

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

VIRGIE ARTHUR
PLAINTIFF

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v.

Civil Action No. 4:07-CV-03742

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

**REPLY TO 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 AND
SUPPLEMENT TO SAID MOTION**

1. Plaintiff Virgie Arthur files this Reply to Defendants CBS Studios Inc. and KPRC Houston's ("Media Defendants") Response to Plaintiff's Amended Motion for Leave to Amend Original Petition (Complaint) to Add Additional Party Defendants ("Amended Motion for Leave") and Jurisdictional Facts and Supplement to Said Motion, and in support thereof would show the following:

2. The Media Defendants argue that Plaintiff seeks to add parties "on the basis of undefined allegations of conspiracy and defamation unrelated to those in her original petition." To the contrary, the Motion alleges that the original conspiracy among the media defendants and Howard K. Stern expanded to include other conspirators whom Plaintiff seeks to join. Therefore, the new allegations are not unrelated to those in the original petition. Furthermore, the new allegations are not "undefined" and are quite specific. Nelda and Kenneth Turner, taking directions from Howard K. Stern through his sister, Bonnie Stern, conspired to defame Plaintiff Virgie Arthur, in cooperation with Art

Harris, a special correspondent for media defendant CBS Studios, and others. The newer members of the conspiracy searched public records and put together a “family tree” of Virgie Arthur’s family, which purported to show that she married her step-brother and had a baby by him. That allegation was false. It was sent by one or more of the conspirators to TMZ/Harvey Levin with the purpose of holding Ms. Arthur up to public ridicule. Harvey Levin, who is in regular communication with Howard K. Stern and/or his representatives, and who often appears on national television to support Howard K. Stern, published the article on the TMZ.com website with the purpose of holding Ms. Arthur up to public ridicule. The article was successful. Thousands of individuals responded to a poll done by TMZ, registering negative attitudes towards Ms. Arthur on the basis of the story. Thousands of comments were posted by members of the public on the TMZ website, with many of those comments accusing Ms. Arthur of incest. Art Harris, who works for media defendant CBS, Studios, and who often appears on the CBS program *Entertainment Tonight*, as a special correspondent, and in cooperation and conspiracy with current Defendants and the proposed new defendants, republished on his own website the allegation of childhood abuse made by Vickie Lynn Marshall on *Entertainment Tonight*. Harris has taken every opportunity to spin the news in support of Howard K. Stern and to denigrate Ms. Arthur and those around her.¹

3. The Media Defendants argue that the e-mails and web postings attached to the Amended Motion for Leave “are not directly attributable to any of the present Defendants,” but some of the exhibits appear to show that Bonnie Stern was relaying instructions from a current defendant, her brother, Howard K. Stern, to the newer

¹ A recent spin by Harris appears at <http://www.artharris.com/2008/03/31/daniel-inquest-verdict-accidental-overdose/#more-896>.

members of the conspiracy and relaying information back to Howard K. Stern.² For a person to be a member of a conspiracy, he or she need not have direct contact with the kingpin or even know his identity. That Howard K. Stern is the kingpin cannot be doubted. There are numerous examples of exchanges between Bonnie Stern and members of the conspiracy, showing that Howard K. Stern is at the center.³

4. The Media Defendants argue that the goal of the Amended Motion for Leave 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.” The Media Defendants misunderstand the Amended Motion for Leave. The allegations, which hardly are conclusory in light of the e-mails detailed in the Amended Motion for Leave and in this Reply, are that the new defendants joined an already-existing conspiracy involving Howard K. Stern and the Media Defendants. Furthermore, Plaintiff has no intention of “destroying diversity,” as the Media Defendants put it, because Plaintiff believes that diversity does not exist in the first place, unless this Court makes new law for the State of Texas by adopting the Media Defendants’ “conduit theory,” which would require the unwarranted finding that the *Entertainment Tonight* program is something other than the rumor-mongering television tabloid that it shows itself to be every day.⁴

² As for the Media Defendants’ suggestion that several of the e-mails “appear to be anonymous,” here is a key to the e-mails previously filed and to the ones referenced herein: “Rose,” “cajunrose,” “cajunR,” and “R” refer to Nelda Turner; “Havana” and “Sweet Havana” are Chrystal Baker, “KB” is Krista Barth, “QV” is Yvonne Waddle, “VM” is the video man, who is a person named “Duane.” The Media Defendants have not challenged the authenticity of the e-mails. Neither has Defendant Howard K. Stern.

³ See e-mails attached as Exhibit A.

⁴ **JUST IN FROM NY:** Check out our video of what appears to be JAY-Z arriving to his rumored wedding! Stay tuned for more details! <http://www.etonline.com/news/2008/04/60294/index.html> (April 4, 2008).

5. The Media Defendants rely on *Hensgens v. Deere & Company*, 833 F.2d 1179 (5th Cir. 1987). *Hensgens* is inapposite, however, because it was a case, unlike the present one, in which removal for diversity jurisdiction originally was proper and undisputed. That is not so in the present case, where there is merely the assertion of diversity on a novel legal theory that would create new law for the State of Texas, and a pending motion to remand.

6. In their extensive quotation from *Hensgens*, the Media Defendants omit the decision's guiding rationale:

We are confronted with competing interests. On one hand, there is the danger of parallel federal/state proceedings with the inherent dangers of inconsistent results and the waste of judicial resources. On the other side, the diverse defendant has an interest in retaining the federal forum.

Id. at 1182. The Media Defendants also completely ignore the competing interests described above in *Hensgens*. In the present case there is not only "the danger of parallel federal/state proceedings" but the certainty, if this Court grants neither the Motion to Remand nor the Amended Motion for Leave. If neither motion is granted, then Plaintiff's present intention is to file suit against the new defendants in Texas state court. Furthermore, current Defendants do not have a valid "interest in retaining the federal forum," because no diversity jurisdiction exists as things now stand.

7. Although Plaintiff does not believe that *Hensgens* is applicable, she has no problem with the factors set out in that decision. The first *Hensgens* factor is the extent to which joinder of the new defendants is sought to defeat diversity. This Court cannot decide whether joinder of the new defendants is sought to defeat diversity without first deciding that there is diversity. The Court cannot decide that there is diversity without making new law for Texas by adopting the "conduit theory" that the Media Defendants

espouse as the basis of their argument that KPRC Houston has been joined inappropriately. There is no diversity, because KPRC Houston is an admittedly non-diverse party, and the current Defendants have not carried their heavy burden of showing inappropriate joinder of KPRC Houston.

8. The second *Hensgens* factor is whether the Plaintiff has been dilatory in seeking to add the parties. In paragraph 10 of the Response, the Media Defendants argue that Plaintiff has been dilatory in seeking to amend, pointing out that the dates of the e-mails and website links referenced in the Amended Motion for Leave are April and May 2007, nearly five months before Plaintiff filed suit. In fact, when the original petition was filed, Plaintiff, not being into the blogosphere, was not aware of the perfidy of the new blogging defendants or of their connection to the current Defendants, nor should she have been aware. Additionally, Plaintiff did not have access to the e-mails in question until a former member of the conspiracy, "Havana," provided them in January 2008, after Defendant Howard K. Stern testified in his deposition on January 4, 2008 and denied that Havana had blogged for him, even though she had done considerable work for him under the direction of Bonnie Stern.⁵ Below is the portion of Mr. Stern's testimony that bothered Havana:

19 Q. How about a person who uses the name

20 "Sweet Havana"? Have you ever had someone by

21 that name blogging on your behalf?

⁵ See "thank you" note from Bonnie Stern to Havana, Nelda ("Rose") Turner, and her husband, attached as Exhibit B and published at <http://annanicoleandhowardkstern.com/wp-content/uploads/2008/01/bonnie-ty-rosespeaks-post2.gif>.

22 A. No.⁶

9. It is clear from an exchange of e-mails that Havana believed that Howard K. Stern had testified falsely about her not blogging for him. Bonnie Stern tried to mollify Havana, while admitting that Havana was a blogger for her brother. Art Harris and Nelda Turner pretended not to see the falsehood, with Harris hoping Havana would not “jump ship.”⁷ Around the same time, in January 2008, “QV,” another blogger who had supported Mr. Stern, went public to explain her “not so quiet departure” from the group.⁸ Believing that Mr. Stern had testified falsely in his deposition, she published relevant e-mails and chat room materials.⁹ On March 14, 2008, Plaintiff filed the Motion for Leave in a timely manner, only four days after Havana finally agreed to verify her e-mails.¹⁰

10. The third *Hensgens* factor is whether the Plaintiff will be significantly injured if the requested amendment is not allowed. If Plaintiff is not permitted to join the new defendants (and if this Court declines to grant the pending Motion to Remand), Plaintiff will suffer significant injury, in that she will need to litigate in two parallel proceedings in federal and state court.

11. Fourth, other factors bearing on the equities. Regarding this factor, the Media Defendants argue that joinder is not proper, because recovery is not possible against the new defendants. Another specious argument. See paragraph 2, above. The Media

⁶ Deposition of Howard K. Stern, Jan. 4, 2008, page 153. Counsel for Mr. Stern labored mightily to keep him from being presented with questions about the bloggers, on the ground that it did not relate to Texas jurisdiction. See Exhibit C, excerpt from Deposition of Howard K. Stern, Jan. 4, 2008, 148:20 – 157:1. That position seems to be at odds with the apparent fact that counsel for Mr. Stern had been in contact with the bloggers, including the Texas blogger, “Rose” Turner, as shown by the attached exhibits.

⁷ See e-mails to and from Havana, Bonnie Stern, Nelda (“cajunose”) Turner, and Art Harris, attached as Exhibit D.

⁸ See Articles by QV attached as Exhibit E. <http://annanicoleandhowardkstern.com/category/qv/>. (On the website, the articles should be read starting with the bottom one, dated Jan. 7, 2008.)

⁹ See e-mails and chat room transcript attached as Exhibit F. <http://annanicoleandhowardkstern.com/the-emails/>; <http://annanicoleandhowardkstern.com/the-full-chat/>.

¹⁰ See affidavit of Chrystal Baker, aka “Sweet Havana,” attached as Exhibit G.

Defendants may not be able to see a colorable cause of action, but Plaintiff is confident that this Court knows what conspiracy and defamation look like.

12. As for the balancing of equities of which *Hensgens* speaks, the Media Defendants argue that the court must balance the danger that the Plaintiff may have to file additional suits in state court against “the diverse defendants’ interest in retaining the forum.” Of course, by their own admission, only one of the Media Defendants, CBS Studios, is “diverse.” KPRC Houston is not. The Media Defendants’ Response erroneously assumes that diversity already exists, an issue on which this Court has not ruled. Because diversity does not exist unless and until this Court says so, there is nothing on the Defendants’ side of the balance of equities.

13. The Media Defendants also argue that Plaintiff “has purposefully avoided mentioning, let alone addressing, 28 U.S.C. § 1447(e),” then they fail to address it. Maybe that is because the statute merely states the obvious:

(e) If 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 action to the State court.

Id. The statute neither helps nor hurts the argument for either side. As Plaintiff has explained above, joinder in the present case would not, in the words of the statute, “destroy subject matter jurisdiction,” *i.e.* diversity jurisdiction, because such jurisdiction does not exist in the first place, there already being an admittedly non-diverse Defendant, KPRC Houston.

14. The Media Defendants argue that the new defendants cannot be liable for allegedly libelous statements made by the current Defendants in November 2006, because of the one-year limitations period on defamation. (Response para. 12.) The Media

overlook the rule of law that joining in a conspiracy, adoption of its goals, and action in furtherance of it constitute “a ratification of those acts already committed with the purpose of accomplishing the same goal. ” *Dixon v. Mack* 507 F.Supp. 345, 350 (S.D.N.Y.1980). “[I]t is black letter conspiracy law that one who joins a conspiracy in progress ratifies all that has come before.” *Id.* at 350-51. The new defendants, aware of the defamatory statements by the current Defendants, ratified those statements, repeatedly made reference to them, and sought, through rumor and innuendo, to support those statements. Contrary to the argument in paragraph 13 of the Response, the proposed new defendants are not “tangential to the alleged defamatory broadcasts in November 2006 and February 2007 complained of in the original complaint,” because, as shown above, the new defendants ratified those acts by joining the conspiracy, which already was in progress. The new defendants, having ratified the past tortious actions of the current Defendants, are liable for those actions. The current Defendants are liable for the tortious actions of the newer members of the conspiracy.

15. In paragraph 16 of the Response, the Media Defendants fault Plaintiff for not attaching the proposed amended complaint to the Amended Motion for Leave, but no applicable rule requires Plaintiff to do so. Nevertheless, Plaintiff has attached the Amended Complaint as Exhibit H.

16. In paragraph 16 of the Response, the Media Defendants argue that “Plaintiff has not shown why amendment is necessary,” but Plaintiff has no such burden. The rule requires that “The court should freely give leave when justice so requires.” Fed. R. Civ. P. Rule 15(B)(2). In the present case, it would be unjust to require Plaintiff to litigate in parallel proceedings in state and federal court.

PRAYER

Plaintiff prays that the Court grant the Amended Motion for Leave to Amend and that the attached Amended Complaint be deemed filed.

Respectfully submitted,

THE O'QUINN LAW FIRM

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CERTIFICATE OF SERVICE

This is to certify that on the 10th day of April 2008, a true and correct copy of the foregoing Reply to 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 and Supplement to Said Motion served upon the following counsel electronically via the CM/ECF system:

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Civil Action No. 4:07-CV-03742
(Jury)

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that the documents attached hereto as Exhibits A - H are true and correct copies of the following:

Exhibits A and D – Excerpts from e-mails sent or received by Chrystal Baker and authenticated by her affidavit which appears as Exhibit G.

Exhibits B, E and F – Web postings obtained from website operated by Yvonne Waddle.

Exhibit C – Excerpts from deposition of Howard K. Stern, January 4, 2008.

Exhibit G – Affidavit of Chrystal Baker

Exhibit H – Plaintiff Virgie Arthur’s First Amended Complaint

/s/ Neil C. McCabe
NEIL McCABE