

VIRGIE ARTHUR,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFF,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
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 REPLY TO DEFENDANT CBS STUDIOS INC.’S RESPONSE  
TO PLAINTIFF’S MOTION FOR CONTINUANCE  
OF SUMMARY JUDGMENT SUBMISSION**

Plaintiff Virgie Arthur files this Reply to Defendant CBS Studios Inc.’s Response to Plaintiff’s Motion for Continuance of Summary Judgment Submission. In support of this Reply, Arthur shows as follows.

In its Response, CBS makes the following somewhat misleading statement: “Instead of the 21 days required by TEX. R. CIV. P. 166a(c), the Motion for Summary Judgment has been on file for 45 days.” The 21 days, however, is counted from the date of the notice, not the motion. *Chatdderdon v. Blaschke*, 988 S.W.2d 387, 388 (Tex. App. –Houston [1<sup>st</sup> Dist] 1999, no pet.). No matter how long the motion is on file, the movant must give the nonmovant 21 days notice of the hearing date when it sets the motion for a hearing. *Id.* As shown by the attached notice, CBS did not do so initially.<sup>1</sup> (See Exhibit A, Notice of Submission)

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<sup>1</sup> The attached Notice of Submission shows that it was mailed to Arthur on October 7, 2009, setting a submission date for October 26, 2009. The math is not difficult to do: 26 minus 7 equals 19, not 21. Actually, service by mail adds three days to the notice requirement. *Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex.1994); *Chatdderdon v. Blaschke*, 988 S.W.2d 387, 388 (Tex. App. –Houston [1<sup>st</sup> Dist] 1999, no pet.); Tex. R. Civ. P. 21a. That math is easy, too: 21 plus 3 equals 24.

CBS also makes the misleading representation that the submission date for its summary judgment motion was reset “at Arthur’s request.” (Response at 1) Instead, Arthur prepared a motion for continuance of the original setting and contacted counsel for CBS by email for purposes of a certificate of conference only, informing them of Arthur’s intention to file the motion for continuance, because CBS had failed to give 21 days notice, as required by TEX. R. CIV. P. 166a(c). Rather than admit its mistake, however, CBS announced to the parties that, while it did not agree that it had failed to give the requisite 21 days notice, it was resetting its motion for summary judgment for submission on November 16, 2009 at 8:00 a.m. and disingenuously tried to make it appear that it was giving Arthur’s counsel a break. (See Exhibit B, emails between law firms for Arthur and CBS) Contrary to the impression CBS tried to give this Court by saying that the submission date was reset “at Arthur’s request,” counsel for Arthur did not ask for anything except a response to the proposed motion for continuance, which called for the assistance of this Court in getting CBS to follow the rules.

CBS also argues, “As Arthur has now fully responded to CBS’s reply and its objections to Plaintiff’s response to the motion for summary judgment, her motion for continuance is moot ....” (Response at 2) Not really. The continuance of the submission date was requested to cure alleged deficiencies in summary judgment proof, not merely to “respond” to CBS’s filings. Specifically, Arthur is endeavoring to address CBS’s objection to Arthur’s Exhibit E, which is a transcription of one of CBS’s broadcasts of the prison interview with Larry Dale Hart. In its summary judgment motion, CBS provided only a partial transcription of several broadcasts, then objected that the additional transcription filed by Arthur was not authenticated properly and that the DVD from which the transcription was made was not attached. (Objections at 3 – 4)

The Court should note that CBS did not allege that the transcription filed by Arthur was not *in fact* true and correct, because CBS knows that it is. CBS also has not explained why it withheld one of the prison interview broadcasts from this Court and from the parties in this litigation.


In an additional effort to cure the alleged deficiency in her filing, Arthur will be filing a motion for leave to file late summary judgment evidence in the form of a copy of a DVD and a transcription of a CBS prison interview broadcast contained on that DVD, which CBS did not file with its Motion for Summary Judgment. That DVD was produced by CBS to Arthur in the prior federal suit in response to written discovery. See TEX. R. CIV. P. 193.7 Production of Documents Self-Authenticating. (See Exhibit C, image of DVD labeled CBS 000011) That DVD contains the portion of the CBS broadcasts that Arthur quotes on page 7 of Plaintiff's Response to Defendant CBS Studios Inc.'s Motion for Final Summary Judgment. Should CBS object to the authenticity of the contents of that DVD -- which it produced in response to written discovery requests in the federal case but withheld from this Court and the parties in filing its summary judgment motion - - then this Court should grant the continuance requested by Arthur and shorten the time for CBS to respond to a request from Arthur that CBS admit to the authenticity of the broadcast on that DVD and the transcription thereof. It should not take CBS more than a day or two to check its records and to admit the truth.

#### **Prayer**

Arthur prays that this Court grant Plaintiff's Motion for Continuance of Summary Judgment Submission.

Respectfully submitted,

THE O'QUINN LAW FIRM

By: 

Neil C. McCabe  
State Bar No. 13335300  
M. Michael Meyer  
State Bar No. 13993850  
Jonathan Stoger  
State Bar No. 00797504  
440 Louisiana, Suite 2300  
Houston, Texas 77002  
713-223-1000 (telephone)  
713-222-6903 (fax)  
**ATTORNEYS FOR  
PLAINTIFF**

**CERTIFICATE OF SERVICE**

On the 19<sup>th</sup> day of November 2009, Plaintiff served the foregoing Plaintiff's Reply to Defendant CBS Studios Inc.'s Response to Plaintiff's Motion for Continuance of Summary Judgment Submission as follows.

*Via Email and Fax*  
Mr. Harry Susman  
Mr. Richard Hess  
Susman Godfrey LLP  
1000 Louisiana, 51<sup>st</sup> Floor  
Houston, Texas 77002  
(713) 651-9366  
Fax: (713) 654-6666

*Via Email and Fax*  
Mr. L. Lin Wood  
Mr. Luke Lantta  
Powell Goldstein  
Bryan Cave  
2200 Ross Avenue, Suite 3200  
Dallas, Texas 75201  
Fax: (214) 721-8100

*Via Email and Fax*  
Mr. Charles Babcock  
Ms. Amanda Bush  
Ms. Nancy Hamilton  
Jackson Walker  
1401 McKinney, Suite 1900

Houston, Texas 77010  
(713) 752-4200  
Fax: (713) 752-4221

*Via Email and Fax*  
Ms. Diana Marshall  
Marshall & Lewis, LLP  
1010 Lamar, Suite 450  
Houston, Texas 77002  
(713) 655-0300  
Fax: (713) 655-0130

*Via Certified Mail*  
Ms. Teresa Stephens  
5022 Cloyce Court  
North Richland Hills, Texas 76180

*Via Email and Certified Mail*  
Ms. Bonnie Stern  
269 S. Beverly Dr., No. 1247  
Beverly Hills, CA 90212

*Via Email and Certified Mail*  
Ms. Lyndal Harrington  
8318 Burning Hills Dr.  
Houston, TX 77071

*Via Email and U.S. Mail*  
Mrs. Nelda Turner  
13348 County Road 3111  
Gladewater, Texas 75647

A handwritten signature in black ink, appearing to read "Neil McCabe", written over a horizontal line.

Neil McCabe

VIRGIE ARTHUR,  
PLAINTIFF,

v.

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.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

80th JUDICIAL DISTRICT

**AFFIDAVIT OF NEIL MCCABE**

BEFORE ME, the undersigned authority, personally appeared Neil McCabe, who is personally known to me. Upon his oath, he deposed and said:

1. My name is Neil McCabe. I am over the age of eighteen (18) years and am competent to make this affidavit. I am an attorney licensed to practice in the State of Texas, and I serve as lead plaintiff's counsel in the above-styled cause of action. I also served as lead plaintiff's counsel in the federal litigation styled Civil Action No. 4:07-cv-03742; *Virgie Arthur v. Howard K. Stern, CBS Studios, Inc.*; in the United States District Court for the Southern District of Texas; Houston Division.

2. The attached Exhibit A is a true and correct copy of Defendant CBS's Notice of Submission of Motion for Final Summary Judgment.

3. The attached Exhibit B is a true and correct copy of an email exchange between Defendant's counsel, Amanda Bush with Jackson Walker and The O'Quinn Law Firm for Plaintiff on October 21, 2009.

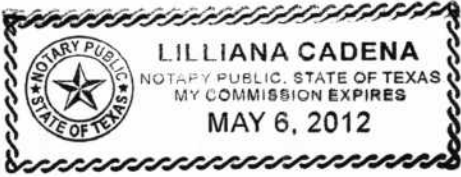
4. The attached Exhibit C is a true and correct copy of the cover of the DVD I received from CBS Studios, Inc. in the federal litigation cited above in response to a written request for production. That DVD was labeled CBS 000011, Entertainment Tonight Show #6704.

FURTHER AFFIANT SAITH NOT.



NEIL MCCABE

SWORN and SUBSCRIBED before me on the 19<sup>th</sup> day of November, 2009.



*Lilliana Cadena*

NOTARY PUBLIC in and for the  
STATE OF TEXAS

Tab A

CAUSE NO. 2008-24181

VIRGIE ARTHUR,

*Plaintiff,*

vs.

HOWARD K. STERN, BONNIE STERN,  
LYNDAL HARRINGTON, ART HARRIS,  
NELDA TURNER, TERESA STEPHENS,  
HARVEY LEVIN, TMZ PRODUCTIONS,  
INC., LARRY BIRKHEAD, and CBS  
STUDIOS INC.

*Defendants.*

§  
§ IN THE DISTRICT COURT OF  
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§ HARRIS COUNTY, TEXAS  
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§ 80<sup>TH</sup> JUDICIAL DISTRICT

**NOTICE OF SUBMISSION**

PLEASE TAKE NOTICE that Defendant CBS Studios Inc.'s Motion for Final Summary Judgment will be submitted to the Court for ruling on Monday, October 26, 2009, at 8:00 a.m.

Respectfully submitted,

By: *s/Amanda L. Bush*  
Charles L. Babcock  
State Bar No. 01479500  
Nancy W. Hamilton  
State Bar No. 11587925  
Amanda L. Bush  
State Bar No. 24042161  
JACKSON WALKER L.L.P.  
1401 McKinney Street, Suite 1900  
Houston, Texas 77010  
Telephone: (713) 752-4200  
Facsimile: (713) 752-4221

**ATTORNEYS FOR DEFENDANT  
CBS STUDIOS INC.**

**CERTIFICATE OF SERVICE**

This is to certify that on this 7<sup>th</sup> day of October 2009, a true and correct copy of the foregoing *Notice of Submission of Defendant CBS Studios Inc.'s Motion for Final Summary Judgment* was served upon all counsel of record and *pro se* defendants as indicated below:

***Via Email and First Class Mail:***

Neil McCabe  
Michael Meyer  
The O'Quinn Law Firm  
440 Louisiana, Suite 2300  
Houston, Texas 77002  
*Attorneys for Plaintiff Virgie Arthur*

***Via Email and First Class Mail:***

Diana Marshall  
Marshall & Lewis, LLP  
1010 Lamar St. Suite 450  
Houston, Texas 77002  
*Attorneys for Defendant Larry Birkhead*

***Via Email and First Class Mail:***

Harry Susman  
Richard Hess  
Susman Godfrey, LLP  
1000 Louisiana, 51<sup>st</sup> Floor  
Houston, Texas 77002  
*Attorneys for TMZ Productions, Inc.  
and Harvey Levin*

***Via Email and First Class Mail:***

L. Lin Wood  
Luke Lantta  
Bryan Cave  
One Atlantic Center, 14<sup>th</sup> Floor  
1201 West Peachtree Street, NW  
Atlanta, Georgia 20209  
*Attorneys for Defendant Howard K. Stern*

***Via Email and First Class Mail:***

Teresa Stephens  
5022 Cloyce Court  
North Richland Hills, Texas 76180  
*Defendant Pro Se*

***Via Email and First Class Mail:***

Bonnie Stern  
269 S. Beverly Drive, No. 1247  
Beverly Hills, California 90212  
*Defendant Pro Se*

***Via Email and First Class Mail:***

Nelda Turner  
13348 County Road 3111  
Gladewater, Texas 75647  
*Defendant Pro Se*

***Via Email and First Class Mail:***

Lyndal Harrington  
8318 Burning Hills Dr.  
Houston, Texas 77071  
*Defendant Pro Se*

*/s Amanda L. Bush*

\_\_\_\_\_  
Amanda L. Bush

Tab B

**Subject:** RE: 2008-24181; Arthur v. Stern -- Conference

**From:** "Bush, Amanda" <abush@jw.com>

**Date:** Wed, 21 Oct 2009 11:29:09 -0500

**To:** "Patti Lampton" <pattil@oqlaw.com>, "B. Lyle" <B.Lyle@BryanCave.com>, "Bonnie Stern" <bonnies10@yahoo.com>, <butterfly75218@yahoo.com>, <DEMarshall@MarshallLewisLLP.com>, "Harry Susman" <HSUSMAN@SusmanGodfrey.com>, "Herring, Walt" <Walter.Herring@BryanCave.com>, "Jan Cobden" <jcobden@SusmanGodfrey.com>, "L. Lin Wood" <lin.wood@BryanCave.com>, "Lilliana Cadena" <lilliana@oqlaw.com>, "Luke A. Lantta" <luke.lantta@BryanCave.com>, "Lyndal" <tx\_babee@yahoo.com>, "M. Michael Meyer" <mikem@oqlaw.com>, "Neil McCabe" <neilm@oqlaw.com>, "Nelda Turner" <cajunrose@verizon.net>, "Pam Thiele" <PKThiele@MarshallLewisLLP.com>, "Richard W. Hess" <rhess@SusmanGodfrey.com>, "Teresa Stephens" <trinitistrends@aol.com>

**CC:** "Babcock, Chip" <cbabcock@jw.com>, "Hamilton, Nancy" <nhamilton@jw.com>

Ms. Lampton, we don't agree with Mr. McCabe's position, but it appears he needs more time to respond, so we filed the attached Amended Notice of Submission, re-setting the Motion for Summary Judgment for submission on November 16, 2009 at 8:00 a.m.

Thanks,

**Amanda L. Bush**

Jackson Walker, LLP

100 Congress Avenue, Suite 1100

Austin, Texas 78701

Telephone: 512.236.2347

Facsimile: 512.691.4447

Email: abush@jw.com

Austin | Dallas | Fort Worth | Houston | San Angelo | San Antonio

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**From:** Patti Lampton [mailto:pattil@oqlaw.com]

**Sent:** Wednesday, October 21, 2009 10:21 AM

**To:** Bush, Amanda; B. Lyle; Babcock, Chip; Bonnie Stern; butterfly75218@yahoo.com; DEMarshall@MarshallLewisLLP.com; Hamilton, Nancy; Harry Susman; Herring, Walt; Jan Cobden; L. Lin Wood; Lilliana Cadena; Luke A. Lantta; Lyndal; M. Michael Meyer; Neil McCabe; Nelda Turner; Pam Thiele; Richard W. Hess; Teresa Stephens

**Subject:** 2008-24181; Arthur v. Stern -- Conference

Neil McCabe asked me to inform all of you that he plans to file a Motion for Continuance of the submission setting on Art Harris's Motion for Final Summary Judgment. The motion is based on the fact that we did not receive the requisite 21 days notice of the setting. Please respond by email as to whether you are opposed or unopposed. Thank you.

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Tab C

THE  QUINN LAW FIRM

Virgie Arthur  
v.  
Howard K. Stern,  
CBS Studios, Inc., &  
KPRC Houston

C.A. No.  
4:07-CV-03742

ET Show #6704  
Airdate 05-24-07

**CBS 000011**