

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' MOTION FOR PROTECTIVE ORDER AND
MEMORANDUM OF LAW, IN SUPPORT THEREOF**

Defendants, John O'Quinn ("Mr. O'Quinn") and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm ("the Law Firm"), by and through undersigned counsel and pursuant to Fed.R.Civ.Pro. 26(b) moves this Court for a protective order as to:

- A. Plaintiff's Second Set of Interrogatories propounded to John O'Quinn;
- B. Plaintiff's Second Request for Production to John O'Quinn;
- C. Plaintiff's First Set of Interrogatories to the O'Quinn Law Firm; and
- D. Plaintiff's Second Request for Production to the O'Quinn Law Firm

(collectively, "financial discovery"), and as grounds therefor would state as follows.

1. On August 19, 2008, Plaintiff, Howard K. Stern, propounded the above-referenced financial discovery to Defendants.

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The financial discovery seeks information extending back to the year 2006 related to Defendants' net worth and complete assets, including bank statements, financial statements, property documents, investment information, and federal and state income tax returns. Copies of the Interrogatories and/or Requests for Production, which are identified as Exhibit "A" - "D" to this submission, are attached hereto and are specifically incorporated by reference herein.

2. The Second Request for Production of Documents to the O'Quinn Firm is overly broad, and seeks discovery that is not relevant to any determination as to the Defendants' current net worth. For example, Request for Production 2 seeks financial statements prepared from 2006 to date, along with copies of "appraisals, mortgages, deeds, or other documents of title" relating to the valuation of any property owned by the Firm. (paragraphs 2 and 3). The Request also seek copies of appraisals and insurance policies on personal property (paragraph 4), copies of documents demonstrating the current value of "securities, stocks or bonds" owned by the Firm (paragraph 5) and federal and state income tax returns for the years 2006, 2007 and 2008, along with any communications between the Firm and Internal Revenue Service concerning "tax filings, tax payments, financial statements, or finances from 2006 to present." The interrogatories to the Firm are similarly broad, and seek complete information concerning the

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Firm's "revenues, costs and profits" for calendar years 2006, 2007 and 2008 (interrogatory 1), along with "the current value of each piece of property owned by the Firm, the purchase price of the property and when it was acquired," and other information, in addition to seeking an assessment as to the current value of that property.

3. The Second Request for Production directed to John O'Quinn personally is similarly broad. It seeks complete bank statements for the preceding year, including each and every investment account or savings account of any kind, whether in Mr. O'Quinn's name individually or jointly - including accounts that he maintains with this wife or other family members (paragraph 1). The document request also seeks financial statements from Mr. O'Quinn from 2006 to date (paragraph 2), copies of any appraisals, mortgages, deeds, or other documents of title and all documents relating to the valuation of any property owned by Mr. O'Quinn, (paragraph 3), copies of appraisals and insurance policies on any and all personal property (paragraph 4) as well as information reflecting the current value of any "securities, stocks or bonds" owned by Mr. O'Quinn, "either individually or jointly...." Finally, as is the case with the request for production that was directed to the O'Quinn Firm itself, Mr. O'Quinn has been asked to produce federal and state income tax returns from 2006, 2007 and

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2008, along with any of his communications with the Internal Revenue Service during that same period of time.

4. The Interrogatories to Mr. O'Quinn do ask Mr. O'Quinn to relate his current net worth. However, that request seeks a list of "all your assets and liabilities." The second Interrogatory goes into considerable detail, and seeks information that goes far beyond the net worth information that is necessary to assess a potential punitive damage claim, including the full name and address of any entity in which Mr. O'Quinn owns an interest, either directly or as a shareholder, the nature of the ownership interest, the date of the acquisition of the purchase of that interest and the actual purchase price. The third Interrogatory seeks complete information concerning virtually any piece of personal property that has been insured by Mr. O'Quinn personally, including "but not by limitation" art work, jewelry, sculpture, automobiles, aircrafts, yachts and the like, whether he has disposed of any of that property and purchase price of the property. Again, this information goes far beyond what is reasonably necessary in order to assess Mr. O'Quinn's current net worth, which is the only relevant inquiry given a pending punitive damage claim.

5. There is no question about the fact that certain financial discovery may be relevant in the face of a pending claim for punitive damages however, Defendants would respectively submit

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that only current net worth information should have to be produced. Lane v. Capital Acquisitions, 242 F.R.D. 667, 670 (S.D. Fla. 2005) In addition, Defendants do not believe that it would be appropriate to insist upon production of this sensitive documentation until thirty (30) days before the trial of this cause. See In re E.S. Bankest, L.C., 2008 WL 746444 (S.D. Fla. 2008).

6. Because of the sensitive and personal nature of the financial information requested by the Plaintiff, Defendants believe that they are entitled to ensure that this information is not disclosed in any form or fashion by Plaintiff's counsel, and that the information is not disseminated to anyone other than Plaintiff's counsel. Toward that end, and in an effort to reach an accommodation concerning production of this information, undersigned counsel wrote to Plaintiff's attorney L. Lin Wood, on September 17, 2008, offering to provide copies of financial statements from Mr. O'Quinn and his Firm thirty (30) days prior to trial, along with current Firm balance sheets. However, Defendants also requested that Plaintiff's counsel enter into an expansion of the existing Confidentiality Agreement that has been filed by the parties, whereby the responses to the request for financial information would be limited, and would only be subject to review by Plaintiff's counsel or any expert that might be retained to review the documentation. That same Agreement would have prevented dissemination of the financial documentation to Mr. Stern or anyone

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else outside of Mr. Wood's Firm. A copy of counsel's letter to that effect which has been identified as Exhibit "E," is attached hereto, and is specifically incorporated by reference herein. Plaintiff's counsel refused to agree to the proposal. In his response on September 19th, Mr. Wood offered no compromise whatsoever. A copy of Mr. Wood's letter of September 19, 2008 to that effect is attached hereto as Exhibit "F" and is specifically incorporated by reference herein.

7. Defendants have a legitimate basis for their concerns over the premature dissemination of sensitive financial documentation and information, and the failure to provide for some kind of confidentiality, which will restrict the dissemination of that information to anyone other than Plaintiff's counsel, and any potential experts who may have need to review the financial production. Those concerns are occasioned in part by Mr. Stern's prior conduct in another matter, where he was accused of disclosing personal financial information of one of the parties to a probate proceeding, notwithstanding an existing Confidentiality Agreement.

8. As is noted in the affidavit of Russell Hardin, Jr., attached hereto as Exhibit "G," who was trial counsel in the probate proceeding involving the estate of J. Howard Marshall, II, in Harris County, Texas, Mr. Stern "surreptitiously took from counsel's table Pierce Marshall's financial statement." According to Mr. Hardin, Mr. Stern then made a photocopy of the financial

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statement and sent that document to be filed in a bankruptcy court in California, where it was ultimately posted on the internet. While Mr. Stern was rebuked by the Texas Probate Court for this conduct, and "admitted that he had obtained the statement from opposing counsel's table," Stern claimed that he did not know that the information was confidential. That exchange is reflected in Exhibit "A" to Mr. Hardin's affidavit. In that same affidavit, Mr. Hardin refutes sworn testimony that was given by Mr. Stern less than a year ago in another federal matter-which is being prosecuted by the O'Quinn firm against Mr. Stern-- wherein Stern denied any involvement with the transmittal of Mr. Marshall's financial statement to the California probate court. Finally, Mr. Hardin takes issue with Mr. Stern's suggestion that this was simply some kind of legitimate misunderstanding.

9. There have been similar problems relating to the disclosure of confidential information involving Mr. Stern and his counsel. In December of last year, the Honorable D.J. Chin, of the United States District Court for the Southern District of New York, chided Mr. Stern's attorneys for releasing information to the Art Harris website, despite an existing Confidentiality Agreement. A copy of Judge Chin's Memorandum and Order to that effect, is attached hereto as Exhibit "H" and is specifically incorporated by reference herein. Judge Chin noted that Mr. Wood had "vigorously opposed the application for a protective order" in that matter.

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10. For obvious reasons, Defendants in this cause are concerned that this kind of conduct may be repeated here, causing the disclosure of personal and corporate financial information that is extraordinarily sensitive. Accordingly, Defendants would respectively ask this Court to grant a protective order limiting the scope of the discovery sought by the Plaintiff in the subject Interrogatories and Request for Production to "current financial information," including personal and corporate financial statements and a current Firm balance sheet, and otherwise directing that these materials need not be produced until thirty (30) days prior to the trial of this cause. Defendants would further respectfully request that this Court enter an Order restricting dissemination of the financial information that is produced to Mr. Wood and the attorneys within his Firm, or any expert who may be retained to specifically review the financial documentation for the purposes of offering any testimony at trial. That same order should specifically preclude Plaintiff's counsel from disseminating this information to Mr. Stern or any other individual.

11. LOCAL RULE 7.1.A.3 CERTIFICATE -The undersigned certifies that he has attempted to discuss the foregoing motion with counsel for Plaintiff in order to obtain counsel's consent hereto, but has been advised that Plaintiff's counsel refused to agree to the proposal.

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MEMORANDUM OF LAW

Rule 26 (b) allows a party to seek protection from the Court for discovery that is overly broad, harassing or otherwise privileged. In this instance, while Defendants certainly acknowledge that recent precedent from this jurisdiction tends to indicate that evidence of a Defendant's net worth may be discoverable once a punitive damage claim withstands a preliminary motion to dismiss, the fact remains that this type of discovery is undeniably coercive and thoroughly invasive. Under the circumstances, Defendants would submit that extreme caution should be taken to zealously protect against overly broad financial discovery which goes far beyond what is truly necessary and relevant to a potential punitive damage claim. Further, all appropriate measures should be available to protect the Defendants from disclosure of the documentation that is ultimately produced, beyond what is absolutely necessary in order to allow Plaintiff's counsel to prepare his case.

Several District Courts have ruled that a Plaintiff may seek discovery concerning the Defendants' current net worth, given a pending punitive damage claim. See Lane v. Capital Acquisitions, 242 F.R.D. 667, 670 (S.D. Fla. 2005) and In re E.S. Bankest, L.C., 2008 WL 746444 (S.D. Fla. 2008). However, in each of those two decisions, the Courts made it clear that any discovery which sought information that was not truly relevant to a determination as to

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the Defendants' current net worth was irrelevant, and could be protected from disclosure. In addition, both cases took steps to ensure that the financial information that was to be produced by the Defendants was subject to an appropriate confidentiality order.

This is precisely what was proposed by Defendants' counsel in his letter of September 17th. Unfortunately, for reasons that have not been explained, Plaintiff's counsel refused to agree to limit the response to the financial discovery to current net worth information and also refused Defendant's request to protect the confidentiality of the requested documentation from disclosure to the Plaintiff in this matter, Howard K. Stern.

In Lane v. Capital Acquisitions, 242 F.R.D. 667 (U.S.D.C. 2005), United States Magistrate Judge Seltzer found that discovery requests for financial records were "over broad on their face," to the extent that the Plaintiffs sought financial records for a five (5) year period, and some records for an unlimited period of time. The Court cited with approval from several other Federal District Court decisions which had determined that the only relevant financial information that needs to be produced given a pending punitive damage claim is "current information [of the] party's net worth...." Among other decisions, the Lane Court cited to the decision in Raiser v. O'Schaughnessy, 192 WL 309541 (N.D. Il. 1992), which had determined that a request for financial records could be met "by disclosure of the most recent of the types of the

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documents described that substantially discloses the defendant's assets and liabilities.'" "

In this instance, Plaintiff has also requested information that is overly broad on its face, including all tax returns and filings dating back three years, copies of appraisals and insurance policies on personal property, copies of appraisals, mortgages, and other documents of title or other documents relating to the valuation of any real property owned by the Firm or Mr. O'Quinn, and complete copies of bank statements "of any kind, wherever located" for both the Firm and Mr. O'Quinn, regardless of the fact that there is a substantial amount of proprietary information contained on those statements which is wholly irrelevant to any punitive damage claim in this claim. Similarly, the Interrogatories not only request information concerning the net worth of Mr. O'Quinn and the Firm, but also a complete itemization of all personal property and real estate owned by Mr. O'Quinn and the Firm, including the date of acquisition and purchase price of any and all of that property, including "but not by limitation" art work, jewelry, sculpture, automobiles, aircraft, yachts and the like...."

That latter request alone is clearly burdensome, given the fact that it obviously require an extraordinary amount of time and effort to research that information. In addition, however, the only relevant information...current values... would be readily reflected

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- albeit not in this kind of painstaking detail - on personal or corporate financial statements. In truth, Plaintiff's discovery appears to be clearly designed to harass the Defendants and is analogous to the type of discovery which one would expect in aid of execution, after a final judgment. It goes far beyond what is necessary to present a jury with evidence of the Defendants' net worth.

In E.S. Bankest, L.C. v. BDO Seidman, LLP, 2008 WL 746444 (Bkrcty. S.D. Fla. 2008), Chief Judge Emeritus Cristol granted a motion for protective order in the face of discovery into BDO's financial affairs and condition, given a pending claim for punitive damages. In sustaining that objection, Judge Cristol noted that the existence of those claims did not justify "the broad based discovery into past and present financial condition and future projections at this stage of the litigation." There - as here - the Defendant offered to supply the Plaintiff "with current net worth information...." Bankest, supra at 4. The Court also sustained objections to the provision of "historical financial information...."

In addition to limiting the financial discovery that needed to be produced in the Bankest case, Judge Cristol also granted a request to limit disclosure of that information, and to prevent the Plaintiff from "sharing, disclosing, divulging or otherwise making known to the Plaintiff... or any other party" any of BDO's

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confidential financial information. Judge Cristol then directed BDO to provide the requested information "thirty days prior to the trial in this proceeding."

In ruling to that effect, Judge Cristol endorsed the finding by the Federal District Court in the Lane matter, which "establishes that entitlement is to be limited to current net worth information about the Defendant at the time of trial." Bankest, supra at 3. Thus, in this instance, Defendants would respectfully submit that they should not be required to respond to these Interrogatories or to provide their net worth statements until thirty (30) days prior to trial.

In Van Westrienen v. Americontinental Collection Corporation, 189 F.R.D. 440 (D. Or. 1999), the trial court sustained an objection to "overly broad and unduly burdensome financial discovery." In the Van Westriener matter, the Court pointed out that the Defendant had disclosed his income by means of an affidavit. The Court went on to note that a Defendant's ability to pay "is best measured in terms of his assets and liabilities as shown by a financial statement," and that a personal tax return often contains "irrelevant and confidential information, especially if it is a joint return." Yet in this instance, Plaintiff responded to Defendants' timely request for a negotiated limitation on the documentation that was to be produced by flatly refusing to consider any modification of Plaintiff's overly broad discovery

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requests, or any restrictions on dissemination of the financial documentation to Mr. Stern's attorneys alone. Instead, Mr. Stern's counsel simply pointed out that he disagreed with the proposal, while noting that "there is no rule that punitive damage discovery must only be produced within 30 days of trial...."¹

In this instance, the Defendants have legitimate cause to be concerned about Mr. Stern's access to the Defendants' highly confidential financial information. Unfortunately, given similar circumstances on a prior occasion, Mr. Stern was accused of removing financial documents from the table of opposing counsel during the *Marshall* probate proceedings, and then forwarding them to a court in California, where they were then routinely posted on the court's website.

Further, as is noted in the attached Order from Judge Chin in the Rita Cosby proceedings, other confidential documents managed to find their way onto the website of a rather well known Stern supporter, Art Harris, mere moments after those confidential documents were filed in a Federal District Court in Texas, purportedly because they were necessary to support a response to a motion for protective order that had been filed in Texas.

¹ Defendant would respectfully submit that this hardly comports with the Local Rule 7.1 (A) (3) requirement of a good faith attempt to resolve a legitimate discovery dispute.

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Obviously, Defendants seek to avoid a repetition of this type of conduct. Simply put, Mr. O'Quinn and his Firm do not want their personal financial information posted all over the internet, and do not have any confidence whatsoever that they can ensure the confidential nature of that information if Mr. Stern is allowed access to that information.

Given legitimate concerns over the dissemination of this sensitive financial information to third parties, Defendants would ask the Court to enter an order precluding Mr. Wood's Firm from disseminating the Defendants' financial information to their client, Mr. Stern. The production here should be limited to financial statements and a current Firm balance sheet. There is simply no need for the production of lists of personal property, including purchases and original purchase prices, three years of income tax returns or Mr. O'Quinn's personal income tax returns, which obviously include innumerable items of sensitive information that are not relevant to any claim concerning the personal or corporate net worth of Mr. O'Quinn and his Firm at the time of trial.

WHEREFORE, Defendants would respectfully request this Court to grant a protective order, limiting the Plaintiff's Requests for Production and Interrogatories to the O'Quinn Firm and Mr. O'Quinn to current financial statements and a current balance sheet for the Firm, to be prepared thirty (30) days prior to trial. Defendants

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would also ask this Court to enter an order directing that these matters be held in the strictest of confidence by Mr. Wood and his Firm, and expressly preventing disclosure of any of that financial information to Mr. Stern himself. Finally, given the fact that the offices of the Firm's accountants were closed for an extended period of time following Hurricane Ike, and given their urgent need to complete and file client income tax returns by October 16th - which will obviously take precedence over a request to prepare formal financial statements for Mr. O'Quinn and his Firm pursuant to a federal discovery request - Defendants would respectfully ask this Court to enter an order allowing the accountants a minimum of two weeks to prepare the requested financial statements and balance sheets following the close of the October 16th tax deadline, if the Court determines that the financial statements need to be produced more than thirty days prior to trial.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on September 25, 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

