

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

VIRGIE ARTHUR,  
PLAINTIFF.

v.

HOWARD K. STERN,  
CBS STUDIOS INC. and  
KPRC HOUSTON,  
DEFENDANTS.

§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO.: 4:07-cv-03742

**DEFENDANTS’ CBS STUDIOS INC. AND KPRC HOUSTON’S RESPONSE TO  
PLAINTIFF’S AMENDED MOTION FOR LEAVE TO AMEND  
ORIGINAL PETITION (COMPLAINT) TO ADD ADDITIONAL  
PARTY DEFENDANTS AND JURISDICTIONAL FACTS**

Defendants CBS Studios Inc. and KPRC HOUSTON (“Defendants”) file this Response to Plaintiff’s Amended Motion for Leave to Amend Original Petition (Complaint) to Add Additional Party Defendants and Jurisdictional Facts, and in support thereof would show the following:

**I.**

**INTRODUCTION**

1. Plaintiff filed her original petition in state court on October 9, 2007, alleging Howard K. Stern, CBS Studios Inc. and KPRC Houston conspired to defame her by broadcasting statements made by her daughter Anna Nicole Smith in November 2006 and February 2007. This case was removed to this court on November 5, 2007, on the grounds of improper joinder of Defendant KPRC.

2. Plaintiff’s Motion for Leave to Amend Original Petition (Complaint) to Add Additional Party Defendants and Jurisdictional Facts (hereafter the “Amended Motion”), seeks to join Nelda Turner, a non-diverse Texas resident whose joinder will destroy diversity subject

matter jurisdiction, together with four other proposed defendants, on the basis of undefined allegations of conspiracy and defamation unrelated to those in her original petition. Plaintiff refers to e-mails and websites, several of which appear to be anonymous, most of which are dated in April and May 2007, and none of which is directly attributed to any of the present Defendants or the complained of broadcasts in November 2006 and February 2007, which form the basis of Plaintiff's original complaint.

3. Under 28 U.S.C. § 1447(e), “[i]f after removal, the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the case to the State court.” Thus, the Court has discretion to deny post-removal attempts to join non-diverse defendants. *See Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023, 1029 (5th Cir. 1991), *cert denied*, 502 U.S. 859 (1991). Indeed, in light of 28 U.S.C. § 1447(e), the Fifth Circuit has advised district courts to closely scrutinize an amendment which would destroy subject matter jurisdiction and that justice requires the consideration of a number of factors to determine if the amendment should be permitted. *See e.g., Doleac Ex Rel. Doleac*, 264 F.3d 470, 474 (5th Cir. 2001); *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677 (5th Cir. 1999).

4. Here, Plaintiff's goal is transparent—that is—to destroy diversity jurisdiction on the barest of conclusory allegations of conspiracy to defame her, by a Texas resident **“and/or”** other unidentified “co-conspirator[s]” but none of the present Defendants. (*See Amended Motion at pages 2-7*). Accordingly, this case calls for the Court's close scrutiny in determining whether or not to permit the amendment including consideration of Defendants' original choice of forum, among other factors. *See Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987) *cert denied*, 493 U.S. 51 (1989); *see also, Doleac v. Michaelson*, 264 F.3d 470, 474 (5th

Cir. 2001); *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677 (5th Cir. 1999).<sup>1</sup> As we show below, application of factors enunciated in *Hensgens* weighs decidedly against joinder and, therefore, Plaintiff's motion for leave to amend her complaint should be denied.

## II.

### ARGUMENT

5. Contrary to Plaintiff's position, leave to amend her complaint is by no means automatic. *Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991). This is especially true in a case removed to federal court on the basis of diversity. Where, as here, the court is confronted with an amendment to add a non-diverse party which would destroy the court's jurisdiction, it should scrutinize the proposed amendment more closely than an ordinary amendment and consider the original defendant's choice of forum, among other factors. *Hensgens v. Deere Company*, 833 F.2d 1179, 1182 (5th Cir. 1987) *cert denied*, 493 U.S. 51 (1989). In *Hensgens*, the Fifth Circuit opined:

Because the court's decision will determine the continuance of its jurisdiction, the addition of a non-diverse party must not be permitted without consideration of the original defendant's interest in the choice of forum. The district court, when faced with an amended pleading, naming a new non-diverse defendant in a removed case, should scrutinize that amendment more closely than an ordinary amendment . . . . In this situation, justice requires that the district court consider a number of factors to balance the defendant's interest in maintaining the federal forum with the competing interests of not having parallel lawsuits. For example, **the court should consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.** The

<sup>1</sup> Plaintiff cites only a single case in her Amended Motion, *Shipner v. Eastern Airlines, Inc.*, 868 F.2d 401, 406-07 (11th Cir. 1989), for the proposition that leave to amend must be granted unless a substantial reason exists to deny it. (Amended Motion at 8). *Shipner*, however, is inapposite because it did not involve joinder of a non-diverse defendant in a removed case, which is governed by 28 U.S.C. § 1447(e). Furthermore, the Court in *Shipner* held that the district court did not err in denying Shipner's motion for leave to amend and supplement the complaint. *Id.* at 406. Accordingly, *Shipner* is of no moment here.

**district court with input from the defendant should then balance the equities and decide whether amendment should be permitted.**

*Id.* at 1182 (emphasis added).

6. In the instant case, consideration of the above referenced factors militates in favor of denying Plaintiff's motion to amend:

(1) **The extent to which joinder of the defendant is sought to defeat diversity.**

7. The motion to remand has been fully briefed and awaits disposition yet Plaintiff now seeks to defeat diversity jurisdiction by another avenue by joining Nelda Turner, a Texas resident. Indeed, Plaintiff has purposefully avoided mentioning, let alone addressing, 28 U.S.C. § 1447(e), and landmark Fifth Circuit case law, such as *Hensgens*, which govern disposition of her Amended Motion. She has also failed to cite a single case where a court has permitted the joinder of a non-diverse defendant on the basis of claims that are not related to those in the original petition.

8. Even under FED. R. CIV. P. RULE 15(a), which Plaintiff does cite, leave to amend may be granted only "when justice so requires." *See* FED. R. CIV. P. 15(a). Plaintiff has failed to meet even this burden. Absent a copy of Plaintiff's proposed amended complaint, it is impossible to determine its viability or not. Consequently, on its face, the Amended Motion fails to show that "justice so requires" that she be permitted leave to amend to add new parties and claims unrelated to those in her original petition.

9. Indeed, all the above together with her motion to remand are indications of the gamesmanship at play here and that Turner's joinder is sought solely for the purpose of destroying diversity jurisdiction. This factor weighs against granting the Amended Motion.

(2) **Whether the plaintiff has been dilatory in seeking to add the party.**

10. According to the footnotes in the Amended Motion, the dates of the emails and website links referenced therein are April and May 2007, nearly five months before Plaintiff filed suit on October 9, 2007. (See Amended Motion at footnotes 1-14, and 17-18). Plaintiff has offered no explanation for her failure to include these parties when her Petition was originally filed. Rather, this need to amend to include a diversity busting non-diverse party and more “jurisdictional facts” as to Defendant Stern, comes on the heels of her motion to remand and her attempts to defeat Stern’s Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. Furthermore, it can not be gainsaid that Plaintiff’s failure to attach her proposed amended complaint is further evidence that she has been dilatory in seeking to add the non-diverse party. This factor weighs against granting the Amended Motion.

(3) **Whether the plaintiff will be significantly injured if the requested amendment is not allowed.**

11. Although it is not apparent from the Amended Motion, in the event Plaintiff may be complaining that these new parties were involved in the publications complained of in the original petition, those claims are time-barred under Texas law. Plaintiff cannot suffer prejudice from not being permitted to assert time-barred claims. *See Rosa v. Aqualine Resources, Inc.*, 2004 WL 2479900 (N.D. Tex. 2004) (unpublished).

12. In her original petition, Plaintiff complains of allegedly libelous statements made by Anna Nicole Smith that were allegedly published by Defendants in November 2006 (Original Petition at page 4), and February 14, 2007, (Original Petition at page 5). Causes of action for libel are subject to a one-year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN. § 16.002 (Vernon 2002). Plaintiff filed her original petition in October 2007 but she did not seek

to add these new parties as defendants until March 2008, well in excess of one year after the dates of the alleged publications. Under Texas law, an amended pleading adding a party does not relate back to the date of the original pleading. *Kirkpatrick v. Harris*, 716 S.W.2d 124, 125 (Tex. App.–Dallas 1986 no writ). Thus, the claims are time-barred as a matter of law.

13. Moreover, because the parties Plaintiff seeks to join are apparently accused of being co-conspirators, and thus joint tortfeasors, they are not indispensable parties and, therefore, failure to join them in this action does not prejudice Plaintiff. See FED. R. CIV. P. RULE 19; *Nottingham v. General American Communications Corp.*, 811 F.2d 873, 880 (5th Cir. 1987); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970) (joint tortfeasors or co-conspirators are not indispensable parties under Rule 19). It is not an abuse of discretion for the court to deny a motion to amend to join a non-indispensable party. *Hawthorne Land Co. v. Occidental Chemical Corp.*, 431 F.3d 221, 226 (5th Cir. 2006) (holding district court did not abuse its discretion in denying second motion to amend to join a non-diverse party under Rule 19); *Hensgens*, 833 F.2d 1179, 1182. In *Hawthorne*, the Fifth Circuit held the claim against the non-diverse party was so tangential to the main issue in the case as to be insufficient to make the party necessary under Rule 19. *Id.* at 227. Similarly here, the claims against the proposed defendants are so tangential to the alleged defamatory broadcasts in November 2006 and February 2007 complained of in the original complaint, as to be insufficient to make them necessary parties.

14. Moreover, Plaintiff has not stated a cause of action against the new parties and, therefore, she cannot be prejudiced if the amendment is not allowed. Accordingly, this factor weighs against the granting of the Amended Motion.

(4) **Other factors bearing on the equities, such as the futility of the amendment.**

15. In considering whether or not to permit joinder of a non-diverse party, the court may also consider whether there is a colorable claim against the party the plaintiff is seeking to join. *See Cobb v. Delta Exports, Incorporated*, 186 F.3d 675 (5th Cir. 1999). A court should never grant a request to join a party against whom recovery is not really possible and whose joinder would destroy subject matter jurisdiction. *Cobb*, 186 F.3d at 677. As stated above, the Amended Motion does not state a cause of action against any of the proposed defendants or the present Defendants. The Amended Motion also fails to comply with the “particularity” requirement of FED. R. CIV. P. RULE 7(b). *See* FED. R. CIV. P. RULE 7(b) (“An application to the court shall be by motion which . . . shall state with particularity the grounds therefore . . .”).

16. Plaintiff’s failure to attach the proposed complaint is also a factor to be considered in determining whether or not the court should grant the motion. *Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991) (finding no abuse of discretion where plaintiff’s failure to attach the proposed pleading was a factor considered by the court in failing to grant motion to amend). In this case, without the proposed amended complaint, it is impossible for the court to closely scrutinize the amendment to determine its viability. *See e.g., Lambertsen v. Utah Dept. of Corrections*, 79 F.3d 1024, 1029 (10th Cir. 1996). Simply put, Plaintiff has not shown why amendment is necessary and should be permitted.

17. Finally, the possibility that Plaintiff may have to file additional suits in state or federal court, in the event that her motion for leave is denied, is not enough to overcome the Defendants’ interest in retaining this federal forum in this case. *See e.g., See Rosa v. Aqualine Resources, Inc.*, 2004 WL 2479900 (N.D. Tex.) (unpublished). The court must balance that danger against the diverse defendants’ interest in retaining the forum. *Id.* Under *Hensgens* and

its progeny, the aforementioned factors and equities weigh heavily in favor of denying leave to amend.

18. Wherefore, Defendants CBS Studios Inc. and KPRC Houston respectfully request the Court deny the Plaintiff's Amended Motion for Leave to Amend Original Petition (Complaint) to Add Additional Party Defendants and Jurisdictional Facts and for such other and further relief, at law or in equity, to which they may justly be entitled.

Respectfully submitted,

**JACKSON WALKER L.L.P.**

By: /s/ Nancy W. Hamilton

Charles L. Babcock  
State Bar No. 01479500  
Nancy W. Hamilton  
State Bar No. 11587925  
1401 McKinney, Suite 1900  
Houston, Texas 77010  
(713) 752-4200  
(713) 752-4221 – Fax  
Email: nhamilton@jw.com

**ATTORNEYS FOR DEFENDANTS  
CBS STUDIOS INC. and  
KPRC HOUSTON**

**CERTIFICATE OF SERVICE**

This is to certify that on this 4th day of April, 2008, a true and correct copy of the foregoing document was served by electronic notification to parties of record through the e-filing website of the Southern District, and by certified mail, return receipt requested upon:

Neil McCabe  
M. Michael Meyer  
The O'Quinn Law Firm  
440 Louisiana, Suite 2300  
Houston, Texas 77002  
Email: [neilm@oqlaw.com](mailto:neilm@oqlaw.com)  
Email: [mm0102@sbcglobal.net](mailto:mm0102@sbcglobal.net)

*Via Electronic Filing*

L. Linn Wood  
John C. Patton  
Luke Lantta  
Powell Goldstein LLP  
One Atlantic Center  
Fourteenth Floor  
1201 West Peachtree Street, NW  
Atlanta, GA 30309-3488  
Email: [llwood@pogolaw.com](mailto:llwood@pogolaw.com)  
Email: [jpatton@pogolaw.com](mailto:jpatton@pogolaw.com)

*Via Electronic Filing*

M. Krista Barth  
Eric M. Sauerberg, P.A.  
200 Village Square Crossing, Suite 102  
Palm Beach, FL 33410

*Via CM/RRR*

*/s/ Nancy W. Hamilton*

Nancy W. Hamilton