

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VIRGIE ARTHUR

v.

NELDA (ROSE) TURNER and
KENNETH TURNER

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Civil Action No. 6:08MC6

**RESPONSE TO MOTION TO
COMPEL COMPLIANCE WITH SUBPOENA**

Respondents Rose Turner and Kenneth Turner file this response (their third) to Plaintiff Virgie Arthur's Motion to Compel, and request that Plaintiff's motion be denied.

**I.
GROUNDS**

- 1. Respondents have twice filed written objections to the subpoenas, which were heard on April 18, 2008 in the Southern District, and are currently under consideration by Judge Lee Rosenthal (presiding judge in the main case);**
- 2. Judge Rosenthal has jurisdiction under FED. R. CIV. P. 26 to decide Plaintiff's Motion to Compel and the Turners' Motion to Quash and/or for Protection, and she is best situated to rule on the scope and extent of relevant discovery; and**
- 3. Plaintiff has filed a Texas state court action directly against Rose Turner on the same claims, and the discovery sought must be obtained in that action.**

**II.
INTRODUCTORY STATEMENT**

1. This case concerns a *tsunami* of libel and slander litigation filed by Virgie Arthur, the mother of Anna Nicole Smith, against at least ten defendants, now extending into three different Texas courts. Ms. Arthur is manifestly unhappy with public discussion about her tumultuous relationship with her famous daughter.

2. Respondent Rose Turner is housebound and terminally ill with a bone marrow autoimmune disorder. As a distraction from her troubles, and for therapy, she posts a celebrity-oriented website: www.rosespeaks.com and a weblog: www.rosespeaks.com/rose-blog. The internet sites contain discussion of celebrity court cases, including some of the legal proceedings following the death of Anna Nicole Smith. Internet readers other than the Turners can post their comments to the weblog. Turner believes Ms. Arthur's lawsuits and subpoenas are retaliation for commentary and criticism regarding the Anna Nicole Smith proceedings, and to intimidate her critics into silence.

3. The Turners have twice filed for protection from the oppressively overbroad subpoenas. See Exhibits C and E. Turner's motion was heard April 18 in the Southern District before Judge Lee Rosenthal. See Exhibit F, Docket Entry 73. Arthur has now sued the Turners in Texas state court. See Exhibit G. The Turners should not be forced to appear multiple times in three different Texas courts to obtain relief. The Turners seek protection from Ms. Arthur's repetitive and abusive torrent of discovery, and ask that this Motion to Compel be denied, so that the other courts already chosen by Ms. Arthur can properly deal with her subpoenas.

III. BACKGROUND FACTS

4. On October 9, 2007, Plaintiff filed a Texas state court defamation lawsuit against Howard K. Stern, CBS Studios, Inc., and KPRC Houston. On November 5, 2007, the case was removed to federal court and is now pending as Civil Action No. 4:07-CV-03742, *Virgie Arthur v. Howard K. Stern, CBS Studios, Inc. and KPRC Houston*, in the Southern District of Texas, the Honorable Lee Rosenthal presiding. See Exhibit A (State court petition and Notice of Removal).

5. On January 29, 2008, Plaintiff issued two record subpoenas in the Southern District defamation action to non-parties Rose and Kenneth Turner. See Exhibit B. The Turners

timely moved for protection and to quash the subpoenas. See Exhibit C (motion without attachments). Prior to the Court's consideration of the Turners' motion, however, Plaintiff voluntarily withdrew the subpoenas. Although the Turners objected to the subpoenas on several grounds, they never claimed (nor did Ms. Arthur) that the Southern District was an improper venue or that it lacked jurisdiction.

6. On March 14, 2008, Plaintiff reissued identical subpoenas to the Turners. See Exhibit D. This time, however, Plaintiff inexplicably issued the subpoenas out of the Eastern District. On March 27, 2008, the Turners again timely filed their Motion to Quash and/or for Protection in the Southern District. See Exhibit E (second motion without attachments). On April 11, 2008, Plaintiff filed her response in the Southern District. On April 18, 2008, Judge Rosenthal held an hour-and-a half hearing, with attorneys for both parties present, after which she took the matter under consideration, and has not yet ruled. See, Docket Entry 73, Civil Docket Sheet in Case No. 4:07-CV-03742, attached as Exhibit F.

7. Disregarding the April 18 hearing before Judge Rosenthal, Plaintiff filed the instant Motion to Compel in this Court on April 22, 2008, erroneously implying that the Turners have never responded to the subpoenas. See Plaintiff's Motion, ¶ 7. Remarkably, Plaintiff failed to advise this Court that (a) the Turners have twice timely moved for protection and to quash the subpoenas, and (b) the same issues related to the subpoenas have already been argued by the parties and are currently pending before Judge Rosenthal.

8. Moreover, on April 21, 2008—three days after Judge Rosenthal's hearing and a day before Plaintiff filed her motion in this Court—Plaintiff filed a second defamation lawsuit in Texas state court against eight defendants, including *Rose Turner*, wherein Plaintiff asserts essentially the same causes of action, alleges many of the same facts, and includes six of the

same parties as in the action pending in the Southern District. *See Exhibit F*. Because the issues raised in Plaintiff's motion to compel have already been argued and are under consideration by Judge Rosenthal, and because Plaintiff has now filed another case directly against Rose Turner on essentially the same claims, Plaintiff's Motion to Compel should be denied.

**IV.
ARGUMENT AND AUTHORITY**

9. On April 18, 2008, the issues presented in Plaintiff's Motion to Compel and the Turners' Motion to Quash and/or for Protection were properly heard by Judge Rosenthal, with the full participation of Plaintiff's counsel. *Exhibit F*, Docket Entry 73. The Turners were entitled to present their Motion to Quash and/or for Protection to Judge Rosenthal pursuant to FED. R. CIV. P. 26(c)(1), noting that "any person from whom discovery is sought may move for a protective order in the Court *where the action is pending*." Judge Rosenthal is in the best position to determine the issues presented in the Turners' Motion for Protection, as she has presided over the main action since November 2007, and has an extensive knowledge of the case and the parties' claims, including how the documents requested by Plaintiff relate (or do not relate) to Plaintiff's complaint. Plaintiff's attempt to relitigate or avoid those issues in this Court is a waste of judicial resources, a waste of party resources, presents a risk of conflicting rulings, and should be denied.

10. For example, at the April 18 hearing, counsel for the Turners argued in the alternative that Judge Rosenthal could at least narrow the scope of the subpoena under Rule 26, to limit production as to only those persons directly related to the Plaintiff's complaint. Counsel also offered to submit Turner's records *in camera*, so Judge Rosenthal could determine their relevance, and counsel for Ms. Arthur agreed, on Judge Rosenthal's request, to pay for an independent forensic examination of the Turners' computer hard drive if Judge Rosenthal

determined this was needed.¹ Why bring a third motion to compel now, in a different forum, to repeat or undo what is already argued and pending before Judge Rosenthal?

11. Moreover, the purpose of ancillary court jurisdiction under Federal Rule of Civil Procedure 45 is plainly for the convenience of the non-party witness. Plaintiff originally issued the subpoenas out of the Southern District and, although the Turners objected to the subpoenas on several grounds, they did not object to the Southern District as an improper venue or that it lacked jurisdiction. Plaintiff's attempt to use this Court's Rule 45 ancillary jurisdiction to obtain an end run around Judge Rosenthal's ruling, or a second bite at the apple, should be denied.²

12. Lastly, Plaintiff has filed a Texas state court defamation lawsuit directly against Rose Turner based on the same facts alleged in the Southern District case. *See Exhibit G.* Plaintiff cannot disregard the state court's procedural rules and protections by initiating this ancillary proceeding—clearly related to the Southern District case—to obtain document production from Rose Turner. Both Federal and Texas law prohibit using a Court's subpoena power to avoid the procedural requirements of obtaining document production directly from a party in the litigation. *See* TEX. R. CIV. P. 176 cmt. 2 (prohibiting the use of a subpoena “to circumvent the discovery rules,” and specifically prohibiting the use of a subpoena to avoid the procedural requirements of obtaining documents from a party). Because Rose Turner is now a party defendant in the Texas state court lawsuit, Plaintiff is required to obtain discovery from her in that matter and in that forum.

¹ On information and belief, the April 18 hearing was recorded. The undersigned counsel offers to obtain a transcript and submit it to this Court should the Court so desire.

² Plaintiff's disingenuous claim—that the Turners have failed to respond to the subpoena and “offered no excuse for their failure to produce,” *see* Plaintiff's Motion, ¶ 7—is utterly false. The Turners timely filed and served their Motion to Quash and/or for Protection in response to both instances that Plaintiff issued her subpoenas. *See Exhibits C and E.* Plaintiff was therefore provided with unequivocal and timely notice of the Turners' objections, and the objections are in full compliance of the rules. FED. R. CIV. P. 45(c)(2)(B) (noting that a respondent has 14 days to *serve* objections on the requesting party).

WHEREFORE, PREMISES CONSIDERED, Rose and Kenneth Turner pray that Plaintiff's Motion to Compel be denied, the subpoenas at issue be quashed, and for other relief appropriate in the premises.

DATED and SERVED this 2^d day of May, 2008.

Respectfully submitted,

OGDEN, GIBSON, BROOCKS & LONGORIA, L.L.P.

By:




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ATTORNEYS FOR ROSE AND KENNETH TURNER

CERTIFICATE OF SERVICE

I hereby certify that on this 2^d day of May, 2008 a true and correct copy of the foregoing Motion to Quash and/or for Protection was served by electronic notification to parties of record through the efilng website of the Eastern District, and by certified mail, return receipt requested as follows:

Mr. Neil C. McCabe
Mr. M. Michael Meyer
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