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.
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DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF HOWARD K. STERN'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH LOCAL RULE 26.1

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 to Plaintiff Howard K. Stern's ("Stern") Memorandum of Law in Support of Plaintiff's Motion to Compel Compliance with Local Rule 26.1 ("Memorandum"), and as grounds therefor state as follows:

I. Defendants' Privilege Logs Comply With the Federal Rules of Civil Procedure and the Local Rules of this Court.

A. Defendants are not required to divulge information which would cause disclosure of privileged information.

The crux of Stern's argument in support of his Motion to Compel is that the privilege logs produced by O'Quinn are insufficient because they do not provide enough information. This argument, however, is based on an erroneous characterization of

Fed. R. Civ. P. 26(b)(5) and Southern District Local Rule 26.1(G)(3).

Contrary to Stern's suggestion that O'Quinn has an obligation to describe every document for which he and Ms. Vicedomine are claiming as privileged, Local Rule 26.1(G)(3)(b)(ii) provides that discovery need not be produced where "divulgence of such information would cause disclosure of the allegedly privileged information." *See also*, Fed. R. Civ. P. 26(b)(5)(A)(ii) (allowing privileged information to be described "without revealing information itself privileged or protected"). Here, a more detailed description of the communications and documents set forth in Defendants' privilege logs would indeed cause the disclosure of privileged information and, therefore, is not required pursuant to the rules of this Court. *See In re Subpoena Duces Tecum*, 191 B.R. 476, 482 (S.D. Fla. 1995) ("[U]pon review of Local Rule 26.1(G)(6)(b)(ii)[1] this Court finds that Reed was not required to provide a detailed privilege list to Delta since 'divulgence of such information would cause disclosure of the allegedly privileged information.'").

In addition to this Court's holding in *In re Subpoena Duces Tecum*, supra., O'Quinn's position regarding the information

[1] The Court appears to have cited to a subsection in a prior version of the Local Rules which corresponds to the current Local Rule 26.1(G)(3)(b)(ii).

contained in the privilege logs is also in accord with the Florida case law governing this issue. In *Nevin v. Palm Beach County School Bd.*, 958 So. 2d 1003 (Fla. 1st DCA 2007), the First District Court of Appeal held that waiver of work-product privilege for failure to file a privilege log should NOT apply where the assertion of the privilege is not document specific, but category specific, and the category itself is plainly protected. The claimant had sought to protect the findings and opinions of an expert retained by counsel in anticipation of litigation and who was not going to testify at trial. *Id.* at 1008. The court found that "[t]his is clearly a categorical claim of privilege, and the category referenced is undeniably protected by work-product immunity." *Id.* As for the privilege log, the court held "there was no need to identify specific documents, because any document or statement within the purview of the request was clearly subsumed within the categorical privilege claimed by Petitioner." *Id.*

In the instant case, the applicability of the privileges being claimed by O'Quinn and Vicedomine is clear from the information provided in the privilege logs, especially considering much of the protected material reflects e-mail between various parties working for the O'Quinn Firm on the numerous related proceedings in the Anna Nicole Smith litigation or in the defense of this action. Any further details describing the communications and information

listed in the privilege logs will expose an aspect of Defendants' thought processes, preparation and strategy regarding the various related proceedings, including communications concerning potential witnesses, facts, and theories that are being developed or researched in the related actions. At best, if there is any question concerning the privileged nature of these documents, they should be presented to the Court for *in camera* inspection[2] before Defendants are compelled to reveal those details to Stern. *See Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 339 (E.D. N.Y. 1996) (motion to compel denied in part and *in camera* inspection ordered where descriptions of documents in privilege log did not convey enough information for court to determine whether communications were privileged;).

B. Explanation of third-party communication included on Defendants' privilege logs.

In his Memorandum, Stern points out that Defendants' privilege logs contain some entries that appear to include correspondence from third parties. After further review of the privilege logs, it appears that some of these entries were inadvertently included on the privilege logs and have now been removed. *See* Amended

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[2] Defendants are amenable to an *in camera* inspection of the items claimed as privileged in an effort to enable this Court to further assess the applicability of the privileges without the possibility of revealing any protected information to Plaintiff.

Privilege Log of the O'Quinn Law Firm (please see Exhibit "A" which will be provided to Plaintiff's counsel only, under separate cover). The items removed include email correspondence from reporter Dawna Kaufman, as well as correspondence from Carolyn Herring, Howard Lynn, and a person only listed as "C."[3] These emails are now being produced (please see Exhibit "B" which will be provided to Plaintiff's counsel only, under separate cover). As far as emails from Pam Burns, however (listing 81), those documents remain on the privilege log, as Ms. Burns is John O'Quinn's assistant; thus, her correspondence on these matters is protected under the work-product doctrine.

The Vicedomine privilege logs, however, remain unchanged. Vicedomine's email communications with various third-parties (listing 3) were part of her investigation for O'Quinn and are, therefore, protected as work-product. In addition, the unsolicited phone calls and emails forwarded to Vicedomine for follow-up from other O'Quinn Law Firm employees (listing 6) are also work-product, as they would reveal O'Quinn's strategy and thought processes related to this case and the related litigation. *See U.S. v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 698 (S.D. Fla. 1990)

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[3] These items were initially included on the privilege log because the relationship of these parties to the O'Quinn Law Firm was unknown, and it was unclear whether the communications were protected as work-product.

(recognizing work-product protection based on the holding of *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (opinion work product may be reflected in something as subtle as the act of selecting or ordering documents because this may reflect an attorney's opinion as to the significance of those documents in the preparation for his case)).

C. The work product doctrine is applicable to all documents and communication relating to Defendants' factual investigation regarding the deaths of Anna Nicole and Daniel Smith.

Stern claims that the work-product doctrine does not apply to the items listed on the privilege logs for the following reasons: "1) O'Quinn explicitly relies on the investigation performed by Mr. Clark and Ms. Vicedomine to support the 'truth' of the [alleged defamatory] Statements; 2) the facts contained in the documents are not privileged and the privilege logs do not explain why the full document is being withheld; and 3) Stern has a substantial need for the requested documents which he cannot obtain elsewhere because the alleged factual sources for O'QUinn's statements about Plaintiff are known only to O'Quinn and his investigators." Memorandum at 12. Each of these arguments is addressed in turn below.

To support his contention that the work-product privilege is waived when a party attempts to rely on work-product to support positions taken in litigation, Stern cites to *Kallas v. Carnival Corp.*, 2008 WL 2222152, *6 (S.D. Fla. 2008), a case addressing the concept of testimonial waiver. 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. As Magistrate Torres noted, 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 "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.*

Here, O'Quinn's use of Clark's and Vicedomine's investigation has not approached anything close to the testimonial use of work-product addressed in *Kallas*. O'Quinn has not made any representations to this Court regarding the substance of those investigations pertaining to this case or any of the related matters. *See In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 472

(S.D. N.Y. 1996) (finding testimonial waiver where company made representations to various courts and an arbitration panel as to substance of work-product as being a "reliable, if not authoritative, source of data on which the court should rely in reaching whatever conclusion would favor the company"). Nor has O'Quinn offered the work-product in any testimonial capacity in these matters. *See U.S. v. Nobles*, 422 U.S. 225, 239 (1975) (finding that party who presented an investigator as a witness waived the work-product privilege with respect to matters covered in the investigator's testimony). Clearly, the limited use of testimonial waiver was been applied by various courts under completely different circumstances than those in the instant case.

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

> What 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). Stern should not be allowed to invoke the rule of testimonial waiver in a situation where "there normally is no waiver." *Id.*

As for Stern's contention that the facts contained in the relevant documents and communications are not privileged, Stern has misconstrued the holding in *Dunkin' Donuts, Inc. v. Mary's Donuts, Inc.*, 206 F.R.D. 518 (S.D. Fla. 2002), to suggest that Clark's and Vicedomine's work-product is discoverable simply because they uncovered facts during their investigations that are related to O'Quinn's defense. The *Dunkin' Donuts* decision does not support this argument.

Dunkin' Donuts involved a suit by a franchisor against a franchisee for underreporting gross sales. The franchisee moved to compel the franchisor to produce for deposition a corporate representative with knowledge of all the facts that support 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 the information was attorney work-product that was absolutely privileged. *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.* In other words, only the facts upon which the franchisee's claim was actually based were discoverable, as opposed to the work-product that incorporated those facts.

Furthermore, Stern's contention that he cannot obtain from other sources the factual information that he seeks is disingenuous, especially in light of his argument that the results of Defendants' investigations have been shared with third parties. While O'Quinn agrees that a disclosure to third parties may occasion a waiver, any waiver on these grounds is "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); *see also*, *Niagara Mowhawk Power Corp. v. Sten & Webster Eng'g Corp.*, 125 F.R.D. 578, 590 (N.D. N.Y. 1989). Therefore, Stern is not entitled to any information other than the basic facts allegedly revealed to third parties.

Because those facts have already been revealed in the allegedly defamatory statements made by O'Quinn, as well as on the

internet and in Rity Cosby's book, *Blonde Ambition*, that information is already available to Stern or anyone else who may seek that same information from these same sources.[4] Thus, Defendants should not be compelled to reveal their work-product simply so that Stern can more easily obtain these same facts. *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 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

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[4] The information is also available from the original sources who initially gave Don Clark and Wilma Vicedomine certain information. *See* Deposition Transcript of Rita Karen Cosby, dated November 15, 2007 ("Cosby Depo") at 107; *id.* at 164, 166 ; *id.* at 165-66. While Stern may argue that obtaining the information from these other sources imposes an undue hardship, "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).

substantial equivalent of another party's work product by other means, a party's work product will remain immune from discovery.").

D. All responsive documents prior to the commencement of this lawsuit have been produced, are being produced, or are referenced in the privilege logs.

In his Memorandum, Stern makes unsubstantiated assumptions and accusations that Defendants have not identified all responsive documents, and that "Defendants have not confirmed that they have identified all responsive documents either by producing them or by listing them in their privilege logs." Memorandum at 13. For the sake of clarity, with the exception of documents and communications generated after the commencement of this lawsuit[5], O'Quinn now confirms that all responsive documents have been produced, are in the process of being produced, or have been referenced on the privilege logs.

Stern makes much of the fact that there are no documents listed for John O'Quinn in the privilege logs. *See* Memorandum at 13. The reason is quite simple--John O'Quinn does not typically use a computer or communicate through e-mail, which explains the lack of any entries in his name. His communications are routinely processed through his assistant, Pam Burns; it was for this precise

[5] O'Quinn addresses the issue of post-commencement work-product below.

reason that Ms. Burns' e-mail was listed on the O'Quinn Law Firm's Amended Privilege Log.[6] *See* Exhibit "A."

As far as the July 23, 2007 letter from Don Clark to the State Attorney's office (referenced in Stern's Memorandum at 14), Defendants have recently located it and are producing it with this Response (please see Exhibit "C" which will be provided to Plaintiff's counsel only, under separate cover).[7] After a diligent search, however, Defendants are unable to locate any follow-up correspondence related to Don Cark's April 16, 2007 letter to the FBI requesting an investigation of Anna Nicole's death. *See* Memorandum at 14.

In addition, Defendants are now producing numerous unsolicited communications from third parties to the O'Quinn Law Firm regarding the various Anna Nicole proceedings (please see Exhibit "D" which will be provided to Plaintiff's counsel only, under separate cover).[8] With the attached documents now being produced and the

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[6] After retrieving these e-mails from the O'Quinn Law Firm's Houston computers, undersigned counsel were not able to open the emails in its Miami office due to the fact that special software is required to open these e-mails. Counsel recently acquired this software and has only now been able to review the content of these e-mails.

[7] Defendants had a draft version of the letter, but were only recently able to locate a copy of the final version.

[8] Due to the voluminous nature of these communications, Defendants only recently completed their review of the documents

amendment to the O'Quinn Law Firm's privilege log, Defendants have identified all responsive documents generated prior to the commencement of this action.[9]

E. Defendants are not obligated to specifically identify individual work-product documents produced after the commencement of this lawsuit.

Stern contends that Local Rule 26.1(G)(3)(b) "makes it clear that Defendants had a duty to identify in their response to the document request ALL responsive documents, regardless of when created or received, if they are withheld on the assertion of privilege." Memorandum at 14. Stern's belief appears to be based on his position that "[t]here is an apparent tension in the local rules on this point insofar as Local Rule 26.1.G.3.b.ii requires a responding party to disclose <u>in its objection</u> the existence of all documents and certain identifying information regarding those documents, regardless of when they were created, while Local rule 26.1.G.3.c limits a <u>privilege log</u> to those documents created prior to the commencement of the action."

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in order to determine whether they were privileged in any way.

[9] 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 documents protected by the attorney-client privilege.

However, Stern neglects to point out that Local Rule 26.1(G)(3)(b)(ii) only requires a responding party to disclose the relevant information in its objections if it will not "cause disclosure of the allegedly privileged information." Therefore, there is no tension between the two subsections; both include provisions preventing the disclosure of work-product material in response to discovery requests. For the reasons set forth in Section I(A), supra., any further description of Defendants' work-product would cause the disclosure of the privileged information. Accordingly, O'Quinn's objections are proper under the Local Rules of this Court.

Furthermore, regardless of whether "Defendants' post-lawsuit conduct is relevant to Stern's claims in the Complaint," Defendants are 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) also 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).

Furthermore, the cases cited by Stern in support of his position on this issue are completely inapposite. None of the cases Stern cites address the discovery of work-product material. At most, the cases discuss the relevance of non-privileged post-publication material; at least, 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 Memorandum at 16. Accordingly, Defendants are not required to specifically identify or describe any work-product material created or received after commencement of this lawsuit.

II. Sanctions Against O'Quinn Are Inappropriate

Stern seeks attorneys' fees as a sanction against O'Quinn on the grounds that O'Quinn has filed "baseless objections." Memorandum at 4, 17. On the contrary, Defendants have provided ample support for every proposition set forth in their responses to discovery, and have cited numerous authorities establishing the

legal arguments set forth therein. *See Jade Trading, LLC v. U.S.*, 65 Fed Cl. 641, 645 (Fed. Cl. 2005) (denying motion for sanctions where position taken was not frivolous, i.e., had basis in law or fact, and where party was attempting to protect what counsel reasonably believed to be his client's rights). Defendants have every right to take all legally appropriate steps to protect their work product privilege in response to overly broad discovery requests seeking documentation which clearly includes the Firm's work-product, and an obligation to assert its client's right to prevent the Firm's investigation from being fully and improperly disclosed to her adversary in the Texas litigation. It might also have been possible to resolve some of these issues had Stern not advanced the proposition that virtually all of the Firm's investigation is now subject to full disclosure merely because Mr. O'Quinn has relied in part upon information that he received from his investigator when speaking with the press, or because individuals who were investigating this matter on behalf of the Firm spoke with a third party concerning the results of limited portions of their investigation. Accordingly, sanctions against O'Quinn are not warranted here.

WHEREFORE, Defendants, John M. O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm, respectfully request that this Court enter an order denying Plaintiff, Howard K.

Stern's, Motion to Compel Defendant's Compliance with Local Rule 26.1.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on July 21, 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) Powell Goldstein LLP, *Co-counsel for Plaintiff*, One Atlantic Center, 14th Floor, 1201 W. Peachtree Street, N.W., Atlanta, GA 30309; and **M. KRISTA BARTH, ESQ.** (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@oqlaw.com) The O'Quinn Law Firm, 440 Louisiana, Suite 2300, Houston, TX 77002 who are listed as recipients as counsel under said system.

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