CAUSE NO. 2008-24181

VIRGIE ARTHUR, Plaintiff, v. HOWARD K. STERN, BONNIE STERN, LYNDAL HARRINGTON, ART HARRIS, NELDA TURNER, TERESA STEPHENS, HARVEY LEVIN, and TMZ PRODUCTIONS, INC., Defendants.	§ § § § § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 280th JUDICIAL DISTRICT

DEFENDANT HOWARD K. STERN'S RESPONSE TO PLAINTIFF'S SUPPLEMENT TO MOTION TO COMPEL PRODUCTION FROM STERN

COMES NOW Defendant Howard K. Stern ("Stern") and hereby files this response in opposition to Plaintiff Virgie Arthur's ("Arthur") Supplement to Motion to Compel Responses to Requests for Production from Defendant Howard Stern (the "Supplement to Motion to Compel"), showing this Court as follows:

PRESERVATION OF SPECIAL APPEARANCE

Stern specifically preserves his special appearance for lack of personal jurisdiction in this matter. This response in opposition to Arthur's Supplement to Motion to Compel should not be used to erroneously imply that the District Court of Harris County, Texas has personal jurisdiction over Stern in the above-captioned action. Further, Stern's serving of this response in opposition to Arthur's Supplement to Motion to Compel should in no way be considered an admission that the District Court of Harris County, Texas has personal jurisdiction over him in the above-captioned action or that Stern consents to jurisdiction in the District Court of Harris County, Texas. See Huynh v. Nguyen, 180 S.W.3d 608, 617-18 (Tex. App.-Houston [14th Dist.] 2005) ("A trial court's resolution of discovery matters related to the special appearance is not a

general appearance by the party contesting personal jurisdiction."). Stern specifically incorporates herein his Special Appearance Objecting to Jurisdiction and supporting affidavit, both filed on August 4, 2008, and his Bench Brief in Support of Special Appearance filed on November 19, 2008, by this express reference thereto.

1. Arthur claims that Stern represented to the Court that he "no longer has electronic communications responsive" to Arthur's requests for production. (Supplement to Mot. to Compel, 1.) Arthur misstates the truth. As an initial matter, Arthur's requests for production are objectionable in their entirety because Arthur has not established that this Court may exercise personal jurisdiction over Stern. Arthur's requests far exceed the scope of jurisdictional discovery, and—even if served under the guise of merits discovery—are objectionably overbroad. See Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (requests for production without limitation to time, place, or subject matter are objectionably overbroad on their face). Nevertheless, Stern has produced to Arthur all documents he has located that are responsive to the scope of discovery agreed upon by Arthur—certain emails pertaining to jurisdictional discovery that were sent or received from **October 12, 2006** (the date of Arthur's interview with Nancy Grace) through **March 14, 2008** (the date on which Arthur filed her motion for leave to amend her complaint in Arthur's Federal Court Action to add the co-defendants and claims in this action to the Federal Court Action). Stern has provided a sworn affidavit that he has produced all emails between the co-defendants and him concerning Virgie Arthur from October 12, 2006 through March 14, 2008, that he was able to locate during a search of his email. (Stern Aff. ¶ 3, previously filed with the Court on December 9, 2008.) Stern cannot be compelled to produce documents that either do not exist or which he does not have in his possession, custody or control. See Texaco, Inc. v. Dominguez, 812 S.W.2d 451, 455 (Tex.

App.-San Antonio 1991) [holding that (i) an order compelling production cannot issue unless the existence of responsive documents is established; and (ii) a party who receives documents pursuant to discovery requests does not have a right to ascertain the accuracy and completeness of the production by searching through non-produced documents].

2. Arthur claims that Stern's counsel made statements that "permit the inference" that Stern destroyed evidence by deleting emails. (Supplement to Mot. to Compel, 1.) Stern has not engaged in spoliation of evidence, and Arthur's accusations of spoliation are unfounded, inappropriate, and sanctionable. As is Arthur's practice, the 'evidence' she relies on does not support her conclusory contentions. If the Court reviews the transcript attached by Arthur to her Supplement to Motion to Compel, the only representation made to the Court about deleted emails is that if Stern deleted any emails on his Yahoo! account (which is a web-based email account), no record of those emails would exist on his personal computer unless Stern saved the email from his web-based email account to his computer. How this "permit[s] the inference" of spoliation is inconceivable. Because of the media circus surrounding the deaths of Ms. Smith and her son, Daniel—including Arthur's counsel's verifiably false accusations that Stern murdered Ms. Smith and Daniel—and issues relating to the custody and paternity of Ms. Smith's daughter, Dannielynn, Stern regularly received numerous unsolicited emails between October 12, 2006, and March 14, 2008, many of which he likely deleted in the normal course, as was his practice.

Arthur has the burden of demonstrating that Stern anticipated litigation against her on the claims that form the basis of this action at the time he deleted any potentially relevant emails. See Trevino v. Ortega, 969 S.W.2d 950, 956 (Tex. 1998). Only once Arthur attempted to seek leave to amend her complaint in the Federal Court Action on March 14, 2008 to add three of the defendants in this action as well as the claims alleged by Arthur in this action, could Stern have

reasonably contemplated the frivolous litigation on the issues posed in this action. Prior to March 14, 2008, deletion of emails 'relevant' to the above-referenced action could not constitute spoliation or an attempt to "destroy evidence." See id. (duty to preserve evidence arises when, considering the totality of the circumstances, a reasonable person in the party's position would have anticipated litigation and whether the party actually anticipated litigation). Cf. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003) (spoliation instruction should not have been given where defendant disposed of evidence in the ordinary course of business and before defendant realized that there was a substantial likelihood that plaintiff would pursue claim); Brumfield v. Exxon Corp., 63 S.W.3d 912, 930 (Tex. App.-Houston [14th Dist.] 2002, rev. denied) (spoliation instruction was unwarranted where evidence was disposed of in the ordinary course and before plaintiff made claim against defendant).

3. On January 23, 2009, Arthur submitted to the Court a proposed "Order Compelling Production by Defendant Howard K. Stern and expanding Appointment of Independent Computer Forensic Examiner" (the "Proposed Order"). Arthur's Proposed Order would require Stern, a California resident who is not subject to the jurisdiction of this Court, to surrender his personal computer—which he shares with his parents who are non-parties to this litigation—to a special master, who would then run an invasive search of Stern's personal computer. Stern has a legally protected privacy interest in his personal computer, a reasonable expectation of privacy in the files contained on his computer, and examination of his computer by the special master would constitute a serous invasion of privacy. See TBG Ins. Servs. Corp. v. Superior Court, 117 Cal. Rptr.2d 155 (Cal. Ct. App. [2d Dist.] 2002) (reversing trial court's denial of motion to compel production of computer because the computer at issue was owned by the defendant-employer and was not plaintiff's personal computer). The scope of the

examination of Stern's personal computer under Arthur's Proposed Order would seriously invade Stern's privacy. While Arthur has interposed a time limitation in her Proposed Order, (i) the September 20, 2006 beginning time limitation she has proposed is still unreasonable and unrelated to any pertinent event; (ii) the subject matter of her document requests is still unlimited; (iii) Stern has already averred that he has he has produced all emails between the co-defendants and him concerning Virgie Arthur from October 12, 2006 through March 14, 2008, that he was able to locate during a search of his email and because Stern uses a web-based email account, the special master will not be able to locate any 'deleted' emails on Stern's personal computer (Stern Aff. ¶ 3); and (iv) the special master would capture all emails between Stern and his attorneys. Moreover, any information retrieved through an examination of Stern's personal computer would be duplicative of information Arthur would have received from the co-defendants or has already received from her "cooperating former co-conspirators." Indeed, Arthur claims that the emails already in her possession are sufficient to prove her conspiracy claim. [See Pl.'s Mot. to Compel Resps. to Reqs. for Produc. from Def. Howard K. Stern, filed on Dec. 3, 2008, at 3 n.3 (the emails in Arthur's possession allegedly "clearly" show a conspiracy); Pl.'s Resp. in Opp'n to Special Appearances of Defs. Bonnie Stern & Art Harris, filed on Nov. 21, 2008, at 7, 12 (Arthur possesses an "abundance of evidence" allegedly proving the existence of a conspiracy).]

4. Through Arthur's Proposed Order, Arthur asks the Court to order the Special Master to "capture electronic communications, including but not limited to e-mails, to or from DEFENDANT HOWARD K. STERN'S attorneys . . . ." As an initial matter, it is unimaginable how communications between Stern and his attorneys could be relevant to the sole issue before the Court at this point—whether it may exercise personal jurisdiction over Stern. Moreover,

communications between Stern and his attorneys are unquestionably privileged communications and Stern has not in any way waived that privilege. Texas Rule of Civil Evidence 503(b) precludes the discovery of communications between attorney and client. Tex. R. Civ. Evid. 503(b). Under the rule, a client has the privilege to refuse to disclose and prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of legal services to the client. Id. This rule does not require that the communication contain an attorney's mental impressions, legal advice, or opinions in order to retain their privileged nature. The privilege attaches to the complete communication between client and attorney, including both legal advice and factual information, and the subject matter of the communication is of no concern when determining whether it is privileged. In re ExxonMobil Corp., 97 S.W.3d 353, 357 (Tex. App.-Houston [14th Dist.] 2003, orig. proceeding). There simply exists no basis for even capturing this privileged information off Stern's personal computer and requiring Stern to prepare a privilege log when these communications are unarguably not discoverable.

5. As discussed in Stern's Response in Opposition to Arthur's Motion to Compel, Arthur's lawsuit against Stern is groundless in law and fact. Should this Court fail to sustain Stern's special appearance, Stern will seek his costs and expenses incurred in defending against this baseless lawsuit, including his reasonable and necessary attorneys' fees, pursuant to Texas Rules of Civil Procedure 13 and 215-2b.

WHEREFORE, PREMISES CONSIDERED, Defendant Howard K. Stern respectfully prays that this Court DENY Plaintiff's Motion to Compel Responses to Requests for Production

from Defendant Howard K. Stern and DENY Plaintiff's request to expand the appointment of the Special Master. A proposed order denying the motion is attached hereto.

Dated: February 4, 2009.

Respectfully submitted,

BRYAN CAVE LLP

By: /s/ John C. Patton

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CERTIFICATE OF SERVICE

I certify that a true copy of the above Defendant Howard K. Stern's Response to Plaintiff's Supplement to Motion to Compel Production from Stern has been sent by certified mail and by e-mail on February 4, 2009, to: