial court entered the Order that eBay has appealed. This is an appeal of a final judgment. <i>In re Jorden</i> , 249 S.W.3d 416, 419 (Tex. 2008) (trial court’s ruling on a Rule 202 petition is a final, appealable order when the petition seeks discovery from a witness against whom a suit is not anticipated); <i>IFS Sec. Grp., Inc. v. Am. Equity Ins. Co.</i> , 175 S.W.3d 560, 563 (Tex. App.—Dallas 2005, no pet.) (same). On June 26, 2014, this Court issued a stay of the district court’s order pending this appeal.

## **REQUEST FOR ORAL ARGUMENT**

Appellant respectfully requests the opportunity to present oral argument. This appeal involves the application of a recent decision by the Texas Supreme Court, *In re Doe* (“Trooper”), --S.W.3d--, 2013 WL 9600953 (Tex. Aug. 29, 2014), and a separate issue of first impression in Texas about the limits on a court’s power to order pre-suit discovery from a witness residing outside its borders.

## **STATEMENT OF JURISDICTION**

The Court has jurisdiction over this appeal because the trial court’s Order is a final judgment, as eBay would not be a party in Mary Kay’s anticipated suit. *See In re Jorden*, 249 S.W.3d at 419 (trial court’s ruling on a Rule 202 petition is a final, appealable order when the petition seeks discovery from a third party against whom a suit is not contemplated); *IFS*, 175 S.W.3d at 563 (“[A]n order pursuant to rule 202 allowing discovery against a third party not liable to the petitioner would be final for purposes of appeal.”).

## **ISSUES PRESENTED**

1. Whether the district court erred in granting Mary Kay's Rule 202 Petition?
  
2. Whether Rule 202 may be used to obtain the identities of anonymous internet posters for use in an anticipated suit, absent any showing by the Rule 202 petitioner that the anticipated suit could be filed properly in a Texas court or that a Texas court could exercise personal jurisdiction over the anonymous posters?
  
3. Whether Rule 202 gives Texas courts the authority to reach outside the State's borders to compel a nonresident witness who will not be a party in any anticipated suit to submit to a pre-suit deposition in Texas, without following the procedures for obtaining testimony from a nonparty, nonresident witness in a pending suit, including the requirements of Rule 201.1 and all applicable requirements of the witness's home jurisdiction?

## **STATEMENT OF FACTS**

This case is one of several now pending before this Court and the district courts of Dallas County and Collin County, in which Rule 202 is being improperly exploited in ways that are inconsistent with the Texas Supreme Court's recent decision in *Trooper* and its warning in that case that Rule 202 should not be interpreted "to make Texas the world's inspector general." 2013 WL 9600953, at \*5. All of these cases involve the resale on eBay.com of products originally distributed by "multi-level marketing companies."<sup>1</sup> eBay is the world's largest online marketplace in which anyone, whether it be a business or individual consumer, can buy and sell (and resale) a broad variety of goods. Multi-level marketing companies sell their products through networks of "independent" distributors, rather than directly to consumers. To protect this model and their desired pricing structures, these companies often contractually prohibit their distributors from reselling products on eBay.

Under the pretense of needing to "perpetuate" testimony for use in "anticipated suits" against anonymous distributors in potential breach of this "no eBay sales" prohibition, many multi-level marketing companies are turning to Rule 202 in an effort to force eBay to identify anonymous website users, so that the companies can send threatening cease-and-desist letters to them. The number of

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<sup>1</sup> See *infra* at n. 6.

anonymous eBay users at issue in each Rule 202 proceeding varies, ranging from the 48 users at issue in this appeal to the *more than 15,000 users* at issue in the most recently-filed appeal.

**A. Mary Kay’s Multi-Level Marketing Model**

Based in Dallas, Mary Kay is one of the multi-level marketing companies seeking mass discovery from eBay through Rule 202 . CR7. Under its business model, Mary Kay sells its cosmetics to Independent Beauty Consultants (“IBC’s” or “Beauty Consultants”), who may then resell the products to consumers. *Id.* Like other multi-level marketing companies, Mary Kay would prefer to have full control over the resale of its products, so that consumers are only allowed to purchase items from the company’s own independent consultants, at Mary Kay’s suggested prices. CR8 (“Mary Kay does not authorize the sale of any of its products or the use of its trademarks or trade dress on eBay.”).

One way Mary Kay attempts to control the aftermarket sales of its products, including on eBay, is through the enforcement of its contractual rights against Beauty Consultants. To become a Beauty Consultant, an individual must sign an IBC Agreement. CR7. According to Mary Kay, the current version of that Agreement prohibits Beauty Consultants from selling Mary Kay products online,

including through ecommerce websites.<sup>2</sup> CR8. But Mary Kay has made no showing that any of the anonymous internet users it seeks to identify here are current or former Beauty Consultants, who have signed a “no eBay sales” agreement. And for any anonymous eBay users who are not Beauty Consultants or who have not signed such an agreement, Mary Kay has no breach-of-contract claims against them.

Another way that Mary Kay attempts to control the aftermarket resale of its products is through the assertion of intellectual property claims—primarily trademark claims—against resellers. CR9. But, again, Mary Kay’s ability to use such claims to stamp-out the online aftermarket of its products is limited. It is well established under the first-sale doctrine that “trademark law does not apply to the sale of genuine goods bearing a true mark, even if the sale is without the mark owner’s consent.” *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.*, 988 F.2d 587, 590 (5th Cir. 1993) (quotation marks and citations omitted); *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 61-62 (2d Cir. 1992) (individual “who resells trademarked goods without change is not liable for trademark infringement”). So if a consumer purchases Mary Kay products from a Beauty Consultant, she has the

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<sup>2</sup> Apparently, this restriction was added only recently to the IBC Agreement, as previous versions do not include this prohibition. CR102. It is unclear from the record in this case when Mary Kay revised its Agreement and how many of its Beauty Consultants are bound by the new terms prohibiting online resale of company products.

right to resell those products on eBay and to advertise them accurately as “Mary Kay” products. *See Matrix*, 988 F.2d at 589-90 (unauthorized reseller of hair products protected under first sale doctrine despite labels on products stating that they were to be “Sold Only in Professional Salons”). Moreover, although Mary Kay might contend that copyright law prohibits a reseller from using Mary Kay’s photography or its verbatim product descriptions in the reseller’s own listing, copyright law does not prevent a reseller from using her own photo of a “Mary Kay”-branded product or describing the product in her own words. *See* 17 U.S.C. § 201(a).

**B. Mary Kay’s Rule 202 Petition to eBay**

On April 1, 2014, Mary Kay served its Rule 202 Petition, seeking an order compelling eBay to identify 48 anonymous users who might be selling Mary Kay products on ebay.com in alleged violation of contract or intellectual property law. CR8-9. Mary Kay states that it anticipates bringing “claims against one or more of these persons or entities. . . .” CR9. These potential claims include “trademark infringement, copyright infringement, breach of contract, unfair competition, misappropriation of confidential information, and tortious interference with contract.” *Id.* Mary Kay does not allege that it is anticipating filing any claims

against eBay. Thus, in any anticipated suit against eBay users, eBay would be a nonparty witness.<sup>3</sup>

As eBay is not based in Texas, Mary Kay served its Rule 202 Petition on eBay's registered agent: National Registered Agents, Inc., 1999 Bryan St., Ste. 900, Dallas, Texas. CR7. In fact, eBay is a Delaware company with its principal place of business in San Jose, California. CR14, 130, 138. Thus, eBay is a *California resident*.<sup>4</sup> Mary Kay noted that it could not seek its requested discovery from a court in California because "California law [Cal. C.C.P. § 2035.010(b)] . . . expressly precludes the use of [pre-suit depositions] 'for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.'" CR112. So, in an attempted end-run around California discovery limitations, Mary Kay filed this action in Texas, hoping to use Rule 202 as a "super subpoena" and the

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<sup>3</sup> This is not surprising, as eBay is not a party to the IBC Agreements Mary Kay seeks to enforce. Moreover, courts have rejected attempts by rights-owners to hold eBay liable for the infringing sales of third-party users of eBay's website. *See, e.g., Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 103-10 (2d Cir. 2010) (eBay cannot be held liable for third-party users' sales of counterfeit Tiffany products on its website).

<sup>4</sup> Because eBay maintains its headquarters in San Jose, California, it is a resident of that State. *See Ring Power Sys. v. Int'l De Comercio y Consultoria*, 39 S.W.3d 350, 355 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("A corporation's residence is the place where its corporate affairs are conducted—its principal place of business.").



district court as a multi-jurisdictional “inspector general.” *But see Trooper*, 2013 WL 9600953, at \*5.

Mary Kay did not establish, in its Petition or at hearing, that a Texas court would have personal jurisdiction over any of the anonymous internet users. Moreover, Mary Kay’s Rule 202 Petition is vague about the specific claims it anticipates bringing against any of the 48 anonymous eBay users. CR9. In fact, the Petition is unclear whether Mary Kay actually anticipates suing all of these anonymous users and, if so, what such a suit (or suits) might look like. *Id.* The evidence Mary Kay submitted to the district court suggests that the anonymous eBay users are unrelated and independent actors, selling different products under different usernames. *See* Ex. 1A & 1B to 3RR5 (sample eBay listings of 48 anonymous users). Mary Kay does not even allege that all of these users are Beauty Consultants or, if not, how their listings might infringe Mary Kay’s intellectual property rights (and, thus, which statutes are at issue). Rather, Mary Kay contends that such considerations are not proper matters of inquiry under Rule 202. CR112; *but see Trooper*, 2013 WL 9600953, at \*3 (Rule 202 cannot be used to perpetuate testimony for use in suits alleging federal intellectual property claims).

eBay opposed Mary Kay’s Rule 202 Petition on various grounds. In addition to the issues raised in this appeal, eBay argued that Mary Kay had failed to show that it could not identify any of these 48 anonymous eBay users through its own investigations. CR25. eBay also showed that Mary Kay’s interest in obtaining the removal of listings that infringed its intellectual property rights was well-served through eBay’s Verified Rights Owners (“VeRO”) program. CR166-67. Under the VeRO program, a company may notify eBay of a listing that infringes its copyright or trademark rights. CR166. In response to a legitimate request, eBay may take various actions, ranging from the identification of an eBay user selling counterfeit items (*e.g.*, fake “Mary Kay” products) to rapid takedown of listings that violate a company’s intellectual property rights in images and text (*e.g.*, use of Mary Kay photography or proprietary product descriptions).<sup>5</sup> CR166-67. Mary Kay has been a member of VeRO for almost 15 years. CR166. During the past year alone, eBay has voluntarily removed approximately 600 listings from its site in response to Mary Kay’s requests. *Id.*

### **C. The Court’s Rule 202 Order**

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<sup>5</sup> Since 2013, eBay has not identified users whose listings are removed under the “image and text” takedown procedures. CR167. eBay does comply with valid subpoenas pursuant to Section 512(h) of the Digital Millennium Copyright Act, through which companies may obtain the identities of infringing users. *Id.*

After conducting a hearing, the Honorable Martin Lowy, Judge of the 101st District Court of Dallas County, granted Mary Kay's Rule 202 Petition. 3RR23-25; CR179-80 (Tab A). The district court's Order specifically requires eBay to travel to Texas to provide its testimony regarding the name, address, telephone number, fax number, and email address associated with each of the 48 anonymous eBay users listed in Mary Kay's Petition. CR180. The Order has been stayed pending the resolution of this appeal. CR216-17; 6/26/14 Order Granting Appellant's Emergency Stay.

### **STANDARD OF REVIEW**

A trial court's order granting a deposition under Rule 202 is reviewed for abuse of discretion. *See Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 571 (Tex. App.—Dallas, 2011, no pet.). A trial court has no discretion in determining the law or in applying the law to the facts, even when the law is unsettled. *In re Jorden*, 249 S.W.3d at 424.

### **SUMMARY OF THE ARGUMENT**

This is one of a growing number of cases in which multi-level marketing companies are attempting to use Rule 202 as an extraterritorial "super subpoena," to obtain the identities of hundreds—and sometimes thousands—of anonymous website users from across the county (and, possibly, around the world) in a single Rule 202 action. These companies claim to need this mass discovery in order to

perpetuate testimony for use in anticipated suits against any anonymous website users who are revealed to be licensed distributors in breach of their distribution contracts or who are infringing the companies' intellectual property rights. *See* Tex. R. Civ. P. 202.1(a). As the world's largest online marketplace, eBay is a primary target for this mass discovery.

Here, the district court ordered California-based eBay to submit to deposition in Texas to identify 48 anonymous, unrelated users of its website.<sup>6</sup> CR178-181. The district court's Order must be reversed and vacated and Mary Kay's Petition must be dismissed with prejudice under the Texas Supreme Court's recent decision in *Trooper*, which reaffirmed that Rule 202 cannot be used as an end-run around procedural rules and limitations that would apply in the anticipated suit. 2013 WL 9600953, at \*4-5. In *Trooper*, the Supreme Court held that the petitioner could not use Rule 202 to obtain the identity of an anonymous blogger

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<sup>6</sup> In another case now pending before the Court, the district court ordered eBay to submit to deposition in Texas to identify 169 anonymous users. *See eBay, Inc. v. Origami Owl, LLC*, No. 05-14-00788-CV. In yet another, the district court ordered it to submit to deposition in Texas to identify more than 200 users. *See eBay, Inc. v. Zurvita, Inc.*, No. 05-14-00925-CV. And in the most recent case to be appealed to this Court, eBay was ordered to submit to deposition in Texas to identify more than 15,000 anonymous users. *See eBay, Inc. v. Beachbody*, No. 05-14-01178-CV. eBay will file a motion for judicial notice of certain documents in the files of other Rule 202 appeals currently pending before this Court and before the district courts of Dallas County and Collin County. *See In re Estate of Clark*, 198 S.W.3d 273, 275 (Tex. App.—Dallas 2006, review denied) (court properly takes judicial notice of its own files and pleadings); *see also Brown v. Brown*, 145 S.W.3d 745, 750 (Tex. App.—Dallas 2004, pet. denied) (court may take judicial notice of the records in another court when it is provided copies of those records).

for an anticipated defamation suit, without a showing that Texas courts could exercise personal jurisdiction over the anonymous blogger. *Id.* at \*3-5.

Here, Mary Kay failed to make such a showing, ignoring eBay's point that "[m]any of these eBay sellers appear to be from outside Texas and therefore might not be subject to suit here." CR23. Mary Kay has made no effort to limit its discovery to Texas residents or to plead allegations that would support the exercise of personal jurisdiction over nonresident sellers by a Texas court. *But see Trooper*, 2013 9600953, at \*5 ("The burden is on the plaintiff in an action to plead allegations showing personal jurisdiction over the defendant.").

More broadly, Mary Kay made no effort to show that it could properly maintain a suit against any one of these 48 anonymous internet users under Texas rules. Mary Kay does not allege that any of these eBay sellers are related to each other in any way or that they are working in concert. CR22. Nor has Mary Kay established that these anonymous eBay sellers are Beauty Consultants who signed IBC agreements prohibiting them from selling on eBay. *Id.* Mary Kay's aggregation of these 48 apparently unrelated anonymous users into a single Rule 202 action is an attempt to expand pre-suit discovery far beyond any discovery that Mary Kay could obtain in any actual pending suit and to mask the deficiencies in its allegations as to each specific user. Particularly in light of *Trooper*, Mary

Kay's Petition should have been denied and dismissed for failure to comply with Rule 202.

Even if Mary Kay could demonstrate that its anticipated suit could be maintained properly in a Texas court, Rule 202 does not authorize a Texas court to reach outside the State's borders to force a nonparty, nonresident witness to give testimony without first obtaining the authorization of the courts in the witness's home jurisdiction. Rather, Mary Kay must proceed through a well-established, two-step process that applies pre-suit and in pending suits. The *Texas* procedures for obtaining the deposition of nonresident, nonparty witness in a pending case are explicitly set forth in Rule 201.1. But compliance with *Texas* rules is only one step in a two-step process. The first comment to Rule 201 warns:

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.*

Cmt. 1 to Tex. R. Civ. P. 201.1 (emphasis added). These procedures are based on basic principles of comity between states, including the recognition that a state court's subpoena power stops at that state's border. *See Corliss v. Smith*, 560 S.W.2d 166, 173 (Tex. Civ. App.—Tyler 1977, no writ) (“[A] Texas court has no

subpoena power to compel the attendance of the witnesses residing in [another state].”). Simply put, there is no such thing as “long-arm” subpoena power.

These rules and limitations also apply to pre-suit depositions under Rule 202. In fact, Rule 202.5 expressly states that “depositions authorized by [Rule 202] are governed by the rules applicable to depositions of nonparties in a pending suit.” Tex. R. Civ. P. 202.5. Furthermore, the Texas Supreme Court has held that Rule 202 may not be used as “an end-run around discovery limitations that would govern the anticipated suit[.]” *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011).

The trial court’s order forcing eBay to travel to Texas to submit to a deposition in connection with an anticipated suit in which it would not be a party violates these well-established rules and limitations. Whereas Mary Kay would be required to obtain a letter rogatory or similar order in the pending-suit context, and then issue a subpoena under California law to obtain its requested deposition, *see* Rule 201.1 & Cmt. 1, the district court’s Order purports to reach directly into California and attempts to require a company residing there to be deposed in Texas. This cannot be done.

A Texas court simply has no power to issue such an order, either in the pending-suit context or in the pre-suit context. Mary Kay cannot identify any statute or other source of law that gives the district court such broad,

extraterritorial discovery powers. Accordingly, the district court's Order should be reversed and vacated, and Mary Kay's Rule 202 Petition should be denied and dismissed with prejudice.

### **ARGUMENT**

As the Texas Supreme Court recognized in *Trooper*, Rule 202 “covers the subjects of two repealed rules, Rule 187, permitting discovery to perpetuate testimony, and Rule 737, providing for a bill of discovery.” 2013 WL 9600953, at \*2. Here, Mary Kay proceeds under Rule 202.1(a), the successor to Rule 187 and the long-standing practice in Texas and other states “of taking discovery to perpetuate testimony in imminent danger of being lost, such as by the death or departure of the witness, for use in a later-filed suit.” *Id.*; CR7. Consistent with this purpose, Rule 202.5 restricts pre-suit discovery in aid of an anticipated suit “the same as if the anticipated suit . . . had been filed.” *In re Wolfe*, 341 S.W.3d at 933 (quoting Tex. R. Civ. P. 202.5). Similarly, Rule 202.5 expressly incorporates the rules and limitations governing discovery from nonparties in pending suits. Tex. R. Civ. P. 202.5. Here, the district court erred by granting pre-suit discovery that Mary Kay could never obtain in any pending suit and by ignoring the proper procedures for obtaining the testimony of a nonresident, nonparty witness like eBay.



**A. *Trooper* Confirms that Rule 202 Does Not Authorize Pre-Suit Discovery that Would Be Unobtainable in the Anticipated Suit.**

As the Texas Supreme Court explained in *Trooper*, Rule 202 does not “make Texas the world’s inspector general.” 2013 WL 9600953 at 5. Moreover, it “does not guarantee access to information for every petitioner who claims to need it.” *Id.* A district court’s exercise of discretion under Rule 202 must be limited by rules and principles, to ensure that the court’s “power to compel testimony [is not] limited only by its grasp over witnesses.” *Id.* at \*4. Foremost among these limitations is the requirement that a court deciding a Rule 202 petition have the power and ability to adjudicate the anticipated suit for which the “pre-suit” discovery is being requested. *Id.* As Chief Justice Hecht noted in *Trooper*, this requirement has long been a feature of the statutory predecessors to Rule 202.2(b)(1), which governs discovery to perpetuate testimony for use in an anticipated suit. *Id.* at \*2.

In application, this means that the Rule 202 court “must have subject-matter jurisdiction over the anticipated action.” *Id.* at \*3. For example, Rule 202 cannot be used to investigate federal claims. *Id.* In addition, a Rule 202 petitioner must allege facts sufficient to make a prima facie showing that the court has personal jurisdiction over the anticipated defendant—even if the petitioner does not yet know the defendant’s identity. *Id.*

Texas procedural rules that would govern the anticipated suit also limit the discovery available under Rule 202. *In re Wolfe*, 341 S.W.3d at 933 (Rule 202 may not be used as an “end-run around discovery limitations that would govern the anticipated suit”). The Texas Supreme Court has twice vacated Rule 202 orders that allowed petitioners to obtain discovery in the pre-suit context that they would not have been able to obtain as a plaintiff in a pending suit. *Id.*; *see also In re Jorden*, 249 S.W.3d at 424.

In *Wolfe*, the petitioner sought pre-suit discovery to investigate a potential claim for removal of a county official. *Id.* at 932. Under Texas procedural rules, such an action could not be prosecuted—and thus discovery could not be taken—except through joinder of a state official, which the petitioner had failed to do in the Rule 202 proceeding. *Id.* The trial court granted the Rule 202 petition, but the Texas Supreme Court vacated the trial court’s order. *Id.* at 932-33. In doing so, the Supreme Court held that the same limitations that would apply to discovery in a pending suit also applied to Rule 202 discovery in support of that suit. *Id.* at 933 (citing Tex. R. Civ. P. 202.5).

Similarly, in *Jorden*, the petitioner sought pre-suit discovery under Rule 202 for use in an anticipated medical malpractice suit. *Id.* at 419-20. Under Texas rules, a plaintiff in a pending medical malpractice suit may not take discovery until

she serves an expert report supporting her claims against the defendant. *Id.* at 420 (citing Tex. Civ. Prac. Rem. Code § 74.351(s)). The Texas Supreme Court applied this limitation in the Rule 202 context, holding that the petitioner could not obtain a pre-suit deposition of the targeted medical providers without having served the expert report that would be required prior to the commencement of discovery in the anticipated malpractice case. *Id.* at 424.

Relying on this precedent, the First Court of Appeals recently held that a potential plaintiff in a retaliation suit under the Texas Labor Code could not obtain pre-suit discovery to investigate her claims, without first satisfying the exhaustion-of-remedies requirement that would apply in a pending retaliation suit. *See In re Bailey-Newell*, --S.W.3d--, 2014 WL 2779420, at \*3 (Tex. App.—Houston [1st Dist.] June 19, 2014, orig. proceeding) (vacating trial court order granting Rule 202 petition). And earlier this year, the Second Court of Appeals relied on *Wolfe* and *Jorden* in holding that the heightened “necessity” requirements in Rule of Evidence 507 for obtaining discovery of trade-secret information in pending cases also applied in the Rule 202 pre-suit context. *See In re PrairieSmarts LLC*, 421 S.W.3d 296, 305 (Tex. App.—Fort Worth 2014, orig. proceeding) (vacating trial court order granting Rule 202 deposition). In short, as the Thirteenth Court of Appeals observed, “Rule 202 was not intended as a means of obtaining otherwise

unobtainable discovery.” *In re Reassure Am. Life Ins. Co.*, 421 S.W.3d 165, 172 (Tex. App.—Corpus Christi 2013, orig. proceeding) (vacating trial court order granting Rule 202 deposition).

**B. The Mass Discovery Ordered by the District Court Would Be Unobtainable in Any Actual Pending Suit.**

Here, Mary Kay’s Rule 202 Petition is improperly designed to obtain discovery that it would be denied in any actual pending suit. Texas joinder rules would prohibit Mary Kay from using a single “Doe” suit to obtain the identities of 48 unrelated eBay users. Under Texas Rules of Civil Procedure 40(a), joinder is improper unless the claims arise out of the “same transaction, occurrence, or series of transactions or occurrences” and there is a common question of law or fact. *In re Levi Strauss & Co.*, 959 S.W.2d 700, 704 (Tex. App.—El Paso 1998, no writ). And if Mary Kay were to sue any single eBay user (or any subgroup of them), it could not obtain discovery relating to other, unrelated eBay users. *See* Tex. R. Civ. P. 192.3(a) (discovery must be “relevant to the subject matter of the pending action”).

As *Trooper* demonstrates, this is not just a procedural cavil. By seeking mass discovery through a single Rule 202 action, Mary Kay attempts to evade important limits on the district court’s authority to order pre-suit discovery. For example, as eBay argued in the district court, Mary Kay improperly seeks

discovery from eBay users who appear (based on their public eBay profiles) to be from outside the State, and thus possibly outside the jurisdiction of a Texas court. CR23 (“[M]any of these eBay sellers appear to be from outside Texas and therefore might not be subject to suit here.”); *see, e.g.*, CR93 (profile of eBay user from Bolivar, Ohio). Under *Trooper*, however, a Rule 202 petitioner must “plead allegations showing personal jurisdiction over the [anticipated] defendant.” 2013 WL 9600953 at \*5. Mary Kay has not even attempted to comply with this requirement. It does not limit its discovery to Texas residents, and it makes no allegations that these 48 users are subject to personal jurisdiction in Texas.<sup>7</sup> Mary Kay should not be allowed to avoid *Trooper*’s requirements by aggregating multiple, unrelated users into a single Rule 202 action, when these users could never be properly joined defendants in any single pending suit brought by Mary Kay.

In essence, application of joinder rules that would govern the anticipated action helps ensure that Rule 202’s requirements are taken seriously and that Rule 202 is not abused to the detriment of anticipated defendants and witnesses. If a potential plaintiff cannot show that a Rule 202 petition should be granted as to a

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<sup>7</sup> Moreover, *Trooper* holds that the requested pre-suit discovery must be related to a claim over which a Texas court has subject-matter jurisdiction. *Id.* at \*3. Although Mary Kay contends that listings by the 48 eBay users infringe its intellectual property rights, it makes no attempt to tie specific allegations of infringement to specific users to support subject-matter jurisdiction.

single anonymous internet user—*e.g.*, because of personal jurisdiction or subject-matter jurisdiction problems—that defect cannot be cured by the addition of 47 unrelated anonymous internet users and the vague allegation that the potential plaintiff anticipates suing “one or more” of them. *But see* CR9 (“Mary Kay seeks to take a deposition on written questions of eBay in anticipation of claims against *one or more* of these persons and entities . . . .”) (emphasis added). At a minimum, a Rule 202 petition must show that *all* of the discovery being sought would be obtainable in a pending suit. If the discovery concerns the identities of anonymous internet users, the Rule 202 petition must show that the requirements of Rule 202 have been satisfied as to each of them. Otherwise, Rule 202 is transformed into exactly what the Texas Supreme Court has said it is not: “an end within itself.” *In re Wolfe*, 341 S.W.3d at 933.

Here, given the absence of any showing by Mary Kay that there is an anticipated suit in which it would be able to obtain this mass discovery, and given the absence of any specific allegations in Mary Kay’s Petition that would satisfy Rule 202’s requirements for obtaining discovery as to each of the 48 anonymous users, the district court abused its discretion in granting Mary Kay’s Rule 202 Petition.

**C. Texas Courts Do Not Have Extraterritorial Power under Rule 202 to Compel the Testimony of a Nonresident Witness for Use in an Anticipated Suit in which the Witness Would Not Be a Party.**

Based on the above, the district court's Order should be vacated, and Mary Kay's Rule 202 Petition should be denied and dismissed. But even if Mary Kay could satisfy the other requirements of Rule 202, the district court's Order runs afoul of Rule 202.5 and basic principles of comity by ordering eBay, a nonresident, to submit to deposition in Texas in connection with a suit in which eBay would not be a party.

Rule 202.5 expressly incorporates the rules and limitations that govern nonparty depositions in pending suits:

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.

Tex. R. Civ. P. 202.5 (emphasis added). Despite this clear mandate, Mary Kay argued:

A reading of Rule 202.5 in its entirety reveals, however, that it imposes limitations only on the 'scope' of depositions . . . . *In other words, Rule 202.5 limits only the matters of inquiry under—not the procedure for obtaining—a deposition pursuant to Rule 202.* The procedure for obtaining the deposition is explicitly covered in Rule 202 itself.

CR110 (emphasis added). This argument ignores the plain language of Rule 202.5. Indeed, the first sentence of the rule addresses procedures governing “nonparty” depositions (*e.g.*, the issuance of subpoenas). It is only the second sentence of the rule that relates to the substantive “scope” of pre-suit depositions. Mary Kay’s interpretation of Rule 202.5 is inconsistent with the cases cited above, *see supra* at 14-17, all of which involved *procedural* rules and limitations that were held to apply in pre-suit depositions despite not being “explicitly covered by Rule 202 itself.” CR110.

In sum, Rule 202.5 means what it says: Pre-suit depositions are “governed by the rules applicable to depositions of nonparties in a pending suit.” Tex. R. Civ. P. 202.5. Accordingly, Mary Kay’s suggestion to the district court that it need not “comply with the nonparty deposition procedures provided in Rule 201,” *see* CR110, invited error. And the district court’s Order, which does not comply with Rule 201, is fatally undermined by that error.

The process that Mary Kay must follow (assuming it can otherwise satisfy Rule 202) is clear. Rule 201.1, which governs “Depositions in Foreign Jurisdictions for Use in Texas Proceedings,” allows a Texas court to issue a letter rogatory or similar order permitting the party in the Texas proceeding to obtain a deposition in a foreign jurisdiction. Tex. R. Civ. P. 201.1. But because the taking



of the deposition in a foreign jurisdiction must comply with the law of that jurisdiction, “[a] party must first determine what procedures are permitted by the jurisdiction where the witness is located[.]” Cmt. 1 to Tex. R. Civ. P. 201.1. *See* NATHAN L. HECHT & ROBERT H. PEMBERTON, A GUIDE TO THE 1999 TEXAS DISCOVERY RULES REVISIONS, at G-16, Nov. 11, 1998, *available at* <http://www.supreme.courts.state.tx.us/rules/tdr/disccl37.pdf>. (“Comment 1 also clarifies the relationship between this rule and the law of foreign jurisdictions where the witnesses are located.”); *see also Feltham v. Bell Helicopter Textron, Inc.*, 41 S.W.3d 384, 388 (Tex. App.—Fort Worth 2001, no pet.) (“We know, by reference to Rule 201.1 . . . that Texas courts have procedures by which depositions may be taken in foreign jurisdictions for use in Texas proceedings, assuming those procedures are permitted or recognized by the law of the state or foreign jurisdiction where the witness is located.”).<sup>8</sup>

This mandatory two-step process is based on a fundamental principle of comity: a state court’s subpoena power ends at the state border. A Texas court does not have the power to compel a nonresident witness to submit to deposition in

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<sup>8</sup> Like Texas, California permits a civil litigant in an action pending outside the State to obtain a subpoena from a court inside the State in order to secure discovery from a witness residing there. *See* Cal. C.C.P. §§ 2029.100-900 *et seq.*; *cf.* Tex. R. Civ. P. 201.2 (allowing reciprocal procedure for depositions of Texas residents for use in foreign proceedings). Mary Kay admits, however, that California law would not permit the type of *pre-suit* discovery it seeks here. CR112.

Texas. *See Corliss*, 560 S.W.2d at 173; Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 Minn. L. Rev. 968, 984 (2004) (“Most states retain strict limits on the reach of the subpoena power, holding that subpoena service cannot reach nonparties found outside the state.”). Consistent application of this rule across jurisdictions protects Texas residents from having to travel to another state to provide deposition testimony. *See, e.g., In re Prince*, No. 14-06-00895-CV, 2006 WL 3589484, at \*1 (Tex. App.—Houston [14th Dist.] Dec. 12, 2006, no pet.) (“Because Prince resides in Houston, the California court in which the divorce proceeding is pending did not have the power to issue a subpoena to compel Prince to appear for a deposition.”).

Mary Kay’s attempts to excuse itself from complying with this fundamental rule of procedure based on eBay’s contacts with Texas and its service of eBay’s registered agent for Texas both fail. In the district court, Mary Kay suggested that eBay’s “immense physical presence in Texas” rendered Rule 201.1 inapplicable. CR110. But this argument confuses two distinct concepts: subpoena power and personal jurisdiction. It is well-established that the territorial limitations on a state court’s subpoena power do not depend on whether the nonresident witness is subject to personal jurisdiction in the state. *See Colorado Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731, 733 n.3, 734 (Colo. 2012) (“Nor have we

found any authority applying our long-arm statute, or the long-arm statute of any other state for that matter, to enforce a civil subpoena against an out-of-state nonparty.”); *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So.2d 121, 127 (Miss. 2005) (finding no statutory authority that would allow court to compel nonresident, nonparty to produce documents in forum state); *Phillips Petroleum Co. v. OKC Ltd. P’Ship*, 634 So.2d 1186, 1188 (La. 1994) (“Whereas the long-arm statute extends Louisiana’s personal jurisdiction over persons or legal entities beyond Louisiana’s borders, there is no similar authority for extending the subpoena power of a Louisiana court beyond state lines to command in-state attendance of [out-of-state] nonparty witnesses.”); Rhonda Wasserman, *The Subpoena Power: Pennoyer’s Last Vestige*, 74 Minn. L. Rev. 37, 39 (1989) (“Regardless of the distance between the witness and the courthouse, the amount of contact the witness has with the state, or the need for live testimony, the states uniformly and steadfastly have refrained from exercising extraterritorial subpoena power.”). Accordingly, even if Mary Kay were able to show that Texas courts could exercise personal jurisdiction over eBay,<sup>9</sup> that showing would not extend a Texas court’s

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<sup>9</sup> Even if principles of personal jurisdiction were relevant here, Mary Kay has made no showing that eBay is subject to personal jurisdiction in Texas in connection with an anticipated suit against unknown eBay users. Specific jurisdiction would not apply, as no claims against eBay are being asserted (and therefore no conduct by eBay in Texas gives rise to claims against eBay). See *Moki Mac River Expeditions v Drugg*, 221 S.W.3d 569, 576 (Tex. 2007) (“Specific jurisdiction is established if the defendant’s alleged liability ‘aris[es] out of or [is] related to’ an

subpoena power across state lines. *See Ulloa v. CMI, Inc.*, 133 So.3d 914, 920 (Fla. 2013) (“Even if [the corporate witness] is subject to the personal jurisdiction of Florida courts under the long-arm statute, this does not mean that [it] is required to respond to a subpoena to appear and/or to produce documents in a Florida court in a criminal case in which it is not a party.”).

Mary Kay’s suggestion that it did not have to comply with Rule 201 because it served its Rule 202 Petition on eBay’s registered agent for Texas also fails for lack of any supporting authority. Under Texas law, a nonresident corporation’s appointment of a registered agent in Texas does not transform that corporation into a Texas resident. *See Moni Pulo Ltd. v. Trutec Oil & Gas, Inc.*, 130 S.W.3d 170, 175 n.7 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (“Although Texas law requires nonresident corporations to appoint a registered agent with a Texas address, they remain nonresidents.”). This is particularly true where, as here, the registered agent is not a corporate employee or custodian of the records being sought. *See Phillips*, 634 So.2d at 1188 & n.6 (rejecting argument that nonparty, “having qualified to do business in this state and having designated an agent for service of process, is the equivalent of a ‘resident’ of Louisiana, thus subjecting the

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activity conducted within the forum.”) (quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984)). And the United States Supreme Court has recently limited general jurisdiction such that, absent extreme circumstances, a corporation is not subject to general jurisdiction outside the state of its principal place of business, or “home.” *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014).

corporation to the subpoena power of a Louisiana court”); *Ulloa*, 133 So.3d at 920 (“The registered agent has a limited role, and is not a corporate employee or custodian of corporate records.”). After all, Mary Kay is not seeking to depose eBay’s registered agent; it wants to depose eBay.<sup>10</sup>

The Second Court of Appeals has applied these principles in a closely analogous context. In *Reader’s Digest Ass’n, Inc. v. Dauphinot*, 794 S.W.2d 608 (Tex. App.—Fort Worth 1990, orig. proceeding), the trial court refused to quash a subpoena served on the registered agent for Reader’s Digest, a large out-of-state publisher. *Id.* at 609. In denying the publisher’s motion to quash, the trial court used the same reasoning that Mary Kay in the district court:

The Court finds beyond a reasonable doubt that proper service of the subpoena has been had on Reader’s Digest, through its registered agent in Texas, and that Reader’s Digest has been properly served to appear in this Court and to produce the records called for by the subpoena.

*Id.* at 609-10. Reader’s Digest filed a petition for writ of mandamus seeking to vacate the trial court’s order and to quash the subpoena because the procedures for

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<sup>10</sup> For this reason, Mary Kay’s reliance on Tex. R. Civ. P. 176.3, which governs the location of a deposition by providing that a “person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served” is misplaced. eBay’s residence is more than 150 miles from Texas, and Mary Kay cannot transform eBay into a Texas resident by considering eBay’s registered agent to be the “person” subpoenaed as a witness.

obtaining discovery from a nonresident witness<sup>11</sup> had not been followed. *Id.* at 610. In granting Reader’s Digest’s petition for writ of mandamus, the Second Court of Appeals held:

[R]espondent[s] argue that article 24.28 applies only to ‘persons who truly have no contact with the State of Texas’ and state that relator ‘has more than significant contact with Texas through its business dealings because its employees and agents reside in Texas and conduct its corporate business on a daily basis.’ *This argument is not supported by citation to any authority, nor do we know of any.*

*Id.* (emphasis added).

Like the petitioner in *Reader’s Digest*, Mary Kay has failed to cite any authority for its argument that service on eBay’s registered agent and eBay’s Texas “presence” excuse its noncompliance with Rule 201.1 and the letter-rogatory process set forth in that rule. As demonstrated above, the reason no such authority exists is because Texas courts do not have the power to force a nonresident, nonparty witness like eBay to submit to deposition in this State—whether in the pre-suit context or pending suit-context.

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<sup>11</sup> See TEX. CODE CRIM. PRAC. art. 24.28 (“Uniform Act to Secure Attendance of Witnesses from Without State”).

## **CONCLUSION AND PRAYER**

For the foregoing reasons, eBay respectfully requests that the Court reverse the judgment of the district court, vacate the district court's Order, and deny and dismiss Mary Kay's Rule 202 Petition with prejudice.

DATED: September 8, 2014

Respectfully submitted,

VINSON & ELKINS L.L.P.

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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing document contains 6,693 words, excluding the portions excluded by Texas Rule of Appellate Procedure 9.4(i)(1). It was prepared in Microsoft Word using 14-point typeface for body text and 12-point typeface for footnotes. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Marc A. Fuller



**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was filed and served electronically on the following counsel of record on this 8th day of September, 2014:

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US 2721682v.1

# APPENDIX

<b>Tab</b>	<b>Document</b>	<b>CR cite</b>
A	Order Granting Granting Petitioner Mary Kay's Request for Pre-Suit Deposition of eBay Inc.	CR179-81
B.	Texas Rule of Civil Procedure 202	

# **EXHIBIT A**



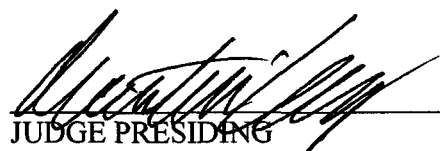
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inhootca	mkalpiniste	candylandsquare
crackers37	Discountwholesalewarehouse	myguest
simpletreasure123	amazing deals for you	consigned_treasures
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globalglam4you	rosemaryribbons	tman1271
feeling-pretty-good	texas great deals	estore2
marie_harley	locktenenterprises	suppliesindemand
mrsells6678	jenniepeanut3	soulwinner2013
pezlok58	gracefully13	999football999

IT IS FURTHER ORDERED that eBay Inc. shall provide the information described in the foregoing paragraph by deposition upon written questions within thirty (30) days from the date of this Order. Notice of the deposition shall be served upon eBay Inc.'s counsel, and the deposition shall occur in the office of eBay Inc.'s counsel, located at 2001 Ross Avenue, Suite 3700, Dallas, Texas 75201.

IT IS FURTHER ORDERED that Petitioner shall use the information obtained during the deposition only in connection with its anticipated suit, including for the purpose of serving demand letters to the eBay users listed above, filing suit against those users, and/or filing Petitions pursuant to Texas Rule of Civil Procedure 202 to obtain further information regarding those users.

Because eBay Inc. would not be a party in Petitioner's anticipated suit, this order is final and appealable.

SIGNED: May 20, 2014

  
JUDGE PRESIDING

**AGREED AS TO FORM:**

          /s/ Preston R. Mundt

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# **EXHIBIT B**

Vernon's Texas Rules Annotated [Currentness](#)

Texas Rules of Civil Procedure

Part II. Rules of Practice in District and County Courts

Section 9. Evidence and Discovery ([Refs & Annos](#))

▣ B. Discovery

➔ [Rule 202](#). Depositions Before Suit or to Investigate Claims ([Refs & Annos](#))

➔ **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.

➔ **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 yet 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.

### →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 newspaper 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 33\(f\)\(2\) 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.

#### **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 [FN1] or 200. [FN2] 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.

[FN1] Vernon's Ann.Rules Civ.Proc., rule 199.1 et seq.

[FN2] Vernon's Ann.Rules Civ.Proc., rule 200.1 et seq.

#### **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.

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