

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

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

HOWARD K. STERN,

Plaintiff,

vs.

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

Defendants.

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

Plaintiff HOWARD K. STERN ("Stern") hereby submits this Memorandum of Law in Support of His Motion to Compel Defendants' Compliance with Local Rule 26.1.

STATEMENT OF FACTS

A. The First Amended Complaint.

This action arises out of the death of model and actress Anna Nicole Smith. Plaintiff Stern, Ms. Smith's companion and attorney, alleges that Defendants defamed and painted him in a false light in eight (8) separate statements Defendant O'Quinn made during appearances on national media television outlets such as FOX News, CNN and MSNBC ("Statements"). (See 1st Am. Comp. at ¶¶ 93, 110, 129, 145, 168, 181, 195 & 208.) In each appearance, O'Quinn accused Stern of murdering Anna Nicole Smith and/or her son, Daniel Smith, out of greed – i.e., Mr. Stern would receive a financial

windfall upon Ms. Smith's death from, among other things, life-insurance proceeds and proceeds from Ms. Smith's pending lawsuit with the J. Howard Marshall estate.

B. Background Regarding Plaintiff's Discovery Requests.

On April 4, 2008, Plaintiff served Interrogatories and a Request for Production of Documents on Defendant John O'Quinn ("O'Quinn") and, separately, a Request for Production of Documents on Defendant John O'Quinn & Associates PLLC. The discovery requests generally sought the facts supporting O'Quinn's Statements, O'Quinn's efforts to investigate the truth of the Statements and whether O'Quinn was quoted accurately in the First Amended Complaint.

On May 16, 2008, after having agreed to an extension on Defendants' discovery responses so that they were due May 23, undersigned counsel asked that Defendants produce their responsive documents and a privilege log soon after the May 23 due date because a witness, Ms. Wilma Vicedomine, was subpoenaed and noticed to be deposed on June 2, 2008.¹ In response, Defendants indicated that they did not intend to produce a privilege log.²

Stern's counsel responded by letter of May 21, 2008, citing Local Rule 26.1 and decisions indicating that a privilege log was required under Local Rule 26.1.G.3.c for any document created before the lawsuit was filed. The letter stated that Defendants were further required, pursuant to Local Rule 26.1.G.2.b, to identify any responsive, withheld communication and to document the same in their objections to the Interrogatories and Requests to Produce, regardless of when it was created.³ By letter of May 23, 2008,

¹ Letter from Eric Schroeder to Robert Klein (May 19, 2008), attached hereto at Tab A.

² Letter from Robert Klein to Eric Schroeder (May 20, 2008), attached hereto at Tab B.

³ Letter from Eric Schroeder to Robert Klein (May 21, 2008), attached hereto at Tab C.

Defendants indicated they would produce a privilege log, but that they were not required to produce any documents created or received after the lawsuit was filed.⁴

On May 23, Defendants indicated that they could not meet the May 23 deadline due to a computer mishap at Defendants' offices. On that basis, Plaintiff agreed to another extension.⁵ On May 28, Defendants served their responsive documents, and on May 30, they produced two privilege logs.⁶ A motion for a protective order for Ms. Vicedomine's deposition was also filed.

C. The Parties Conferred But Disagree Regarding Defendants' Compliance With Local Rule 26.1.

On June 19, 2008, undersigned counsel, pursuant to Local Rule 7.1.A.3, asked Defendants to bring the privilege logs into compliance, asking that they identify any documents regarding Defendants' investigation into the death of Anna Nicole Smith and Daniel Smith which were created or received after the lawsuit was filed and further to confirm that no responsive documents were withheld but were not identified on the privilege logs.⁷ No resolution regarding this discovery dispute was reached.

⁴ Letter from Roberta G. Mandel to Eric Schroeder (May 23, 2008), attached hereto at Tab D.

⁵ Email from Greg Glasser to Eric Schroeder (May 23, 2008), attached hereto at Tab E.

⁶ Privilege Log O'Quinn Law Firm, and Privilege Log Wilma Vicedomine, attached hereto as Tab F and Tab G, respectively.

⁷ Letter from Eric Schroeder to Robert Klein (June 19, 2008), attached hereto at Tab H.

D. The Privilege Logs And Defendants' Production Of Documents.

As demonstrated in the four other motions to compel filed today,⁸ Defendants' strategy on discovery has been to stonewall Plaintiff from any meaningful discovery by asserting multiple, baseless objections to each discovery request. For example, Defendants refuse to identify any "specific facts" supporting the truth or falsity of the Statements – despite this being the ultimate issue in this case – because O'Quinn is supposedly "not at liberty" to disclose those facts due to the work-product doctrine and attorney-client privilege. (O'Quinn's Resp. to Interrogs. at 8.) This baseless refusal to disclose any relevant factual information extends to the privilege logs and Defendants' meager production of documents.

Defendants produced two privilege logs, both lacking subject-matter descriptions: (1) "Privileged Documents O'Quinn Law Firm" (the "Law Firm Privilege Log"); and (2) "Privileged Documents Wilma Vicedomine" (the "Vicedomine Privilege Log"). No separate privilege log was produced for Defendant John O'Quinn.

Defendants' document production was sparse, consisting of: 1) 100 e-mails from members of the public offering their support of or disgust with O'Quinn for his involvement in the media circus surrounding Ms. Smith's death; 2) a copy of an insurance liability policy; and 3) nine letters – five letters from members of the public offering advice to O'Quinn; a letter from Don Clark to Stern's counsel, Krista Barth,

⁸ (1) Motion to Compel Responses to Interrogatories from Defendant John M. O'Quinn; (2) Motion to Compel Production of Documents Responsive to Plaintiff's First Request for Production of Documents from Defendant John M. O'Quinn; (3) 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; and (4) Motion to Determine Sufficiency of Defendant John M. O'Quinn's Responses to Plaintiff's First Request for Admissions.

threatening to go to the Florida Bar for her public comments regarding Virgie Arthur (Mr. O'Quinn's client); a letter from Don Clark to the FBI asking that the FBI investigate the death of Anna Nicole Smith; a letter from Brian Cavanaugh, Assistant State Attorney-In-Charge at the Florida State Attorney's Office responding to a July 23 letter from Clark (the "July 23 Clark Letter") asking for further evidence regarding Clark's claim of "possible foul play" in Ms. Smith's death; and a reply letter from Clark to Brian Cavanaugh, stating Defendants' position that Ms. Smith's death was not an accident.⁹ The July 23 Clark Letter is not produced or listed on any privilege log.

DISCUSSION

A. Defendants Were Required To Either Produce Or Identify All Responsive Documents.

Under the Federal Rules of Civil Procedure and the Local Rules of this Court, a party asserting a claim of privilege bears the burden of producing a privilege log that identifies: 1) the document, communication or information that is being withheld on the assertion of privilege; 2) the date, subject matter, creator and recipient of such information and other identifying information; and 3) the basis upon which the party claims its privilege. Fed. R. Civ. P. 26(b)(5) & S.D. Fla. L.R. 26.1.G.3.b. E.g., Williams v. Cannon, Inc., 2008 WL 2053492 (S.D. Fla. May 13, 2008) ("[T]he Federal rules clearly prohibit a party from withholding privileged materials . . . without producing a privilege log that 'describe[s] the nature of the documents . . . not produced or disclosed . . . in a manner that . . . will enable other parties to assess the claim.'" (citing Fed. R. Civ. P. 26(b)(5)).

⁹ Aff. of Mr. J. Matthew Watson, attached hereto at Tab I and Tabs 1 through 11 of Aff.

The party that asserts an evidentiary privilege or the work-product doctrine bears the burden of proving the privilege is properly asserted. Place St. Michel, Inc. v. Travelers Property Cas. Co. of Am., 2007 WL 1059561, at *3 (S.D. Fla. April 4, 2007). Because the work-product doctrine seeks to prevent access to documents, it is narrowly applied. Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 661 n.2 (S.D. Ind. 1991) (stating that the work-product rule “should not be given a broad scope” but should be “narrowly construed” in light of the free and open discovery intended by the Federal Rules). A privilege log is necessary so that “the court will be in a position to determine the possible merit of the Defendant’s objections.” Taylor v. Fla. Atl. Univ., 132 F.R.D. 304, 306 (S.D. Fla. 1990). The objecting party is therefore responsible for creating a privilege log that illustrates the basis of the privilege. CC-Aventura, Inc. v. The Weitz Co., 2008 WL 828117, at *5 (S.D. Fla. March 27, 2008); see also Developers Sur. & Indem. Co. v. Harding Vill., Ltd., 2007 WL 2021939, at *5-6 (S.D. Fla. July 11, 2007) (ordering that privilege log be re-filed with Court with sufficient description to assess the validity of the asserted privilege); Cherenfant v. Nationwide Credit, Inc., 2004 WL 5315889, at *2 (S.D. Fla. May 12, 2004) (“Federal Rule of Civil Procedure 26(b)(5) and Local Rule 26.1.G.3 . . . set forth the type of information that must be provided.”); Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 210 F.R.D. 506, 509 (S.D.N.Y. 2002) (requiring “sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege”) (internal quotations omitted). The court should reject the privilege if it fails to meet this standard. Id.

Further, Local Rule 26.1.G.3.b requires that any withheld document or communication must be identified in the objection to the interrogatory or document

request itself. Thus, generalized objections that a “category” of documents is off-limits because it is work-product violate the Local Rules:

IV. Objections Based upon Privilege:

Generalized objections asserting “confidentiality,” attorney-client privilege or work-product doctrine also do not comply with local rules. Local Rule 26.1 G 3(b) requires that objections based upon privilege identify the specific nature of the privilege being asserted, as well as identifying such things as the nature and subject matter of the communication at issue, the sender and receiver of the communication and their relationship to each other, among others. Parties are instructed to review Local Rule 26.1 G 3(b) carefully, and refrain from objections in the form of: “Objection. This information is protected by attorney/client and/or work-product privilege.” If such an objection is made without a proper privilege log attached, it shall be deemed a nullity.

Guzman v. Irmadan, Inc., 249 F.R.D. 399, 401 (S.D. Fla. 2008); See also ABM Fin. Servs., Inc. v. Express Consol., Inc., 2007 WL 2572322 (S.D. Fla. 2007) (same).

Thus, after a response to a request to produce has been made, the requesting party should have been made aware of all responsive documents either through production of same, by their listing on a privilege log, or by their identification in the response to the document request itself. Suncast Techs., LLC v. Patrician Prods., Inc., 2008 WL 179648, at *2 (S.D. Fla. Jan. 17, 2008) (Rosenbaum, Magistrate Judge) (requiring Defendant to file affidavit attesting that all responsive documents were produced or included in a privilege log).

B. Defendants’ Privilege Logs Violate Local Rule 26.1.G.3.

1. The Logs Are Insufficient Because They Do Not Provide Enough Information.

Despite Plaintiff’s clear notice to Defendants that Local Rule 26.1 prohibits listing documents in groups, listing documents without an explanation of what the document is

and why the privilege applies,¹⁰ Defendants' privilege logs do not comply with Local Rule 26.1 as they provide little basis (besides documents which obviously do not belong on the privilege log) on which Plaintiff or the Court can determine whether the privilege has been properly asserted.

a. The Law Firm Privilege Log.

The Law Firm Privilege Log violates Local Rule 26.1.G.3 because:

- i. The Log does not describe the general subject matter for **any** document or its purpose;
- ii. Listings 146, 155 and 157 impermissibly group documents, do not provide an author or recipient for the document or with whom it was shared;
- iii. Listings 155 and 157 do not have any dates; and
- iv. The Log lists only "Work-product" as the privilege relied on, yet the Responses to the Document Requests object to producing documents under the Attorney-Client privilege,¹¹ suggesting that documents have been omitted from the Log.

(Tab F.)

b. The Vicedomine Privilege Log.

The Vicedomine Privilege Log violates Local Rule 26.1.G.3 because:

- i. The Log impermissibly lists documents together in groups;
- ii. There is no general subject matter description for listings 1 through 13;
- iii. Not one document is identified individually by date, author and recipient; and
- iv. The Log lists only "Work-product" as the privilege relied on, yet the Document Requests object to producing documents under the Attorney-Client privilege, suggesting that documents have been omitted.

¹⁰ See Tabs C and H.

¹¹ See Memorandum of Law in Support of Motion to Compel Discovery at 9.

(Tab G.)

In short, the Privilege Logs are grossly insufficient. See generally 6 MOORE'S FEDERAL PRACTICE § 26.90[1] (Matthew Bender 3d ed.) (“[T]he applicable privilege must be claimed for each document withheld . . . [and] enough information must be supplied so that the court can determine whether the asserted privilege is applicable.”). In Harding Village, a party attempted to describe the subject matter of its documents as simply “subcontractor claims” – nothing more. 2007 WL 2021939, at *5. Although the party did more than Defendants have done here – providing some, albeit meager, subject-matter description – the court found that description “too sweeping” and insufficient to determine whether the privilege applied, and the court ordered the party to produce a conforming privilege log. Id. at *5-6. Defendants’ efforts here fall well short of the standard required under Rule 26. Defendants bear the responsibility of showing that each individual document is entitled to work product protection. See 6 MOORE’S FEDERAL PRACTICE § 26.90[1] (citing Green v. Baca, 219 F.R.D. 485, 491 (C.D. Cal. 2003) (rejecting assertion that separating privileged documents from unprivileged documents was unduly burdensome, but was instead effectively an improper blanket privilege objection where party did not make particularized showing that any documents were privileged)). Due to the above omissions and failures, the Privilege logs fail their essential purpose: except for some obvious instances discussed below, neither Plaintiff nor the Court can assess whether the privilege is being properly asserted or whether there has been a full accounting of Defendants’ responsive documents.

As a result, Defendants should be ordered to re-submit their privilege logs so that they comply with Local Rule 26.1. This Court should sanction Defendants by, at a

minimum, requiring Defendants to pay Plaintiff's attorney's fees for being forced to file this motion. See 6 MOORE'S FEDERAL PRACTICE § 26.90[1] ("Failure to follow the procedures set forth in Rule 26(b)(5)(A) subjects the party to sanctions under Rule 37(c), which may include an order to pay the reasonable expenses of the party seeking discovery, including attorney's fees, as well as waiver of the asserted privilege.").

2. The O'Quinn Law Firm Log Lists Documents Produced By Third Parties And Fails To List Correspondence To Third Parties Which Obviously Were Created.

Despite the inadequacy of the information included in the privilege logs, it is clear that Defendants' privilege logs include documents not protected by the work-product doctrine because they were created by or distributed to third-parties.

Listings for which the O'Quinn Law Firm improperly asserted work-product protection include the following listings:

- Dawna Kaufman (listings 82-85 & 91), who is believed to be a reporter for the *National Enquirer*;
- Pam Burns (listing 81), who may or may not be an O'Quinn Law Firm employee;
- "C" (listing 79), identity unknown;
- Carolyn Herring (listing 76), relationship to the O'Quinn Law firm unknown; and
- Howard Lynn (listings 86 & 91), relationship unknown.

(Tab F.)

The Vicedomine Privilege Log lists a number of third-party communications with no explanation given for why the work-product doctrine would apply, including:

- "E-mail communications with various third-parties" (listing 3); and

- “Unsolicited phone calls and e-mails forwarded to Wilma Vicedomine for follow-up” (listing 6).

(Tab G.)

Documents created by third-parties are ordinarily not protected by the work-product doctrine absent a “real” showing that the attorney’s work product would be exposed by production of the materials. See Hunter’s Ridge Gold Co. v. Georgia-Pacific Corp., 233 F.R.D. 678 (M.D. Fla. 2006) (work-product doctrine does not cover documents created by third parties unless respondent can show a “real” – not “speculative” – concern that attorney’s thought-processes would be exposed). See generally 6 MOORE’S FEDERAL PRACTICE § 26.70[4] (“The work product doctrine . . . provides protection only for documents or things prepared by or for another party or for that other party’s representative. . . . [D]ocuments prepared in anticipation of litigation in another case against the same defendant . . . are not protected because they are not prepared by or for the particular party asserting the work product privilege”). No such showing has been made here. Consequently, any document created by a third-party should be produced as Defendants have made no attempt to show a “real” danger that revealing a document created by a third-party will reveal their attorney’s thought processes.

3. The Work-Product Doctrine Is Inapplicable To Documents Relating To Defendants’ Factual Investigation Into Defendants’ Statements And The Facts Regarding The Deaths Of Anna Nicole Smith And Daniel Smith.

Further, to the extent that the Court determines that it can rule on the asserted privileges given the little information provided, any documents having to do with Defendants’ investigation into the death of Anna Nicole Smith and Daniel Smith, any

attempts by Defendants to jump-start or influence any law or medical investigation into the deaths, the investigation into the veracity of the Statements and any efforts by Defendants to share information about Stern with third-parties are not covered by the work-product doctrine. The work-product doctrine does not apply to these documents 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 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. See Kallas v. Carnival Corp., 2008 WL 2222152, at *6 (S.D. Fla. May 27, 2008) (holding that when a party attempts to rely on alleged work-product to support positions taken in litigation, work-product privilege is waived because of its testimonial use); Dunkin' Donuts, Inc. v. Mary's Donuts, Inc., 206 F.R.D. 518, 521 (S.D. Fla. 2002) (holding that facts supporting plaintiff's claims were not protected as work-product). The information is particularly discoverable here, where Defendants have relied on their investigation in attempting to get law enforcement authorities to investigate the deaths of Anna Nicole Smith and Daniel Smith. See Westmoreland v. CBS Inc., 97 F.R.D. 703, 706 (S.D.N.Y. 1983) (internal memorandum detailing investigation of defamatory broadcast discoverable when results of that investigation were shared with third-parties.)

In the alternative, Plaintiff submits that the Court examine the documents *in camera* to determine whether the privilege is applicable. See Kallas, 2008 WL 2222152, at *7.

C. Defendants Have Not Confirmed That They Have Identified All Responsive Documents, Have Likely Omitted Documents And Should Be Required To Identify And/Or Produce Responsive Documents Created After The Lawsuit Was Filed.

Finally, Defendants' objections, insufficient privilege logs and correspondence indicating that they would not be producing or identifying any documents created or received after the lawsuit was filed in April 2007 all cause Plaintiff to believe that Defendants have not identified all responsive documents. As a result, Plaintiff asks that the Court order Defendants to produce or identify any withheld documents, in particular documents created after the lawsuit was filed which relate to Defendants' factual investigation into the truth or falsity of O'Quinn's Statements and the deaths of Anna Nicole Smith and Daniel Smith, or confirm that there are no such responsive documents in Defendants' possession.

1. Defendants' Production Indicates That Not All Responsive Documents Have Been Produced.

First, Defendants have not confirmed that they have identified all responsive documents either by producing them or by listing them in their privilege logs. For instance, not one document is listed for John O'Quinn in the privilege logs and no separate privilege log was prepared for him. It may be that Mr. O'Quinn never received and kept any documents that support his Statements, but Defendants should be required to state that he has no responsive documents and confirm this fact. Given the "stonewalling" Defendants have exhibited in producing insufficient privilege logs and refusing to produce any documents, Plaintiff has no confidence that all responsive documents had been identified and accounted for in response to Plaintiff's discovery requests. See Memorandum of Law in Support of Motion to Compel Discovery at 7.

Indeed, Defendants' production of documents indicates that Defendants likely have held back documents from production. Defendants produced correspondence from the State Attorney's Office for Florida, see August 2, 2007 letter of Michael Satz to Don Clark, which references a letter dated July 23, 2007 from Don Clark to the State Attorney's Office, but no such letter was produced or included on the privilege logs. Further, there is no follow-up correspondence related to Mr. Clark's April 16, 2007 letter to the FBI requesting that the FBI investigate Ms. Smith's death. Where are these documents?

2. Defendants Should Be Compelled To Produce Or Identify Documents Which Were Created Or Received After The Lawsuit Was Filed And Concern Their Factual Investigation Regarding The O'Quinn Statements And The Deaths Of Anna Nicole Smith And Daniel Smith.

Further, Defendants have refused to identify any document created after Plaintiff's lawsuit was filed. In correspondence with counsel before Defendants responded to Plaintiff's discovery requests, Defendants' counsel indicated their belief that they had no duty to identify responsive documents which were being withheld on assertion of privilege if those documents were created or received AFTER the above lawsuit was filed. Plaintiff has no interest in seeing Defendants' attorney-work-product or attorney-client communications. Stern believes 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.¹²

¹² There 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 in its objection 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 privilege log to those

Defendants only identify three sets of documents in their privilege logs which were created after the lawsuit was filed: 1) Ms. Vicedomine's handwritten notes and e-mail communications with third-parties, Vicedomine Privilege Log (listings 1 and 3); 2) pleadings from various lawsuits, e.g., O'Quinn Law Firm Privilege Log (listings 148 through 154); and 3) the August 2, 2007 letter of Michael Satz to Don Clark referencing Mr. Clark's July 23 Letter. The O'Quinn Law Firm Privilege Log does not list any document created after April 11, 2007, despite evidence that the O'Quinn Law Firm continued to investigate Anna Nicole and Daniel Smith's death well into the summer of 2007. See Mr. Satz's letter above.

Defendants' post-lawsuit conduct is relevant to Stern's claims in the Complaint. Specifically, Defendants' conduct after the Statements were made is relevant to the truth of the statements and Stern's allegation that O'Quinn acted with actual malice, particularly where Stern has alleged that Defendants have engaged in a public relations campaign to injure his reputation and subject him to criminal investigations for Ms. Smith's and Daniel Smith's deaths, despite repeated statements by law enforcement and medical authorities that their tragic deaths were accidental. Circumstantial evidence of Defendants' state of mind – including post-Statement conduct – is relevant and discoverable as it relates to the issue of actual malice, because “how can it reasonably be contended that post-publication statements or activities could not form the basis for an inference as to pre-publication state of mind?” Herbert v. Lando, 73 F.R.D. 387, 396-97

documents created prior to the commencement of the action. As set forth in the accompanying memoranda of law simultaneously filed herewith, Defendants' reliance on allegedly protected documents as a defense to this action necessitates that Defendants fully comply with Local Rule 26.1.G.3.b.ii, and Stern believes he is entitled to documents concerning Defendants' investigation of the facts supporting the Statements.

(S.D.N.Y. 1977), rev'd on other grounds, 568 F.2d 974 (2d Cir. 1977), rev'd on other grounds, 441 U.S. 153 (1979) (inquiry into post-publication conduct may lead to discovery of evidence supporting inferences concerning state of mind of author and publisher defendants at time of publication of defamatory statements and is discoverable). See generally Harte Hanks Comms. v Connaughton, 491 U.S. 657, 668 (plaintiff entitled to prove actual malice by circumstantial evidence); Herbert v. Lando, 441 U.S. 153, 160 (1979) (same); Tavoulareas v. Piro, 817 F.2d 762, 789 (D.C. Cir. 1987) (en banc), cert. denied, 484 U.S. 870 (1987) (same). Cf. Sw. Hide Co. v. Goldston, 127 F.R.D. 481, 483-84 (N.D. Tex. 1989) (no per se rule barring discovery of events that occurred after action was filed); King v. E.F. Hutton & Co., 117 F.R.D. 2, 7-10 (D.D.C. 1987) (discovery permitted on events occurring after complaint filed because information might reflect defendants' intentions or truthfulness of their representations; securities fraud and RICO case); Westmoreland v. CBS Inc., 601 F. Supp. 66, 67 (D.C.N.Y. 1984) (post-broadcast report prepared by CBS executive regarding defamatory broadcast was not excluded as a subsequent remedial measure; portions deemed inadmissible on other grounds); see also Rocky Mtn. Helicopters v. Bell Helicopters Textron, 805 F.2d 907 (10th Cir. 1986) (post-event report not considered a "remedial measure" protected under rules of evidence).

Indeed, here, where Defendants have engaged in an extensive factual investigation in an effort to confirm the truth (or falsity) of O'Quinn's statements, "he should not be permitted to ignore with impunity the fruits of that investigation. Lando, 73 F.R.D. at 397 (plaintiff entitled to discovery regarding defendant's post-lawsuit conversations with "source persons") (citing Airlie Found., Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421 (D.D.C. 1972)).

Therefore, Stern requests that Defendants be compelled to identify any heretofore unidentified responsive documents – including documents created or received after the lawsuit was filed – or confirm by affidavit that all responsive documents have either been produced to Stern or identified in a proper privilege log. See Suncast Techs., LLC, 2008 WL 179648, at *2 (requiring Defendant to file affidavit attesting that all responsive documents were produced or included in a privilege log).

CONCLUSION

Stern therefore respectfully submits that Defendants have failed to comply with Local Rule 26.1 because the privilege logs are wholly inadequate to determine whether any purported privilege applies. The motion to compel should therefore be GRANTED and appropriate sanctions be levied against Defendants.

Respectfully submitted this 30th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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