

**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 MOTION TO COMPEL DEFENDANTS'
COMPLIANCE WITH LOCAL RULE 26.1**

Plaintiff Howard K. Stern ("Stern") respectfully moves this Court for an order pursuant to S.D. Fla. Local Rule 26.1.G compelling Defendants John M. O'Quinn and John M. O'Quinn & Associates PLLC d/b/a The O'Quinn Law Firm to: 1) provide privilege logs which comply with Local Rule 26.1.G.3.c; and 2) identify any responsive documents which have been withheld due to or on the assertion of privilege but which have not been listed in Defendants' privilege logs and have Defendants confirm by affidavit that they have no further responsive documents.

STATEMENT OF MEETING AND CONFERRING

Counsel for Plaintiff certifies that prior to filing this motion, pursuant to S.D. Fla. Local Rule 7.1.A.3, counsel for Plaintiff and counsel for Defendants conferred in a good faith effort to resolve the matters raised in this motion. (A true and correct copy of correspondence between Eric P. Schroeder and Robert M. Klein dated June 19, 2008, is

attached hereto as Tab A.) This motion has become necessary, as it is apparent that the issues raised in this motion cannot be resolved by agreement.

DEFENDANTS HAVE NOT COMPLIED WITH LOCAL RULE 26.1

A. Defendants' Privilege Logs Violate Local Rule 26.1.

In response to Plaintiff's Requests for the Production of Documents, Defendants have produced two privilege logs: 1) "the O'Quinn Law Firm Log"; and 2) "the Vicedomine Log." Both privilege logs are grossly insufficient.

1. The Logs Themselves Are Insufficient.

These privilege logs violate Local Rule 26.1.G.3.c for the following reasons:

- a. Defendants do not provide the general subject matter for the documents identified in the privilege log so it is impossible to determine whether the asserted privilege applies;
- b. Defendants do not provide the dates of the documents identified in the Vicedomine privilege log; and
- c. the Vicedomine privilege log impermissibly lists documents together in groups so it is impossible to determine the identity and subject matter of the grouped documents.

2. The Logs List Documents Produced By Third Parties.

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

3. The Documents in the Logs Contain Unprotected Facts.

Defendants attempt to block Plaintiff's access to facts about Defendants' investigation into the deaths of Anne Nicole Smith and Daniel Smith that Plaintiff needs and cannot acquire without undue hardship. These facts are not protected under the work-product doctrine.

B. Plaintiff Has Reason To Believe That Not All Responsive Documents Which Have Been Withheld Have Been Identified.

Finally, in correspondence with counsel before Defendants responded to Plaintiff's discovery request, 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 believes that Local Rule 26.1 G.3.b.ii makes it clear that Defendants had a duty to identify in their response and objection to the document requests all responsive documents, regardless of when created or received, if they are withheld on the assertion of privilege.¹

Defendants did not identify any documents in making their generalized work product objections. Moreover, Defendants' responses do not confirm that they have identified all responsive documents. Plaintiff therefore requests that Defendants be compelled to identify any heretofore unidentified responsive documents that have been withheld on the assertion of privilege or to confirm by affidavit that all responsive documents have either been produced to Plaintiff 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).

¹ 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 documents created prior to the commencement of the action. As set forth in the accompanying memoranda of law simultaneously filed herewith, Defendants' reliance on alleged protected documents as a defense to this action necessitates that Defendants fully comply with Local Rule 26.1.G.3.b.ii.

WHEREFORE, Petitioner Howard K. Stern respectfully requests that this Court:

COMPEL Defendants John M. O'Quinn and John M. O'Quinn & Associates, PLLC to provide Plaintiff Howard K. Stern with privilege logs that conform with S.D. Fla. Local Rule 26.1; or,

CONSIDER the documents at issue in this Motion during an *in camera* proceeding in order to determine whether or not Defendants have properly asserted their privilege or other protection.

WHEREFORE, Stern further requests that this Court:

COMPEL Defendants to identify any responsive documents which have been withheld due to or on the assertion of privilege or other protection but which have not been listed in Defendants' privilege logs and have Defendants confirm by affidavit that they have no further responsive documents.

ORDER, pursuant to Federal Rule of Procedure 37(a)(5), Defendants to pay Plaintiff's reasonable expenses, including attorney's fees, incurred in filing this motion, in an amount to be determined at hearing.

Respectfully submitted this 30th day of June, 2008.

/s/ L. Lin Wood
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Attorneys for Plaintiff
Howard K. Stern

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:

Robert M. Klein, Esq.
kleinr@stephenslynn.com
Roberta G. Mandel, Esq.
Cayla B. Tenenbaum, Esq.
Law Offices of Stephens Lynn La Cava
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Two Datran Center – Penthouse II
9130 South Dadeland Boulevard
Miami, FL 33156

Neil McCabe, Esq.
The O'Quinn Law Firm
440 Louisiana, Suite 2300
Houston, Texas 77002

This 30th day of June, 2008.

/s/ M. Krista Barth

M. Krista Barth
(Florida Bar No. 0461229)
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EXHIBIT A



Atlanta * Washington * Dallas

RESIDENT IN ATLANTA OFFICE
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June 19, 2008

BY E-MAIL kleinr@stephenslynn.com

Robert M. Klein, Esq.
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Two Datan Center – Penthouse II
9130 South Dadeland Boulevard
Miami, FL 33156

Re: *Howard K. Stern v. John O'Quinn*, Case No. 07-60534-CIV-DIMITROULEAS

Dear Rob:

I write pursuant to Fed. R. Civ. P. 37(a), Local Rules 7.1 and 26.1 and Item VI of the Appendix to the Local Rules of the Southern District of Florida in a good faith attempt to resolve a potential discovery dispute. In short, we believe that many of Defendants' recent discovery responses are grossly insufficient and evasive, and the work-product privilege is improperly asserted. We also believe that Defendants' "privilege logs" do not meet the minimal standards imposed by the Local Rules.

In particular, we have issues with the following responses supplied by Defendants:

- Defendant John M. O'Quinn's Responses to Interrogatories No.'s 1 through 11;
- Defendant John M. O'Quinn's Responses to Requests for Production No.'s 2 through 11, 16, 17, 19 through 21, 23 through 28, 30, and 32;
- Defendant John M. O'Quinn & Associates PLLC's Responses to Requests for Production No.'s 1 through 10, 15, 16, 18 through 22, 24, and 25;
- Defendants' privilege logs do not comport with S.D. Fla. Local Rule 26.1 (G)(3)(c), and Local Rule 26.1(G)(3)(b)(ii) requires Defendants to identify responsive documents created after the lawsuit was filed but withheld due to an asserted privilege; and
- Defendant John M. O'Quinn's Responses to Requests for Admission No.'s 9 through 16 and 18.

The response to Interrogatory No. 1, which asks Mr. O'Quinn if he was misquoted in the First Amended Complaint and to identify any error, is insufficient and evasive as he does not identify the "portions that were omitted" from the Complaint, how the quote was taken "completely out of context", how the "medium" affects the veracity of the quoted material and

Robert M. Klein, Esq.
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how any of these issues caused the quotation to be in error. If Mr. O'Quinn is misquoted, please identify which portion of the quote is in error.

The responses to Interrogatories Nos. 2 through 11 each assert the work-product privilege as justification for withholding any or further factual response and the identity of anyone interviewed by O'Quinn or his investigators. We believe this broad assertion of the privilege is improper for at least four reasons: 1) it seeks to conceal facts which are freely discoverable; 2) Defendants waived any applicable privilege by placing Defendants' reliance on its investigators at issue in this litigation: namely, John O'Quinn avers that he relied on facts supplied by his investigators for his belief that Mr. Stern killed Anna Nicole Smith and Daniel Smith; 3) Defendants waived any privilege by sharing details of their investigation with third-parties, e.g., Rita Cosby; and 4) Plaintiff has a substantial need for the information and cannot get it without undue burden because only Mr. O'Quinn and his investigators know the facts supporting his accusations regarding Mr. Stern and Defendants' investigation into the veracity of such facts. Further, due to the nature of the response, we are unsure whether any relevant information is being withheld on each of these Interrogatories on assertion of the various objections raised. We therefore request that you confirm, for each interrogatory, any information is being withheld under the assertion of privilege.

Defendants' responses to the identified Requests for Production are unacceptable for the same reason: the work-product privilege is improperly asserted to conceal facts; any applicable work-product privilege has been waived because Defendants' have placed their investigation of Howard K. Stern and the deaths of Anna Nicole and Daniel Smith at issue; any applicable work-product privilege was waived through disclosures to third-parties; and Plaintiff has a substantial need for the sought-after documents and cannot get the equivalent without undue burden because only Defendants and their investigators know the facts supporting Mr. O'Quinn's accusations and his investigation into the veracity of such facts. Further, we request that you confirm whether or not any documents are being withheld which are responsive to each of the identified document requests. See Suncast Technologies, LLC v. Patrician Products, 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)

Moreover, Defendants' boilerplate objection that an Interrogatory or Request to Produce is "overbroad" does not relieve Defendants of their duty to respond with relevant information.

The privilege logs provided by Defendants are unacceptable because they do not meet the minimal standards set forth in S.D. Fla. Local Rule 26.1(G)(3)(c), i.e. they do not supply the general subject matter of each document. See Williams v. Cannon, Inc., 2008 WL 2053492 (S.D. Fla. May 13, 2008) (privilege log must "describe[s] the nature of the documents .. not produced or disclosed .. in a manner that ... will enable other parties to assess the claim"). Further, the privilege log for Ms. Vicedomine impermissibly lists documents in groups; and the O'Quinn Law Firm's privilege log improperly asserts the work product privilege with reference to third parties to the lawsuit, i.e. Dawna Kaufman, who we understand has written articles for the *National Enquirer*.

Robert M. Klein, Esq.
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To the extent that any documents were created after commencement of this litigation, we believe that Defendants must, pursuant to Local Rule 26.1.(G)(3)(b)(ii), list those documents by date, type and general subject matter and as otherwise provided in the Rule to confirm that no documents were created after that date. Suncast Technologies, 2008 WL 179648 at * 2; Guzman v. Irmadan, Inc., ___ F.R.D. ___, 2008 WL 1733613 (S.D. Fla. April 10, 2008) (responsive but withheld documents must be identified when withheld on assertion of privilege). In an effort to compromise, and without waiving our right to contest the work-product privilege asserted, we do not seek a list of documents created by counsel after this lawsuit was filed relating to legal issues or advice, but rather only that Defendants identify any documents created or received by Defendants and their investigators after the lawsuit was filed which relate to the Defendants' factual investigation into the deaths of Anna Nicole and Daniel Smith, or its investigation of Howard K. Stern.

Finally, the responses to Mr. Stern's Requests for Admissions Nos. 9 through 16, which ask that Mr. O'Quinn admit or deny that he is accurately quoted in the Complaint, are improperly evasive as the "denial" is meaningless because Mr. O'Quinn does not identify which "portions are omitted", how the quotes are "taken out of context" or how "consideration of the medium" in which they were uttered supports a qualified denial of the accuracy of the quotes. The request is rather simple: did O'Quinn say the words attributed to him or did he not? Similarly, Request to Admit No. 18 asked O'Quinn to admit he has no knowledge of "any life insurance policies in which a third-party would benefit upon the death of Anna Nicole Smith." Mr. O'Quinn responded that he has insufficient information to "admit or deny" the Request. We believe the answer is improper, as he was asked a "yes" or "no" question – either he knows there are life insurance policies, or he does not.

Please let me know a good time to discuss the above in the next few days. If we are unable to come to an agreement, we will file motions to compel on the items listed above on or before Monday, June 30, 2008.

Sincerely,



Eric P. Schroeder

For Powell Goldstein LLP

cc: L. Win Wood, Esq.
Neil McCabe, Esq.
M. Krista Barth, Esq.
John C. Patton, Esq.
Luke Lantta, Esq.

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SOUTHERN DISTRICT OF FLORIDA
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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.

**PROPOSED ORDER COMPELLING DEFENDANTS' COMPLIANCE WITH
LOCAL RULE 26.1**

THIS CAUSE came before the Court upon Plaintiff Howard K. Stern's Motion to Compel Defendants' Compliance with Local Rule 26.1, and this Court having considered said Motion, it is hereby

ORDERED that Plaintiff's Motion to Compel Defendants' Compliance with Local Rule 26.1 is **GRANTED**. Accordingly, it is further **ORDERED** that Defendants shall:

1. Provide privilege logs to Plaintiff which comply with Local Rule 26.1.G.3.c;
2. Identify any responsive documents which have been withheld due to or on the assertion of privilege but which have not been listed in Defendants' privilege logs; and
3. Confirm by affidavit that Defendants have no further documents responsive to Plaintiff's First Requests for Production of Documents.

SO ORDERED THIS ___ DAY OF _____, 2008.

William P. Dimitrouleas
Judge, United States District Court
Southern District of Florida