

**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
MOTIONS TO COMPEL DISCOVERY FROM DEFENDANTS
JOHN M. O'QUINN AND JOHN M. O'QUINN & ASSOCIATES PLLC, d/b/a
THE O'QUINN LAW FIRM**

Plaintiff HOWARD K. STERN ("Stern") hereby submits this Memorandum of Law in Support of His Motions to Compel Discovery from Defendants John M. O'Quinn and John M. O'Quinn & Associates PLLC d/b/a The O'Quinn Law Firm. Due to the similarity of issues regarding the inadequacy of Defendants' responses to Interrogatories and Requests to Produce, Stern submits this single Memorandum of Law in support of three motions to compel filed herewith:

- (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.

STATEMENT OF FACTS

I. The First Amended Complaint

This action arises out of the death of model and actress Anna Nicole Smith, her son Daniel Smith, and the media circus which ensued after Ms. Smith was found dead in her hotel room in the Seminole Hard Rock Hotel & Casino in Hollywood, Florida, on February 8, 2007. As worldwide media coverage descended to cover Ms. Smith's death and the custody issues surrounding her daughter, Dannielynn, Defendant John O'Quinn ("O'Quinn") became a minor celebrity by injecting himself into the discussion regarding Anna Nicole's death. His ticket to notoriety was recklessly accusing Stern of murdering Anna Nicole Smith and her son Daniel in at least eight separate appearances on national media television outlets such as FOX News, CNN and MSNBC ("Statements"). (First Am. Comp. at ¶¶ 93, 110, 129, 145, 168, 181, 195 & 208.) In each appearance, O'Quinn accused Stern, who was Ms. Smith's companion and attorney, of murdering the supermodel and her son out of greed – i.e., alleging that Mr. Stern would receive a financial windfall upon Ms. Smith's death in the form of life-insurance proceeds, the proceeds from Ms. Smith's pending lawsuit with the J. Howard Marshall estate, the proceeds from the Smith estate, and other false alleged motives. In his Complaint, Stern alleges that O'Quinn defamed and painted him in a false light in uttering his Statements.

Then and now, O'Quinn's wild accusations have found no factual support. Both the Broward County Medical Examiners' Office and the Seminole Police declared Ms. Smith's death to be accidental with no criminal activity involved. In the Bahamas, the medical investigation team, law enforcement authorities, and a Bahamian jury have all found that Daniel Smith died due to an accidental overdose. Despite Defendants' persistent efforts to get Stern indicted or charged with some crime connected with the Smith deaths (see below), Stern has

never been charged, arrested or indicted for any involvement in their deaths and is not criminally or otherwise responsible for their deaths.

II. Defendants' Investigation Into The Deaths Of Ms. Smith And Daniel Smith

After Ms. Smith died, Mr. O'Quinn was hired by Ms. Smith's estranged mother, Virgie Arthur, to represent her in the custody proceedings then pending in Florida. At some time thereafter, Defendants began investigating the deaths of Ms. Smith and her son. Don Clark and Wilma Vicedomine allegedly served as Defendants' main investigators. Mr. O'Quinn claims that Mr. Clark is his sole source for any facts O'Quinn learned that support his contention that Stern is "criminally responsible" for Ms. Smith's death. (Def. John O'Quinn's Resp. & Objections to Pl.'s First Set of Continuing Interrogs., 23.)

Defendants' investigation continued through April 2008, as Plaintiff has information that Mr. Clark and Ms. Vicedomine were actively investigating the death of Daniel Smith as late as April 2008 and trying to influence the Bahamian inquest into Daniel Smith's death. As part of their investigation (the "Clark/Vicedomine investigation"), the Clark/Vicedomine team has also engaged in a public relations campaign intent on ruining Stern's reputation.¹ For example, documents produced by Defendants indicate the Don Clark was shopping information and actively trying to get the Federal Bureau of Investigation and Florida Attorney General to re-open the investigation into Ms. Smith's death.² Further, Clark and Vicedomine fed the "fruits" of their investigation to third-parties such as Rita Cosby, author of *Blonde Ambition*, and posted their progress on the Internet.³

¹ Resp. to Defs.' Motion for a Protective Order, previously filed under seal with the Court on June 24, 2008, at 10.

² Id. at 5-6.

³ Id. at 9-10.

III. 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 and, separately, Request for Production of Documents on Defendant John O'Quinn & Associates PLLC. The discovery requests specifically sought information concerning 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.

After a series of correspondence regarding Defendants' duty to produce a privilege log,⁴ Defendants indicated that they were not required to produce any documents created or received after the lawsuit was filed. (Tab A). On May 28, Defendants served their responsive documents, and on May 30 they produced two privilege logs. Defendants also filed a motion for a protective order concerning Ms. Vicedomine's deposition and requests for production of documents directed at Vicedomine.

IV. Defendants' Responses To Interrogatories And Documents Requests

As demonstrated in the (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; (4) Motion to Determine Sufficiency of Defendant John M. O'Quinn's Responses to Plaintiff's First Request for Admissions; and (5) Motion to Compel Defendants' Compliance with Local Rule 26.1, filed today, and Plaintiff's response to Defendants' motion for

⁴ See Mem. of Law in Support of Motion To Compel Compliance With Local Rule 26.1, at 2-5.

a protective order regarding Wilma Vicedomine, Defendants' strategy on discovery has been to stonewall Plaintiff from any meaningful discovery by asserting multiple baseless objections to each discovery request and disclosing little in way of information.⁵ Defendants' individual responses to Interrogatories and Document Requests are set forth fully in Plaintiff's respective motions to compel, and their numerous objections are summarized by subject matter below:

Work-Product Objections

- a. **Specific Facts.** Defendants' refuse to identify "specific facts" supporting or contradicting O'Quinn's Statements or O'Quinn's present-day contention that Stern is "criminally responsible" for the death of Anna Nicole Smith and Daniel Smith. (Response to Interrogatories Nos. 4, 5 & 6; O'Quinn's Response to Document Request Nos. 2-9 & 23-28; The O'Quinn Law Firm's Response to Document Request Nos. 1-8 & 18-22.)
- b. **Investigative Efforts.** Defendants refuse to identify or produce any document or statement generated or received as part of O'Quinn's efforts to investigate whether his Statements were true or false and Defendants' investigation into Stern and the deaths of Anna Nicole Smith or Daniel Smith. (O'Quinn's Response to Document Request Nos. 11, 16, 17, 30 & 32; The O'Quinn Law Firm's Response to Document Requests Nos. 10, 11, 24 & 25.)
- c. **Other Sources.** Defendants refuse to further identify any source or sources for O'Quinn's Statements. (Response to Interrogatories 2-3 & 7-10.)

⁵ O'Quinn's memory is usefully bereft of detail: he could not remember the source for his life insurance policy claim (Resp. to Interogs. at 2); could not remember his source for his "Stern requested the will four days before she died" (*id.* at 6); and could not remember the investigator he referred to in a March 2007 interview (*id.* at 20).

- d. **Investigators' Documents.** Defendants refuse to identify or produce any document regarding their investigators. (Response to Interrogatory 11.)
- e. **Communications with Third Parties.** Defendants refuse to identify or produce any document concerning communications between O'Quinn and his investigators with third-parties, including the media. (O'Quinn's Response to Document Request Nos. 10, 20 & 21; The O'Quinn Law Firm's Response to Document Request Nos. 9, 15 & 16.)

Overbreadth and Relevancy Objections

- f. **Overbroad.** Defendants object to nearly every single request with an objection that it is overbroad because it asks for "all" documents and is purportedly unlimited in time and scope. (O'Quinn Document Request Nos. 2-11, 16-17, 20-21, 23-28, 30 & 32; O'Quinn's Law Firm Document Request Nos. 1-10, 15-16, 18-22 & 24-25.)
- g. **Relevancy.** Echoing their refusal to produce any documents created or received after the lawsuit was filed, Defendants object to several document requests because they seek communications "that occurred before, during and after the lawsuit." (O'Quinn Document Request Nos. 11 & 23-28 & 30; O'Quinn's Law Firm Document Request Nos. 10 & 18-22.)

Failure to Answer the Question Stated

- h. Defendants fail to answer a simple question – whether O'Quinn is quoted accurately in the First Amended Complaint. Defendants' response that he is not quoted accurately has no specific factual support and does not identify any error in the quoted Statements attributed to him. (Response to Interrogatory No. 1.)

V. Defendants' Document Production

Defendants produced little in the way of responsive documents, and **no** document which purported to support O'Quinn's Statements. In fact, Defendants produced **zero** documents concerning any investigation O'Quinn or his investigators made before O'Quinn uttered his Statements; **zero** documents concerning any investigation after the Statements were made; and **not one** source of factual information – either documentary or a person – was identified by name.

Further, Defendants did not confirm whether or not that they had any further information responsive to the Interrogatories and Document Requests, did not identify which documents listed in the Privilege Logs were responsive to which Interrogatory or Request, and did not comply with Local Rule 26.1.G.b.3 by listing withheld documents in their objections.

Instead, Defendants produced: 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 (9) letters – five letters from members of the public offering advice to O'Quinn; a letter from Don Clark to Stern's counsel, Krista Barth, 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 (Affidavit of Mr. J. Matthew Watson,

attached as Tab B hereto and Tabs 1 through 11). Notably, the July 23 Clark Letter referenced in the Florida State Attorney's letter has not been produced and is not listed on any privilege log.

In effect, Defendants contend that O'Quinn's Statements are true and not uttered with actual malice but they are not going to provide any evidence supporting those defenses. In short, Defendants stonewalled Plaintiff from any discovery.

VI. The Parties Conferred But Disagree Regarding Defendants' Responses To Interrogatories And Document Requests.

On June 19, 2008, counsel for Plaintiff, pursuant to Local Rule 7.1 A(3), asked Defendants to supplement their answers to the Interrogatories and Document Requests because the work product doctrine was improperly asserted, that Defendants' boilerplate objection of "overbroad" was ineffectual and did not relieve Defendants of their duty to respond with relevant information and requested that Defendants confirm that they had no further responsive information or documents. (Tab C). No resolution regarding this discovery dispute was reached.

ARGUMENT AND CITATION OF AUTHORITIES

I. Defendants' Assertion That Every Relevant "Specific Fact" Is Protected From Disclosure By The Work-Product Doctrine Or Attorney-Client Privilege Is Baseless.

A. The Work-Product Doctrine And Attorney-Client Privilege

i. The Work-Product Doctrine

When a party asserts a claim of privilege to prevent discovery of certain information, it is responsible for showing that the purported privilege applies. "[T]he burden is on the party withholding discovery to show that the documents should be afforded work-product immunity." Kallas v. Carnival Corp., 2008 WL 2222152, at *3 (S.D. Fla. May 27, 2008) (citing United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991) (applying rule for attorney-client issue)). Indeed, the party withholding discovery always bears the burden of showing that the

purported privilege applies. Place St. Michel, Inc. v. Travelers Prop. Cas. Co. of Am., 2007 WL 1059561, at *3 (S.D. Fla. Apr. 4, 2007).

The work-product doctrine has a limited scope of protection. It does not apply to every document or communication simply because a lawyer happens to be involved. Platypus Wear, Inc. v. Clarke Modet & Co., 2007 WL 4557158, at *6 (S.D. Fla. Dec. 21, 2007). It only protects against discovery of “documents and tangible things that are prepared in anticipation of litigation or for trial.” Fed. R. Civ. Proc. 26(b)(3). The work product doctrine does not extend to documents “created for business reasons which . . . were not intended to assist in prosecution or defense of a lawsuit.” Gutter v. E.I. Dupont de Nemours & Co., 1998 WL 2017926, *3 (S.D. Fla. May 18, 1998). The objecting party has the burden of introducing evidence that the documents in question were created in anticipation of litigation. Place St. Michel, Inc., 2007 WL 1059561, at *3. “The mere conclusory assertion that material sought is covered by . . . work product privilege is not sufficient to render such material undiscoverable.” Id. (internal quotation omitted).

ii. The Attorney-Client Privilege

Defendants also bear the burden of proving that the attorney-client privilege applies. Confidential communications between an attorney and client are generally protected from discovery. See 6 MOORE’S FEDERAL PRACTICE § 26.49[1]-[2] (Matthew Bender 3d ed.). But the party claiming the privilege bears the burden of showing that the attorney-client relationship existed and that the communications were confidential. United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991). To be privileged, the communication must be made to the attorney for the purpose of seeking legal advice. Id.

B. The Work-Product Doctrine And Attorney-Client Privilege Do Not Protect “Specific Facts” Regarding O’Quinn’s Statements, His Contention The Stern Is Criminally Responsible For The Deaths Of Anna Nicole Smith And Daniel Smith, And The Details Of Defendants’ Investigation Into Those Deaths.

When asked in Interrogatory No. 4 to explain his contention that Mr. Stern is “criminally responsible” for Ms. Smith’s death, O’Quinn responded:

While I am not at liberty to disclose the balance of any information that I have learned which currently forms a part of my opinion, since that would violate my own work-product privilege with regard to my continuing representation of Virgie Arthur, and would also violate the attorney/client privilege with my own counsel in this matter, we have had investigators working on this case since March of 2007. One of those investigators is Don Clark, whom I believe to be an extraordinary and talented investigator.

Likewise, when asked in Interrogatory No. 8 to identify his sources for his allegations about Stern during a particular interview, O’Quinn responded:

Other than media interviews, any information that I had received [that Ms. Smith’s death was not an accident] would have come directly from our own in-house investigator, Don Clark.

Defendants then object to identifying any facts or the identity of O’Quinn’s sources for his statements under the work-product doctrine. O’Quinn repeats a similar objection for other Interrogatories and Document Requests that ask O’Quinn to supply facts which confirm or contradict the veracity of his Statements, his present-day contention that Stern is “criminally responsible” for the death of Anna Nicole Smith and Daniel Smith, and the details of the Clark/Vicedomine investigation. This is an improper assertion of the work-product doctrine and the attorney-client privilege.

- i. **The Work-Product Doctrine Does Not Apply.**
 - a. **Defendants Waived Any Applicable Work Product Protection By Making The Clark/Vicedomine Investigation Their Defense To The Complaint.**

Defendants cannot have it both ways: they cannot rely on the Clark/Vicedomine investigation as a defense and as support for O'Quinn's Statements, and then refuse to inform Stern or the Court of the details and results of that investigation. See U.S. v. Nobles, 422 U.S. 225, 239-40 (1975) (holding that a defendant waives work-product protection when, like here, the defendant attempts to make testimonial use of work-product); In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 472-73 (S.D.N.Y. 1996) (holding that a party cannot use work-product as a sword and simultaneously invoke the work-product doctrine as a shield to prevent disclosure of the same or related materials).⁶ As this Court has repeatedly recognized in a variety of contexts, a party is entitled to "verify the accuracy of that investigation, to discover if the process used by [investigators] was somehow flawed, and to obtain information if possible to impeach" the investigators and the party. Kallas v. Carnival Corp., No. 06-20115-CIV, 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, the same rule based on waiver through testimonial use of work-product is applied).

Moreover, Stern is entitled to all "opinion" work-product relating to the investigation because the mental impressions of John O'Quinn are directly at issue in this case, the need for the material is substantial and compelling, and Stern cannot obtain this information by any other

⁶ This District also recognizes a concept based on implied waiver where fairness requires disclosure of work-product where a party tries to use alleged work-product as both a sword and a shield. See, e.g., Pitney Bowes, Inc. v. Mestre, 86 F.R.D. 444, 447 (S.D. Fla. 1980) (regarding attorney-client privilege). This concept is equally applicable here where Defendants' defense relies on alleged work-product.

means because the facts before O'Quinn when he made his accusations of murder are known only to him and his investigators. In re Air Crash Near Cali, Colombia on Dec. 20, 1995, 959 F. Supp. 1529, 1536 (S.D. Fla. 1997) citing with approval Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992) (holding that Fed. R. Civ. P. 26(b)(3) does not require absolute protection for opinion work-product, and noting that these materials "may be discovered and admitted when mental impressions are at issue in the case and the need for the materials is compelling"). Stern must have access to the "specific facts" O'Quinn contends support the Statements and the details of the Clark/Vicedomine investigation if he is to fully test O'Quinn's claim that his claims of murder are true and that O'Quinn did not act negligently or with actual malice in uttering his statements. See, e.g., Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1099 (D.N.J. 1996) (plaintiff entitled to work-product—including documentation of defendant's investigation—to prove an element of plaintiff's *prima facie* case against defendant and because defendant raised the investigation as a defense to plaintiff's claims); Hartman v. Banks, 164 F.R.D. 167, 170 (E.D. Pa. 1995) (plaintiff entitled to discovery concerning alleged work-product—including defendants' officials' opinions and mental impressions—to prove that defendant's conduct was extreme and outrageous, an element of plaintiff's intentional infliction of emotion distress claim). At a minimum, given O'Quinn's claim that "the investigators told me everything I knew," Plaintiff is entitled to the details of the Clark/Vicedomine investigation, what information O'Quinn had before him each time he accused Stern of murdering Anna Nicole and Daniel Smith, the credibility of the information and its source(s), and what steps—if any—O'Quinn took to investigate the veracity of information that he shared with the public or chose to leave unmentioned.

O'Quinn placed the Clark/Vicedomine investigation at the very epicenter of his defense to this action. He has therefore waived any work-product protective that may have once attached to that investigation. Stern is entitled to discovery regarding any facts discovered, documents possessed and the alleged opinion work-product produced by the Clark/Vicedomine investigation. See In re Air Crash Near Cali, Colombia on Dec. 20, 1995, 959 F. Supp. at 1536.

b. Facts Supporting Or Contradicting O'Quinn's Statements Are Not Privileged Information

O'Quinn's assertion that he cannot provide "specific facts" due to an asserted attorney-client and work product privilege is without merit. Any relevant 'fact' known to O'Quinn or discovered by the Clark/Vicedomine investigation is not privileged from discovery because facts are always discoverable. Upjohn Co. v. U.S., 449 U.S. 383, 395-96 (1981) (the work-product doctrine does not extend to underlying facts relevant to the litigation). See Dunkin' Donuts, Inc. v. Mary's Donuts, Inc., 206 F.R.D. 518, 520-21 (S.D. Fla. 2002) (holding that facts supporting plaintiff's claims were not protected as work-product); 6 MOORE'S FEDERAL PRACTICE § 26.70[2][a] ("Facts Contained In Work Product Are Freely Discoverable", citing cases).

Defendants admit that O'Quinn and his investigators have, in their possession, knowledge and documents containing facts relevant to whether O'Quinn's statements are true or false, the steps O'Quinn took to verify those facts, whether O'Quinn knew that his statements or the alleged facts supporting the statements to be false when he accused Stern of murder, whether O'Quinn recklessly disregarded the truth or falsity of his murder accusations before he uttered them, and what facts O'Quinn decided to include in his public statements, and which facts he disregarded and chose to omit. These facts are all patently discoverable and should be disclosed. U.S. v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 699 (S.D. Fla. 1990) (denying work-product protection and requiring deponent to testify to the factual basis for the claims and

defenses asserted in the litigation, including facts learned by reviewing documents selected by counsel).

c. Vicedomine Waived Any Alleged Work-Product Protection By Disclosure To Third Parties.

Even if any work-product protection existed for facts supporting or contradicting the Statements at issue or details concerning the Clark/Vicedomine investigation, any such protection was waived when Defendants, Don Clark and Ms. Vicedomine disclosed details of the investigation to Rita Cosby and Ms. Vicedomine shared details of the Clark/Vicedomine investigation with countless people on the Internet. See U.S. v. Nobles, 422 U.S. 225, 239-40 (1975) (work-product protection is “not absolute,” and “[l]ike other qualified privileges, it may be waived”); Kallas, 2008 WL 2222152, at *4 (waiver occurs “when the covered materials are used in a manner that is inconsistent with the protection”) (internal quotation omitted). See also U.S. v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (waiver occurs when disclosure to a third party is inconsistent with secrecy against opponents).

Both Don Clark and Ms. Vicedomine waived any work-product protection for any information they shared with Rita Cosby as their deliberate disclosure of details of the Clark/Vicedomine investigation to a reporter is wholly inconsistent with treating that information as protected work product. See Niagara Mohawk Power Corp. v. Stone & Webster Eng’g Corp., 125 F.R.D. 578, 590 (N.D.N.Y. 1989) (work-product protection was waived when alleged work-product was included in a project management book because inclusion in the book increased the opportunity for potential adversaries to obtain the information).⁷ See 6 MOORE’S FEDERAL

⁷ This is not a case where a party claiming work-product protection defends against an alleged waiver as a consequence of sharing the alleged work-product with a consultant, joint litigant, or similar third party. See, e.g., Cooper v. Meridian Yachts, Ltd., No. 06-61630-CIV, 2008 WL 2229552, *7 (S.D. Fla. May 28, 2008). Nor is this a case that requires an analysis of inadvertent

PRACTICE § 26.70[6][c] (test is whether “there was a substantial danger that the documents would be disclosed to an adversary.”) Further, Defendants – specifically Don Clark – waived what little work-product protection the “specific facts” enjoyed when Defendants peddled their “facts” to the F.B.I. and Florida Attorney General in a failed attempt to get law enforcement authorities to prosecute Stern for 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.) Defendants also waived any work-product protection that may have existed for the Clark/Vicedomine investigation (and any independent investigation Vicedomine may have undertaken) when Vicedomine published details concerning the investigation on the Internet. See Plaintiff’s Response to Defendant’s Motion for a Protective Order at 17.

Further, Defendants’ cannot shield documents generated by third-parties under the cloak of the work-product doctrine. Documents created by third-parties are not protected by the work-product privilege absent a “real” showing that the attorney’s work product would be exposed by production of the materials. E.g., Hunter’s Ridge Gold Co., Inc. v. Georgia-Pacific Corp., 233 F.R.D. 678, 683 (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

disclosure of alleged work-product. See, e.g., Ray v. Cutter Labs, Div. of Miles, Inc., 746 F. Supp. 86 (M.D. Fla. 1990).

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.

ii. The Attorney-Client Privilege Does Not Apply.

Similarly, the attorney-client privilege does not shield from disclosure relevant facts regarding the truth or falsity of the Statements, Defendants’ investigation, and facts relevant to O’Quinn’s state of mind when he uttered the statements simply because he shared those facts at some point with his attorney. In Florida, when a party desires to prove an essential element of its case, “the proof of which will necessitate the introduction of privileged matter into evidence, and then [the party] attempts to raise the privilege so as to thwart discovery,” a court may find that the party has waived the privilege. GAB Bus. Servs., Inc. v. Syndicate 627, 809 F.2d 755, 762 (11th Cir. 1987) (citing Home Ins. Co. v. Advance Mach. Co., 443 So.2d 165, 168 (Fla. Dist. Ct. App. 1983)). Indeed, as the Southern District of Florida held in Pitney-Bowes, exceptions to the attorney-client privilege are appropriate where “the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party.” Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444, 446 (S.D. Fla. 1980)

O’Quinn fails to meet his burden of proof in showing that the privilege applies. O’Quinn offers naked assertions of privilege and does not even specify whether he was communicating in his capacity as a client or an attorney in a related matter. Regardless, O’Quinn has waived the privilege by placing it squarely at issue in this case. O’Quinn will be relying upon this evidence at trial – he cannot prevent discovery of it now.

II. Defendants' Overbreadth And Relevance Objections Are Meritless.

A. Defendants' General Objection That Each Interrogatory And Document Request Is Overbroad Is Meritless.

Defendants' stock objection that each Interrogatory and Document Request is overbroad because it asks for "all" documents and contains no "time limitation" is without merit. Each Interrogatory and Request limits itself to the time period of the Interrogatory – for example, facts, statements or investigations concerning Anna Nicole Smith's death can only be from 2007 forward; facts regarding O'Quinn's statements are from the date of the statement on, etc. The time period encompassed is thus relevant and unambiguous, and Defendants' objection is needless. Further, with respect to Defendants' objection about the usage of "all" when requesting documents, that usage subsumes all relevant documents. Defendants have a duty to produce the relevant documents, which they have not done to date.

B. Defendants' Objection To The Relevance Of Documents Created After The Lawsuit Was Filed Is Meritless.

Defendants' post-lawsuit conduct after the Statements were made is relevant to Stern's allegation that O'Quinn acted with actual malice. Circumstantial evidence of Defendants' state of mind – including post-Statement conduct – is patently relevant and discoverable as it relates to the issue of actual malice. It is well settled that such conduct is relevant as circumstantial evidence to prove pre-publication state of mind. See Herbert v. Lando, 73 F.R.D. 387, 396-97 (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 (S.D. 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).

Defendants' have engaged in an extensive post-Statement and post-lawsuit factual investigation in an effort to confirm the truth (or falsity) of O'Quinn's statements. O'Quinn "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") (quoting Airlie Found., Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421 (D.D.C. 1972)). The relevance of post-lawsuit conduct is also particularly strong here as 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. A jury may find this post-Statement attempt to "libel-proof" Stern is an indication that O'Quinn realized that he recklessly accused Stern of murder and has no facts to back up his claims.

Stern therefore requests that Defendants be compelled to produce or, to the extent privilege is legitimately asserted, identify in a privilege log 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 v. Patrician Prods., Inc., 2008 WL 179648 (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).

III. Defendants Should Identify What Statements Attributed To O’Quinn In The First Amended Complaint Are Inaccurate.

Finally, Defendant O’Quinn should be compelled to respond to Interrogatory No. 1 with what specific portions of the Statements attributed to him are inaccurate, or he should be compelled to admit that there is no inaccuracy. O’Quinn’s stock answer to a simple question – was he quoted accurately in the eight Statements listed in the Complaint? – is essentially meaningless. Stern simply cannot determine from O’Quinn’s response whether Defendant O’Quinn contends the statements in the Complaint are accurate or inaccurate.

O’Quinn fails to identify, for any for any of the eight separate statements at issue, the following crucial factual information: 1) the portion of the quoted statement that is in error; 2) the part of statement that is quoted correctly; 3) how the quotation is “taken out of context”; 4) what “certain portions [are] omitted” and 5) how that “medium in which those words were uttered” causes the quotation to be in error. O’Quinn is obligated to answer with all responsive facts on these points and he should be compelled to list the inaccuracy in each of the Statements attributed to him in the First Amended Complaint. If he cannot identify any misquotes or error, he should be compelled to state that the Statement is accurate rather than be allowed to evade the issue.

CONCLUSION

Stern therefore respectfully submits that Defendants objections to the above identified Interrogatories and Document Requests are baseless. This Court should therefore GRANT the following motions:

- (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 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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