

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-60534-CIV-DIMITROULEAS  
MAGISTRATE JUDGE: ROBIN ROSENBAUM

HOWARD K. STERN,

Plaintiff,

vs.

JOHN O'QUINN, and JOHN M. O'QUINN  
& ASSOCIATES, PLLC d/b/a  
The O'Quinn Law Firm,

Defendants.

\_\_\_\_\_ /

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF  
HOWARD K. STERN'S MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY**

Defendants, John O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm ("O'Quinn"), by and through undersigned counsel and pursuant to Fed. R. Civ. P. 26(b), hereby respond in opposition to Plaintiff Howard K. Stern's ("Stern") Memorandum of Law in Support of Plaintiff's Motions to Compel

LAW OFFICES OF

**SLK**

STEPHENS LYNN KLEIN  
LA CAVA HOFFMAN & PUYA, P.A.

Discovery ("Discovery Memo")<sup>1</sup>, and as grounds therefor state as follows:

**I. Defendants Have Not Waived Their Work-Product Protection By Relying on the Clark/Vicedomine Investigation or By Asserting an Affirmative Defense Based on This Investigation.**

Stern claims that "Defendants cannot have it both ways," by using work-product in their defense without waiving the work-product privilege, citing *U.S. v. Nobles*, 422 U.S. 225 (1975). In *Nobles*, the United States Supreme Court held that a party who presented an investigator as a witness waived the work-product privilege with respect to the matters covered in the investigator's testimony. *Id.* at 239 (emphasis added). Clearly, this limited testimonial waiver was applied under a completely different set of circumstances than those in the instant case, where O'Quinn has not relied upon any work-product in testimony before this Court.

---

<sup>1</sup> Stern's single Discovery Memo was submitted in support of the following three motions to compel previously filed with the Court: 1) Motion to Compel Production of Documents Responsive to Plaintiff's First Request for Production of Documents from Defendant John M. O'Quinn & Associates PLLC, d/b/a The O'Quinn Law Firm; 2) Motion to Compel Production of Documents Responsive to Plaintiff's First Request for Production of Documents from Defendant John M. O'Quinn; and 3) Motion to Compel Response to Interrogatories from Defendant John M. O'Quinn. As noted by Stern, the motions to compel all involve a "similarity of issues," and overlap each other to a great extent. Accordingly, this Response will serve to address all the issues raised in Stern's Discovery Memo and the three motions to compel referenced above.

The other cases cited by Stern for this same proposition are also eminently distinguishable. *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459 (S.D. N.Y. 1996), involved a party's assertion of work-product protection for an investigative report which the party "repeatedly proffered . . . not merely as a signal of its own good faith, but as a reliable, if not authoritative, source of data on which the court should rely in reaching whatever conclusion would favor the company." *Id.* at 472. "Having in effect made representations to the various courts and an arbitration panel as to the substance of those statements, Kidder cannot now invoke a privilege to bar disclosure of those documents or portions of documents that would reveal the substance of the statements." *Id.* O'Quinn, on the other hand, has not made any representations to this Court regarding the substance of investigation by Vicedomine or Clark pertaining to this case or any of the related matters.

Similarly, *Kallas v. Carnival Corp.*, 2008 WL 2222152 (S.D. Fla. 2008), is inapplicable to the circumstances here. In *Kallas*, the plaintiffs relied upon an investigative survey of their counsel's agents to support their arguments in a motion for class certification. *Id.* at \*5. The Magistrate noted that the plaintiffs "decided to file the affidavits of the investigators themselves, attaching as exhibits some of the information those investigators obtained from the witnesses," rather than attaching

LAW OFFICES OF

---

**SLK**

---

STEPHENS LYNN KLEIN  
LA CAVA HOFFMAN & PUYA, P.A.

"affidavits from the persons that were interviewed, which would have generated no waiver of work product protection." *Id.* The court held that the investigators' "testifying that the survey was accurate and that the results of the survey is as they are describing," was "clearly a testimonial use of what would have otherwise been work product protected information." *Id.*

If Stern's view of testimonial waiver were to be accepted by this Court, any form of reliance on work-product to prove an element of a claim or defense would constitute a waiver of the work-product protection. This is at odds with the United States Supreme Court's view of testimonial waiver. As was noted in *Nobles, supra,*

[w]hat constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, *there normally is no waiver.* But where, as here, counsel attempts to make a *testimonial use* of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.

*Noble*, 422 U.S. at 240, n.14 (emphasis added). Clearly, Stern has attempted to invoke the rule of testimonial waiver in a situation where "there normally is no waiver." *Id.*

LAW OFFICES OF

---

**SLK**

---

STEPHENS LYNN KLEIN  
LA CAVA HOFFMAN & PUYA, P.A.

Stern also cites cases which suggest that opinion work-product may be discoverable when the attorney's mental impressions are at issue in the case. See *Holmgren v. State Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084 (D. N.J. 1996); *Hartman v. Banks*, 164 F.R.D. 167, 170 (E.D. Pa. 1995). Those decisions which have been criticized in many jurisdictions and have not been adopted in Florida. As explained by the Third Circuit Court of Appeals in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994):

These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.

See also, 8 Wright and Miller, *Federal Practice & Procedure* § 2016.2 at 253-54 (2d ed. 1994) ("[T]he courts have carried this waiver concept beyond the situation in which the privilege-holder raises certain legal or factual issues. These cases do not fit within any sensible concept of waiver, and might best be viewed as ad hoc adjustments by courts in the scope of privilege.")

While the *Rhone-Poulenc* court analyzed this issue in the context of attorney-client privilege<sup>2</sup>, its rationale is equally applicable to the work-product doctrine. The court drew a distinction between situations where privileged information is placed at issue by a party attempting to prove their claim or defense by disclosing or describing the privileged information, and situations where only a party's state of mind -- not the actual privileged information -- is placed in issue by the assertion of a claim or defense:

Thus, in a patent suit, where an infringer is alleged to have acted willfully, the advice of the infringer's lawyer may be relevant to the question of whether the infringer acted with a willful state of mind. However, the advice of the infringer's counsel is not placed in issue, and the privilege is not waived, unless the infringer seeks to limit its liability by describing that advice and by asserting that he relied on that advice.

*Id.* at 863.

Here, the Clark/Vicedomine investigation has not been placed in issue, even though O'Quinn's state of mind may be. Therefore, only the specific information upon which O'Quinn relied would be subject to discovery. See *Hartman*, 164 F.R.D. at 170-71 (cited by

---

<sup>2</sup> Defendants inadvertently discussed attorney-client privilege in their objections to discovery. After further review of the documents at issue, it is clear that only the work-product doctrine protects the information listed on Defendants' privilege logs. At this time, there do not appear to be any relevant documents protected by the attorney-client privilege.

Stern in his Opposition Memo at p.15) (in bad faith action against insurer, only those opinions and mental impressions that were directly in issue were subject to discovery; not the insurer's entire file).

On the contrary, Stern's discovery requests go well beyond the limited scope of implied waiver as applied in *Hartman* and the other cases cited in Stern's Discovery Memo. See Request for Production to The O'Quinn Law Firm at ¶24 ("All investigative notes, memoranda and emails of Don Clark and Wilma Vicedomine concerning Anna Nicole Smith, Daniel Smith and Howard K. Stern"); *id.* at ¶30 ("Any and all investigative notes, memoranda and emails of any person employed, hired or engaged by The O'Quinn Law Firm to investigate and provide information concerning Anna Nicole Smith, Daniel Smith and Howard K. Stern").

Many other jurisdictions have also rejected the suggestion of implied waiver to circumvent work-product or attorney-client privilege, even when a party's state of mind is in issue. See *In re Geothermal Resources Int'l, Inc.*, 93 F.3d 648, 652-53 (9th Cir. 1996) (Chapter 11 debtor did not waive attorney-client privilege as to communications with outside counsel regarding propriety of officers' employment contracts, by filing breach of fiduciary duty counterclaim in officers' action to enforce agreements); *Dixie Mill Supply Co. v. Continental Cas. Co.*, 168 F.R.D. 554, 558-59 (E.D.

La. 1996) ("The mere fact that a claim of bad faith (or its affirmative defense of good faith) or other claim or defense based on a party's state of mind is involved does not waive the attorney-client privilege [or work product protection]."); *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 1994 WL 510043, \*12 (S.D. N.Y. 1994) ("Even where a party's state of knowledge is particularly at issue, such as in a case involving claims of laches or justifiable reliance, waiver of the privilege should not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when."); *Ryan v. Appleton Elec. Co.*, 153 F.R.D. 660, 662-63 (D. Colo. 1994) (concept of implied waiver "does not concern the distinct and broader concept of work product immunity"). Accordingly, Stern is not entitled to the discovery of Defendants' work-product based on the suggestion of implied waiver.

**II. Stern Cannot Circumvent Applicable Privileges By Claiming He Only Seeks the Underlying "Facts" of Clark/Vicedomine's Investigation.**

Stern implies that he is entitled to O'Quinn's work-product because the "facts" discovered by the Clark/Vicedomine investigation are not privileged from discovery. Stern construes the case law as suggesting that the entirety of the Clark/Vicedomine investigation is discoverable because it led to knowledge and documents containing facts. This argument is not

---

LAW OFFICES OF

**SLK**

---

STEPHENS LYNN KLEIN  
LA CAVA HOFFMAN & PUYA, P.A.

supported by the cases that Stern cites as authority for this proposition.

For example, in *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981), the United States Supreme Court considered an argument by the U.S. Government based on the following language in the Court's earlier decision, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947): "Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had . . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." The *Upjohn* Court actually rejected the Government's argument seeking production of privileged work product based on this language, holding that, "[i]t is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine." *Upjohn*, 449 U.S. at 401.

*Dunkin' Donuts, Inc. v. Mary's Donuts, Inc.*, 206 F.R.D. 518 (S.D. Fla. 2002), involved a suit by a franchisor against a franchisee for underreporting gross sales. The franchisee moved to compel the franchisor to provide for the deposition of a corporate representative with knowledge of the facts supporting the franchisor's claim of underreporting. *Id.* at 520. The franchisee

objected to providing a corporate representative to testify as to the facts supporting their theory, contending that the information was subject to the work-product privilege. *Id.* The *Dunkin' Donuts* court held that the franchisee had to provide the facts supporting its contention of underreporting, but specified that "Plaintiffs will not be required to divulge the manner in which Plaintiffs intend to prove underreporting at trial; Plaintiffs' legal strategy; Plaintiffs' intended lines of proof; the strengths and weaknesses of Plaintiffs' underreporting case; or any inferences which Plaintiffs' counsel has drawn from interviewing witnesses." *Id.*

Stern construes the *Dunkin' Donuts* holding as support for his efforts to seek discovery of Defendants' work-product, simply because Clark and Vicedomine may have uncovered facts during their investigation that are related to O'Quinn's defenses in this matter. At best, Defendants would suggest that Stern may seek discovery of those facts which served as a basis for Mr. O'Quinn's statements, or those facts that O'Quinn intends to rely upon as support for his defenses in this cause.

Further, it is clear that Stern seeks more than just facts. As was noted previously, Stern seeks production of "[a]ll investigative notes, memoranda and e-mails of Don Clark and Wilma Vicedomine concerning Anna Nicole Smith, Daniel Smith and Howard K.

Stern." See Request for Production to The O'Quinn Law Firm at ¶24. It is therefore thoroughly disingenuous for Stern to now suggest that he is simply seeking discoverable facts underlying Vicedomine's investigation.

**III. Defendants Have Not Waived Work-Product Protection by Disclosure to Third Parties.**

Stern claims that Defendants waived the work-product protection concerning the Clark/Vicedomine investigation by revealing details of the investigation in conversations over the internet and in conversations with Rita Cosby. While O'Quinn agrees that this type of disclosure may occasion a waiver, any waiver on these grounds would be "limited to the information actually disclosed, not subject matter waiver." *Continental Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 773 (D. Md. 2008) (cited by Stern in his Opposition Memo at p. 19); *see also, Niagara Mohawk Power Corp. v. Sten & Webster Eng'g Corp.*, 125 F.R.D. 578, 590 (N.D. N.Y. 1989) (also cited by Stern). The appropriate application of this limited waiver thus directly contradicts Stern's broad contention that Defendants "waived any work-product privilege that may have existed for the Clark/Vicedomine investigation." See Discovery Memo at p. 15 (emphasis added).

Thus, the only information for which the work-product privilege may have been waived are the actual facts that Vicedomine

revealed in statements made to Rita Cosby which were published in *Blonde Ambition*, or statements actually - not allegedly - posted by Vicedomine on the internet. Since that information is already available to Stern (or anybody else who seeks it out) online or in *Blond Ambition*,<sup>3</sup> Stern should not be allowed to depose Vicedomine in order to discover the full gamut of her work-product. See Fed. R. Civ. P. 26(b)(3)(A)(ii) (party may only discover work-product if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent *by other means*") (emphasis added); *Hall v. Sullivan*, 231 F.R.D. 468, 475 (D. Md. 2005) (information obtainable from other source warranted denial of motion to compel); *Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111, 112 (D. Conn. 2005) (granting motion to quash subpoenas on grounds that

---

<sup>3</sup> This same information is also available from the original sources who may have provided Don Clark and/or Ms. Vicedomine with information that was ultimately imparted to Ms. Cosby. Thus, and to the extent that Ms. Cosby has specifically identified individuals who purportedly provided information to Ms. Vicedomine during her deposition, or made note of those individuals in the book *Blond Ambition* itself, Mr. Stern is certainly at liberty to depose those individuals to confirm the statements or information which was reportedly attributed to them by Ms. Vicedomine. See Deposition Transcript of Rita Karen Cosby, dated November 15, 2007 ("Cosby Depo") at 107, 164, 165-166. While Stern may argue that it will impose an undue hardship for him to obtain that information from these other sources, "in the ordinary case, the cost of one or a few depositions is not enough to justify discovery of work-product." *In re Int'l Sys. & Controls Corp.*, 693 F.2d 1235, 1241 (5th Cir. 1982).

LAW OFFICES OF

**SLK**STEPHENS LYNN KLEIN  
LA CAVA HOFFMAN & PUYA, P.A.

subpoenas sought publicly available documents); *Proter & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1194 (Fla. 1st DCA 1985) ("It is well established in Florida that absent this required showing of need and undue hardship to obtain the substantial equivalent of another party's work-product by other means, a party's work-product will remain immune from discovery.").

Furthermore, any waiver of work-product protection allegedly occasioned by Clark or Vicedomine with regard to any investigation that they performed on behalf of the O'Quinn Firm would not affect a waiver on the part of Virgie Arthur, O'Quinn's client in the related litigation. See *United Steelworkers of America, AFL-CIO-CLC v. Ivaco*, 2002 WL 31932875, \*6 (N.D. Ga. 2002) ("[T]he work-product privilege belongs to both the client and the attorney, either one of whom may assert it; thus, a waiver of the privilege by the client does not deprive the attorney of his own privilege, and vice versa.") (citing *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994); *In re John Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981)). Thus, since Virgie Arthur has not waived this protection, it would still apply to prevent Stern from discovering O'Quinn's work-product, regardless of whether or not there has been some kind of limited waiver occasioned by Ms. Vicedomine's disclosures. Accordingly, Stern's motion to compel should be denied.

**IV. Defendants' Overbreadth and Relevance Objections Are Not Meritless.**

Stern's contention that each interrogatory and document request "limits itself to the time period of the Interrogatory," is inaccurate. While Anna Nicole Smith died on February 8, 2007, the investigation concerning the cause of her death could extend much further into the past in order to understand the events that ultimately led to her death. Similarly, a request for "[a]ll documents supporting, contradicting or otherwise concerning the statements attributed to O'Quinn," could include documents created years before the alleged defamatory statements were made. Therefore, the time period encompassed by Stern's requests are not unambiguous, as Stern claims.

Furthermore, Defendants have not asserted, as Stern suggests they have, that all documents created after this lawsuit was filed are irrelevant. Defendants' position is simply that regardless of whether "Defendants' post-lawsuit conduct is relevant to Stern's allegation that O'Quinn acted with actual malice," O'Quinn is not required to include specific entries on their privilege logs for work-product created after the commencement of this lawsuit (April 13, 2007). See Local Rule 26.1(G)(3)(c) (excepting work-product material created after commencement of the action from inclusion on the required privilege log). Prior decisions of this Court

interpreting Local Rule 26.1(G)(3)(c) support Defendants' position on this issue. See *Cherenfant v. Nationwide Credit, Inc.*, 2004 WL 5315889, \*2 (S.D. Fla. 2004) (noting that a privilege log is not necessary to identify a party's handwritten notes and her attorney's notes if created after commencement of the action); *Gutescu v. Carey Intern., Inc.*, 2003 WL 25589031, \*2 (S.D. Fla. 2003) (privilege log not necessary for post-commencement notes of interviews created by counsel [not containing witness statements] and internal notes created by counsel for defendants).

The cases cited by Stern regarding relevance do not address this point. Nor do they speak to the discovery of work-product material. At best, these cases discuss the relevance of non-privileged post-publication material; in other instances, the cases address wholly unrelated issues. See, e.g., *Herbert v. Lando*, 73 F.R.D. 387, 396-97 (S.D. N.Y. 1977) (addressing objection to non-privileged information on the grounds that it would not lead to the discovery of admissible evidence); see also, other cases cited in Discovery Memo at 17-18. Accordingly, Defendants are not required to specifically identify or describe any work-product material created or received after commencement of this lawsuit.

**IV. A Complete Video of the Relevant Interviews Is Necessary to Determine the Nature and Accuracy of O'Quinn's Statements.**

Contrary to Stern's contention, O'Quinn has clearly stated that the highly edited portions of various television interviews referenced in Stern's Complaint in which O'Quinn allegedly made defamatory statements are not an accurate depiction of the content of those interviews. While the actual words being quoted by Stern may well be correct, as O'Quinn stated in his response to Interrogatory No. 1, "the quotes are taken completely out of context, with certain portions omitted, and without consideration of the medium in which those words were uttered, including the complete audio and visual components of the subject television broadcasts."

Presenting the combination of graphics and segment titles on the television shows, along with complete questions by the interviewers and/or people calling into the show, and the complete, unedited version of O'Quinn's statements, is the only way to accurately portray the context and content of those statements. Therefore, it is O'Quinn's position that Stern must present a complete video of the television interview segments in which O'Quinn appeared in order for Stern to attempt to prove his claims.

WHEREFORE, Defendants, John M. O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm, respectfully request

Stern v. O'Quinn, et. al.  
Case No.: 07-60534-CIV-DIMITROULEAS  
Page 17

that this Court enter an order denying Plaintiff, Howard K. Stern's  
1) Motion to Compel Production of Documents Responsive to  
Plaintiff's First Request for Production of Documents from  
Defendant John M. O'Quinn & Associates PLLC, d/b/a The O'Quinn Law  
Firm; 2) Motion to Compel Production of Documents Responsive to  
Plaintiff's First Request for Production of Documents from  
Defendant John M. O'Quinn; and 3) Motion to Compel Response to  
Interrogatories from Defendant John M. O'Quinn.

Respectfully Submitted,  
STEPHENS LYNN KLEIN LA CAVA  
HOFFMAN & PUYA, P.A.  
**Counsel for Defendants**  
9130 S. Dadeland Blvd., PHII  
Two Datran Center  
Miami, FL 33156  
Tele: 305/670-3700  
Fax : 305/670-8592  
E-Mail: [kleinr@stephenslynn.com](mailto:kleinr@stephenslynn.com)

By: \_\_\_\_\_/s/\_\_\_\_\_  
ROBERT M. KLEIN  
Florida Bar No. 230022

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that on July 21<sup>st</sup>, 2008, this document was e-  
filed using the CMECF system and that a true and correct copy was  
served via e-mail to: **L. LIN WOOD, ESQ.,** ([llwood@pogolaw.com](mailto:llwood@pogolaw.com))  
Powell Goldstein LLP, *Co-counsel for Plaintiff*, One Atlantic  
Center, 14<sup>th</sup> Floor, 1201 W. Peachtree Street, N.W., Atlanta, GA

LAW OFFICES OF  

---

**SLK**  

---

STEPHENS LYNN KLEIN  
LA CAVA HOFFMAN & PUYA, P.A.

Stern v. O'Quinn, et. al.  
Case No.: 07-60534-CIV-DIMITROULEAS  
Page 18

30309; and **M. KRISTA BARTH, ESQ.** ([krista@emsattorneys.com](mailto:krista@emsattorneys.com)), Eric M. Sauerberg, P.A., *Co-counsel for Plaintiff*, Suite 102, 200 Village Square, Palm Beach Gardens, FL 33410 **NEIL McCABE, ESQ.**, ([neilm@oglaw.com](mailto:neilm@oglaw.com)) The O'Quinn Law Firm, 440 Louisiana, Suite 2300, Houston, TX 77002 who are listed as recipients as counsel under said system.

\_\_\_\_\_/s/\_\_\_\_\_  
ROBERT M. KLEIN  
Florida Bar No. 230022