

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA WEST PALM BEACH DIVISION

CASE NO. 07-60534CIV-DIMITROULEAS
Magistrate Judge Seltzer

HOWARD K. STERN,

Plaintiff,

vs.

JOHN O'QUINN

Defendant

_____ /

**DEFENDANT O'QUINN'S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION;
IMPROPER VENUE AND/OR FAILURE TO STATE
A CLAIM AND, ALTERNATIVELY, TO TRANSFER
THIS CAUSE OF ACTION BASED ON THE
DOCTRINE OF *FORUM NON CONVENIENS* AS
CODIFIED BY CONGRESS IN 28 U.S.C. §1404(a)
AND 28 U.S.C. §1406(a).**

Defendant JOHN O'QUINN ("O'QUINN") by and through undersigned counsel, files this Motion to Dismiss for lack of personal jurisdiction and improper venue pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §1391 and/or failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) because none of the challenged statements are capable of defamatory meaning as a matter of law, and, alternatively, to transfer this cause of action to the Southern District of Texas based upon the

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doctrine of *forum non conveniens* as codified by Congress in Fed. R. Civ. P. 1404(a) and Fed. R. Civ. P. 1406(a) and, in support, states as follows:

O'QUINN is an attorney licensed to practice law in the State of Texas.

O'QUINN gained *pro hac vice* admission in Florida solely to represent the interests of his Texas client Virgie Arthur, the mother of Anna Nicole Smith, in Broward County Court Case No. 07-00824(61) and Arthur's subsequent appeal to the Fourth District Court of Appeal.

This is a defamation and false light invasion of privacy action in which the Plaintiff, HOWARD K. STERN ("STERN") alleges injuries arising from O'QUINN's statements to national news media organizations concerning the judicial proceedings involving his client Virgie Arthur. O'QUINN continues to represent Virgie Arthur's legal interests in on-going judicial proceedings.

STERN alleges that this Court has original subject matter jurisdiction pursuant to U.S.C. §1332 because there exists complete diversity of citizenship between STERN, a resident of California, and O'QUINN, a resident of Texas and because the amount in controversy exceeds Seventy Five Thousand Dollars (\$75,000), exclusive of interests and costs.¹ STERN additionally alleges that this Court has personal jurisdiction over O'QUINN pursuant to §§48.193(1)(a) and (b), Fla. Statutes., and

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that it comports with due process and proper venue pursuant to 28 U.S.C. §1391(a). STERN's Jurisdictional Statement, however, provides no factual support for his allegations of personal jurisdiction and due process. Defendant O'QUINN respectfully submits that no factual support exists for STERN's allegations and that venue in Florida is improper, pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §1391, because neither STERN nor O'QUINN reside in the State of Florida and because O'QUINN didn't commit any substantial acts or omissions in the State of Florida. In the alternative, Defendant O'QUINN requests that this action be transferred to the United States District Court for the Southern District of Texas and submits that when the applicable factors are applied to determine the more convenient forum, the results weigh overwhelmingly in favor of venue in Texas.

Alternatively, should this Court determine that jurisdiction and venue are proper, dismissal is still mandatory pursuant to Fed. R. Civ. P. 12(b)(6) since STERN's Complaint fails to state a claim upon which relief can be granted, because none of the challenged statements are capable of defamatory meaning as a matter of law.

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MEMORANDUM OF LAW

I.

THIS CAUSE SHOULD BE DISMISSED SINCE THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER DEFENDANT O'QUINN, A RESIDENT OF THE STATE OF TEXAS.

In order to determine whether personal jurisdiction exists over an out-of-state defendant, a court must conduct a two-pronged analysis.² First, the court must assess whether there is jurisdiction under the state's long-arm statute. Second, the court must decide whether the defendant has established sufficient minimum contacts with the state, such that the exercise of jurisdiction will satisfy the Fourteenth Amendment's due process requirement by comporting with "traditional notions of fair play and substantial justice."³ In the context of this two-pronged analysis, the plaintiff must plead facts that establish the basis for jurisdiction.⁴ Additionally, the reach of the Florida Long-Arm statute is a question of Florida law. Thus, this Court must construe the statute in accord with the Florida Supreme Court's construction.⁵ Further, the Florida Long-Arm Statute must be strictly construed to comport with due process requirements.⁶

Although STERN cites to §§48.193(1)(a) and (b), Fla. Stat.,⁷ as the basis for personal jurisdiction in Florida, STERN fails to provide any factual support for his

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bald legal conclusions. Indeed, STERN's Jurisdictional Statement doesn't allege that O'QUINN operated, conducted, engaged in or carried out a business venture in the State of Florida or that O'QUINN committed a tortious act in the State of Florida. For this reason alone, this Court should dismiss STERN's Complaint for lack of personal jurisdiction.

Additionally, Courts must examine three factors to determine whether a defendant has established sufficient minimum contacts with the forum state to comport with the forum state to comport with the Fourteenth Amendment's due process requirement: (1) whether the defendant has purposefully availed itself of the benefits of doing business in the forum state; (2) whether the cause of action arose out of the activities through which the defendant did so; and (3) whether the defendant could have reasonably anticipated being haled into court in the forum state.⁸ Finally, the Court must determine whether the exercise of personal jurisdiction over the Defendant comports with traditional notions of fair play and substantial justice.⁹

- 1. STERN'S Complaint does not and cannot satisfy the requirement for application of Subsection 1(a) of §48.193, Florida's Long-Arm Statute, and consequently O'QUINN can not be sued in Florida, because O'QUINN was not "conducting business" in the State of Florida.**

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Florida's Long-Arm Statute gives the Court jurisdiction over a party who, either directly or through an agent, operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state.¹⁰ Contrary to STERN's assertion that O'QUINN's acts fall within Florida's Long-Arm Statute, an analysis of O'QUINN's relationship to the State of Florida, as governed by Florida's Long-Arm Statute will demonstrate that O'QUINN cannot be sued in Florida and that long-arm jurisdiction is inappropriate.

In order to establish that a defendant is "carrying on business," for the purposes of §48.193(1)(a), Florida's Long-Arm Statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit.¹¹ Factors relevant, but not dispositive, to the analysis of whether a non-resident defendant is "carrying on business" in Florida within the meaning of Florida's Long-Arm Statute include: (I) the presence and operation of an office in Florida; (ii) the possession and maintenance of a license to do business in Florida; (iii) the number of Florida clients served; and (iv) the percentage of overall revenue gleaned from Florida clients.¹²

Based on the foregoing, personal jurisdiction is not proper because O'QUINN was NOT doing business in Florida, as defined by §48.193(1)(a), Florida's Long-Arm

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Statute. O'QUINN has NO ties to Florida other than the fact that he gained *pro hac vice* admission in Florida solely to represent the interests of his Texas client (Virgie Arthur) in the judicial proceedings involving Arthur's daughter, Anna Nicole Smith. Defendant O'QUINN's Sworn Affidavit, attached to this Motion to Dismiss establishes:

1. O'QUINN neither maintains an office in Florida nor a license to practice law in the State of Florida.
2. At no time did O'QUINN ever reside in the State of Florida or practice law in the State of Florida.
3. O'QUINN has never applied for or attempted to seek to obtain a license to practice law in the State of Florida.
4. O'QUINN is a native of Houston, Texas where he still lives and maintains his law practice.
5. O'QUINN graduated from the University of Houston, Texas, and the University of Houston, College of Law.
6. O'QUINN is a philanthropist to organizations throughout his hometown of Houston, Texas. There is the "O'QUINN MEDICAL TOWER," the "JOHN O'QUINN FIELD" at the University of Houston; the "JOHN O'QUINN LAW LIBRARY" at the University of Houston, College of Law and "THE CHILDREN'S ASSESSMENT CENTER—JOHN M. O'QUINN CAMPUS."

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- 7 O'QUINN is a former member of the University of Houston Board of Regents.
8. O'QUINN was the Past Director of the Texas Trial Lawyers Association as well as the Past Director of the Houston Bar Association.
9. O'QUINN does not solicit business in Florida, nor did he do so in Virgie Arthur's case.
- 10 O'QUINN accepted representation of Virgie Arthur, also a Texas resident, in Texas.
11. O'QUINN has never owned, operated or controlled an office, legal or otherwise in the State of Florida.
12. O'QUINN never owned, possessed or held any real property in the State of Florida.
13. O'QUINN never had a bank account, mailing address, post office box or a telephone number in the State of Florida.
14. O'QUINN never operated, conducted, engaged in or carried on a business venture, or had an office or agency in the State of Florida.

Accordingly, O'QUINN was not "conducting business" in Florida and contrary to STERN's assertion, Florida's Long-Arm Statute, §48.193(1)(a), does not provide a basis for personal jurisdiction over O'QUINN.

2. **STERN'S Complaint does not and cannot satisfy the requirement for application of Subsection 1(b) of §48.193, Florida's Long-Arm Statute, and consequently O'QUINN can**

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not be sued in Florida, because O'QUINN did not commit a tortious act in the State of Florida.

STERN next alleges that Defendant O'QUINN may be sued in Florida based on subsection (1)(b) of §48.193, Florida's Long-Arm Statute.¹³ This allegation is likewise erroneous. Although Subsection 1(b) of Florida's Long-Arm Statute provides for the assertion of personal jurisdiction over an out-of-state defendant who commits a tortious act in Florida, the analysis of jurisdiction under §48.193(1)(b), raises the issue of whether or not a tort was even committed in Florida, under Florida law.¹⁴ Here, personal jurisdiction does not exist because O'QUINN did not commit a tortious act in Florida. This point will be discussed in greater detail in a subsequent section of this Motion to Dismiss. Moreover, O'QUINN's statements concerning the death of Anna Nicole Smith cannot serve as a basis for a defamation action because STERN is not entitled to relief under any set of facts that can be proven consistent with the allegations of his Complaint. This point will also be discussed in greater detail in a subsequent section of this Motion to Dismiss.

However, even if, *assuming arguendo*, this Court were to find that STERN's Complaint properly states a claim for defamation or false light invasion of privacy, O'QUINN did not "commit a tortious act in Florida" sufficient to justify personal jurisdiction under Subsection (1)(b) of §48.193, Florida's Long-Arm Statute. Here,

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O'QUINN made certain non-defamatory statements while sitting in a sound truck that just happened to be located in Florida. These statements were transmitted by satellite and first published to national television studios located in New York.

While there is no case law that addresses the issue of where defamation occurs when defamatory statements are uttered over satellite waves, in Florida, as a general rule, when tortious acts are committed over telephone lines, the situs of the tort is the place where the telephone call was received.¹⁵ The Florida Supreme Court found jurisdiction under Subsection (1)(b) of §48.193, Florida's Long-Arm Statute, where an out-of-state defendant allegedly defamed a Florida resident during a phone call made into Florida.¹⁶ Furthermore, such actions "depend upon proof of either the existence or content of any of the communications...into Florida."¹⁷ Accordingly, it is not the location of the speaker/caller, but rather the location of the listener.¹⁸ For example, this Honorable Court considered whether, under Florida law, a defamatory statement made by a nonresident during a conference call from the non-resident's office in Maryland to a person in Florida constitutes a tort committed or occurring within Florida or within Maryland.¹⁹ This Court deemed the slanderous statement "to have been made" in Florida, rather than in Maryland. Although the statements were never written down or circulated, this Court explained that it was upon their

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publication, which occurred in Florida, that the tort occurred, thereby bringing the action within the ambit of the Florida Long-Arm Statute.²⁰

Thus, proper application of this Court's precedent to this case dictates that the mere fact that certain statements were made by O'QUINN in Florida, is of no consequence to a determination of where the actual tort of defamation occurred. This is because more is required than a mere defamatory statement.²¹ Similarly, the Middle District of Florida has also held that absent some furthering act, *i.e.* publication to a listener or reader in Florida, mere statements cannot be deemed defamatory and personal jurisdiction cannot be established under §48.193(1)(b), Florida's Long-Arm Statute.²² Here, by analogy, the fact that O'QUINN made the allegedly defamatory statements while sitting in a sound truck that happened to be located in Florida, is of no consequence to a finding of personal jurisdiction in Florida. Although O'QUINN may have vocalized the allegedly defamatory statements while in Florida, it was not until the statements traveled through sound waves that were transmitted by satellite to Nancy Grace and Greta Van Susteren in New York, where the FOX, CNN and MSNBC studios are located, that **publication** first occurred. Therefore, under Florida law, the actual tort of defamation must be deemed to have occurred, if at all, **in New York** - - not in Florida, for purposes of determining the reach of Florida's Long-Arm

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Statute. Accordingly, STERN has failed to demonstrate that O'QUINN committed the substantial portion of any tort in the State of Florida.

Furthermore, STERN has failed to demonstrate that O'QUINN's mere utterance of words in the State of Florida, resulted in any injury in the State of Florida. Florida courts are "deeply divided" on the issue of whether a tortious act committed outside the State of Florida resulting in injury in the State of Florida produces personal jurisdiction under §48.193(1)(b), Florida's Long-Arm Statute.²³ Nevertheless, the Eleventh Circuit has found that "jurisdiction under §48.193(1)(b) '[is] not limited to a situation where an act in Florida cause[s] an injury in Florida, but also . . . reache[s] the situation where a foreign tortious act cause[s] injury in Florida.'"²⁴ Here, however, STERN has failed to allege having suffered any substantial injury in Florida. Given the fact that STERN alleges that he is a citizen of the State of California, any substantial injury to STERN's reputation or character occurred in California, rather than in Florida.

It is anticipated that STERN may argue that he suffered injury in Florida because O'QUINN's allegedly defamatory statements were ultimately broadcast from the FOX, CNN and MSNBC studios in New York, to television viewers in every state across the country, including Florida. However, this fact alone does not furnish a

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basis for STERN, a non-Florida resident Plaintiff, to haul O'QUINN, a non-Florida resident Defendant, into Florida to defend himself. Following that logic would subject defendants in defamation actions to suit in all fifty states. Therefore, Subsection (1)(b) of §48.193, Florida's Long-Arm Statute, does not provide a basis for personal jurisdiction over non-resident Defendant O'QUINN.

3. STERN'S Complaint does not and cannot satisfy the requirement for application of Florida's Long-Arm Statute and, consequently, O'QUINN can not be sued in Florida because O'QUINN does not have the "sufficient minimum contacts" to satisfy the due process requirements of the United States Constitution.

Under Florida law, personal jurisdiction over a non-resident defendant, does not exist unless the action and/or the defendant fit within the criteria of Florida's Long-Arm Statute and, if those requirements are met, the defendant has sufficient "minimum contacts" with the state to satisfy due process.²⁵ A non-resident defendant must have certain minimum contacts with the forum state such that it would reasonably anticipate being haled into court there.²⁶ If the Court exercises "general" personal jurisdiction over a cause of action unrelated to the defendant's activities in the forum state, the due process clause requires that those contacts be "systematic and continuous."²⁷ Further, the exercise of jurisdiction must comport with "traditional notions of fair play and substantial justice."²⁸ Thus, even if this Court determines that

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the criteria of Florida's Long-Arm Statute have been met, this Court must also determine whether Defendant O'QUINN has sufficient minimum contacts with the State of Florida to satisfy due process.

This Court must, therefore, analyze numerous factors as to whether it is able to subject Defendant O'QUINN, a non-resident defendant, to jurisdiction. These factors include: (1) burden on O'QUINN in defending the lawsuit; (2) Florida's interest, as the forum state, in adjudicating the dispute; (3) STERN's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and; (5) the shared interest of the states in furthering fundamental social policies.²⁹ Here, not only do O'QUINN's contacts with Florida FAIL to satisfy Florida's Long-Arm Statute, O'QUINN's contacts with Florida are also NOT "systematic and continuous" so as to satisfy due process concerns. Defendant O'QUINN has almost no contact with the State of Florida and does not purposely avail itself of the privilege of doing business in the State of Florida, with the exception of a few cases which make up a minute percentage of his Texas law firm's regular Texas caseload.

Florida courts have held on several occasions that non-resident defendant attorneys had minimum contacts such that the exercise of personal jurisdiction under

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Florida's Long-Arm Statute did not violate due process, where the non-resident defendant attorneys availed themselves of the benefits of Florida's laws by contracting with or representing a Florida resident.³⁰ However, O'QUINN's *pro hac vice* representation of Virgie Arthur in the Anna Nicole Smith burial hearings in Broward County, Florida was not an activity on the behalf of a resident of the State of Florida, but rather **on the behalf of a Texas resident**. Accordingly, the cases cited are distinguishable and, therefore, inapplicable to the requisite determination of due process in this case.

Accordingly, O'QUINN's due process rights would be violated should he be subjected to suit in a Florida court. *See, e.g., Fleming & Weiss, P.C. v. First American Title Ins. Co.*³¹(New York law firm did not have sufficient minimum contacts with Florida to warrant the exercise of personal jurisdiction and, thus, law firm could not reasonably have anticipated being haled into Florida court; New York law firm was retained by New York client to render legal opinion pursuant to New York, law firm did not solicit business in Florida or represent a Florida resident, maintained no agent or property in Florida); *See also, Snow v. DirecTV, Inc.*³²(Washington law firm's negotiations on defendant client's behalf with some Florida residents, its seven appearances as counsel of record for client, and its representation of four Florida

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clients in Washington courts were not enough to establish general jurisdiction over law firm under Florida's long-arm statute, when balanced against firm's lack of a physical presence in Florida, its non-solicitation of Florida clients, and its deriving less than one percent of its revenues from matters connected with Florida); *Steinhilber v. Lamoree*,³³(Missouri attorney's brief contact with Florida in attempt to settle class action lawsuit filed in Missouri against Florida plaintiffs, did not satisfy due process requirement of minimum contacts; and, thus, plaintiff failed to satisfy test required to establish personal jurisdiction over Missouri attorney under Florida long arm statute); *Cerebus Partners L.P. vs. Gadsby & Hannah, LLP*,³⁴ (California law firm's *pro hac vice* appearances in six cases that were unrelated to the representation of its in-state Rhode Island client did not constitute such "continuous and systematic" contacts with Rhode Island as to subject the law firm to a Rhode Island court's jurisdiction, nor did appearances together with the firm's other sporadic and incidental contacts with the state, demonstrate the requisite pervasive presence in Rhode Island, for purposes of exercising general jurisdiction over a nonresident defendant law firm).

Moreover, Florida courts have also applied the "effects test" to determine whether the publisher of an out-of-state publication is subject to personal jurisdiction

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in a defamation action in a given state.³⁵ In *Alternate Energy Corp.*,³⁶ this Court dismissed a Nevada plaintiff's diversity defamation action against a Michigan-based website operator for lack of personal jurisdiction and held that the sale of subscriptions to an Michigan-based internet site to an unknown, relatively small number of Florida residents, without more, did not constitute carrying on a business in Florida under §48.193(1)(a) and did not constitute the commission of a tortious act under §48.193(1)(b). This Court then went on to address the question of due process and noted that, even if the Court could properly exercise jurisdiction pursuant to Florida's Long-Arm Statute, nothing indicated that the defendant had "expressly aimed" his website postings at Florida resident.³⁷ Therefore, this Court found that the defendant could not have reasonably anticipated being hailed into court in Florida.³⁸ Accordingly, "[p]ersonal jurisdiction is proper under the 'effects test' only when the defamatory publication was "expressly aimed" at the forum state, which impels the conclusion that the defendant reasonably anticipated being hailed into court there."³⁹

Here, as in *Alternate Energy Corp.*,⁴⁰ there is no indication that O'QUINN "expressly aimed" the publication of his statements at the State of Florida. O'QUINN may have known that his statements would ultimately be broadcast from the FOX, CNN and MSNBC studios in New York, to television viewers in every state across

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the country, including Florida but this fact alone does not mean that O'QUINN should reasonably anticipate being haled into court in all fifty states, including Florida. Accordingly, O'QUINN's due process rights would be violated should he be subjected to suit in Florida.

Moreover, even if the Court somehow finds that O'QUINN has enough contacts with the State of Florida, O'QUINN has an opportunity to present compelling evidence of other considerations that would render jurisdiction in the State of Florida unfair.⁴¹

- 4. STERN'S Complaint does not and cannot satisfy the requirement for application of Florida's Long-Arm Statute, and as such, O'QUINN can not be sued in Florida because the exercise of jurisdiction in Florida does not comport with fair play and substantial justice and, thus, does not satisfy the due process requirements of the United States Constitution.**

Even if this Court determines that Defendant O'QUINN has established minimum contacts in Florida, the exercise of jurisdiction still does not comport with "fair play and substantial justice." The determination of whether the exercise of jurisdiction over a nonresident defendant comports with "traditional notions of fair play and substantial justice" is the last step in the personal jurisdiction analysis.⁴² While this step is conducted separately from the minimum contacts analysis, a particularly weighty finding under either the minimum contacts prong or the fair play

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and substantial justice prong can compensate for a weaker finding on the other prong. *See, Asahi Metal Indus. Co. v. Superior Court*⁴³ (Minimum requirements of "fair play and substantial justice" may defeat the reasonableness of asserting personal jurisdiction, even if the defendant purposefully established minimum contacts with the forum to subject the defendant to jurisdiction in the forum's courts).

“Other relevant factors the Court should consider include the burden upon the Defendants, Florida’s interest in adjudicating the dispute, Plaintiff’s interest in obtaining effective and convenient relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interests of the several states in furthering substantive social policies.”⁴⁴

In *Kelly v. Kelly*,⁴⁵ the court determined that even if it could properly exercise jurisdiction under Florida’s Long-Arm Statute, that the exercise of jurisdiction over the defendant would not comport with the traditional notions of fair play and substantial justice. In evaluating the factors relevant to this determination, the court explained:

Here Defendants would be greatly burdened if they were made to travel to Florida to defend this action. Defendants have never engaged in any business related activity, and there is insufficient evidence to show affirmative tortious activity within Florida. Moreover, Florida does not have a special interest in adjudicating this dispute, especially

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where considerations of comity exist. Furthermore, declining to exercise jurisdiction would not harm Plaintiff's interests as he could take action in New York. Therefore, given Defendants' alleged tortious activities as vaguely described by Plaintiff in his memorandum and supporting affidavit, this Court declines to assert personal jurisdiction.⁴⁶

It is likewise unreasonable, in the case at hand, to subject nonresident Defendant O'QUINN to trial in Florida given the fact that this lawsuit involves: (1) a non-resident defendant attorney; (2) who practices law and resides in Texas; (3) who only represented Vergie Arthur, a non-Florida resident client, in Florida proceeding, and (4) this action arises from statements that were not defamatory, and, if at all, could not have become defamatory until they were broadcast, aired and published out of national news studios located in New York, not Florida. Additionally, Florida does not have a special interest in adjudicating this dispute. Furthermore, declining to exercise jurisdiction would not harm STERN's interests as STERN could bring this action against O'QUINN in the State of Texas.

Therefore, Defendant O'QUINN respectfully submits that this Court should decline to assert personal jurisdiction because the exercise of jurisdiction over non-resident Defendant O'QUINN would not comport with the traditional notions of fair play and substantial justice.

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II.

**THIS CAUSE SHOULD BE DISMISSED
FOR IMPROPER VENUE PURSUANT
TO 28 U.S.C.A. §1391(a).**

The Plaintiff, in our jurisdiction, bears the burden of establishing that venue is proper. On a motion to dismiss for improper venue, dismissal is warranted if the Defendant is able to controvert the allegations in the complaint.

28 U.S.C. §1391 provides, in pertinent part:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought **only** in (1) **a judicial district where any defendant resides, if all defendants reside in the same State**, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.⁴⁷

In his Jurisdictional Statement, STERN alleges that he is a citizen of the State of California and that Defendant O'QUINN is a citizen of the State of Texas.⁴⁸ Although STERN's Complaint additionally alleges that venue is proper pursuant to the terms of 28 U.S.C. §1391(a), the Complaint does not specify which subsection of §1391(a) confers venue.⁴⁹ Other than the judicial district in which all of the

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Defendants reside, the only proper venue for this matter would be in a judicial district in which a substantial part of the events giving rise to the Plaintiff's claims occurred.⁵⁰ STERN's action arises out of the publication of statements Defendant O'QUINN made in interviews he gave to national news media organizations while representing his client, Virgie Arthur, a non-Florida resident, in the Anna Nicole Smith burial hearings in Florida. Indeed, it is upon the publication of these statements that the alleged defamation tort occurred. As previously discussed, although O'QUINN may have vocalized the allegedly defamatory statements while sitting in a sound booth in the State of Florida, it wasn't until O'QUINN's statements traveled through soundwaves that were transmitted by satellite to Nancy Grace and Greta Van Susteren in New York, where the FOX, CNN and MSNBC's studios are located, that the alleged tort of defamation occurred. Therefore, under Florida law,⁵¹ the actual tort of defamation must be deemed to have occurred, if at all, **in New York - -not in Florida**. Accordingly, there is no basis under 28 U.S.C. §1391 for venue in Florida.

III.

THIS CAUSE SHOULD, ALTERNATIVELY, BE TRANSFERRED PURSUANT TO THE DOCTRINE OF *FORUM NON CONVENIENS* AS CODIFIED BY CONGRESS IN 28 U.S.C. §1404(a) AND 28 U.S.C. §1406(a).

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Defendant O'QUINN respectfully submits that this Court should determine that STERN filed suit in an improper forum and dismiss STERN's Complaint, as previously discussed, or alternatively transfer this cause of action pursuant to Section 1404(a) or Section 1406(a) of Title 28 of the United States Code. Congress, therein, codified the common-law doctrine of *forum non conveniens* for application in the federal court system. If venue in a federal civil action is improper, the district court may dismiss the cause of action, as previously discussed, or the district court may transfer the case under Section 1406(a) of Title 28 of the United States Code to a proper forum. If venue is proper, but another federal district court would be a more convenient forum, the case may be transferred under Section 1404(a) of Title 28 to that other forum. Thus, Section 1404(a) transfers are discretionary determinations made for the convenience of the parties and presuppose that the court has jurisdiction and that the case has been brought in the correct forum. Section 1406(a) comes into play where plaintiffs file suit in an improper forum. In those instances, district courts are required either to dismiss or transfer to a proper forum.⁵²

Although a defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum, as the United States Supreme Court held only four short months ago, when the plaintiff's choice of forum is not his home

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forum, (as in this case), the presumption in the plaintiff's favor applies with less force and the assumption that the plaintiff's chosen forum is appropriate is deemed less reasonable.⁵³ Defendant O'QUINN respectfully submits that this is a textbook case for immediate *forum non conveniens* transfer pursuant to either Section 1404(a) or Section 1406(a) of Title 28 of the United States Code. This Court has aptly held that "an alternative forum is usually found when the defendant is amenable to process in that other forum."⁵⁴ There is absolutely no doubt that Defendant is amenable to process in the Southern District of Texas. Defendant O'QUINN was born, raised and educated in Texas. O'QUINN resides and maintains his law practice in Houston, Texas. Defendant O'QUINN has absolutely no ties to the State of Florida. Trial in this Court would establish oppressiveness and vexation to Defendant O'QUINN out of all proportion to STERN's convenience. The Southern District of Texas is an alternative forum that clearly has jurisdiction to hear this case.

IV

THIS CAUSE SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) SINCE STERN CAN PROVE NO SET OF FACTS IN SUPPORT OF HIS CLAIMS WHICH WOULD ENTITLE STERN TO

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**RELIEF BECAUSE NONE OF THE CHALLENGED
STATEMENTS ARE CAPABLE OF DEFAMATORY
MEANING AS A MATTER OF LAW.**

Fed. R. Civ. P. 12(b)(6) provides that this Court must dismiss a complaint if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions. A formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.⁵⁵ In determining whether to grant a Rule 12(b)(6), this Court may also consider the allegations in the complaint, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint.⁵⁶ In order to survive a motion to dismiss, a complaint must set forth enough facts to state a claim to relief that is plausible on its face.⁵⁷

Where the facts giving application to Florida's litigation privilege are apparent on the face of the complaint, as in this case, the litigation privilege may be raised by motion to dismiss.⁵⁸ In the specific context of defamation actions, in order to survive

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a motion to dismiss, a plaintiff must establish both that the words about which they complain are reasonably capable of sustaining a defamatory meaning and that they are not mere comment within the ambit of the First Amendment.⁵⁹ Defendant O'QUINN respectfully submits that STERN is not entitled to relief under any set of facts that can be proven consistent with the allegations of his complaint. STERN's complaint fails *in toto* to render his entitlement to relief plausible and must, therefore, be dismissed.

If a case is in federal court based on diversity of citizenship, the forum state's law governs the substantive claims, but federal law governs the specificity with which to allege the substantive claims.⁶⁰ Under Florida law, the test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality and the context in which it was uttered or published.⁶¹ In determining whether an allegedly defamatory statement is an actionable statement of fact, the court must consider all of the circumstances surrounding the statement, including the medium, by which the statement is disseminated and the audience to which it is published.⁶² As Justice Holmes once said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the

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circumstances and the time in which it is used. The same word or expression may vary with context, jurisdiction and time.”⁶³ Thus, each statement will be examined and analyzed individually, herein.

AS TO ALL OF O’QUINN’S STATEMENTS

Florida’s litigation privilege bars Stern’s defamation claim

O’QUINN has absolute immunity for all of his statements to national news media organizations during his representation of Virgie Arthur. STERN’s own description demonstrates that O’QUINN’s statements were made in the course of judicial proceedings and were related to the litigation in question:

“In recent months, **Defendant O’Quinn has been an attorney representing Virgie Arthur, the biological mother of Anna Nicole Smith**, in relation to questions of legal custody regarding Anna Nicole Smith’s body and parental custody over Ms. Smith’s infant daughter, Dannielynn Hope Marshall Stern.” (¶5 Stern’s Complaint).

“... since Ms. Smith’s death, **Defendant O’Quinn has used his status as Ms. Arthur’s attorney** to be a frequent guest on national television shows and other media. . .” (¶6 Stern’s Complaint).

“Shortly after Ms. Smith’s death, **Defendant O’Quinn began making media appearances on nationally broadcast television shows and in the print media representing himself to be the attorney for Virgie Arthur**, Ms. Smith’s biological mother. (¶25 Stern’s Complaint).

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“Defendant O’Quinn represented Ms. Arthur in the hearings held from February 16 through February 22, 2007 in Broward County Circuit Court regarding custody of the body of Anna Nicole Smith. . .” (¶26 Stern’s Complaint).

“Defendant O’Quinn’s strategy was to injure Plaintiff Stern’s reputation in the public arena so that he and Ms. Arthur could gain a competitive advantage in the court proceedings. . .”(¶29 Stern’s Complaint).

“. . .Defendant O’Quinn intentionally slandered Mr. Stern in a calculated effort to gain a competitive advantage for his client, Virgie Arthur, in any dispute she may have with Plaintiff Stern over the custody of Anna Nicole Smith’s body, parental custody of Dannielynn and/or control of the estate of Anna Nicole Smith.” (¶30 Stern’s Complaint).

The law in Florida has long been that defamatory statements made in the course of judicial proceedings are absolutely privileged, and no cause of action for damages will lie, regardless of how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry.⁶⁴ The Florida Supreme Court has explained the scope and rationale of the litigation privilege inquiry as follows:

[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior. . .so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered

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communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.⁶⁵

The Court recently addressed the scope of Florida's litigation privilege and made clear that the privilege is applicable to nearly all conduct that occurs during a proceeding, so long as it has some relation to that proceeding.⁶⁶ The determination of whether to apply the litigation privilege focuses on the purpose and the timing of the misconduct, *i.e.*, whether the conduct was in furtherance of the party's defense or prosecution of the lawsuit. "[P]articipants must be free to use their best judgment in prosecuting or defending a lawsuit."⁶⁷ There is little doubt that all of the challenged statements were made in the course of judicial proceedings and were related to the litigation in question. STERN, in fact, readily acknowledges this fact in paragraph 29 of his Complaint when he alleges that it was Defendant O'QUINN's strategy to injure STERN's reputation in the public arena so that he and Ms. Arthur could gain a competitive advantage in the court proceedings. STERN further acknowledges that the challenged statements were made in the course of judicial proceedings and were related to the litigation in question in paragraph 30 of his Complaint when he alleges that Defendant O'QUINN "intentionally slandered STERN in a calculated effort to gain a competitive advantage for his client, Virgie Arthur, in any dispute she may

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have with Plaintiff Stern over the custody of Anna Nicole Smith's body, parental custody of Dannielynn and/or control of the estate of Anna Nicole Smith." Thus, O'QUINN has absolute immunity regarding the challenged statements that he made in the course of the judicial proceedings where such statements were related to the litigation in question.

Statements were non-defamatory, as a matter of law where the statements consisted of pure opinion and/or rhetorical hyperbole not verifiable facts.

It is for this Court to decide as a matter of law whether the complained of words are actionable expressions of fact or non-actionable expressions of pure opinion and/or rhetorical hyperbole.⁶⁸ In determining whether an allegedly defamatory statement is an expression of fact or an expression of pure opinion and/or rhetorical hyperbole, context is paramount:

[The test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality and the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium, by which the statement is disseminated and the audience to which it is published.⁶⁹

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Given the fact that the challenged statements were made through a medium that fosters legal debate on pending lawsuits that routinely uses figurative or hyperbolic language, a reasonable listener is more likely to regard its content as opinion and/or rhetorical hyperbole. This is easily demonstrated by the introduction made by Greta Van Susteren during the March 15, 2007 broadcast of “On The Record With Greta Van Susteren.”⁷⁰ Pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public.⁷¹ Rhetorically hyperbolic statements cannot reasonably be interpreted as stating actual facts about their target, even though they may at first blush appear to be factual.⁷² Where rhetorical hyperbole is employed, the language itself “negate[s] the impression that the writer was seriously maintaining that [the plaintiff] committed the [particular act forming the basis of the alleged defamation].”⁷³

In determining whether an expression is protected rhetorical hyperbole, courts must consider the circumstances in which the statement was made. For instance, in *Horsley v. Rivera*, the Court concluded that although Gerald Rivera had stated that Horsley was “an accomplice to homicide” and that he had “aid[ed] and abet[ted] a homicide,” the context of the remarks demonstrated that the remarks were nothing

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more than non-defamatory hyperbole.⁷⁴ The Court reasoned that both Rivera and Horsley had “used non-literal, figurative language in expressing their views.” Horsley’s statements, according to the Court, showed “that he understood Rivera to be speaking in a figurative rather than literal sense” and statements by both of them “instill[ed] upon a reasonable viewer the impression that the parties were exchanging dialogue at a non-literal level.”⁷⁵ Similarly, in *Horsley v. Feldt*, the Court found that a statement that Horsley had “conspired with others to result in what exactly has happened, that these doctors have been murdered” was merely rhetorical hyperbole and the sort of loose, figurative language that no reasonable person would believe presented facts.⁷⁶ The Court reasoned that the statements constituted fair comment or, more to the point, constitutionally protected comment.

Insufficient proof to sustain Stern’s defamation claim

There is no doubt that, in the context of this defamation case, STERN must be considered a limited public figure since he voluntarily thrust himself into the national and international media spotlight and the forefront of the public controversy stemming from Anna Nicole’s death.⁷⁷ As such, STERN has the legal burden of establishing actual malice on the part of O’QUINN.⁷⁸ Mere allegations that statements were made with malice or with no reason to believe the statements were true are

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insufficient. Proof of malice is necessary.⁷⁹ STERN fails to allege sufficient facts to establish malice. Dismissal of STERN's defamation claim is, therefore, proper.

STERN's False Light Invasion of Privacy claim is precluded

STERN's false light privacy claim is precluded, because it based on the same facts giving rise to STERN's defamation claim.⁸⁰ While the Florida Supreme Court has tacitly recognized the existence of a false light claim, the Court has never endorsed the validity of a cause of action for invasion of privacy based on the false light theory.⁸¹ Although this Motion to Dismiss will discuss STERN's false light allegations, in so doing, O'QUINN does not waive his argument that STERN's false light cause of action must be rejected as it duplicates STERN's defamation cause of action.

STERN fails to allege sufficient facts to sustain a punitive damages claim

As will be shown throughout this Motion to Dismiss, STERN fails to allege facts sufficient to sustain a claim for defamation (Count I) or False Light Invasion of Privacy (Count II). STERN also fails to allege facts sufficient to sustain a claim for punitive damages. Accordingly, STERN's claim for damages should be dismissed pursuant to Fed.R. Civ. P. 12(b)(6).

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February 19, 2007 statement

STERN's first challenge is to statements made by O'QUINN on February 19, 2007. Initially, it should be noted that on that date, O'QUINN was not merely present in Fort Lauderdale, as suggested in STERN's Complaint. O'QUINN was, in fact, appearing *pro hac vice*, on behalf of Virgie Arthur, O'QUINN's Texas client, in the on-going litigation in Florida. Even though STERN neglected to attach a copy of the transcript of the February 19, 2007 so-called "interview" and even though the website provided by STERN provides that the "interview" is no longer available, the little blurb describing the "interview" is still available.⁸² It demonstrates, contrary to STERN's claim, that O'QUINN never give an interview to Rita Cosby of MSNBC.. O'QUINN merely commented as he walked into the courthouse with his client. Most assuredly, Florida's litigation privilege provides immunity for defamatory statements uttered as litigants are walking into a courthouse. STERN's claim regarding O'QUINN's February 19, 2007 comment must, therefore, be dismissed since it is clear that STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in STERN's complaint.

Dismissal is also appropriate for yet another reason. STERN failed to provide a copy of the actual transcript of the comments that O'QUINN allegedly made on to

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Rita Cosby as O'QUINN and his client walked into the Broward County Courthouse. Since there is no absolute rule for determining what words are, and what words are not, actionable, it is necessary and proper to consider the circumstances of its publication and the entire language used. In other words, in assessing whether statements are actionable, they must be considered in light of the surrounding circumstances.⁸³ The context is always important and should be considered in determining the effect and meaning of the words.⁸⁴ The gist of any statement within a publication or broadcast is found only by reference to the entire context.⁸⁵ If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice.⁸⁶

This Court has held that in determining whether an allegedly defamatory statement is an actionable statement of fact, the court must consider all of the circumstances surrounding the statement, including the medium, by which the statement is disseminated and the audience to which it is published.⁸⁷ STERN, however, neglected to include a copy of the transcript of the comments that O'QUINN allegedly made to Rita Cosby on February 19, 2007 in the appendix to his Complaint and the transcript is no longer available on MSNBC's website. Thus, it is impossible to discern the context in which O'QUINN's comments were made.

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Stern is, therefore, not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

February 21, 2007 statement

The second allegedly defamatory statement was uttered by O'QUINN during the February 21, 2007 broadcast of FOX News "On the Record With Greta Van Susteren." It is of particular interest to note that the transcript containing the allegedly defamatory statement, which STERN provides in an appendix to his Complaint, states that it is a "partial transcript," that "has been edited for clarity."⁸⁸ O'QUINN respectfully submits that, as such, it is absolutely impossible to discern the context of O'QUINN's comments. Of particular significance is the following statement included in the transcript: "**This is not a legal transcript for purposes of litigation.**"⁸⁹ Accordingly, this Court should not consider the transcript of the February 21, 2007 broadcast in rendering a decision in this litigation. Even if this Court chooses to consider the partial, edited transcript, a review of the transcript establishes that STERN isn't entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint. The transcript establishes that O'QUINN's comments to Van Susteren were made in the course of

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the judicial proceedings and were related to the litigation in question. Florida's litigation privilege must, therefore, be applied as a bar to STERN's cause of action.⁹⁰

The transcript further reflects that O'QUINN provided the basis for his client's negative opinion of STERN when asked by Van Susteren.⁹¹ O'QUINN specifically stated that it was Virgie Arthur's opinion that STERN murdered Anna Nicole.⁹² Subsequently, VAN SUSTEREN inquired whether O'QUINN agreed with his client's theory in the case.⁹³ O'QUINN was clearly entitled to state his client's opinion of STERN. As Virgie Arthur's attorney, O'QUINN was also entitled to express the fact that he agreed with his client's opinion of STERN. O'QUINN is, therefore, entitled to absolute immunity under Florida's litigation privilege and STERN's claim must be dismissed.

Additionally, it should be noted that although STERN claims that the gist of O'QUINN's comments during was that STERN murdered Anna Nicole Smith,⁹⁴ a review of the transcript does not support STERN's claim. STERN also fails to provide any proof that O'QUINN provided false information about STERN. The transcript of the February 21, 2007 broadcast reveals that O'QUINN's comments were not defamatory and are not actionable. As such, STERN is not entitled to relief

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under any set of facts that could be proven consistent with the allegations contained in his complaint and STERN's complaint must be dismissed.

March 1, 2007 statement

STERN next claims that O'QUINN uttered defamatory statements on the March 1, 2007 broadcast of The Nancy Grace Show. STERN claims that the gist of O'QUINN's statements that Daniel Smith "died under very suspicious circumstances" and "[t]his is all about the money" was that STERN killed Daniel and Anna Nicole for Anna Nicole's life insurance proceeds.⁹⁵ The transcript of the broadcast, however, demonstrates that everyone agreed that Daniel died under suspicious circumstances. The transcript also reveals that it was actually Carlos Diaz, an "Extra" correspondent who spoke about the enormous sums of money being expended and that everyone was interested in making money from Anna Nicole's death.⁹⁶ Thereafter, the transcript establishes that a caller to the show asked where O'QUINN's client was getting the money to pay for litigating the case.⁹⁷ Another caller to the show, thereafter, inquired whether there was any life insurance. STERN claims that O'QUINN, subsequently, gave a false factual statement regarding the existence of insurance policies thereby placing STERN in a false light in the public eye by creating the false impression that STERN stood to benefit from Anna Nicole and Daniel's deaths and that STERN

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killed both of them for his personal gain. STERN's claims, however, are easily refuted by the transcript of the broadcast that STERN, himself, provided this Court. The transcript reveals that O'QUINN never stated actionable facts about the life insurance policy. In fact, review of the transcript demonstrates that O'QUINN had no independent knowledge that the insurance policies even existed and that any information that O'QUINN had concerning insurance came from what he heard from other people.⁹⁸

Similarly, STERN's claim that O'QUINN's statement that Daniel "died under very suspicious circumstances" placed STERN in a false light in the public eye, by creating the false impression that STERN stood to benefit from the deaths and that STERN, therefore, killed Anna Nicole and Daniel is also subject to dismissal where it is clear that STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint. There was nothing false or defamatory about any of O'QUINN's statements. Daniel did, in fact, die under suspicious circumstances. At the time that O'QUINN made the statement, an inquest into Daniel's death was about to begin in the Bahamas. The inquest, into Daniel's death is, in fact, still going on as of this date.

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Under Florida law, the two essential elements for recovery under false light invasion of privacy are: (1) the false light must be highly offensive to a reasonable person; and (2) the defendant must have acted either knowingly or in reckless disregard as to the falsity of the publicized material and the false light in which it would be placed.⁹⁹ The essential characteristic that false light shares with defamation is that both acts require proof that the defendant provided false information about the plaintiff. The transcript provides that O'QUINN never provided false information about STERN and, as such, STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

A review of the transcript also establishes that O'QUINN's comments were made in the course of the judicial proceedings and were related to the litigation in question. During the interview, O'QUINN was, in fact, specifically asked about his representation and his relationship with his client.¹⁰⁰ Florida's litigation privilege should, therefore, be applied as a bar to STERN's cause of action.

March 14, 2007 statement¹⁰¹

As far as the next allegedly defamatory statement is concerned, the transcript provided by STERN containing the statement states that it is a "partial" transcript that has been "edited for clarity." Defendant O'QUINN respectfully submits that, as such,

there is no way of discerning whether statements contained in the transcript have been taken out of context. The transcript also provides: **“This is not a legal transcript for purposes of litigation.”**¹⁰² Accordingly, this Court should not even consider the transcript. Even if this Court chooses to consider the partial, edited transcript, STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

STERN claims that the gist of O’QUINN’s comments was that STERN murdered Daniel and Anna Nicole and that STERN would harm Dannielynn in order to control Anna Nicole’s estate. A review of the transcript, however, reveals that the entire focus of the interview was that the Seminole Police and the Broward County Homicide prosecutors were meeting to discuss Anna Nicole’s death and that murder charges were a possibility.¹⁰³ The transcript also reflects that O’QUINN spoke about his client’s actions to obtain custody of her granddaughter Dannielynn given the circumstances of the case.¹⁰⁴ Consideration of the context in which the complained of statements were made completely undermines STERN’s claims. The time, place, circumstances and the situation that existed when O’QUINN uttered the statements demonstrate that the statements were directly related to O’QUINN’s representation of his client Virgie Arthur. Accordingly, Florida’s litigation privilege provides

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absolute immunity. Additionally, O'QUINN's statement that his client was concerned for her granddaughter's safety since her granddaughter remained in the care of an individual who was the subject of continued speculation and allegations was, in fact, a true statement. There was nothing defamatory or false about O'QUINN's statement. Van Susteren's introduction to her show that evening is, in fact, illustrative of the fact that there was on going speculation and allegations.¹⁰⁵

A review of the transcript demonstrates that none of O'QUINN's statements placed Stern in a false light in the public eye by creating false impressions that STERN stood to benefit from the deaths of Anna Nicole and Daniel or that harm may come to Dannielynn. Additionally, the transcript reveals that none of O'QUINN's statements placed STERN in a false light by creating a false impression that STERN killed Anna Nicole or Daniel for his personal financial gain. Consequently, STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

March 27, 2007 statement to Nancy Grace

STERN alleges that O'QUINN accused STERN of murdering Anna Nicole during the March 27, 2007 broadcast of The Nancy Grace Show. The transcript of the broadcast, however, reveals that O'QUINN never made any factual statements and

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never opined that STERN murdered Smith. The transcript demonstrates that O'QUINN, merely agreed with the other guests on the show that STERN's actions in the case were unusual. Furthermore, although STERN argues that O'QUINN's comment that STERN was present when both Anna Nicole and Daniel got sick and died places STERN in a false light in the public eye and creates a false impression that STERN murdered Anna Nicole for his own financial gain, a review of the transcript from the broadcast actually reveals that O'QUINN was merely stating a fact---a fact that was recognized in the video clips shown throughout the broadcast—a fact recognized by all of the guests on the show. STERN was, in fact, present when both Anna Nicole and Daniel got sick. STERN was also, in fact, also present when both Anna Nicole and Daniel died.

The transcript reflects that the March 27, 2007 broadcast centered around Daniel's mysterious death¹⁰⁶ and Daniel's visits to a private investigator.¹⁰⁷ Nancy Grace specifically questioned whether Anna Nicole's death was accidental where nine different drugs were found in her body. It was at that point, that Nancy Grace asked O'QUINN for his analysis. O'QUINN agreed with the opinion espoused by Nancy Grace, namely that it was disturbing that both Anna Nicole and Daniel Smith died of accidental drug overdoses, involving some of the same drugs. O'QUINN also

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agreed with the opinions given by the other guests on the show that STERN's actions in the case were unusual.¹⁰⁸ The transcript demonstrates that O'QUINN never made defamatory statements and never made false statements. As such, STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

March 27, 2007 statement to Greta Van Susteren

STERN next challenges statements made by O'QUINN on the March 27, 2007 FOX Broadcast "On the Record With Greta Van Susteren." The document submitted by STERN which is allegedly the "transcript" of the March 27, 2007 broadcast¹⁰⁹ is dissimilar to the transcript of the March 27, 2007 broadcast that appears on the FOX website that STERN, himself, provided the Court. In fact, the transcript that appears on the FOX website¹¹⁰ doesn't even include O'QUINN's interview with Van Susteren.¹¹¹ Comparing the document submitted by STERN¹¹² with copies of the other FOX transcripts that STERN provides in Tabs A and C to his Complaint, it is questionable whether the document provided by STERN is, what it purports to be---a transcript of the March 27, 2007 broadcast. The document, for instance, contains a "byline" and the number of words (6,674) under a heading marked "length" as would a news article. —as opposed to a transcript. The document also provides that it is

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located in the “news” section—again, indicative of a news article as opposed to a transcript. Unlike the other FOX transcripts submitted by STERN, the document does not contain a “Content and Programming Copyright” or a disclaimer stating that it “is not a legal transcript for purposes of litigation.” Furthermore, the document does not include the “Fox News.Com” logo. It instead states: “Fox News Network.” The document also fails to state that it is a partial transcript which has been edited for clarity, as the other FOX transcripts provide.¹¹³ The document provided by STERN is seemingly not what it purports to be—the transcript of the March 27, 2007 FOX broadcast. Clearly, the document should not be considered by this Court. The actual transcript of the March 27, 2007 broadcast does, in fact, exist and can be found in the website that STERN, himself, provided this Court. Furthermore, as previously stated, none of the transcripts of the FOX News broadcasts should be considered by this Court since all of the transcripts specifically state that they have been edited for clarity and are not legal for purposes of litigation.

Even if this Court decides to consider the document submitted by STERN, dismissal of STERN’s claim is, nevertheless, proper. A review of the document demonstrates that O’QUINN’s statements merely related the reasons why O’QUINN’s client was upset by STERN’s actions in court.¹¹⁴ There is little doubt

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that the challenged statements made by O'QUINN were made in the course of judicial proceedings and were related to the litigation in question. Thus, O'QUINN has absolute immunity regarding these statements.

Review of the document submitted by STERN reveals that O'QUINN never accused STERN of murdering Daniel. It reveals that O'QUINN was asked what he, as a lawyer, would ask STERN, a witness on the inquest list. O'QUINN, thereafter, responded that he would ask whether the prescriptions were in STERN's name and whether STERN carried the drugs in the duffel that STERN and Anna Nicole used. When asked, by Van Susteren, what his client could add if she testified as a witness, O'QUINN speculated that his client could testify that she believed that STERN manipulated Anna Nicole and drove a wedge between Anna Nicole and her family because she believed that STERN wanted Anna's Nicole's money. When asked how his client's testimony would be relevant, O'QUINN responded that it would be relevant to motive.¹¹⁵

STERN alleges that the gist of O'QUINN's factual statements was that STERN murdered Daniel for his own financial gain and that O'QUINN's accusation is false and defamatory. STERN further alleges that O'QUINN's accusation that STERN "carr[ie]d the dangerous drugs around in that duffel bag" is false and defamatory as

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is O'QUINN's factual statement that STERN "decided he needed rid of Daniel." STERN additionally claims that O'QUINN's statements placed STERN in a false light by creating the false impression that STERN murdered Daniel for his own financial gain.¹¹⁶ A review of the document reveals that none of the comments made by O'QUINN constituted "factual statements." O'QUINN was merely responding to a hypothetical question regarding what his client could testify to if she were added to the witness list. There is no proof submitted by STERN that demonstrates hat O'QUINN provided false information during his March 27, 2007 interview. Dismissal is, therefore, proper since STERN is not entitled to relief under any set of facts that could be proven consistent with the allegations contained in his complaint.

CONCLUSION

Based upon the arguments and citation of authorities contained herein, this Court should grant Defendant JOHN O'QUINN's Motion to Dismiss STERN's Complaint for lack of personal jurisdiction and improper venue pursuant to Fed. R. Civ. Proc. 12(b)(3) and 28 U.S.C. § 1391, or alternatively transfer this cause of action to the United States District Court for the Southern District of Texas based upon the doctrine of *forum non conveniens* as codified by Congress in 28 U.S.C. §1404(a) and 28 U.S.C. §1406(a).

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Alternatively, should this Court find that jurisdiction is proper, Defendant O'QUINN respectfully submits that dismissal of STERN's Complaint in its entirety is, nevertheless, appropriate pursuant to Fed. R. Civ. P. 12(b)(6), because none of the challenged statements are capable of defamatory meaning as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served via U.S. Mail to all parties listed in STERN's Attachment to Civil Cover Sheet this ____ day of July, 2007.

By: ~~§ Roberta Mandel~~

ROBERTA G. MANDEL

Florida Bar No.: 0435953

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ENDNOTES

1. See, Complaint p. 3, ¶9.
2. See, *Cable/Home Communication v. Network Productions*, 902 F.2d 829 (11th Cir. 1990); *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir.1996).
3. *Id.*, quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
4. See, *Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir.2000); *Elite Aluminum Corp. v. Trout*, 451 F. Supp. 2d 1311 (S.D. Fla. 2006).
5. See, *Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889, 890-91 (11th Cir. 1983).
6. *Id.* at 891.
7. § 48.193(1)(a) & (b), Fla. Stat. provides:
 - (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
 - (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
 - (b) Committing a tortious act within the state.
8. See, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed.2d 528 (1985).

9. *Id.* at 471 U.S. at 471-72.
10. *See*, Fla. Stat. §48.193(1)(a).
11. *See*, *Horizon Aggressive Growth, L.P. v. Rothstein Kass, P.A.*, 421 F.3d 1162 (11th Cir. 2005).
12. *Id.*, at 1167.
13. §48.193(1)(a).
14. *See*, *Acquadro v. Bergeron*, 851 So.2d 665 (Fla. 2003).
15. *See*, *Green v. USF & G Corp.*, 772 F. Supp. 1258 (S.D. Fla. 1991).
16. *See*, *Acquadro v. Bergeron*, 851 So.2d at 670.
17. *See*, *Carlyle v. Palm Beach Polo Holdings, Inc.*, 842 So.2d 1013, 1017 (Fla. 4th DCA 2003).
18. *See*, *Acquadro*, 861 So.2d at 671.
19. *See*, *Green v. USF & G Corp.*, 772 F. Supp. at 1258.
20. *Id.* at 1262.
21. *Id.*
22. *Kelly v. Kelly*, 911 F. Supp. 518 (M.D. Fla. 1995).
23. *See*, *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1206 (11th Cir. 1999).
24. *See*, *Sun Bank, N.A. v. E.F. Hutton & Co., Inc.* 926 F.2d 1030 (11th Cir. 1991).
25. *See*, *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla. 1989).
26. *See*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-477, 105 S. Ct. 2174, 85 L. Ed.2d 528 (1985).
27. *See*, *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984).

28. *See, International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
29. *See, Burger King Corp. v. Rudzewicz*, 471 U.S. at 477.
30. *See, e.g. Kim v. Keenan*, 71 F. Supp 2d 1228 (M.D. Fla. 1999).
31. *See, e.g., Fleming & Weiss, P.C. v. First American Title Ins. Co.*, 580 So.2d 646 (Fla. 3d DCA 1991).
32. *Snow v. DirecTV, Inc.*, 450 F. 3d 1314 (11th Cir. 2006).
33. *Steinhilber v. Lamoree*, 825 F. Supp. 1003 (S.D. Fla. 1992).
34. *Cerebus Partners L.P. vs. Gadsby & Hannah, LLP*, 836 A.2d 1113 (R.I. 2003).
35. *See, Alternate Energy Corp. v. Redstone*, 328 F. Supp.2d 1379 (S.D. Fla. 2004)(citing *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L. Ed.2d 804 (1984)).
36. *Alternate Energy Corp. v. Redstone*, 328 F. Supp.2d at 1379.
37. *Id.* at 1383.
38. *Id.*
39. *Id.*
40. *Alternate Energy Corp. v. Redstone*, 328 F. Supp.2d at 1379.
41. *See, Burger King*, 471 U.S. at 477.
42. *Id.*
43. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).
44. *See, Kelly v. Kelly*, 911 F. Supp. 518, 523 (M.D. Fla. 1995)(citing *Burger King*, 471 U.S. at 477).
45. *Id.*

46. *See, Kelly*, 911 F.Supp. at 1572.
47. *See*, 28 U.S.C.A. §1391(a)(*emphasis added*).
48. *See*, Complaint at ¶¶7-8.
49. *See*, Complaint at ¶10.
50. *See*, 28 U.S.C. §1391(a)(2); *AMPAC Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973 (S.D. Fla. 1992).
51. *See, Green*, 772 F.Supp. at 1262.
52. *See, Goldlawr, Inc., v. Heiman*, 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed.2d 30 (1962).
53. *See, Sinochem International Co. LTD.*, 127 S. Ct. 1184, 167 L. Ed.2d 15 (2007), *citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-256, 102 S. Ct. 252, 70 L. Ed.2d 419.
54. *See, King v. Cessna Aircraft Co.*, 405 F. Supp.2d 1374 (S.D. Fla. 2005), *citing Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001).
55. *Bell Atlantic Corp., v. Twombly*, 2007 WL 1461066 at 8. (U.S. May 21, 2007).
56. *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1535 (S.D. Fla. 1993), *aff'd.*, 84 F.3d 438 (11th Cir. 1996).
57. *Bell Atlantic Corp., v. Twombly*, 2007 WL 1461066 at 8.
58. *See, Fariello v. Gavin*, 873 So.2d 1243 (Fla. 5th DCA 2004). *See also, Horsley v. Rivera*, 292 F.3d 695 (11th Cir. 2002) holding that a defamation complaint must be dismissed where it is clear that plaintiff would not be entitled to relief under any set of facts that could be proven consistent with allegations of the complaint.
59. *See, Knieval v. ESPN*, 393 F.3d 1068, 1073-1074 (9th Cir. 2005).
60. *James Ventures, L.P. v. Timco Aviation Services, Inc.*, 2007 WL 141156 (S. D. Fla. Jan. 17, 2007) *citing Caster v. Hennessey*, 781 F. 2d 1569 (11th Cir. 1986).
61. *See, Fortson v. Colangelo*, 434 F. Supp.2d 1369 (S.D. Fla. 2006).

62. *Id.*

63. *See, Towne v. Eisner*, 245 U.S. 418, 425 (1918), *quoted in Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 867 n. 17 (5th Cir. 1970).

64. *See, Fridovich v. Fridovich*, 598 So.2d 65 (Fla. 1992), *citing Myers v. Hodges*, 44 So. 357, 361 (1907).

65. *Levin, Middlebrooks, Marbie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606, 607-608 (Fla. 1994).

66. *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007).

67. *Id.* at 384.

68. *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 926 F. Supp. 917 (M.D. Fla. 1996).

69. *Id.* at 923.

70. “Tonight, manslaughter or worse? Is Anna Nicole’s death a murder? Just hours ago, a stunning report. Seminole police have been meeting with homicide prosecutors.” *See*, Tab C to Stern’s Complaint.

71. *Fortson v. Colangelo*, 434 F. Supp2d 1369 (S.D.Fla. 2006).

72. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 S. Ct. 2695, 11 L. Ed.2d 1 (1990)(noting protection accorded “statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual”).

73. *Id.* at 21, 110 S. Ct. 2695.

74. *Horsley v. Rivera*, 292 F.3d 695, 698, 702 (11th Cir. 2002).

75. *Id.*

76. *Horsley v. Feldt*, 304 F.3d 1125, 1132-1133 (11th Cir. 2002).

77. *See, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S. Ct. 2997, 3012, 41 L. Ed.2d 789 (1974). *See also, Wynberg v. National Enquirer, Inc.*, 564 F. Supp.

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924 (C.D. Cal., 1982)(“Due to his “close personal relationship” with a celebrity for over 14 months and the substantial publicity they received, plaintiff was a “public figure” relative to the issue of their relationship and therefore could not recover on his defamation claim against publisher of an article which contended that plaintiff used that relationship for his financial gain where plaintiff failed to show that publisher acted with actual malice in writing and publishing the allegedly defamatory article).

78. *See, Gertz, supra.*

79. *See, Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539 (M.D. Fla. 1993), *aff’d.*, 15 F.3d 1097 (11th Cir. 1994). *See, also, 19 Fla. Jur.2d Defamation and Privacy §52. “Malice.”*

80. *See, Ortega Trujillo v. Banco Central Del Ecuador*, 17 F. Supp.2d 1334 (S.D. Fla. 1998).

81. *See, Gannett Co., Inc., v. Anderson*, 947 So.2d 1 (Fla. 1st DCA 2006) (Discussing the history of false light claims and that the Florida Supreme Court has never held that a cause of action based on false light invasion of privacy is cognizable in the Florida courts).

82. “Feb. 19: MSNBC-TV's Rita Cosby speaks exclusively with Anna Nicole Smith's mother Virgie Arthur and her attorney John O'Quinn as they enter court in Florida for the second day.” *See, http://www.msnbc.com/id/17490544/page 2/.*

83. *See, Smith v. Cuban American National Foundation*, 731 So.2d 702 (Fla. 3d DCA 1999).

84. *Hood v. Connors*, 419 So.2d 742 (Fla. 5th DCA 1982). *See also, 19 Fla. Jur.2d Defamation and Privacy §41* (May, 2007). A statement is not defamatory unless the gist or sting of the statement is defamatory.

85. *See, Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305 (11th Cir. 2001), *citing to Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240.

86. *Id.*

87. *Fortson v. Colangelo*, 434 F. Supp.2d 1369 (S.D. Fla. 2006). *See also*, *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222 (11th Cir. 2002)(In determining whether a statement is defamatory, court must read and construe the publication as a whole).

88. *See*, Tab A to Stern's Complaint.

89. *See*, Tab A to Stern's Complaint "Content and Programming Copyright 2007 FOX News Network, LLC.").

90. *See*, Tab A to Stern's Complaint.

VAN SUSTEREN: All right. You represent Virgie, the grandmother of the baby...

O'QUINN: True.

VAN SUSTEREN: It certainly seems like she doesn't have much fondness for Howard K. Stern.

O'QUINN: No. She believes Howard K. Stern murdered her daughter.

VAN SUSTEREN: Murdered?

O'QUINN: Yes.

O'QUINN: That's what she said. She said that in court, He killed her.

91. **VAN SUSTEREN:** What's the basis for that, for the — for being there, sort of complicit that Anna Nicole took drugs or providing her drugs? I mean, what's her theory?

O'QUINN: He handled all the drugs. We've talked to the maid who kept the place. She gave us a list of the drugs. That's where I got the list. And he wanted to keep total control over her by keeping her doped up. He had total control over her. It was all a technique, a Machiavellian, sinister technique.

92. **VAN SUSTEREN:** Now, wait a second, John. You and I are both lawyers. I mean, the fact is that, with all due respect to your client, she hasn't seen her daughter in about 10 years, so she really doesn't know what the interaction

between Howard K. Stern is. We can all have our sort of suspicions, but in terms of evidence of murder, that's a different level.

O'QUINN: She sat in the courtroom, like we all have. She has her own judgment about what she's heard. Everybody has a judgment by now about what they've heard.

93. **VAN SUSTEREN: And you agree with that judgment, murder?**

O'QUINN: You better believe it. . .

VAN SUSTEREN: There's a of suspicion about their presence in the Bahamas. I agree. That's still not murder, though.

O'QUINN: And motive. He had opportunity. He was alone with her for three days. He had motive. And there's evidence that he handled her drugs.

94. *See, ¶ 40, Stern's Complaint.*

95. *See, ¶48, Stern's Complaint.*

96.

NANCY GRACE: Tonight, after weeks of hand-to-hand legal combat in court, appeals judges order the body of covergirl Anna Nicole Smith buried beside her son, Daniel, on the island paradise the Bahamas. But rest in peace? No way. The battle rages over Nicole Smith's 6-month-old baby girl and the \$475 million she's set to inherit. Tonight, two men emerge as contenders to control that nearly half a billion dollars. The body finally leaving a Florida morgue under tight security 0530 tomorrow morning. All the parties -- the mother, the boyfriend and the lawyer -- converge for a Bahamian funeral.

DIAZ: . . The church is here on this private property. And this church is now charging every media outlet between \$2,000 and \$5,000 to be on their private property to cover the church service... **It seems that everyone's looking to make money off of Anna Nicole Smith.**

GRACE: You're absolutely right, Carlos Diaz...joining us from "Extra." Everyone seemingly is making money.

97.

UNIDENTIFIED FEMALE: . . I would like to know, please, where this lady, the mother, is getting the funds to pay for the attorney to travel from Florida to the Bahamas and monies also to exhume the bodies of her grandson and daughter. . .?

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GRACE: Good question. . .Out to you, Art Harris, investigative reporter. . .**where is she getting the money? Where are any of the parties getting the money?**

HARRIS: Nancy, we`ve been asking that. . .

98.

UNIDENTIFIED FEMALE: I just want to know if there was any life insurance, and who`s the beneficiary.

GRACE: . . .With us tonight is John O`Quinn.. .one of Virgie Arthur`s attorneys.

GRACE: Was there a life insurance policy in any form?

O`QUINN: I`ve been told by sources that should know the truth that there were seven life insurance policies on Anna Nicole`s life, and the beneficiary was her son, who died under suspicious circumstances, and the alternative beneficiary is Stern.

O`QUINN: I`m told they were paid up and in full force, and the primary beneficiary was her son, who died under very suspicious circumstances.

GRACE: Mr. O`Quinn, it gets curiouser and curiouser, does it not?

O`QUINN: Oh, yes, it does. **This is all about money.**

GRACE: Seven life insurance policies, all going to Stern.

99. *See, Heekin v. CBS Broadcasting, Inc., 789 So.2d 355 (Fla. 2d DCA 2001).*

100. *See, Tab B to Stern`s Complaint.*

GRACE: All right. Mr. O`Quinn, question. I understand that last night, there was finally the meeting between your client, Virgie Arthur, and the baby, Dannielynn. What happened?

O`QUINN: I wasn`t there. I know that Mrs. Arthur was not treated correctly as a grandmother. She asked to hold the grandchild, her own grandchild, no question about it, and Stern said, You can`t touch your grandchild. I find that a very despicable thing for a person to do to a grandmother.

That`s one of the reasons I agreed to help Virgie. I was raised by my grandmother, and I respect her greatly and I love her greatly for it.

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101. Although Stern states that O'Quinn had another interview with Van Susteren on March 15, 2007, a review of the transcript provided in Tab C to Stern's Complaint reveals that the interview actually took place on March 14, 2007.

102. See, Tab C to Stern's Complaint.

103. **VAN SUSTEREN: Tonight, manslaughter or worse? Is Anna Nicole's death a murder? Just hours ago, a stunning report. Seminole police have been meeting with homicide prosecutors. . .**

WALLER (Miami Herald Reporter): . . the Seminole police came to our prosecutors in Broward County and had a meeting. . .It's not a homicide investigation yet. This is still a death investigation. It's still a non-criminal investigation. But a lot of people are reading a lot of meaning into that meeting.

VAN SUSTEREN: Are your sources describing this meeting between the Seminole police and the Broward County homicide prosecutors as routine, or are they suggesting that it's unusual?

WALLER: Well, this is officially termed a suspicious death. That just means it's something they're still looking into. Other than that, the Seminole police are holding their cards very close to their chest. . .

VAN SUSTEREN: One last question. Bahamas — any police in the Bahamas involved in this discussion or any law enforcement from the Bahamas?

WALLER: Well, we do have law enforcement from the Bahamas who are here in South Florida right now, and they are meeting with Seminole police. . .

VAN SUSTEREN: Could murder charges be a possibility, or is this just a routine investigation?

BONDI (Prosecutor): . . Any time there's a suspicious death, they consult with the state attorney's office. . .

VAN SUSTEREN: . . . it's termed a suspicious death, but the fact is, we don't even know whether it truly is suspicious, at this point. It's suspicious to us.

BONDI: Yes. . . .

GRIMM (Criminal Defense Attorney): Yes, by definition, anyone that's 39 years old and presumptively in some sort of good health, not terminally ill cancer

patient — somebody dies at 39, there's going to be — it's going to be looked into by the authorities. . .

VAN SUSTEREN: . . .let's assume that this is a methadone overdose. And we've seen the pictures in the refrigerator. If I were investigating it as a criminal investigator, I'd like to know whether she had it lawfully, whether someone was, you know, violating any law in giving it to her and I would also like to know whether — I mean — I mean, prescribing it to her or delivering it to her. I'd also like to know if someone actually administered it to her, and in what amounts.

GRIMM: Right. I mean, that is critical. I wouldn't call that a first-degree murder. It's probably a negligent homicide, but...

VAN SUSTEREN: Manslaughter.

BONDI: Actually, in Florida, we have a drug overdose statute, and it's a third degree murder. It's under the homicide statute. . .

WILLIAMS: Now, **what is interesting in this case, though, is that the Bahamian police department is here in Florida, talking to the police department there. And the only reason that I can see that they are there is that they're looking to see if there's any nexus between the death of Daniel in the Bahamas and Anna Nicole's death.**

VAN SUSTEREN: Oh, that's an interesting point because they're having the inquest at the end of March in the Bahamas. But the thing that still sticks — I mean, sticks with me is the amount of methadone in the refrigerator.

VAN SUSTEREN: Nobody — I mean, according to Dr. Baden (INAUDIBLE) join us, it's not prescribed by that — I used — obviously exaggerating — by a bucket. You know, but...

WILLIAMS: Oh, and as you know, we've been told that Daniel died of a drug overdose. Now, the question is, What happened to Anna Nicole Smith? Was it a methadone death? . . .

VAN SUSTEREN: All right. And how she got it and all the rest of it.

WILLIAMS: Absolutely.

VAN SUSTEREN: . . .we don't know if Anna Nicole's death is an accident, natural causes or a crime. We do know that the medical examiner's report is expected any

day. Joining us, forensic pathologist Dr. Michael Baden.

VAN SUSTEREN: Good evening, Dr. Baden. Dr. Baden, am I wrong to sort of be stuck on the sort of large amount of methadone in the refrigerator?

BADEN: No. I think you're absolutely right. And the way it was given — it was sent under a false name. This was not distributed in the way that it normally would be distributed. And it would only be distributed if she were a heroin addict. Methadone works specifically on other narcotic drugs. Remember, there's some Vicodin or Oxycontin, some other drugs in that refrigerator also. So if Anna Nicole was taking various narcotic drugs that were prescribed for her and sent to her improperly, that may be the reason that they're looking for some criminality.

VAN SUSTEREN: So they probably — so they — so — an alleged criminal investigation. . . — I use "alleged" because, you know, we don't know for sure — could be that they aren't looking into necessarily why she died but it's rather how she got the drugs and whether there was some criminal behavior in — in — with that.

BADEN: I think that's exactly right. . .

VAN SUSTEREN: . . if you have someone particularly vulnerable to some sort of drug or whatever — I mean, the person's an addict or (INAUDIBLE) excessive prescribing and actually handing the drug to the person, is that considered a crime?

BADEN: . . .Now, whether or not it's a crime is up to the prosecutor and the district attorney. But by saying homicide, it means death because of what some other person did, in this case, supplied drugs.

VAN SUSTEREN: All right. Well, then I would not be so quick to dismiss this as simply a routine — it may be a routine discussion between the prosecutor and the police, but I would have my antennas a little bit up. Anyway...

BADEN: I agree.

104. **VAN SUSTEREN: What does Anna Nicole's mother, Virgie Arthur, think about this development? And what about the paternity fight over Dannielynn. Joining us, Virgie Arthur's lawyer, John O'Quinn. . . .**

O'QUINN: . . . In the law, there's two phrases that control custody. One phrase is, Do what's in the best interests of the child. The other phrase is, Who is fit to be a parent? And in this case, what's in the best interests of

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Dannielynn is that her grandmother mother her and provide maternal support, love and affection.

VAN SUSTEREN: All right. Would you agree that a parent, instead of a grandparent, might be — is — in the law would have priority over a grandparent in terms of best interests, assuming that the parent is not a drug addict or a ne'er-do-well of some sort?

O'QUINN: Not in this case because a parent — either of those men are nothing but sperm donors. They're like one-night stands. They had maybe sex one time, not sex to create a child, not have any interest to have a child, just sex. And here's this fellow, Stern, who is sneaky and whatever. He won't even have a blood test to prove that he is or is not the parent. That is a not a fit person that is not willing to come forward as an honest man and say, I will take the blood test. I will let the court know for sure what my status is regarding this child.

VAN SUSTEREN: . . .we'll take them one by one. Howard K. Stern, you say, is not fit, that he's sneaky, won't do the test. Look, I have lots of objections to him not allowing that baby to be swabbed so that paternity can be established. But he has certainly cared for that child and — since the day the child was born, living in the same household. I mean, he's not unfit in that he's going to harm the child. Do you agree?

O'QUINN: I do not agree with that. Howard K. Stern is going to do whatever helps Howard Stern. Remember, he was trying to strike a bargain with Larry Birkman (sic) that he would yield and let Birkman have custody if Birkman would make sure that Stern got to run the estate of Anna Nicole. Stern's motives, Stern's agenda is to keep control of the money.

VAN SUSTEREN: All right. Now, you characterized both of them as one- night stands, sperm donors. Let me take to you task a little bit with that. And that's not to take away from Virgie as the grandmother. But both of them had long-term relationships with Anna Nicole in various forms. Howard K. Stern's been living with her at least since — I mean, off and on, I mean, he's had something for several years of a relationship with her. And Larry Birkhead had a relationship with her and even sought to establish paternity right after the child was born. So it's not like these are runaway dads or attempting to be runaway dads.

O'QUINN: Stern was a user. He used Anna Nicole. He wasn't there for any other reason. Remember, Anna Nicole took a massive amount of drugs while she was pregnant with Anna — with Dannielynn. That was dangerous to Dannielynn. And Stern is the one that got the drugs. He got — they had so many drugs, they got

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them from more than one doctor. And he took them around in a duffel bag — he being Stern — and fed them to Anna Nicole while she was pregnant, which is absolute insanity when it comes to not only the health of Anna Nicole, but the health of the baby.

VAN SUSTEREN: All right, you say Howard K. Stern...

O'QUINN: This man's not showing real concern.

VAN SUSTEREN: . . . **There is a paternity hearing Friday in the Bahamas. Are you — do you intend to be there? Does your client intend to be there? Are you going to assert demand for custody at that hearing?**

O'QUINN: **We both will be there, and we'll ask for interim custody at this time in order to provide a life for this child. And it's subject, of course, to (INAUDIBLE) later if these men ever do take a blood test and it's ever proven either one of them is the father.**

VAN SUSTEREN: . . . **How is Virgie doing, by the way? How is the grandmother doing?**

O'QUINN: **This is an extremely hard time of her life. Not only has she lost her daughter, she lost her grandson, who died in the presence of Stern of a drug overdose. She now has a granddaughter who's still in the hands of the man who all arrows are pointing to as having killed her daughter and her grandson, and she's worried sick about what's going to happen to her granddaughter.**

VAN SUSTEREN: All right. Well, of course, I'm not going to belabor the point. You know, there's been nothing to suggest — not — there's been no even allegation that he killed the grandson or the daughter. But I heard what you said. All right...

O'QUINN: **There are allegations.**

105. “Tonight, manslaughter or worse? Is Anna Nicole's death a murder? Just hours ago, a stunning report. Seminole police have been meeting with homicide prosecutors.” *See*, Tab C to Stern’s Complaint.

106. **NANCY GRACE:** Breaking news -- day one in the investigation of Anna Nicole Smith young son, Daniel Smith, his death eerily similar to his covergirl mother’s,

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both dead from a lethal mix of deadly prescription drugs. A Bahamian court will decide, was foul play involved in the sudden death of 20-year-old Daniel, found dead at Anna Nicole's hospital bedside just after she delivers baby girl Dannielynn?

...First, live to the Bahamas and the investigation into the mysterious death of Anna Nicole Smith's son.

(BEGIN VIDEO CLIP)

UNIDENTIFIED FEMALE: Twenty-year-old Daniel Smith came here to the Doctors Hospital in Nassau, came to celebrate the birth of his baby sister. But three days after she was born, he was found dead in his mother's hospital room. A medical examiner says he died of an overdose of methadone and two antidepressants. Police have now determined his mother died of an overdose, too, although the drugs were different. Her death, they determined, was accidental. But was the son's death an accident, suicide or something else?

UNIDENTIFIED MALE: He was fine when he came to see his newly born sister, and for him to just suddenly drop down dead raises a lot of questions.

UNIDENTIFIED FEMALE: Now, as part of the inquest into his death, 40 witnesses will be questioned, including hospital staff, friends of Daniel and police from the U.S. **Another person authorities here definitely want to talk to, Howard Stern.**

UNIDENTIFIED MALE: Oh, he'll be a key witness because he is the only surviving person who was in that room when Daniel died.

UNIDENTIFIED MALE: Anna was in the room. Daniel slept next to Anna in the same bed, and Howard slept in the bed next to Daniel and Howard (SIC). I mean, it's absolutely ludicrous to suggest a third person did something.

VIRGIE ARTHUR: There wasn't any sign of Daniel taking any kind of drugs other than a sleeping pill and an anxiety pill. Somebody had to give it to him. He had to get it from somewhere. I just know that Danny didn't kill himself. He did not overdose himself.

STERN: Mrs. Arthur over there went to the media and said that I or Anna had murdered Daniel. It was the absolute, absolute final straw.

UNIDENTIFIED MALE I've never seen Daniel take anything. As a matter of fact, if anything, he had a deep hatred for any kinds of drugs.

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GRACE: Today, day one in the inquest of **Daniel Smith, just 20 years old when he died mysteriously there in Doctors Hospital.** Out to Court TV's Jean Casarez. What happened today at the inquest?

CASAREZ: Well, today was supposed to be the jury inquest, first day. . .Wayne Munroe, **the attorney for Howard K. Stern, addressed the court, saying that the jury that normally would preside over the inquest that has already been selected and is ready to go should now be questioned and cross-examined to see if there is any taint because of all the media publicity.**

GRACE: Well, that's very unusual. That's not how the system works in the Bahamas. So this attorney for Howard K. Stern just stands up and everything screeches to a halt?

CASAREZ: Yes. . . I talked with lots and lots of people, people have definite opinions about especially Howard K. Stern.

GRACE: . . Why wasn't Stern in court? Why was he a no-show? I mean, according to him, he had married Anna Nicole Smith. This was her son, her beloved son. And he was not at the inquest?

DAVID CAPLAN, "STAR" MAGAZINE: Yes, **it was a little surprising,** but he's not required to be there, as well, so he didn't want to go. It was that simple.

GRACE: . . I don't know. . . typically, a victim or the deceased's family will show up in court, even though there's no legal obligation for them to be there. Why? Because they care. They care about the outcome of the proceedings. . . **do we have any idea where Stern was today on day one of the inquest? I find that interesting.**

CAPLAN: . . He was in the Bahamas. And I **think it's a little telling, though, about his personality because don't forget, when we had the hearing in Florida,** I believe, he also didn't go for the first day. He came the second day. And I believe -- **you know, we're hearing he's really sending that message that he wants to sort of have his lawyers. And it's weird. He almost wants to almost, you know, get away from it. It's weird. He did this before at the hearing, and it's sort of like he wants to get away -- what's the word I'm -- you know...**

GRACE: Avoid.

CAPLAN: That's it. Avoid.

GRACE: . . I know Stern was not present in court today, but it seems to me that his

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lawyer. . . stood up and made statements as if Stern is somehow a target, a defendant, a suspect, because why? This is an inquest, an inquiry into the cause of death of Daniel Smith, Anna Nicole Smith's 20-year-old son, sudden and unexpected death. So why do Stern's lawyers take it upon themselves to say they want a bench trial, as if somehow they are the target of the investigation?

CASAREZ: Because it is Wayne Munroe's responsibility to protect his client, Howard K. Stern. So that is why I think he's doing it.

GRACE: Protect him from what?

CASAREZ: Protect him from the taint of the media publicity because, as I spoke with people around the Bahamas, **this is what I heard about Howard K. Stern. He's suspicious. He's a crook. I heard a lot of negative things.** So I think it's the duty of Wayne Munroe to have those jurors questioned so that they are not filled with the taint and are fair and impartial.

RECAP:

GRACE: Welcome back. Today day one in the inquest of Daniel Smith. That is the young son of covergirl Anna Nicole Smith. He died unexpectedly at the age 20 at his mother's hospital bedside right after she delivered. Out to you, Jean Casarez. Let's go back over a recap regarding what happened to Daniel Smith.

CASAREZ: Well, Daniel Smith flew to visit his mother in the Bahamas three days after his little baby sister was born. He went immediately from the airport to the hospital. **He was there with her and Howard K. Stern for a number of hours, and then literally collapsed. . .**

After a commercial break, more video clips were played for the audience:

(BEGIN VIDEO CLIP)

UNIDENTIFIED MALE: She died tragically and, I believe, quite accidentally as a result of the cumulative effect of three brain depressant drugs.

UNIDENTIFIED MALE: **Anna Nicole, the mother of Daniel, is dead, and Howard's the only one who's alive who was in the room. So it really arouses our interest to speak to him, to find out exactly what happened in the room.**

GRACE: Today, day one in the inquest in the death of a young man, 20 years old,

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still just a baby himself. I guess that's going to be ruled an accident, too, just like the death of his mother. . .

107.

GRACE: . . . Jack Harding, private investigator. He was contacted by the deceased, 20-year-old Daniel Smith, just before Daniel Smith died, and he made some very interesting revelations to Mr. Harding. Mr. Harding is joining us from LA. Jack, thank you for being with us. When did Daniel visit you?

HARDING: He visited me. . . he didn't seem depressed to me, and he didn't seem anorexic. His skin was clear. His eyes were clear. He was really upset about his mother. And when he made phone calls to his mother, Stern would answer. Stern would hang up on him. And he told me that Stern had given orders to the staff that any time that he would call, to hang up on him. And the boy was frightened to death of Stern. . . the mere fact that the police found my business card on his body showed me that he still wanted to get back to me. . . I don't know if Stern had seen this card or not. . . as I said, he was frightened to death. And he was -- he wanted to help his mother. He loved his mother very much. . . And he told me he wanted to protect his mother. And this is really suspicious to me, the way that this whole thing came out. His mother -- that is -- he passed on with an overdose, and then all of a sudden, his mother passes over with an overdose. You know that the child -- especially when she was being given drugs when she was pregnant, the child is going to have a trace of narcotics in her system. Now, what's to say that later on, if Stern was to get custody of the child later on, that the child would have an overdose? And who gets that money?

GRACE: . . . let's just take a look at the similarities between the death of Anna Nicole Smith and her son, 20-year-old Daniel. Both died during daylight hours. Both died within the vicinity of trained nurses, both with antidepressants in the system, both with sleep aids. Both given drugs by multiple sources. Both died of a combination of drugs, found dead in the presence of those they trusted. Both set to inherit large sums of money. Both had methadone in their systems. Both died away from home. There are even more similarities, in my mind. To you, Jack Harding. It's very disturbing to me that both died after just falling to sleep. They both go to sleep at night. Daniel was there asleep in his mom's hospital room. They both wake up dead. The MO of both of their accidental deaths are extremely similar.

HARDING: Yes. Yes, that's true.

108. **GRACE:** . . . **I don't see it. Is it an accident? She had nine different drugs in her body. He had at least three.** Is it an accident that drugs are prescribed in somebody else's name and they were given to the deceased? Is it an accident they

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both lay there, wake up dead, and nobody does anything? Anna Nicole Smith was blue, for Pete`s sake, before 911 was called.

MIDWIN CHARLES: Well, we can`t deny that there are a number of similarities here between the death of Anna Nicole Smith, as well as Daniel. . .

GRACE: Accidental. . .To you, John O`Quinn, what is your analysis?

O`QUINN: I`d like to add one more circumstance. Howard Stern was there when both of them got deadly sick and died.

GRACE: You know, what`s another thing that`s disturbing, John O`Quinn. . . my concern is about the investigation that goes along with that analysis, Mr. O`Quinn. **Two people dying of accidental drug overdoses, including some of the same drugs?**

O`QUINN: I agree with you entirely. The fact that. . .Perper concluded that it was a drug overdose. I don`t quarrel with that, and I don`t quarrel with his talents to figure that out. But he basically based his story on what happened based on what Howard Stern told him. That`s like asking the murderer to tell us how this person died. You don`t necessarily get the truth.

GRACE: Well, again, before we call Stern a murderer...

O`QUINN: OK, OK. **He`s acting like he`s the one. He storms into court this morning, demands that his lawyers pick the jury, demands that the media be thrown out of the courtroom. I mean, what`s going on here?**

GRACE: Well, I agree. I don`t understand why he has the position -- he was a no-show at court. He didn`t demand anything. His lawyers did, though. You`re correct about that. . .

GRACE: You know, back to you, David Caplan, the bureau chief of "Star" in New York, I was reading a synopsis of what she went through. It was basically hell, the last hours of her life. And it suggested that she went and sat in a dry bathtub, and she was dry heaving and retching. I know that there was emesis, vomit, in the bathroom sink. There was some type of vomit or discharge there in the bed. **Couldn`t everybody see the woman was dying?**

DAVID CAPLAN: . .it was very shocking -- it should come of no surprise to anyone why no one even bothered to help, despite, you know, what she is saying, **this is outrageous.**

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GRACE: Back to you, Mike Brooks, joining us from the Bahamas. What now? Stern`s lawyers have managed to put the kibosh on the whole thing. They`re going to have an argument tomorrow about what?

BROOKS: . . .-- we`re hearing that hopefully this will be done tomorrow. Thursday we`ll get the first witness on the stand, and we`ll get the ball rolling. . .this could still last maybe three to four weeks. . .

GRACE: Day one of the inquest in the death of 20-year-old Daniel Smith. . . I don`t quite understand the objection that Howard K. Stern`s attorneys lodged. . .

GRACE: . . . to go to the judge and say, hey, we don`t like the whole setup, we don`t like a jury, we want to do it our way, that`s crazy.

GRACE: . . .OK, to you, Midwin Charles and Ray Giudice, very quickly. . . The liability, if any, of an enabler in our judicial system. . .Would Stern face any liability if he`s deemed to be an enabler? Remember the testimony about that duffel bag full of drugs he got her in the hospital?

CHARLES: Absolutely. If he`s found an enabler, he certainly can face charges of murder or manslaughter. I mean, at this point, the sky is the limit, because we don`t know his full involvement.

The subject then turned to the question of Stern`s liability in the case:

CHARLES: Someone could file a potential civil suit, but also, Nancy. . . I do see possible criminal liability here, because if Howard K. Stern knowingly, with intent, supplied Anna and Daniel with those drugs, he certainly could be facing criminal charges.

GRACE: OK. We`ll find out more as the inquest continues, whenever Howard Stern`s lawyers decide they can go forward with the inquest down in the Bahamas. I guess they`ll get going.

109. *See*, Tab E to Stern`s Complaint.

110. www.foxnews.com.

111. *See*, Tab E to Stern`s Complaint.

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112. *Id.*

113. *See*, Tabs A and C to Stern's Complaint.

114. *See*, Tab E to Stern's Complaint.

VAN SUSTEREN: Anna Nicole's mother is in the Bahamas. She is there for the inquest as to why her grandson died in a hospital room while visiting his mother in September. But something Howard K. Stern did today has Virgie all fired up. What happened? **Joining us, Virgie Arthur's lawyer John O'Quinn. John, why is your client mad today?**

O'QUINN: Because she went to the inquest like many other people to see the evidence of what caused the death of her grandson, Anna Nicole's son, Daniel. And Stern came in with his lawyers and said: "Stop, stop, stop, stop. I don't want any media here. I want my lawyers to pick the jury that's going to make the decision" and a whole bunch of other stuff and there was no inquest today.

VAN SUSTEREN: So, I guess **she thinks he is putting up some blocks to getting this done, is that a fair way to describe this? In her opinion, at least?**

O'QUINN: Exactly. You're right, there.

VAN SUSTEREN: OK.. **Howard K. Stern is on the inquest list. John, of course, we all know you're a lawyer. What questions would you expect to be asked of him at the inquest into Daniel's death?**

O'QUINN: I'd ask questions to be asked of him (*sic*) about drugs. **Did he actually get prescriptions from doctors in his name to be given to Anna Nicole? Did he actually carry the dangerous drugs around in that duffel bag they had? And things of that nature.**

VAN SUSTEREN: **If your client—is your client----isn't currently on—at least not on the witness list as we have it, but she—I mean it may be that somehow her testimony becomes relevant or desired by someone, what you expect as a lawyer? What kind of information could she add to this?**

O'QUINN: **The information she could add is that her daughter was perfectly—she was a fine girl until she got in with Stern. All the things that Stern did to manipulate her and drive a wedge between the family members and Anna Nicole and the various ways in which Stern sought to manipulate Anna Nicole because really what he wanted was her money.**

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VAN SUSTEREN: How would that be relevant to Daniel's death?

O'QUINN: Motive. Daniel was—had already figured things out. He was trying to get an investigator to—hire an investigator to investigate Stern and he went to his mother to get the money and Stern learned of that and he decided he needed rid of Daniel (*sic*).

VAN SUSTEREN: All right. John, you say very provocative things. **As you know**, on this show I've been taking to you task (*sic*), but tomorrow night we're going to let the viewers ask you questions, see what you have to say about it.

115. *Id.*

116. *See*, §§ 66-69 of Stern's Complaint.

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