

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

VIRGIE ARTHUR,

Plaintiff,

v.

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

Defendants.

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CIVIL ACTION NO: 4:07-cv-03742

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**PLAINTIFF'S REPLY TO  
DEFENDANT HOWARD K. STERN'S SUPPLEMENTAL REPLY  
IN SUPPORT OF HIS RULE 12(b)(2) MOTION TO DISMISS  
FOR LACK OF PERSONAL JURISDICTION**

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Respectfully submitted,

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FOR LACK OF PERSONAL JURISDICTION**

Plaintiff Virgie Arthur (“Arthur”) files this her Reply To Defendant Howard K. Stern’s Supplemental Reply In Support Of His Rule 12(B)(2) Motion To Dismiss For Lack Of Personal Jurisdiction and shows as follows:

**Nature And Stage Of The Proceeding**

This is a defamation proceeding brought by Arthur against several defendants, including Stern. Originally filed in state court, it was removed to federal court. The Court has permitted some jurisdictional discovery to be conducted and has not yet entered a scheduling order or set other deadlines.

**Statement Of The Issues To Be Ruled On By The Court And Standard Of Review**

Although numerous issues are before the Court, the issue that is the basis of this reply is whether this Court may properly exercise personal jurisdiction over defendant Howard Stern. This has been the subject of extensive briefing and Arthur incorporates all this briefing and the evidence filed with those briefs herein. Although Arthur bears the burden of establishing this Court’s jurisdiction over Stern, Arthur only needs to make a *prima facie* case of jurisdiction,

unless this Court conducts an evidentiary hearing. *Johnston v. Multidata Sys. Int'l Corp.*, \_\_\_ F.3d \_\_\_, 2008 WL 921479, \* 5 (5<sup>th</sup> Cir. Apr. 7, 2008), *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir.1994). Proof by a preponderance of the evidence is not required. *Johnston v. Multidata Sys. Int'l Corp.*, 2008 WL 921479 at \* 5; *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir.1990) (citing *D.J. Invs., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545-46 (5th Cir.1985)). For purposes of determining the propriety of dismissing for lack of personal jurisdiction, uncontroverted allegations in the Arthur's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in Arthur's favor. *Johnston v. Multidata Sys. Int'l Corp.*, 2008 WL 921479 at \*5, *Bullion v. Gillespie*, 895 F.2d at 217 (quoting *D.J. Invs., Inc.*, 754 F.2d at 546).<sup>1</sup> In determining whether Arthur has made a sufficient showing for purposes of special jurisdiction this Court should not separate each piece of jurisdictional evidence to determine whether each piece, standing alone, is sufficient for jurisdiction to attach. Rather, this Court should examine the totality of Stern's activities to determine if they relate to conduct within the forum. *Capital Pacific, L.L.C. v. Humble Garden, L.L.C.*, 2005 Tex. App. LEXIS 9158, \*12 (Tex. App.-Houston [1<sup>st</sup> Dist.] Nov. 3, 2005, no pet.).

### Summary Of Argument

The record before this Court is replete with authenticated and admissible evidence that presents a *prima facie* case that the exercise by this Court of personal jurisdiction over Howard Stern comports with due process and does not offend traditional notions of fair play. Although some electronic evidence has been presented to the Court that has not yet been properly

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<sup>1</sup> In his Supplemental Response Stern asserts that some of the emails are contradictory with some showing that Stern had knowledge and control over Turner's activities and some showing that he had no knowledge or control over Turner's activities. Supplemental Response at 7 ("Indeed, some of the unauthenticated, inadmissible emails submitted by Arthur actually evidence that Stern had no knowledge or control over Turner's 'research.'"). This is, of course, irrelevant at this stage of the proceedings, because any conflicts between what the emails evidence must be resolved in Arthur's favor, not Stern's.

authenticated, Stern makes no challenge to the substantive accuracy of this evidence. At most, this is an issue evidencing the need to carry the jurisdictional issue with the case-in-chief so that additional discovery, relevant to all the issues in the case, may be conducted and the evidence properly authenticated. Also, there is no reason why this Court should not consider new evidence which has been placed before it by Arthur.

Contrary to Stern's assertions Arthur has met her burden establishing a *prima facie* case of personal jurisdiction over Stern. There is significant evidence in the record that Stern directed co-conspirators in the state of Texas to do his bidding and assist him in defaming Virgie Arthur.

### **Introduction**

On May 5, 2008, defendant Howard K. Stern ("Stern") filed his *Supplemental Reply In Support Of His Rule 12(B)(2) Motion To Dismiss For Lack Of Personal Jurisdiction* (the "Supplemental Response."). The first portion of the Supplemental Response consists of four trivial objections by Stern to procedural matters, which Arthur will address briefly, before turning her attention to the more important substantive inaccuracy contained in the Supplemental Response.

#### **I. PROCEDURAL ARGUMENTS**

##### **A. Although Certain Evidence May Not Have Been Properly Authenticated, This Simply Means That This Court Should Carry The Decision Of Stern's Personal Jurisdiction With The Case-In-Chief; Additionally, There is Sufficient Evidence In The Waddle And Baker Statements To Satisfy Arthur's Burden.**

First, Stern complains that certain evidence placed before the Court has not been properly authenticated. Supplemental Response at 1 ("repeated attempts to muddy the record with unauthenticated, inadmissible surplusage, . . ."). This is not because they cannot be properly

authenticated, and Stern never asserts that these communications are not authentic.<sup>2</sup> The sole reason that these electronic communications may not have been fully authenticated is because Arthur has not had an opportunity to conduct full discovery in this case. This is not a reason for granting Stern's motion to dismiss this case, but only a reason why, at most, Stern's motion to dismiss should be carried with the case in chief, while this discovery can be fully completed. Additionally, Arthur has filed the sworn statements of Yvonne Waddle and Chrystal Baker, and these statements, by themselves, provide sufficient evidence to overcome Arthur's burden to present *prima facie* evidence that the exercise of jurisdiction against Stern in this state is permissible.

For example, the sworn statement of Chrystal Baker, filed with the Court on May 14, 2008, when Arthur filed her *Response To Defendants' CBS Studios, Inc. And KPRC Houston's Sur-reply*, establishes that Bonnie Stern, Howard Stern's sister, was giving directions concerning research to be done about Arthur<sup>3</sup> and was determining the content to be displayed on various websites.<sup>4</sup> Indeed, Baker's sworn statement provides concrete details of Stern's direct

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<sup>2</sup> The main third person in the submitted emails which have not yet been properly authenticated is Nelda "Rose" Turner, a Texas resident and a linchpin of the conspiracy, who, along with her husband, Kenneth Turner, currently is resisting a subpoena for electronic discovery. Arthur's motion to compel is pending in the District Court for the Eastern District of Texas, the district in which the Turners reside. As the submitted emails indicate, Rose was in direct contact with Howard Stern's sister, Bonnie Stern, and with counsel for Howard Stern. Arthur expects that electronic discovery into the Turners' computers will alleviate any qualms about authenticity. The goal should not be to meet some artificial timetable but to make certain the relevant evidence which this Court needs to make its decision is properly before this Court; that is why this Court should allow Arthur to continue with discovery regarding jurisdiction and the merits of the case, and carry the jurisdictional issue to trial. *Id.*

<sup>3</sup> Q. Would you take a look at this one. It's –what's the number, CB38, CB38.

A. Okay, so what was the question?

Q. The question is, it appears that Bonnie Stern is giving directions . . .

A. Yeah.

Q. So you're saying that Bonnie Stern would give directions not only by email, but over the phone to persons.

A. Yeah.

*Deposition of Chrystal Ann Baker, 6:25 – 7:7 (May 6, 2008).*

<sup>4</sup> Q. So is it correct to say that Bonnie was in a position to direct you to put things on the site?.

involvement in instructing co-conspirators in the state of Texas concerning how his defamation plan was to be carried out.<sup>5</sup> Additional directions to co-conspirators were given by Nelda Rose Turner, a resident of the state of Texas.<sup>6</sup> There was a central group of five - Bonnie Stern, Howard Stern's sister, Rose Turner, Yvonne Waddle, Chrystal Baker, and Duane - who were working for Howard Stern to generate defamatory information on Arthur.<sup>7</sup> Bonnie Stern, was directing the activities of these persons.<sup>8</sup> All of this was done to assist Howard Stern and in furtherance of the conspiracy which he was directing.<sup>9</sup> Howard Stern also acted through his

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A. Yeah.

*Deposition of Chrystal Ann Baker, 19:9 – 19:11 (May 6, 2008).*

<sup>5</sup> Q. I—I've seen an email where Rose was telling Bonnie that you had completed a spreadsheet that Howard had requested, did that happen at some point?

A. Yes.

*Deposition of Chrystal Ann Baker, 78:22 – 78:25 (May 6, 2008).*

<sup>6</sup> Q. Bonnie would do some directing, but so would, you say, Rose?

A. Yeah.

Q. Is Rose a nickname? . . . .

A. Yeah.

Q. What was her real name?

A. Nelda Rose Turner. . . .

*Deposition of Chrystal Ann Baker, 8:1 – 8:14 (May 6, 2008).*

<sup>7</sup> A. [A]t that time it was—between Bonnie—Bonnie and Rose had forged a good relationship as Yvonne and Duane, they were like four musketeers. Duane was the media guy, Bonnie was the—the family relative, Rose was the legal person, and Yvonne's the one with the site.

Q. So Duane was collecting video for the benefit of Howard Stern?

A. Yeah. And his legal team.

Q. And Bonnie would be directing people like Duane and Rose?

A. Yeah. Yeah.

Q. Do you know where Rose lived at the time?

A. In Texas.

*Deposition of Chrystal Ann Baker, 8:26 – 9:9 (May 6, 2008).*

<sup>8</sup> Q. So Duane sought direction from Bonnie?

A. Yeah.

*Deposition of Chrystal Ann Baker, 9:25 – 9:26 (May 6, 2008).*

<sup>9</sup> Q. So was it your impression that Bonnie Stern was requesting and receiving information for the benefit of her brother, Howard?.

A. Oh, for sure, that—that was pretty much the whole gist of it, was to help him.

lawyers, clearly agents for Howard Stern, in furtherance of the conspiracy, and these lawyers had authority to direct the other co-conspirators.<sup>10</sup>

**B. This Court Has Not Ordered That Additional Evidence Relevant To The Jurisdictional Inquiry Not Be Filed With This Court; This Court Should Not Do So.**

Second, Stern incorrectly accuses Arthur of filing additional evidence after this Court ordered her to “file all her evidence in support of personal jurisdiction” by April 21, 2008. Stern’s recollection of the hearing this Court conducted on April 18, 2008 is incorrect.<sup>11</sup> In fact,

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Q. And did you have the understanding that this was all being done for the benefit of Howard K. Stern?

A. Oh, for sure.

*Deposition of Chrystal Ann Baker, 11:16 – 12:19 (May 6, 2008).*

<sup>10</sup> Q. So, it is your understanding that any help that Krista Barth asked Rose Turner for was on behalf of Howard K. Stern?

A. Obviously, yes.

. . .

Q. So—so is it your testimony today that Krista had the authority to tell you to take something off [the website]?

A. To pass it along the lines, yes. Through Rose.

*Deposition of Chrystal Ann Baker, 15:13 – 18:21 (May 6, 2008).*

A. Obviously, yes.

. . .

Q. So—so is it your testimony today that Krista had the authority to tell you to take something off [the website]?

A. To pass it along the lines, yes. Through Rose.

*Deposition of Chrystal Ann Baker, 15:13 – 18:21 (May 6, 2008).*

Q. Let me direct your attention to CB117 and CB118, . . . [Y]ou see an email between Rose and you?

A. To myself, April 17<sup>th</sup>, '07, yeah.

. . .

Q. And it begins by Rose saying, “I sent it on to the lawyers.”

A. H.mm, h'mm. Is that to indicate she's in direct contact with lawyers for Howard K. Stern, is that correct?

A. Oh, yeah. There was never any confusion there.

*Deposition of Chrystal Ann Baker, 32:6 – 32:19 (May 6, 2008).*

<sup>11</sup> It is of course, understandable that Stern’s conception of what transpired at the April 18<sup>th</sup> hearing might be incorrect. The author of the Supplemental Response, Mr. Lin Wood, did not attend the April 18<sup>th</sup> hearing in person, rather depending on telephonic transmission. It is quite foreseeable that Mr. Wood might not have correctly comprehended what this Court was stating in regard to the April 21<sup>st</sup> deadline.

at the April 18<sup>th</sup> hearing, Arthur's counsel pointed out to the Court that, one day earlier, the sworn statement of Yvonne Waddle, one of the former members of the conspiracy to defame Arthur, was taken. The Court told Arthur's counsel to file it by April 21, 2008. That was the extent of the Court's order to Arthur. Nothing in the Court's order indicated that Arthur was precluded from gathering or filing more jurisdictional evidence after April 21, 2008; indeed, this Court should not needlessly cut off jurisdictional discovery but should always consider newly acquired evidence which is relevant to the jurisdictional issue before this Court. *See Walk Haydel & Assoc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 241-42 (5<sup>th</sup> Cir. 2008).

As previously stated, Arthur has, since the hearing, developed additional evidence by taking the sworn statement of Chrystal Baker on May 6, 2008, the earliest date to which she would agree. Baker, like Waddle, is a confessed former member of the conspiracy. Her statement, replete with proper authentication and, more important, extensive insider explication of the workings of the conspiracy made the basis of this case, has been filed with this Court, and her statement puts to rest any question about jurisdiction or the justice of adding new defendants.

**C. Arthur Is Filing The Complete Statement Of Yvonne Waddle; This Issue Should Now Be Moot.**

Third, Stern complains that the filed excerpts from the sworn statement of Yvonne Waddle, a confessed and repentant former member of the conspiracy, were not authenticated and were incomplete. Supplemental Response at 1 n. 1 (“ . . . Arthur filed a copy of a partial sworn statement from a third party that was not notarized or demonstrated to have been given under oath other than the title . . .”). The complete notarized statement of Ms. Waddle, given under oath and penalty of perjury, is attached to this reply as Exhibit “A.”

**D. Two Briefs Did Exceed The Court’s Page Limit – Because They Contained Too Much Evidence.**

Fourth, Stern complains because briefs filed with the Court on April 25<sup>th</sup> and May 1<sup>st</sup> “exceeded the Court’s page limitation for briefs.”<sup>12</sup> Stern is correct. This Court’s procedures state that “[a]ny brief or memorandum is limited to 25 pages unless counsel obtains leave of court for longer submissions.” Arthur apologizes to the Court for this oversight and requests leave of court to file her *Memorandum In Support Of Plaintiff’s Response To Rule 12(b)(2) Motion To Dismiss For Lack Of Personal Jurisdiction And In Support of Plaintiff’s Reply To Defendants’ Response to Plaintiff’s Amended Motion For Leave To Amend Original Petition (Complaint)* (entered with the Court on April 25, 2008 and containing 37 pages) and *Amended Memorandum In Support Of Plaintiff’s Response To Rule 12(b)(2) Motion To Dismiss For Lack Of Personal Jurisdiction And In Support of Plaintiff’s Reply To Defendants’ Response to Plaintiff’s Amended Motion For Leave To Amend Original Petition (Complaint)* (entered with the Court on May 1, 2008 and containing 38 pages).<sup>13</sup>

**II. SUBSTANTIVE ARGUMENTS**

**A. There Is Sufficient Evidence To Establish A *Prima Facie* Case That The Extended Conspiracy Is Related To The Original Conspiracy**

Stern complains that there is no evidence that the extended conspiracy in which the proposed new defendants engaged is related to the original allegations of conspiracy and defamation centering on the Entertainment Tonight “Mommie Dearest” interview. This is simply

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<sup>12</sup> It is interesting that Stern complains because Arthur filed too many pages in her filings of April 25<sup>th</sup> and May 1<sup>st</sup>, and too few pages when she filed Ms. Waddle’s sworn statement.

<sup>13</sup> It must be noted that the reason for the length of these two filings is not because of interminable argument, but rather, because both filings contain voluminous evidence supporting Arthur’s jurisdictional arguments. If these portions of evidence had been moved to appendices, both memoranda would have been well within the Court’s page limit. In any event, however, Stern appears to be complaining because Arthur has filed too much evidence with the Court, not because Arthur has filed too little evidence with the Court.

not true. The sworn statement of Yvonne Waddle,<sup>14</sup> portions of which were previously filed with this Court, and the entirety of which is attached to this reply as Exhibit “A,” and the sworn statement of Chrystal Baker, which previously was filed with this Court, make clear that the motivating factor in their decision to enter the conspiracy managed by Stern, which eventually would lead to further defamation of Arthur was the “Mommie Dearest” interview aired by CBS Studios.<sup>15</sup> Rose Turner also has stated publicly that that interview motivated her.<sup>16</sup> Once they entered the conspiracy, one of their assignments was to develop the “kissing cousins” story.<sup>17</sup> Another assignment was to develop the defamatory story about incest with a step-brother.<sup>18</sup>

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<sup>14</sup> *Sworn Statement of Yvonne Waddle*, 8:1-22 (Apr. 17, 2008) (“What was my impression? I was just heartbroken and I believed everything [Anna Nicole Smith] said.”).

<sup>15</sup> Q. Do you think any of this idea that Virgie was evil and should not have anything to do with the baby, Dannie Lynn (sic), was related to statements made by Anna Nicole Smith on television?

A. Oh, for sure. For sure.

. . .  
Well, on ET, I think it was shortly after Anna had passed away, I had seen it personally, there was a segment of Mummy Dearest, where Anna, who looked completely out of it decided to go off on—on her mother and such, with Howard beside her and whatever. And started making claims against her mother on TV. So, anytime the Mummy Dearest or evil—because Anna was obviously distraught in that segment. Anytime people would utilize Mummy Dearest or Evil, with Virgie, it was taken by emotional impact.

Q. Were the words, Mummy Dearest used as a shorthand for abusive mother?

A. Yes.

*Deposition of Chrystal Ann Baker*, 21:22 – 22:3 (May 6, 2008).

<sup>16</sup> See comments from “Rose Speaks” website, attached as Exhibit “B.” <http://www.rosespeaks.com/rose-blog/?p=279#comments>. (accessed May 21, 2008). See comment No. 281.

<sup>17</sup> Q. Let me show you 608, CB608.

A. It’s an email from Rose to myself, on April 16<sup>th</sup>, ’07.

Q. And in it, the second line down, at the end it say, “I wonder if Virgie and Mr. Sanders were in fact kissing cousins.” Well, what does that mean?

A. There was a –it was along the lines of when checking through Virgie’s family tree that Mr. Sanders, I think it was a man that she had married, if I’m correct. If they were indeed cousins who had—who had had a child together and such. It was just sort of, trying to discredit or even more, if there was, I guess, incest in the family and such.

. . .  
Q. Now tell me about Art [Harris] and the kissing cousins angle.

A. All I know of that is that Rose was gathering all the information we could find and putting it in a proper form for Art to use and go with, and—and get the rest of the story.

A. And publish a story about Virgie having married a cousin.

A. Yes.

“Texas law clearly recognizes a cause of action for civil conspiracy, which is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.” *Chevalier v. Animal Rehabilitation Ctr.*, 839 F. Supp. 1224, 1230 (N.D. Tex. 1993) (cause of action for conspiracy to defame); *Boyne v. Harrison*, 647 S.W.2d 82, 88 (Tex. App. – Austin 1983, writ dismissed). Conspiracy liability extends beyond the active wrongdoer to those who may merely have planned, assisted, or encouraged the wrongdoer’s acts. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925-26 (Tex. 1979).

“The general rule is that conspiracy liability is sufficiently established by proof showing concert of action or other facts and circumstances from which the natural inference arises that the unlawful, overt acts were committed in furtherance of common design, intention, or purpose of the alleged conspirators.” *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963).

When men enter into conspiracies, they are not likely to call in a witness . . . In such cases the injured party must necessarily have recourse to circumstantial evidence. For it is only by the inferences and deductions which men properly and naturally draw from the acts of others in such cases, that their intentions can be ascertained. They are not likely to proclaim them in the hearing of witnesses. A conspiracy may be proven as well by the acts of the conspirators, as by anything they may say, touching what they intended to do.

*Id.* (internal citations omitted). A conspiracy may be established by circumstantial evidence, and that usually is the case. *Schlumberger Well Surv. Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968). It is not necessary to show that every act of a conspirator was in concert

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Q. Did he do so? Did Art [Harris] do so?

A. I think so, yes.

Q. [D]oes the phrase, kissing cousins, mean to you that they were engaged in incest.

A. Yeah, that was pretty much the intention of that title. Was to give off the impression that there was incest within the family.

*Deposition of Chrystal Ann Baker*, 28:19 – 29:24 (May 6, 2008).

<sup>18</sup> See attached web posting by Yvonne Waddle (“QV”) attached as Exhibit “C.”

with the others or that all the conspirators agreed before each act. *Bankers Life Ins. v. Hollaway*, 368 S.W.2d at 583.

“Once a conspiracy is proven, each co-conspirator ‘is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.’” *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979) (quoting *State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (1937)). One who joins a conspiracy already in progress becomes responsible for the acts already committed by the conspirators. As the court in *Cleft of the Rock Foundation v. Wilson* pointed out:

[I]t is of little consequence that Boyd may have joined the alleged conspiracy after the overt acts in New York had been committed and after the Arthurs had invested money in the alleged fraudulent schemes. Boyd's alleged "joining of the conspiracy, adoption of its goals, and action in furtherance of it, thus constituted a ratification of those acts already committed with the purpose of accomplishing the same goal." *Dixon v. Mack*, 507 F.Supp. 350 (S.D.N.Y.1980) (Arthur made the necessary *prima facie* factual showing that the defendant was a member in the conspiracy where defendant joined conspiracy with knowledge that overt acts in furtherance of the conspiracy had already taken place in New York). Boyd's "knowing ratification of acts committed in New York constitutes an awareness of the ramifications or effects in New York of his own activity as a co-conspirator." *Id.* In addition, the Court notes that "it is black letter conspiracy law that one who joins a conspiracy in progress ratifies all that has come before." *Id.* at 350-51.

992 F. Supp. 574, 584 (E.D.N.Y. 1998).

In her sworn statement, Yvonne Waddle makes it clear that she believed everything Ms. Smith said in that interview and was motivated in her efforts for Howard Stern by her belief that abuse had occurred to Anna Nicole Smith as a child. The actions of the other conspirators in repeatedly calling Virgie Arthur “Mommie Dearest,” a shorthand for abusive mother, shows that they all believed the interview and ratified it. Additionally, as Chrystal Baker’s sworn statement shows, the motivation behind her decision to join the conspiracy and begin assisting Stern in

defaming Arthur was the “Mommie Dearest” interview on CBS Studios’ Entertainment Tonight program.

**B. There Is Sufficient Evidence To Establish A *Prima Facie* Case That Stern Purposefully Directed His Defamatory Activities Toward Arthur In The State Of Texas.**

Stern argues that Arthur must show that Stern’s actions were directed into Texas. Stern, in his deposition, testified that he did not know where Arthur resided. This testimony, however, is simply not credible and should be given little weight by this Court. In deciding jurisdictional matters a trial court is entitled to conclude that a party's representations are "lacking in candor and credibility." *Coury v. Prot*, 83 F.3d 244, 251 (5<sup>th</sup> Cir. 1996).

In October, 2006, Arthur was interviewed on television by Nancy Grace; Stern saw the interview. *Affidavit of Melinda Hudson*.<sup>19</sup> In introducing Virgie, Ms. Grace stated that Virgie was speaking from “her home in Montgomery, Texas.”<sup>20</sup> The next day, Stern called Melinda Hudson, Arthur’s niece, and discussed the interview. It is simply not credible that Stern watched the interview but placed his television on “mute” at the precise moment when Nancy Grace stated that Virgie Arthur was at her home in Montgomery, Texas.

Additionally, Rose Turner, with whom Stern was in contact through his sister, Bonnie, sat in Texas directing Stern’s team of researchers and defamers. Also, two of Rose’s moderators and Stern’s fellow conspirators, Teresa Stephens and Lyndal Harrington, both were Texans. Stern vainly attempts to make the evidence go away, not by refuting it but by ignoring it.

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<sup>19</sup> Melinda Hudson’s affidavit was filed with this Court as Exhibit C to *Plaintiff’s Amended Response to Defendant Howard K. Stern’s Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction* on January 11, 2008.

<sup>20</sup> See Transcript of Nancy Grace show, October 12, 2006, which was attached as Exhibit B to *Plaintiff’s Amended Response to Defendant Howard K. Stern’s Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction*.

When nonresidents, such as Defendant Stern and the proposed new nonresident defendants whom Virgie Arthur seeks to add to the present case, acting outside the state, intentionally cause injury within the state, local jurisdiction is presumptively not unreasonable. All of the new defendants knew that Virgie Arthur lives in Texas. All of them purposefully directed their defamatory statements at her reputation, centered in Texas, and their efforts seriously injured her reputation. Under such circumstances, a defendant must “reasonably anticipate” being haled into court in the forum state. *Calder v. Jones*, 465 U.S. 783, 790 (1984). “Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that ... would render jurisdiction unreasonable.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). Defendant Stern and the new defendants cannot carry that burden.

In *National Industrial Sand Association v. Gibson* the Texas Supreme Court rejected nonresidential specific personal jurisdiction based solely on the *effects or consequences* of an alleged conspiracy with Texas residents. 897 S.W.2d 769 (Tex. 1995). There, the Court said:

Jurisdiction based upon the *effects* of extraterritorial conduct within a particular forum is proper only when the extraterritorial conduct focuses upon a *plaintiff residing in that forum*. In *Calder*, the Supreme Court of the United States held that the mere fact that it was foreseeable that an allegedly slanderous article would be circulated and would have an effect in a particular state was an insufficient basis for an assertion of jurisdiction by that state's court over the nonresident defendants, an author and editor. Instead, the assertion of jurisdiction over the nonresident defendants by the state of the plaintiff's residence was proper because the defendants' intentional actions were *expressly aimed at the plaintiff and the defendants knew that the article would have its most devastating effect in the state in which the plaintiff lived and worked*.

*Id.* at 776. (internal citations omitted) (italics in the opinion). In the present case, however, Plaintiff does not assert that jurisdiction is based solely on the effects or consequences of an alleged conspiracy in Texas. Rather, Plaintiff has alleged and has made a *prima facie* case that

(1) Stern's actions, through his sister, Bonnie Stern, were expressly aimed at Arthur and her reputation in Texas, (2) that Stern utilized the help of Rose Turner, his agent in Texas, as well as the help of other Texas conspirators, and (3) that Stern knew that the defamation would have its most devastating effect in Texas, the state in which Arthur lived.

**C. There Is Sufficient Evidence To Establish A *Prima Facie* Case That An Agency Relationship Existed Between Stern And The Other Conspirators.**

Stern asserts that Arthur has failed to provide a *prima facie* case that Stern was a principal directing the activities of his agents inside the state of Texas. Stern then cites to a contract case, *Product Promotions Incorporated v Cousteau*, for the proposition that Arthur must show that Stern's agents inside, notably Rose Turner, had the authority to bind him to a contractual relationship. 495 F.2d 483, 493 (5<sup>th</sup> Cir. 1974)), *overruled on other grounds*, *Insurance Corp. of Ireland v. Companie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982). Stern misapprehends the nature of the agency relationship in a conspiracy and, once again, ignores the clear and uncontroverted evidence.

Texas law is clear that actual authority of an agent can be shown by evidence that the principal had the right to assign tasks to the agent and to control the methods by which the agent performed those tasks. *Walker Ins. Svcs. V. Bottle Rock Power Corp.*, 108 S.W.3d 538, 550 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2003, no pet.). In the case at bar, Baker's sworn and complete statement, as well as Waddle's sworn and complete statement,<sup>21</sup> both of which have been extensively cited to the Court, make clear that Stern was the driving force, directing Bonnie Stern and Rose Turner, a resident of the state of Texas, to research, find, and publish defamatory stories concerning Arthur. Indeed, Stern's own attorneys, who are his agents and clearly working

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<sup>21</sup> See Sworn statement of Yvonne Waddle, 34:17 – 35:10 (Apr. 17, 2008).

for him, directed Rose Turner and others to locate dirt on Arthur which was later published on the web and in other places.<sup>22</sup>

It is true that Stern stated, under oath, that he never was involved with any of the co-conspirators, specifically Chrystal Baker (or Sweet Havana as she was known on line). *See Deposition of Howard Stern*, 149:13 – 154:3 (Jan. 4, 2008) (“Q. How about a person who uses the name "Sweet Havana"? Have you ever had someone by that name blogging on your behalf? A. No.”). This assertion is not, however, dispositive; in fact, the *Bottle Rock* court made clear that sworn testimony by an alleged principal that a person was not working on the principal’s behalf can amount to less than a scintilla of evidence in determining whether a principal/agent relationship exists. *Id.* at 552 (“Contrary to this evidence are Bottle Rock’s statements . . . . that [the alleged agent] is not Bottle Rock’s agent. However, we cannot say that this evidence amounts to more than a scintilla.”). At a minimum, Stern’s testimony does nothing to negate Arthur’s *prima facie* showing which is all that is required at this stage of the proceedings.

This is especially true for two additional reasons. First, one of the very conspirators, Chrystal Baker (a/k/a Sweet Havana) Stern denied involvement with swore under oath that Stern lied in his deposition on this very point.<sup>23</sup> As previously noted conflicts between the facts must be resolved in Arthur’s favor.

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<sup>22</sup> For additional evidence, see *Plaintiff’s Response To Defendants’ CBS Studios, Inc. And KPRC Houston’s Sur-Reply* at 4-6 and accompanying exhibits, which Plaintiff incorporates herein by reference.

<sup>23</sup> Q. And at some point after you left that site, and it was no longer named partly after you, did you have occasion to read a deposition of Howard K. Stern?

A. Yes, I did.

Q. And were you mentioned in that deposition?

A. I definitely was.

Q. And what—how were you mentioned?

A. I was—I was mentioned in the form of the lawyer asking Howard if he was aware of whom Sweet Havana was. And he denied any knowledge of that person or any workings of online helpers, . . . .

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### Conclusion

WHEREFORE, Plaintiff Virgie Arthur requests that this Court enter an order denying Howard K. Stern's Rule 12(b)(2) Motion To Dismiss For Lack Of Personal Jurisdiction and granting Virgie Arthur any additional relief to which she is entitled.

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Q. The actual question to Mr. Stern, by me, in the deposition was, something to the effect of, have you ever had a person named Havana . . . .

A. Sweet Havana.

Q. . . . blogging for you? Yes.

A. You had said Sweet Havana.

Q. Have you ever had a person by that name blogging for you on the internet? And his answer was, no.

A. H'mm, h'mm.

Q. Do—*do you regard his answer as being truthful?*

A. *No.*

Q. And is there some reason why he should have known of Sweet Havana and activities of blogging for him?

A. Well, definitely, and I don't want to sound selfish and such, but he was forwarded numerous pieces of information with my email attached. I never—I think I emailed him once in the beginning, so he would have had that on his email, the [HowardKStern@whatever](mailto:HowardKStern@whatever), whatever. When Rose would send him stuff, and when the lawyers would send his stuff in rough copy, it had my email all over it. Bonnie had talked to him about me. There are emails between and I, which state openly that he was aware that she had made a friend in Canada, and her name was Sweet Havana, there you go. *He was fully aware, and when he answered to you, he lied.*

*Deposition of Chrystal Ann Baker, 82:1 – 83:10 (May 6, 2008) (emphasis added).*

**Certificate of Service**

I hereby certify that on the 21st day of May, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all opposing counsel.

s/ M. Michael Meyer

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