

CAUSE NO. 2008-24181

VIRGIE ARTHUR,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFF,	§	
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
HOWARD K. STERN, BONNIE STERN,	§	
LYNDAL HARRINGTON, ART HARRIS,	§	
NELDA TURNER, TERESA STEPHENS,	§	
LARRY BIRKHEAD, HARVEY LEVIN,	§	
TMZ PRODUCTIONS, INC., and	§	
CBS STUDIOS, INC.	§	
	§	
DEFENDANTS.	§	80th JUDICIAL DISTRICT

**PLAINTIFF'S RESPONSE TO DEFENDANT ART HARRIS'S EMERGENCY  
MOTION TO SEAL PURSUANT TO RULE 76A(5) AND MOTION TO DE-  
DESIGNATE INFORMATION DESIGNATED BY PLAINTIFF AS  
CONFIDENTIAL**

Plaintiff Virgie Arthur files this Response to Defendant Art Harris's Emergency Motion to Seal Pursuant to Rule 76A(5) (sic) and Motion to De-Designate Information Designated by Plaintiff as Confidential, and, in support of her Response, Arthur would show the Court as follows.

**A. HARRIS SHOULD NOT EVEN HAVE A COPY OF THE DOCUMENT HE  
HAS SUBMITTED FOR *IN CAMERA* REVIEW**

Harris has submitted for in camera review excerpts from the deposition of Virgie Arthur taken in the earlier federal litigation. He has not explained, however, how he came into possession of that deposition transcript ("Arthur Excerpts"). There are only two possibilities: CBS shared it with him or Howard K. Stern did. Because Harris shared lawyers with CBS earlier in this case, however, the most likely explanation is that CBS gave him the transcript.

Contrary to the representation made in Harris's Emergency Motion at 2, in the earlier federal litigation Judge Rosenthal did not give permission to Harris to use excerpts from Arthur's deposition or any discovery information marked "confidential" in that case. (See Exhibit B to Emergency Motion) Harris never was a party to the federal case. Arthur objects to Harris's illicit use of the Arthur Excerpts, which should not have been shared with him by a party in the federal case. As shown by the certificate of service in the Emergency Motion, Harris also has compounded the offense by sharing the Arthur Excerpts with other parties to this litigation.

Not mentioned in the Emergency Motion is the fact that undersigned counsel for Arthur spoke with Chip Babcock, counsel for Harris, about submission of the Arthur Excerpts *in camera* and explained to Mr. Babcock that Arthur's objection to Harris's use of the Arthur Excerpts is based on the fact that Harris should not even have a copy of Arthur's deposition, since Judge Rosenthal's order was sought by CBS, not by Harris, who was not a party, and the order does not authorize CBS to share the document with any non-party without obtaining removal of the "confidential" designation.<sup>1</sup> Harris did not confer at all about an emergency motion to seal.

**B. HARRIS HAS NOT COMPLIED WITH RULE 76a(5)**

Harris argues that, under Rule 76a(5), he had a compelling need to file the Arthur Excerpts on Monday August 2, 2010, "so that he is in compliance with the court's scheduling order." Nothing in this Court's scheduling order, however, required him to file the Arthur Excerpts. He argues that, if he did not file the Arthur Excerpts, he would "face immediate and irreparable harm" – "potential violation of a court order." Again, the scheduling order did not require Harris to file anything. Harris argues that, if he did

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<sup>1</sup> Arthur is considering what action she might take against CBS.

not file the Arthur Excerpts, he would suffer damage to his ability to have his summary judgment motion heard, because, as the affidavit of Mary Lou Flynn-Dupart states, there is a deadline regarding dispositive motions, and if Harris “publically (sic) filed the Arthur Excerpts ... he would potentially exposed (sic) himself to sanctions for violation of the court’s protective order.” (Emergency Motion, Exhibit D)

The expression of respect for a court order is refreshing, coming from a defendant who destroyed evidence on his computer in defiance of a court order. Be that as it may, Harris has not explained why, if he were legally in possession of Arthur’s deposition, he could not have submitted it *in camera* at an earlier time instead of manufacturing an emergency by waiting until the last minute. Harris has not explained how he possibly can shoulder the burden of proof set out in Rule 76a(1), which he will have to do even under 76a(5).

Furthermore, the order submitted by Harris does not “set the time for the hearing required by paragraph 4” and does not “direct that the movant immediately give the public notice required by paragraph 3.” TEX. R. CIV. P. 176a(5).

**C. ARTHUR HAS NOT CLAIMED THAT SHE IS TOO ILL TO BE DEPOSED**

Harris incorrectly states in his Emergency Motion that Arthur has claimed that she is too ill to be deposed. Actually, in response to an inquiry from counsel for TMZ and Levin, counsel for Arthur indicated to the defendants on July 14, 2010 the following by email: “Serious health concerns recently have arisen regarding both Mr. and Mrs. Arthur. When I receive information from their doctors about the status of their health, I will get back to you regarding their depositions.” Undersigned counsel, having received the necessary medical authorizations from Mr. and Mrs. Arthur, has spoken with their doctor

and now can report that they are fit to sit for depositions. They also are fit to travel, and they will be out of the state for an indefinite period of time, starting August 3, 2010.

**D. CONCLUSION AND PRAYER**

Because Harris has manufactured a fake emergency, has submitted documents *in camera* that he rightly should not even possess, and has failed to comply with Rule 176a(5), this Court should deny the Emergency Motion and Motion to De-Designate.

Respectfully submitted,

**THE O'QUINN LAW FIRM**

By: 

Neil C. McCabe  
State Bar No. 13335300  
M. Michael Meyer  
State Bar No. 13993850  
440 Louisiana, Suite 2300  
Houston, Texas 77002  
713-223-1000 (telephone)  
713-222-6903 (fax)

**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

This is to certify that on this the 3<sup>rd</sup> day of August, 2010, a true and correct copy of the foregoing document was served on the following counsel and parties as shown below.

  
Neil C. McCabe

**Via Electronic Mail**

Linda M. Burrows  
Lennette W. Lee  
CALDWELL LESLIE & PROCTOR, PC  
1000 Wilshire Boulevard, Suite 600  
Los Angeles, California 90017-2463  
213-629-9040  
213-629-9022 - Fax  
[burrow@caldwell-leslie.com](mailto:burrow@caldwell-leslie.com)  
[lee@caldwell-leslie.com](mailto:lee@caldwell-leslie.com)  
*Attorneys for Defendants Harvey Levin  
and TMZ Productions, Inc.*

**Via Electronic Mail and Regular Mail**

L. Lin Wood  
Luke A. Lantta  
BRYAN CAVE, LLP  
One Atlantic Center, Suite 1400  
14<sup>th</sup> Floor  
Atlanta, GA 30309  
404-572-6600  
404-572-6999 – Fax  
[lin.wood@bryancave.com](mailto:lin.wood@bryancave.com)  
[luke.lantta@bryancave.com](mailto:luke.lantta@bryancave.com)  
*Attorneys for Defendant Howard Stern*

**Via Electronic Mail**

Diana Marshall  
MARSHALL & LEWIS, LLP  
1010 Lamar, Suite 450  
Houston, Texas 77002  
713-655-0300  
713-655-0130 – Fax  
[DEMarshall@MarshallLewisLLP.com](mailto:DEMarshall@MarshallLewisLLP.com)  
*Attorney for Defendant Larry Birkhead*

**Via Electronic Mail**

Harry P. Susman  
Richard W. Hess  
SUSMAN GODFREY, LLP  
1000 Louisiana, Suite 5100  
Houston, Texas 77002-5096  
713-651-9366  
713-654-6666 - Fax  
[hsusman@susmangodfrey.com](mailto:hsusman@susmangodfrey.com)  
[rhess@susmangodfrey.com](mailto:rhess@susmangodfrey.com)  
*Attorneys for Defendants Harvey Levin  
and TMZ Productions, Inc.*

**Via Electronic Mail**

Walter Herring  
BRYAN CAVE, LLP  
JP Morgan Chase Tower  
2200 Ross Avenue, Suite 3300  
Dallas, TX 75201  
214-721 8000  
214-721 8100 - Fax  
[Walter.Herring@bryancave.com](mailto:Walter.Herring@bryancave.com)  
*Attorney for Defendant Howard Stern*

**Via Electronic Mail**

Charles L. "Chip" Babcock  
Amanda L. Bush  
Nancy W. Hamilton  
JACKSON WALKER, LLP  
1401 McKinney, Suite 1900  
Houston, Texas 77010  
713-752-4200  
713-752-4221 – Fax  
[cbabcock@jw.com](mailto:cbabcock@jw.com)  
[abush@jw.com](mailto:abush@jw.com)  
[nhamilton@jw.com](mailto:nhamilton@jw.com)  
*Attorneys for Defendants Art Harris  
and CBS Studios, Inc.*

**Via Electronic Mail**

Nelda Turner  
13348 Country Road 3111  
Gladewater, Texas 75647  
[cajunrose@verizon.net](mailto:cajunrose@verizon.net)  
*Pro Se Defendant*

**Via Electronic Mail**

Leslie Ashby  
Ashby LLP  
1010 Lamar, Suite 1200  
Houston, Texas 77002  
[Leslie.ashby@asby-llp.com](mailto:Leslie.ashby@asby-llp.com)  
*Attorneys for Defendants Harvey Levin  
and TMZ Productions, Inc.*

**Via Electronic Mail**

Bonnie Stern  
269 S. Beverly Drive, No. 1247  
Beverly Hills, California 90212  
[bonnies10@yahoo.com](mailto:bonnies10@yahoo.com)  
*Pro Se Defendant*

**Via Electronic Mail**

Lyndal Harrington  
8318 Burning Hills Drive  
Houston, Texas 77071  
[tx\\_babee@yahoo.com](mailto:tx_babee@yahoo.com)  
*Pro Se Defendant*