

NO. 2014-CI-17145

E.M. and V.B.M., <i>Plaintiffs,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	
	§	BEXAR COUNTY, TEXAS
PHILIP R. KLEIN, KLEIN	§	
INVESTIGATIONS &	§	
CONSULTING, and JAMES W.	§	
LANDESS,	§	
<i>Defendants</i>	§	73rd JUDICIAL DISTRICT

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION

Plaintiffs E.M. and V.B.M. file their Second Amended Original Petition, complaining of defendants Philip R. Klein, Klein Investigations & Consulting, and James W. Landess, and would respectfully show as follows:

I. DISCOVERY CONTROL PLAN

1. Pursuant to TEX. R. CIV. P. 190.4, plaintiffs intend to conduct discovery in this suit under Level 3.

II. NO EXPEDITED-ACTIONS PROCESS

2. This suit is not eligible for the expedited-actions process of TEX. R. CIV. P. 169 because plaintiffs request injunctive relief and monetary relief over \$100,000.00.

III. PLEADING OF LEVEL OF RELIEF PURSUANT TO TEX. R. CIV. P. 47(c)

3. Pursuant to TEX. R. CIV. P. 47(c)(5), plaintiffs plead that they seek monetary relief in excess of \$1,000,000.00.

IV. CONDITIONS PRECEDENT

4. Pursuant to TEX. R. CIV. P. 54, plaintiffs pleads that all conditions precedent to filing this suit have been performed, or have occurred.

V. NOTICE PURSUANT TO TEX. R. CIV. P. 193.7

5. Plaintiffs hereby give notice pursuant to TEX. R. CIV. P. 193.7 that documents produced by defendants will be used against the producing party.

VI. PARTIES

6. Plaintiff E.M. is a natural person and a U.S. citizen, and resides in the Republic of Mexico. E.M. files this suit under a pseudonym because this suit involves defamation by defendants related to a previously charged criminal offense against E.M. The criminal case was dismissed and all records thereof were ordered expunged by the District Court of Bexar County, Texas. *See Gustafson v. Chambers*, 871 S.W.2d 938 (Tex. App.—Houston [1st Dist] 1994, orig. proceeding).

7. Plaintiff V.B.M. is a citizen and resident of the Republic of Mexico. V.B.M. files this suit under a pseudonym because this suit involves defamation by defendants related to a previously charged criminal offense against V.B.M. The criminal case was dismissed and the records of which were ordered expunged by the District Court of Bexar County, Texas. *Id.*

8. Defendant James W. Landess is a natural person residing at 1515 Hawks Meadow, San Antonio, Bexar County, Texas 78248. Landess has appeared and answered in this suit for all purposes.

9. Defendant Philip R. Klein¹ is a natural person residing in Jefferson County, Texas, and may be served with process by serving his attorney of record, Richard W. Espey,² in accordance with TEX. R. CIV. P. 21a.

10. According to its website, defendant Klein Investigations and Consulting is “a division of Klein Investments, Inc.,” a Texas corporation with its principal office at 826 Nederland Avenue, Nederland, Texas 77627. Klein Investigations & Consulting may be served with process by serving its attorney of record, Richard W. Espey, in accordance with TEX. R. CIV. P. 21a.

VII. JURISDICTION & VENUE

11. The Court has jurisdiction over the defendants because they are Texas residents. The Court has jurisdiction over the controversy because damages are above the minimum jurisdictional limits of the Court.

12. Venue is proper in Bexar County pursuant to TEX. CIV. PRAC. & REM. CODE § 15.017 because this suit involves defamation and Bexar County is the county of residence of defendant Landess.

¹ Plaintiffs nonsuited the two Klein defendants without prejudice on **January 6, 2015**, but here rejoin them as defendants.

² Attorney Espey claims that his legal representation of Klein and Klein Investigations & Consulting in this matter did not terminate with plaintiffs’ **January 6, 2015**, nonsuit of claims against Klein. Espey has contended that service of papers in this cause upon Klein directly would be a violation of TEX. DISCIPLINARY R. OF PROF. CONDUCT 4.03(a). Therefore, Espey has agreed to accept service on behalf of Klein.

VIII. FACTS

13. Plaintiff V.B.M., a citizen of Mexico, and defendant Landess were married on September 2, 1994. V.B.M. and Landess had two children, T.L. (18) and B.L. (12).

14. V.B.M. and Landess divorced in 2006. The Final Decree of Divorce gave V.B.M. the exclusive right to establish the primary residence of the children and allowed Landess to have visitation with the children. **Exhibit 1.**

15. V.B.M. married E.M. in 2008. In late 2008, V.B.M. relocated to Monclova, Mexico. After plaintiffs moved to Mexico with the children, Landess attempted—unsuccessfully—to obtain custody of T.L. and B.L. and to limit the geographic area in which they could reside. After a trial on July 21-24, 2009, the 288th District Court of Bexar County, Texas, (Hon. Karen Pozza) signed an order on **March 3, 2010**, allowing V.B.M. to maintain primary residence with the children in Monlova, Mexico. *See Exhibit D to Landess's First Amended Original Answer and Counterclaim.* Almost immediately, Landess started making false claims that V.B.M. had “kidnapped” her children.

16. On May 21, 2010, Landess alleged that V.B.M. failed to appear at the Mexico-U.S. border to deliver the children to him. Although Landess had visited the children just *one week earlier* at their home in Monclova, Mexico—and, therefore, knew exactly where the children lived—Landess claimed he did not know where the children were and that they had been “kidnapped.” To aid him in his scorched-earth campaign of personal destruction against plaintiffs,

Landess employs an acerbic and provocative blogger and failed author, defendant Philip R. Klein, who uses the *nom de guerre* “Klein Investigations & Consulting.” Klein widely claims to have been “instrumental” in many international child abduction cases and displays the following extravagant claims on his website:

Klein has been featured in seven countries outside of the United States to which have resulted in kidnapped children and abducted Americans in their flight home. (sic)³

Klein’s publicity-mongering, bizarre threats, and outrageous harassment of plaintiffs continued for *four years* as more particularly detailed below.

17. During a visitation with the children in Monclova, Mexico, after they had resided there for approximately 18 months, the emotionally unstable Landess had a hysterical incident with an unrelated *5-year-old* child at a bowling alley, during which Landess viciously, verbally abused the child. The incident frightened and disturbed the Landess children so deeply that V.B.M. sought relief from the only court of proper jurisdiction over the children by that time—a Mexican agency related to family and child protection and a court in Monclova, Mexico. V.B.M. applied to the “Desarrollo Integral de la Familia” (“DIF”), a Mexican public institution of social assistance that focuses on strengthening and developing the welfare of the Mexican families.⁴ On May 14, 2010, a Mexican court issued an order protecting the children and limiting Landess’ parental rights.

³ See www.kleininvestigations.com/consulting, last visited September 3, 2014 [mangled syntax in original].

⁴ See <http://sn.dif.gob.mx/>; http://en.wikipedia.org/wiki/National_System_for_Integral_Family_Development, last visited October 31, 2014.

Exhibit 2. V.B.M. sought legal counsel on May 17, 2010, for assistance in establishing legal protection for her children from Landess. **Exhibit 3.**

18. On **June 10, 2010**, the 288th District Court of Bexar County, Texas, (Hon. Karen Pozza) in a “Reformed Order on Motion for New Trial,” ordered that the **March 3, 2010**, order allowing V.M. to reside with the children in Monclova, Mexico was “set aside.” See Exhibit E to *Landess*’ First Amended Original Answer and Counterclaim.

19. On **August 2, 2010**, V.B.M. obtained a temporary order from a Mexican court limiting Landess’ rights of possession of the children. **Exhibit 4.** The Mexican Consul General attempted formal notice to Landess of V.B.M.’s petition affecting his parental rights in the Mexican court. See **Exhibits 5a** and **5b**. However, *Klein*—in a move likely constituting the unlicensed practice of law—wrote the Consul General that his “client” Landess *would not accept service of process* in V.B.M.’s suit. **Exhibit 6.** Klein returned the process. Landess refused to appear in the suit and defaulted.

20. Then, pretending not to know of the Mexican suit *of which Landess had instructed Klein to refuse service*, Landess and Klein put their plan for an “end-run” around the Mexican judicial system into action. On **August 20, 2010**,⁵ Landess filed his First Amended Petition to Modify Patent Child Relationship in the 288th District Court of Bexar County *but never served V.B.M.* The 288th District Court set a hearing on Landess’ First Amended Petition for **October 21**,

⁵ See Exhibit I to *Landess*’ First Amended Original Answer and Counterclaim.

2010. Landess *never served V.B.M.* Therefore, V.B.M. was unable to defend. On **December 13, 2010**, the 288th District Court signed an order designating the children’s primary residence as Bexar County, Texas. **Exhibit 7.**

21. Despite the Mexican court’s May 2010 and August 2010 orders limiting Landess’ parental rights—Klein then began an appalling campaign of fear and intimidation against plaintiffs. In a letter dated December 20, 2010, Klein identified himself as agent for Landess to “facilitate the children’s return to Texas” and to “bring Federal and International Charges for your arrest and extradition to the United States to face charges.” **Exhibit 8.** With misspelled words, misused legal terms, and pseudo-legal gibberish, Klein pretended he had power to withhold prosecution and threatened V.B.M. with criminal punishment if she did not surrender her children to Landess and Klein:

Ms. [V.B.M.], there is no negotiation room. You must have the children back in the United States my (sic) by January 2, 2010, (sic) or you will face felony extradition to the United States under the Hauge (sic) Act. (sic) I have attached a copy of the Hague application that is currently pending in the United States (see attached). If you do not comply — you have a chance of going to prison for a very long time. I urge you to end this matter now.

Id. Apparently under the mistaken belief that the Hague Convention⁶ is a law enforcement organization operating under the aegis of the U.S. Government, Klein

⁶ The “Hague Convention” is a series of international treaties and declarations, and may refer either to the Hague Convention of 1899, the Hague Convention of 1907, or later conventions negotiated at international peace conferences at The Hague in the Netherlands. Along with the Geneva Conventions, the Hague Conventions were among the first formal statements of the laws of war and war crimes in the body of secular international law. The “Hague Convention on the Civil Aspects of International Child Abduction” was a multilateral treaty entered into force between the signatories on October 25, 1983, to ensure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained in a contracting

somewhat comically copied his letter to “the United States Department of State — Hague Convention.” But there was nothing comical about Klein’s blood-curdling closing threats:

[I]t will only be a matter of time before that knock on the door comes and you are placed into custody for felony warrants for your arrest.... There will be nowhere to hide — we will find you.... Either you will send the children back now and not face charges or you will begin a process that will place you in prison for a very long time and you will not be able to watch your children grow up.

Id.

22. Attached to Klein’s December 20, 2010, letter was what Klein inaptly referred to as an “application under the Hauge (sic) Act,” (**Exhibit 8**) in which Landess and Klein told the first of a series of lies that would eventually result in the false arrest of E.M. in February 2013:

In July, 2009 a U.S. court decided to allow the children to remain in [Mexico] provided [V.B.M.] allowed [Landess] regular and free access to my children. As a result of [V.B.M.’s] refusal to comply with those legal orders U.S. judge Karen Pozza ordered in June 2010 that another trial take place and granted me custody of my two children. [V.B.M.] has refused to comply with this legal ruling.... The legal residence of my children at the time of their abduction was San Antonio, Texas, and continues to be San Antonio, Texas.

Id.

23. Just ten days later on December 30, 2010, Klein wrote yet another menacing letter to V.B.M. containing a chilling threat phrased in the *first person*:

state not their country of habitual residence. Of course, the Hague Abduction Convention did not even apply to the Landess children, since—as James Landess well knew—the Bexar County District Court had previously ordered that the Landess children could reside in Mexico.

Again, I want to warn you that if you do not cooperate you face the possibility of ... charges in Federal Court of international kidnapping.... Ms. [V.B.M.], it will not be “if” we come to get you — we are coming.

Exhibit 9.

24. Since 2010, Landess has continued to use false allegations of “child kidnapping” to harass and threaten plaintiffs. In addition to the lies in the “Hague application” (likely authored by Klein), Landess signed a false statement to detectives of the San Antonio Police Department that he was entitled to full custody of his children based on the order he knew to be invalid. Although Landess knew the Mexican court had ruled against him in May 2010 and again in August 2010, Landess concocted plausible deniability of this knowledge by having Klein “refuse” service of the Mexican court’s order. Landess persisted in his story that the Texas court’s December 13, 2010, order—procured by Landess’ false statements of fact from a court that lacked subject matter jurisdiction—gave him custody of the children.

25. As part of his activities as Landess’s agent, Klein published a “Web Log” or “Blog” containing statements regarding both E.M. and V.B.M. (A “Blog” is a personal website or web page on which an individual records opinions, photos or links to other sites on a regular basis.)

26. Klein’s blog at [http://find-fugitive-\[VBM\].blogspot.com](http://find-fugitive-[VBM].blogspot.com) was colorfully emblazoned with:

Find Fugitive [V.B.M.]

27. Although Klein's blog was removed shortly after service of process in this suit, as recently as October 31, 2014, false implications of fact published on Klein's blog included:

- (i) In the Spring of 2010, V.B.M. kidnapped her children;
- (ii) V.B.M. is wanted for Felony Interference with Child Custody, NCIC 0955280 – Warrant issued August 1, 2010;
- (iii) V.B.M. has not communicated with the father (Landess) for over three years; and
- (iv) V.B.M. failed to show for a court hearing in October 2010.

28. Klein's blog also falsely implied that the unnamed father had legal custody of the children, displayed a "WANTED" poster with V.B.M.'s picture on it (**Exhibit 10**), and published the address of plaintiffs' private family home.

29. Landess used false statements and perjurious testimony to obtain indictments against plaintiffs. A copy of Landess' statement to Detective Zuniga is attached hereto as **Exhibit 11**. Klein abetted Landess in his canard (and likely engineered it) by submitting his own affidavit to law enforcement that contained libelous statements regarding "wanted felon V.B.M." who had "kidnapped" her children and was assisted by "current husband E.M." **Exhibit 12**. Both the statements and affidavits omit any discussion of the valid order from the court in Monclova, Mexico—about which both Klein and Landess knew—that gave V.B.M. the right to have her children there.

30. As a result of the affirmative statements and acts of Landess and Klein, as well as their omission of material facts related to the Mexican custody order, plaintiffs were indicted on December 19, 2012, for interference with child custody by the 175th District Court Grand Jury in Case numbers 2012-CR-10398A and 2012-CR-10398B. The cases were filed in the 437th District Court and warrants for plaintiffs' arrest were issued. Redacted copies of the indictments are appended hereto as **Exhibits 13 and 14**.

31. In February 2013, E.M. was arrested in Hidalgo County, Texas, as he drove through Texas for a business trip. He was booked and posted \$10,000 bail. **Exhibit 15**. E.M. was obliged to retain counsel to defend the unfounded and falsely-procured charges. E.M. filed a Plea in Bar contesting the jurisdiction of the Bexar County Criminal District Court due to the dominant jurisdiction of the Mexican court over the children's custody. **Exhibit 16**.

On May 14, 2010, an order by the Family Office of the Inspector General of the State of Coahuila, an "extraordinary situation" occurred wherein Mr. James Landess became angry and this "situation of violence" to a minor female child was witnessed by [the children]. This incident "infuriated" Mr. James Landess who shouted expletives to the minor and his children were found in a "situation of risk, a situation that the minors no longer wanted to be near or with their father."

On August 2nd, 2010, after considering evidence, an order granted temporary custody of [the children] to [V.B.M.] issued by Family Court in the Judicial District of Moncolva (sic).

UCCJEA 152.105 requires a Court of Texas to treat a foreign country as if it were a state of the United States for purposes of applying this subchapter. A child custody determination made in a foreign country under factual circumstances in substantial

conformity with the jurisdictional standards of the chapter must be recognized and enforced.

Exhibit 16, ¶ I.

32. The 437th District Court of Bexar County granted plaintiffs' motions, quashed the indictments, and dismissed the cases of Interference with Child Custody against plaintiffs. **Exhibits 17 and 18.** Plaintiffs sued to expunge the records of the false charges. Expunction was ordered in May 2014.

33. Klein made the false statements of fact about plaintiffs on his blog both as his own assertions and in conspiracy with, and as agent of, Landess. As Klein and Landess well knew, V.B.M. never “kidnapped” her children. V.B.M. was only a “fugitive” and E.M. was only “under investigation” for “interference with child custody” because of the improper criminal prosecutions *Landess and Klein* had themselves used perjurious testimony to procure against them.

34. While some of the facts published by Klein may have been literally true at one time, Texas courts for over 50 years have universally refused to allow clever word-smithing to immunize a tortfeasor from liability for defamation:

[A] plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.

Turner v. KTRK Television, Inc., 38 S.W.3d 103, 114-15 (Tex. 2000) (citing *Golden Bear Dist. Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 948-49 (5th Cir. 1983) (applying Texas law); *Huckabee v. Time Warner Entm't. Co.*, 19 S.W.3d 413,

425 (Tex. 2000); *Express Publ'g Co. v. Gonzalez*, 350 S.W.2d 589, 592 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.)).

35. The *truth* was that V.B.M. always had full legal custody of the children under a final, valid order from a court of proper jurisdiction. **Exhibit 19.** Yet, the perfidious and vulpine Klein published the following false statements so as to create a substantially false and defamatory innuendo and implication that V.B.M. was a criminal:

- (i) “[V.B.M.] refuses to follow a court order;”
- (ii) “Full temporary custody was awarded to the father of the children in [Landess] November 2010;” and
- (iii) “[E.M.] was also under investigation for aiding and interference with child custody.”

Klein also published that V.B.M. “failed to show for a court hearing,” but concealed the fact that this was because Landess never served her with notice of the hearing. Klein also published that “full custody was awarded to the father in November 2010,” but concealed the fact that the only court with proper jurisdiction had awarded custody *to V.B.M.*

36. Defendants’ scheme of relentlessly and maliciously publishing false statements of fact and innuendoes about plaintiffs—either with actual knowledge of their falsity or with reckless disregard for their truth—was done to exert pressure on V.B.M. to surrender her children to Landess and Klein. The statements exposed plaintiffs and their family to public ridicule, caused shame and mental anguish, and tortiously interfered with E.M.’s ability to earn a living.

IX. CAUSES OF ACTION

A. First Cause of Action: Malicious Criminal Prosecution

36. Plaintiffs re-allege the facts and matters contained in paragraphs 1-35 above as if they were fully set forth again below.

37. Through the use of false sworn testimony and false statements to police, defendants initiated or procured criminal prosecutions for felony interference with child custody against E.M. and V.B.M. under Cause No. 2012-CR-10398A and 2012-CR-10398B, respectively, in the 437th District Court of Bexar County, Texas. **Exhibits 13 and 14.** The criminal cases against plaintiffs were both terminated in plaintiffs' favor. **Exhibit 17 and 18.** Plaintiffs were innocent of the charges and the records of their false prosecution and arrest have been expunged pursuant to orders of district courts of Bexar County, Texas.

38. Defendants did not have probable cause to initiate or procure the prosecution because the Bexar County District Court order defendants used to allege the criminal offenses governing the custody and visitation of the children had been superseded by a subsequent order of a court in Mexico that changed and limited the rights of Landess.

39. Defendants acted with malice in seeking to procure the criminal prosecutions by proceeding to inform the police and prosecutors involved in the criminal matters that the superseded order was still in full force and effect.

40. Plaintiffs suffered damages as a result of the prosecution in that they were charged, arrested, forced to post bond, and/or required to retain counsel.

B. Second Cause of Action: False Imprisonment

41. Plaintiffs re-allege the facts and matters contained in paragraphs 1-35 above as if they were fully set forth again below.

42. Defendants willfully and actively engaged law enforcement and prosecutorial personnel in Bexar County, Texas, in their campaign of threats and intimidation aimed at plaintiffs. Landess and Klein directed, requested, and/or participated in the arrest or detention of Plaintiff E.M. by (i) misrepresenting the facts and/or the law to law enforcement and (ii) by engaging in acts that made them the active and procuring cause of the detention. *Bossin v. Towher*, 894 S.W.2d 25, 32 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

43. E.M. was arrested in Hidalgo County, Texas, in February 2013 for the indicted offense procured falsely by Landess and Klein. E.M.'s arrest was without his consent and was accomplished by force and intimidation.

44. E.M.'s arrest was without legal authority or justification as found by Judge Valenzuela in her ruling on the lack of jurisdiction for the criminal case against E.M. *See Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375-76 (Tex.1985).

C. Third Cause of Action: Defamation, Libel, and Libel *Per Se*

45. Plaintiffs re-allege the facts and matters contained in paragraphs 1-35 above as if they were fully set forth again below.

46. As noted above, the 437th District Court of Bexar County granted plaintiffs' motions, quashed the indictments, and dismissed the cases of Interference with Child Custody against both plaintiffs in February 2014. **Exhibits 17 and 18.** The import of such a dismissal was stated by one court as follows:

It is well settled that when a trial court empowered with jurisdiction over a criminal case sustains a motion to dismiss the indictment or information, the person accused thereunder is, in law, discharged from the accusation against him; there is, concomitant to such dismissal, no case pending against the accused and, accordingly, no jurisdiction remaining in the dismissing court. [Citation omitted.] "Furthermore, it is likewise axiomatic that where there is no jurisdiction, 'the power of the court to act is as absent as if it did not exist,' ... and any order entered by a court having no jurisdiction is void." [Citations omitted.]

In re Beaumont City Attys., 2010 Tex. App. LEXIS 5334 (Tex. App.—Beaumont 2010). However, Klein continued to publish his defamatory blog describing plaintiffs as criminals.

47. On **March 11, 2014**, counsel for E.M. and V.B.M. wrote to Klein to advise that the criminal proceedings Klein and Landess had caused to be instituted against plaintiffs "have now been terminated in [plaintiffs'] favor, as you can easily verify from public records." Plaintiffs' informed Klein that plaintiffs were no longer "federal fugitives" and were not "under investigation" for "interference with child custody." Plaintiffs demanded that Klein publish a retraction as

provided by the Defamation Mitigation Act,⁷ TEX. CIV. PRAC. & REM. CODE § 73.051-.062.

48. Also on **March 11, 2014**, private investigator Klein—who apparently could not be bothered to investigate the truth of the statements published regarding E.M. and V.B.M.—recklessly responded:

There will be no retraction printed as the comments were true and accurate.

Thereafter, defendants—neither of whom is a member of the print or broadcast media—relentlessly and continuously published objectively verifiable, false statements of fact to third persons alleging that plaintiffs had committed the felonies of “kidnapping” and interference with child custody. Defendants relentlessly and continuously published statements that V.B.M. is a “wanted fugitive” with an “active warrant.”

49. The false statements made by defendants did not concern a matter of public concern and were not made about a public figure. Plaintiffs are private-figures. *Wolston v. Readers’ Digest Ass’n*, 443 U.S. 157, 166-167 (1979); *Time, Inc. v Firestone*, 424 U.S. 448, 454 (1976).

50. Defendants’ statements referring to plaintiffs were defamatory and tended to injure the plaintiffs’ reputations and expose the plaintiffs to public hatred, contempt or ridicule, or impeach plaintiffs’ honesty, integrity, virtue, or reputation. TEX. CIV. PRAC. & REM. Code, § 73.001. Defendants’ statements

⁷ The Texas Defamation Mitigation Act became law on **June 14, 2013**.

referring to plaintiffs are defamatory *per se* in that they fall within the statutory definition of libel. ***Gartman v. Hedgpeth***, 157 S.W.2d 139, 140-41 (Tex. 1941).

51. With regard to the truth of the foregoing statements, the defendants were:

- (i) Acting with actual malice;
- (ii) Negligent; or
- (iii) Liable without regard to fault.

52. As if all of this were not enough, on or about **December 5, 2014**, Landess traveled to Vancouver, where the daughter for whom he has paid no child support for 5 years (T.L.) is enrolled in a private school. T.L., now 18, declined to Landess. Landess became enraged and told school officials that E.M. had been “incarcerated for interference with child custody.” This was not only more defamation of E.M. by Landess, but a violation of the Court’s Temporary Restraining Order in effect at that time.

53. Because the statements are defamatory as defined by statute, injury to plaintiffs’ reputations is presumed. ***Renfro Drug Co. v. Lawson***, 160 S.W.2d 246, 250 (Tex.1942). Because the false statements impute to plaintiffs the commission of a crime, they are defamatory *per se*. ***Leyendecker & Assocs. v. Wechter***, 683 S.W.2d 369, 374 (Tex. 1984). Defendants’ false statements are libel *per se* because they are so obviously hurtful to plaintiffs that no proof of the statements’ injurious character is required to make them actionable. ***Houseman***, 242 S.W.3d at 524 (Tex. App.—El Paso 2007, no pet.).

D. Vicarious Liability

54. Plaintiffs re-allege the facts and matters contained in paragraphs 1-51 above as if they were fully set forth again below. Plaintiffs seek to impose participatory and vicarious liability on both defendants under theories of (i) civil conspiracy; (ii) agency; and (iii) aiding and abetting; as set forth below.

1. Civil Conspiracy

55. Landess and Klein were members of a combination of two or more persons, the object of which was to accomplish an unlawful purpose, namely, to harass and threaten plaintiffs with defamatory statements and to initiate false criminal charges against them for interference with child custody. Klein and Landess had a meeting of the minds on the object or course of action. One or both of Klein and Landess committed one or more unlawful, overt acts in furtherance of the conspiracy, as a result of which plaintiffs were injured.

2. Agency—Actual Authority

56. In October 2010, Landess employed Klein as his agent to threaten, harass, and defame plaintiffs in an attempt to bully them into agreeing to change the legal custody of the children. Landess also paid Klein to procure criminal charges against plaintiffs with false testimony to law enforcement agencies. A principal can be held vicariously liable for the torts of its agent acting within the scope of the agent's actual authority. *Great Am. Life Ins. v. Lonze*, 803 S.W.2d 750, 754 (Tex. App.—Dallas 1990, writ denied); *Lane v. Security Title & Trust Co.*, 382 S.W.2d 326, 331 (Tex. App.—Dallas 1964, writ ref'd n.r.e.). Landess—

- (i) intentionally conferred authority Klein; allowed Klein to believe he had authority, or through lack of due care, allowed Klein to believe he had authority to carry out the outrageous threats, harassment, intimidation, and defamation Klein directed at plaintiffs; and
- (ii) Klein was acting within the scope of his agency when he committed the various torts herein described.

Celtic Life Ins. v. Coats, 885 S.W.2d 96, 98-99 (Tex. 1994); *Great Am. Life Ins. v. Lonze*, 803 S.W.2d 750, 754 (Tex. App.—Dallas 1990, writ denied); *Texas Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 352 (Tex. App.—Fort Worth 2007, pet. dism'd).

3.Aiding and Abetting

57. While the Texas Supreme Court has not adopted the formulation of assisting or encouraging as set out in RESTATEMENT (2d) OF TORTS § 876(b), Texas courts have universally assumed aiding and abetting is an appropriate theory for imposing joint liability, and § 876(b) offers an outline of elements.

- (i) The primary actor committed a tort
- (ii) The defendant had knowledge that the primary actor's conduct constituted a tort.
- (iii) The defendant had the intent to assist the primary actor in committing the tort.
- (iv) The defendant gave the primary actor assistance or encouragement.
- (v) The defendant's assistance or encouragement was a substantial factor in causing the tort.

Juhl v. Airington, 936 S.W.2d 640,644 (Tex.1996); *Shinn v. Allen*, 984 S.W.2d 308, 311 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

58. Landess assisted or encouraged Klein to commit the tort of defamation. Likewise, Klein assisted or encouraged Landess to commit the torts of libel and malicious prosecution. Because the assistance or encouragement of each to the other was a substantial factor in causing the torts, the defendants are both considered tortfeasors and are responsible for the consequences of the tort. RESTATEMENT (2d) OF TORTS § 876(b) cmt. d (1979).

59. Assisting and participating has long been recognized as a theory for imposing joint liability in Texas. See *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). While the Texas Supreme Court has not adopted assisting-and-participating liability as described in RESTATEMENT (2d) OF TORTS § 876(c) (1979) as a theory for imposing joint liability, § 876(c)'s requirement of actual participation in the tort is already the law in Texas. When a defendant assists and participates in causing a particular result with another actor, the defendant is responsible for the result of the united effort if the act, by itself, was a breach of duty and was a substantial factor in causing the result. *Id.*, cmt. e. It is not necessary for the defendant to know that the act of the other actor was tortious; an unintended tort will suffice under §876(c). *Id.*

60. The elements of assisting-and-participating liability are:
- (i) The primary actor's activity accomplished a tortious result
 - (ii) The defendant provided substantial assistance to the primary actor in accomplishing the tortious result.
 - (iii) The defendant's own conduct, separate from the primary actor's, was a breach of duty to the plaintiff.
 - (iv) The defendant's participation was a substantial factor in causing the tort.

Id. §§ 876(c) (elements 1-3), 876(c) cmt. e (element 4). As shown above, each of Klein and Landess gave substantial assistance to the other in accomplishing the multiple torts herein described.

X. APPLICATION FOR PERMANENT INJUNCTION

61. Plaintiffs re-allege the facts and matters contained in paragraphs 1-61 above as if they were fully set forth again below.

62. Attached hereto as **Exhibit 20** is the unsworn declaration of E.M. pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, verifying the facts supporting this Application for Permanent Injunction.

63. Defendant Landess' and Klein's false statements of material fact accusing plaintiffs of being wanted felons and of interference with child custody significantly injure the reputation of plaintiffs for each day they continue.

64. It is probable plaintiffs will prevail on the merits because defendants' statements are objectively verifiable as false and defamatory *per se*.

65. If an injunction does not issue, plaintiffs will be irreparably and permanently injured in their reputations in ways that not susceptible of calculation or compensation in money. Plaintiffs' losses are likely to exceed the financial worth of defendants, making adequate compensation to plaintiffs impossible. Thus, plaintiffs have no adequate remedy at law.

66. Pursuant to TEX. CIV. PRAC. & REM. CODE § 65, plaintiffs pray that after a trial on the merits the Court permanently enjoin defendants and all acting in concert with them from publishing statements that either plaintiff is a "kidnapper," "criminal," "fugitive," "felon," "wanted," "wanted for interference with child custody," the subject of warrants for their arrest, or that criminal charges against them were ever filed. The Court should also enjoin defendants from:

- (i) publishing or continuing to publish any statement that contains, publishes, identifies, refers to, or reveals the photographs or names of the plaintiffs or their children (other than by pseudonym) as plaintiffs in, or subjects of, this suit, which publication would destroy the purpose for which expunction of all records of the false criminal charges against E.M. and V.B.M. was ordered;
- (ii) filing or causing to be filed in this suit any document that contains, publishes, identifies, refers to, or reveals the photographs or names of the plaintiffs or their children (other than by pseudonym) as plaintiffs in, or subjects of, this suit, which publication would destroy the purpose for which expunction of all records of the false criminal charges against E.M. and V.B.M. was ordered; and
- (iii) filing or causing to be filed in this suit or any other action any document that contains, publishes, identifies, refers to, or reveals the photographs or names of the plaintiffs or their children (other than by pseudonym) as plaintiffs in, or subjects of, this suit, which publication would destroy the purpose for which expunction of all records of the false criminal charges against E.M. and V.B.M. was ordered.

**XI. MOTION FOR A TEMPORARY SEALING ORDER AND TO
SEAL COURT RECORDS**

67. Plaintiffs incorporate herein the factual allegations contained in the foregoing paragraphs and all exhibits to this petition.

68. Plaintiffs move for a temporary sealing order to seal court records, and request the Court to seal the following court documents:

- a. Plaintiffs' original petition, all exhibits thereto, and any subsequent petition and exhibits;
- b. Any documents containing the photographs, names, identities, or addresses of plaintiffs or their children.

69. There is a serious, specific, and substantial interest in sealing the above records that outweighs the presumption of openness and the adverse effect on the general welfare. As noted above, plaintiffs were falsely charged with felony interference with child custody. The charges were dismissed for lack of jurisdiction by the 437th Judicial District Court, and all records thereof have been expunged. Since this suit arises from defendants' false and malicious procurement of the criminal charges and defendants' use thereof then to defame and harass plaintiffs, sealing the court records in this matter is necessary to preserve the purpose for which expunction was ordered.

70. No less restrictive means will adequately protect plaintiffs' interests described above. If the Court denies this motion and the records herein remain public, defendants will be able to exacerbate the damage they have already inflicted on plaintiffs by gleefully publishing the same false and defamatory matter

that gave rise to this suit under color of the judicial communications privilege, thereby frustrating and destroying the very purpose of plaintiffs' expunction and of this suit.

71. Plaintiffs have a compelling need for a temporary order sealing the above records. The specific interest set forth above will suffer immediate and irreparable harm before notice can be posted and a hearing held. Disclosure of information related to the false criminal charges will injure the plaintiffs' reputations and thereby expose the plaintiffs to public hatred, contempt or ridicule, or to impeach plaintiffs' honesty, integrity, virtue, or reputation. TEX. CIV. PRAC. & REM. Code, § 73.001. Plaintiffs request the foregoing be sealed until further order of this Court.

XII. MOTION FOR PROTECTIVE ORDER

72. A trial court has broad discretion to protect a party from harassment, annoyance, or invasion of personal, constitutional, or property rights with a protective order regarding discovery pursuant to TEX. R. CIV. P. 192.6. Plaintiffs request the Court to protect plaintiffs from any discovery requests or deposition questions propounded by defendants to any person that contain, publish, identify, refer to, or reveal the photographs or names of the plaintiffs or their children (other than by pseudonym) as plaintiffs in, or subjects of, this suit, or which would require the responding party to publish or reveal the photographs or names of the plaintiffs or their children (other than by pseudonym) as plaintiffs in, or subjects of, this suit.

XIII. PRAYER

73. For these reasons, plaintiffs pray that after a trial on the merits the Court enter a judgment for plaintiffs that plaintiffs have and recover of defendants, jointly and severally:

- (i) damages for defamation, defamation *per se*, malicious prosecution, and false imprisonment in the amount of \$2,000,000.00;
- (ii) exemplary damages in the amount of \$6,000,000.00;
- (iii) a permanent injunction;
- (iv) a temporary sealing order followed by an order to seal court records;
- (v) a protective order pursuant to TEX. R. CIV. P. 192.6 that both discovery requests and the answers required thereto not contain, publish, identify, refer to, or reveal the photographs or names of the plaintiffs or their children (other than by pseudonym) as plaintiffs in, or subjects of, this suit;
- (vi) prejudgment and post-judgment interest;
- (vii) such other and further relief, at law or in equity, as to which plaintiffs shall show themselves justly entitled;

Respectfully submitted,

HANSZEN LAPORTE

By: _____ /s/ Jeffrey L. Dorrell

Jeffrey L. Dorrell

State Bar No. 00787386

jdorrell@hanszenlaporte.com

Philip A. "Phil" Meyer

State Bar No. 00784597

pmeyer@hanszenlaporte.com

11767 Katy Freeway, Suite 850

Houston, Texas 77079

Telephone: 713-522-9444

FAX: 713-524-2580

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on 2-12, 2015, a true and correct copy of the foregoing was sent by:

- Hand delivery
- Certified mail
- Telephonic document transfer
- E-service in accordance with TEX. R. CIV. P. 21a(a)(1)

in accordance with TEX. R. CIV. P. 21a to the following counsel of record:

Mr. Richard W. Espey
Espey & Associates, P.C.
13750 San Pedro Avenue, Suite 730
San Antonio, Texas 78232
Telephone: 210-404-0333
respey@lawespey.com
FAX: 210-404-0336
ATTORNEYS FOR DEFENDANTS PHILIP KLEIN and KLEIN
INVESTIGATIONS & CONSULTING

Mr. Louis A. Wenzel
Schmidt & Davis, P.C.
14250 Northbrook Drive, Suite 245
San Antonio, Texas 78232
Telephone: 210-340-5297
louisw@schmidtanddavis.com
FAX: 210-340-9088
ATTORNEYS FOR DEFENDANT JAMES LANDESS

/s/ Jeffrey L. Dorrell

JEFFREY L. DORRELL