

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

**PLAINTIFF VIRGIE ARTHUR'S  
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE LEE H.  
ROSENTHAL:

COMES NOW Virgie Arthur ("Arthur"), Plaintiff in this case, and pursuant to Rule 37 of the Federal Rules of Civil Procedure, asks this Court to enter an order requiring Defendant Howard K. Stern ("Stern") to produce certain documents within ten (10) days of the entry of the order, and requiring that Stern's jurisdictional deposition be resumed.

**Introduction**

1. This Court has ordered that Arthur has the right to conduct jurisdictional discovery to enable Arthur to respond to Stern's assertion that this Court lacks personal jurisdiction over him. To further this aim, on December 11, 2007, Arthur served Stern with a request for production (the "Request"). A true and correct copy

of the Request is attached to this motion as Exhibit "A." The Request sought thirteen (13) separate and discrete categories of documents, all of which could have a bearing on whether Stern had contacts with the State of Texas. The thirteen categories of documents are:

- Any and all employment contracts or agreements between Defendant Howard K. Stern and Vickie Lynn Marshall, also known as Anna Nicole Smith, that authorized you to act on her behalf in matters related to the estate of her late husband, Howard Marshall;
- Any and all documents executed by you or drafted by Howard K. Stern on behalf of Vickie Lynn Marshall, also known as Anna Nicole Smith, to obtain legal counsel in matters related to the estate of her late husband;
- Any and all documents drafted by Howard K. Stern or filed by Howard K. Stern in the Harris County probate courts;
- Any and all interviews by Howard K. Stern or set up by Howard K. Stern with any media outlet conducted in Texas or regarding the Texas legal proceedings related to the estate of Howard Marshall;
- Any orders granting *pro hac vice* status, or otherwise authorizing Defendant Howard K. Stern to practice law in any Texas court;
- Any and all documents related to the sale or purchase of Texas real estate by Defendant Howard K. Stern on his own behalf or on the behalf of Vickie Lynn Marshall, also known as Anna Nicole Smith;
- Any and all documents related to any litigation in which Howard K. Stern participated in the state of Texas, on his own behalf or on the behalf of Vickie Lynn Marshall, also known as Anna Nicole Smith;
- Any and all evidence of business expenses in the State of Texas, including but not limited to rental or lease of space used as an office, telephone bills for business conducted in Texas, or payment of employees in Texas;

- Bank statements for any bank accounts on which Defendant Howard K. Stern has or had authority to sign, whether such accounts were held in his own name or in the name of Vickie Lynn Marshall, also known as Anna Nicole Smith;
- Any and all documents related to business conducted while you were in Texas for any entity connected to Vickie Lynn Marshall, also known as Anna Nicole Smith, such as, but not limited to Hot Smoochie Lips;
- Any and all documentary evidence of wire or other money transfers into or out of Texas, including to and from offshore accounts, whether through banks or by other means;
- Any and all notes taken by you in connection with the Marshall v. Marshall proceedings, the recent FBI interview, or at any other time in Texas or while in communication with a person or entity in Texas; and
- Transcripts of the Marshall v. Marshall proceedings.

2. On January 4, 2008, at the jurisdictional deposition of Defendant Stern in Atlanta, Georgia, Stern hand-delivered to Plaintiff's counsel his *Objections and Responses to Virgie Arthur's Requests for Production of Documents* (the "Response"). A true and correct copy of the Response is attached to this motion as Exhibit "B." Stern objected to all the requests on numerous grounds, including:

- Discovery has not yet begun;<sup>1</sup>
- The prefatory instructions might "seek to impose duties beyond the requirements set forth in the Federal Rules of Civil Procedure;<sup>2</sup>

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<sup>1</sup> Stern lodged this objection despite the fact that fifteen (15) days earlier this Court entered an order granting Arthur the right to conduct jurisdictional discovery and despite the fact that Stern did not oppose entry of this order. A true and correct copy of this order is attached to this motion as Exhibit "C." See also *Williamson v. Tucker*, 645 F.2d 404, 414 (5<sup>th</sup> Cir. 1981) (court should give plaintiff an opportunity to discover jurisdictional facts so it can establish jurisdiction over the defendant).

<sup>2</sup> The only prefatory instructions were that (1) Stern should produce the documents at his deposition, and (2) the word "document" included information maintained in electronic form as well as paper documents.

- Overly broad;
- Not reasonably limited in time or scope; and
- Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

3. Stern further objected to requests numbers 2, 4, 5, 7, 8, and 13 because all, or part, of the requests were “vague” and/or “ambiguous.”

4. Stern produced no documents at his deposition or since, not even a contingency-fee agreement of which he publicly had claimed to be a beneficiary, and which supposedly would entitle him to share in a 6% interest in a judgment of over \$88 million. At his deposition, Stern admitted that he had access to the contingency-fee agreement and that he could have obtained a copy from the lawyers who maintain the file.<sup>3</sup> Nevertheless, he informed Arthur that she could obtain the contingency-fee agreement from the records of the United States Bankruptcy Court for the Central District of California.<sup>4</sup> Stern repeatedly responded in the same manner, as if he believed that he had no responsibility to produce documents to which he had access in the files of lawyers with whom he had worked.<sup>5</sup> Stern took that position, even though, as a lawyer, he admitted,

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<sup>3</sup> Deposition of Howard K. Stern, Jan. 4, 2008, 16:23 - 18:24, attached as Exhibit D.

<sup>4</sup> Plaintiff applied to the Bankruptcy Court and obtained a copy of the contingency-fee agreement, which is attached to a Debtor’s Application to Employ Special Personal Counsel. A true and correct copy of the contingency-fee agreement is attached to this motion as Exhibit “E.” A possible explanation for why Stern did not produce the agreement may be found in the signatures on the documents. If one focuses on the last name, “Marshall,” even the untrained eye can see that the purported signature of Ms. Marshall on the application is greatly different from the signature on the contingency fee agreement, even though both signatures were executed on the same day. Stern also may have wished to avoid any focus on his law partner, who signed the agreement and later was disbarred.

<sup>5</sup> Deposition of Howard K. Stern, Jan. 4, 2008, 28:12 – 31:1, attached as Exhibit D.

despite the mighty efforts of his counsel to keep him from doing so, that, when documents within his “possession or control” are requested, that means any documents to which he has access.<sup>6</sup>

5. Stern also attempted in the Response to draw a distinction between documents of which he had possession, control or custody in his individual capacity and documents of which he had possession, control or custody in some other capacity. *See The Response* at ¶ 5 (“Stern objects to the Requests to the extent that they seek the production of documents that are the property of the Estate of Anna Nicole Smith. Stern, *in his individual capacity* in which he has been named as a defendant in this lawsuit, does not have possession, custody, or control of any such documents, . . . .”) (emphasis added).

6. During his deposition, Stern’s counsel improperly instructed him not to answer questions. For example, in an attempt to discover the scope of Stern’s activities as a lawyer in a probate case in Harris County, Texas, counsel for Plaintiff asked Stern whether or not he had made the decision to abandon the litigation. Although the question was framed so as to avoid attorney-client communications, nevertheless, Stern’s counsel instructed him not to answer.<sup>7</sup> At other points in the deposition, when Stern was asked what he meant by the use of a

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<sup>6</sup> Deposition of Howard K. Stern, Jan. 4, 2008, 55:12 – 57:19, attached as Exhibit D.

<sup>7</sup> Deposition of Howard K. Stern, Jan. 4, 2008, 47:23 – 49:4, attached as Exhibit D.

particular word, his counsel improperly instructed him not to answer.<sup>8</sup> Stern testified that, when he was in Texas in 2000-2001, he was Vickie Lynn Marshall's lawyer and also had a "personal relationship" with her. When Stern was asked whether that meant he had a sexual relationship with Ms. Marshall, his counsel instructed him not to answer, even though Stern repeatedly had appeared on *Larry King Live* to claim before the world that he had sexual relations with Ms. Marshall. In one of those television appearances Stern appeared with his legal counsel sitting beside him, the same legal counsel who would not let Stern explain what he meant by a "personal relationship" when Stern was under oath at his deposition.<sup>9</sup>

### Argument

7. Modern discovery serves many purposes, including: (1) to avoid prejudicial surprise; *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 902 (6<sup>th</sup> Cir. 1988), and (2) to provide all parties with full knowledge of the facts so they can prepare. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 236 (2d Cir. 1985). A review of Stern's objections reveals that the objections are simply "cut and paste" boilerplate objections that are designed to interfere with Arthur's attempts to respond to Stern's motion to dismiss and to thwart the purposes of discovery, not to protect Stern's rights. For example, the response to the first request states, in pertinent part, that "Stern further objects to

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<sup>8</sup> Deposition of Howard K. Stern, Jan. 4, 2008, 49:5 – 51:10; 59:6 – 60:21, attached as Exhibit D.

<sup>9</sup> Transcript, Larry King Live, October 13, 2007, attached as Exhibit F.

Request No. 3 to the extent that it seeks . . . .” (Emphasis added). It is rather obvious that Stern’s attorneys simply copied the same objections to all requests, with little or no thought to the documents the individual request actually sought.

8. Reviewing these objections also reveals they were imposed as disingenuous roadblocks to Arthur’s attempts to conduct jurisdictional discovery. For example, Stern, who is an attorney, objects to the words or phrases “set up by” in request number 4, “otherwise authorizing Defendant Howard K. Stern to practice law in any Texas court” in request number 5, “participate” in request number 7, “business expenses” in request number 8, and “proceedings” in request number 13, as being “vague and ambiguous.” The American Heritage<sup>®</sup> Dictionary defines “participate” as “to take part in something.” Likewise, the American Heritage<sup>®</sup> Dictionary defines “proceeding” as “the instituting or conducting of legal action.” Arthur finds it very difficult to believe these words are beyond Stern’s capacity to understand. It is also difficult for Arthur to believe the phrases “set up by,” “otherwise authorizing,” “Defendant Howard K. Stern,” “practice law,” and “any Texas court,” and “business expenses” are beyond Stern’s comprehension.

9. In a similar fashion, Stern’s objections that all the requests are “irrelevant and not reasonably calculated to lead to the discovery of admissible evidence” are specious. The purpose of this discovery is to determine what contacts Stern has had

with the state of Texas. Request number 3 seeks documents filed by Stern in the *Harris County* probate courts. Filing a legal document in the Texas court system, and functioning as an attorney in the state of Texas might be the type of contact that could be considered in deciding whether subject Stern is subject to the jurisdiction of a court sitting in the state of Texas. Request number 5 seeks any order granting Stern the right to practice law in the state of Texas. Once again, it strains credulity for Stern to argue that practicing law in the state of Texas is not the type of contact that might subject him to the personal jurisdiction of courts of this state; documents, therefore, that evidence his admission to practice law in the state of Texas are very relevant to the issue before this Court.<sup>10</sup> Request number 6 sought documents related to his sale or purchase of Texas real estate. Once again,

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<sup>10</sup> In the related case of *Stern v. O'Quinn*, Civil Action No. 07-60534-CIV-Dimitrouleas, in the United States District Court for the Southern District of Florida, Stern has taken the position that O'Quinn's legal representation of Ms. Arthur in Florida is relevant to the issue of whether or not O'Quinn has minimum contacts with the state of Florida and is, therefore, subject to the jurisdiction of a federal court in that state. *See Plaintiff Howard K. Stern's Memorandum Of Law In Opposition To Defendants' Motion To Dismiss For Lack Of Personal Jurisdiction, Forum Non Conveniens, And Improper Venue* ("Stern's Legal Memorandum"). A true and correct copy of Stern's Legal Memorandum is attached to this motion as Exhibit "G."

For example, on page 4 of Stern's Legal Memorandum, in the section entitled "Defendants' Activities in Florida," Stern states, "O'Quinn, along with Neil McCabe ("McCabe"), another attorney with the O'Quinn Law Firm, then traveled to Florida and appeared *pro hac vice* in the custody litigation as Arthur's attorneys." Stern goes on to spend 2 pages detailing the work done in Florida by Mr. O'Quinn's firm in conjunction with his representation of Arthur in the state of Florida. On page 14 of Stern's Legal Memorandum, in the section entitled "Defendants purposefully availed themselves of the privileges of Florida," Stern asserts that "O'Quinn and McCabe were admitted *pro hac vice* in Florida on behalf of their client, Arthur, so that they could 'purposefully avail' themselves of the benefits of Florida laws regarding custody of Ms. Smith's body."

Although the saying is trite, it is also true – what is sauce for the goose is sauce for the gander. It is hard to understand how Stern can take the position in his suit against O'Quinn that O'Quinn's practice of law in the state of Florida establishes jurisdiction over O'Quinn in that state, but that requests for production of documents in a suit in Texas against Stern which seek to discover the extent of Stern's practice of law in the state of Texas are irrelevant to the issue of personal jurisdiction.

Stern has objected to this request as being “irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.” Arthur would also respectfully direct this Court to request number 7 (“any litigation in which Defendant Howard K. Stern participated in the state of *Texas*, . . . .”), request number 8 (“ . . . . rental or lease of space used as office, telephone bills for business conducted in *Texas*, or payment of employees in *Texas*.”), request number 10 (“Any and all documents related to business conducted while you were in *Texas* . . . .”), and request number 11 (“ . . . . wire or money transfers into or out of *Texas*, . . . .”). These requests are very relevant for the permitting Arthur to determine whether Stern had contacts with the state of Texas which would permit this Court to exercise personal jurisdiction over him. *E.g.*, *International Shoe Co. v. Washington*, 326 U.S., 310, 320, 66 S. Ct. 154, 157-60 (1945) (court found defendant’s employment of salesmen who live in the forum state was sufficient to permit the exercise of personal jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-49, 72 S. Ct. 413, 419-20 (1952) (court found that defendant’s maintenance of a temporary office in the forum state, keeping the files of the business in the forum state, and maintaining two active bank accounts in the forum state was sufficient to permit the exercise of personal jurisdiction).

10. Also, Stern’s attempts to segregate out his contacts with Texas in his individual capacity versus his contacts with Texas in some other capacity, such as

executor of the estate of Vickie Lynn Marshall is simply an attempt to thwart the aims of discovery. The issue before this Court is whether Stern had sufficient contact with Texas, so that maintenance of this suit in Texas will not offend traditional notions of fair play and substantial justice. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564 (1980). It does not matter whether those contacts arose because Stern was acting in his individual capacity or as an attorney for some other person, alive or deceased.

11.If one party fails to produce documents, the requesting party may seek an order compelling production. FED. R. CIV. P. 37(a)(2)(B). An evasive or incomplete response is treated as a failure to respond. *Id.* at (a)(3). A cursory review of the Response indicates that the objections and the lack of production are simply an attempt to thwart the proper purpose of this jurisdictional discovery – to permit Arthur to determine the extent of Stern’s contacts with the state of Texas and constitute a failure by Stern to produce documents. This Court should overrule Stern’s objections and order him to produce all responsive documents within ten (10) days of the date of this order.

WHEREFORE, Plaintiff Virgie Arthur requests that this Court enter an order

- overruling Howard K. Stern’s objections to Virgie Arthur’s requests for production of documents;

- ordering Howard K. Stern to produce all responsive documents to Virgie Arthur's attorneys within ten (10) days of the entry of this order;
- ordering Howard K. Stern and his attorneys to certify in writing that they have made a good faith effort to locate and produce all responsive documents;
- ordering that Stern's deposition be resumed;
- requiring that Stern answer questions referred to in paragraph 6 above, which his counsel instructed him not to answer;
- requiring Stern to pay all expenses, costs and attorney's fees associated with the resumed deposition; and
- granting Virgie Arthur any additional relief to which she is entitled.

Respectfully submitted,

THE O'QUINN LAW FIRM

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**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

This is to certify that on the 27<sup>th</sup> day of March, 2008, a true and correct copy of the foregoing Plaintiff Virgie Arthur's Motion to Compel Production of Documents was served upon the following counsel electronically via the CM/ECF system:

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