IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

GAWKER MEDIA, LLC'S OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR PROTECTIVE ORDER

Defendant Gawker Media, LLC ("Gawker") respectfully submits this opposition to the second motion of plaintiff Terry Gene Bollea (a/k/a Hulk Hogan) ("Hogan") for a protective order, this one seeking to prevent any video recording of his upcoming deposition in this case or, in the alternative, asking the court to seal the video recording of his deposition. Here, the parties negotiated and the Court entered an Agreed Protective Order (the "Confidentiality Order") to govern sensitive personal and/or financial information disclosed in written or depositions discovery. Because the Confidentiality Order prescribes a method for both designating materials and testimony as confidential, and for challenging such designations, Hogan's motion is premature and wholly unnecessary at this time. Moreover, Hogan's motion does not come close to demonstrating why, despite Florida's rule permitting video depositions as of right, Gawker should not be permitted to video record his deposition for use at trial. Nor does he show good cause to go beyond the Confidentiality Order to seal the entire videotape of his deposition. For the reasons that follow, the Court should deny his motion.

BACKGROUND

As this Court is aware, this case challenges a report and commentary (the "Gawker Story") published on Gawker.com by Gawker Media, LLC, concerning an extramarital affair that plaintiff, the celebrity publicly known as Hulk Hogan ("Plaintiff" or "Hogan"), conducted with the wife of his then-best friend (Bubba Clem, himself also a celebrity), with Bubba Clem's blessing. It also challenges the publication, along with the Gawker Story, of brief excerpts (the "Excerpts") of a longer video (the "Video") depicting the encounter. Based on the Gawker Story and the Excerpts, plaintiff asserts claims against Gawker for invasion of privacy, for violation of his publicity rights, for negligent and intentional infliction of emotional distress, and for violation of the publication prong of Florida's wiretap statute.

In July 2013, following almost a month of negotiations between the parties over its terms, the parties jointly submitted and this Court entered the Confidentiality Order (attached for the Court's convenience as Exhibit A). Pursuant to the Confidentiality Order, a party may designate as "Confidential" documents or testimony that reflects (a) medical or mental health records, (b) sensitive financial information, and/or (c) "information in which the party from which discovery is sought has a reasonable expectation of privacy or confidentiality." Confidentiality Order ¶ 3. Once documents or testimony is designated "Confidential," they may be "used solely for the purpose of preparation and trial of this litigation and for no other purpose . . . ." *Id.* ¶ 1. The Confidentiality Order requires that confidential information submitted to the Court be filed under seal. *Id.* ¶ 12.

With regard to depositions specifically, the Confidentiality Order sets out clear procedures for designating deposition testimony as "Confidential," allowing the designation to be made on the record at the deposition or within 30 days after the transcript is prepared, during

which time the entire deposition is deemed "Confidential." *Id.* ¶ 6. And to the extent a party disagrees about whether certain material has legitimately been designated as "Confidential," the Confidentiality Order includes a process by which a party may challenge a confidentiality designation. *See id.* ¶ 10. Specifically, the Confidentiality Order requires that the parties "shall first try to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the objecting party may . . . object in writing to the party who has designated the document or information as 'confidential.' Either party may then move for an order adjudicating the designated status of such information or document." *Id.*

On August 7, 2013, Gawker served a deposition notice on plaintiff (attached hereto as Exhibit B.) Like the deposition notices Hogan had served on Gawker's witnesses, which indicated plaintiff's intent to videotape defendants' depositions, Gawker's notice to plaintiff apprised him that the deposition would be recorded both stenographically and by video. Hogan and his counsel then proceeded to take the videotaped deposition of Gawker's President, defendant Nick Denton; Gawker's Vice President of Operations, Scott Kidder (as Gawker's corporate designee); and gawker.com's former editor, defendant A.J. Daulerio. Although Denton and Daulerio have themselves been the subject of widespread media interest – which formed the basis of numerous questions at their depositions – they did not seek to prevent the depositions from being videotaped. Rather, in those instances where the testimony veered into subjects legitimately protected by the Confidentiality Order, the testimony was designated as confidential during the deposition – or will be within the thirty-day period after the transcripts were prepared.

Only after those videotaped depositions of defendants were completed did Hogan object to having any portion of *his* deposition recorded by video. Nor had he objected to the videotaped

deposition in his earlier Motion for a Protective Order, filed August 26, 2013, which addressed at length his deposition and that of his wife and ex-wife. Waiting until only a few weeks prior to depositions that were scheduled in July and noticed in August 2013, for the apparent purpose of completing defendants' videotaped depositions before objecting, is obviously improper, and counsel for Gawker therefore objected to this sequence of events. *See* Email correspondence between S. Berlin and C. Harder dated October 7-8, 2013 (attached hereto as Exhibit C). To the extent that Hogan's belated motion is purportedly based on the fact that Gawker operates websites, Gawker's counsel explained that this was not a proper basis for depriving a defendant of its ability to use videotaped deposition testimony at trial, and that in any event Hogan himself was now operating a hosting and web design company called Hostamania (apparently named after his wrestling moniker "Hulkamania"). Although Gawker's counsel advised that he was willing to discuss the matter in a meet and confer, *id.*, Hogan filed this motion less than one hour later. As discussed *infra*, Hogan now asks this Court to bar Gawker from videotaping his deposition because of some generalized, vague, and unfounded fear of embarrassment.

At bottom, rather than abiding by the terms of the Confidentiality Order his counsel negotiated, under which his deposition would be videotaped and sensitive portions designated as confidential – but ultimately available to Gawker if needed for use at trial – Hogan seeks to prevent such a record from being made in its entirety. Gawker submits that such relief is improper, and respectfully requests that his motion be denied.

ARGUMENT

I. Issues Relating to the Confidentiality of Discovery Materials Are Controlled by the Confidentiality Order.

The parties carefully negotiated and agreed to the Confidentiality Order specifically to govern circumstances – such as those at issue in Hogan's motion – in which a party wishes

certain material to be treated as confidential. The plain purpose of the Confidentiality Order is to provide clear, simple procedures for discovery dealing with information that a party may view as sensitive, including to limit its use and dissemination – without each such instance needing to be the subject of motions practice before this Court. As described *supra*, the Confidentiality Order permits parties to designate information as "Confidential" when it is produced, or in the case of depositions, as the testimony is given or within 30 days after the transcript is prepared. *See* Confidentiality Order ¶¶ 5-6. Recognizing that much of what is discussed at a deposition is not sensitive, the Confidentiality Order does not allow parties prospectively to designate all deposition testimony as confidential. Rather, the parties must wait until the testimony is offered so that designating counsel has a reasonable basis upon which to contend that the testimony concerns a sensitive subject. Moreover, the Confidentiality Order expressly provides that if portions of a video recording – or a standard transcript – of Hogan's deposition are designated confidential, and that designation is not successfully challenged, the testimony cannot be used for any purpose other than for this litigation, and, if it is filed with the Court, must be filed under seal.

In light of the existing Confidentiality Order, the instant motion is procedurally improper and premature and should be denied on this basis alone. Hogan should not be permitted to bypass the Confidentiality Order he negotiated and jointly presented to the Court for entry, particularly *after* he took defendants' videotaped depositions. The Court should not condone one party's attempt to undercut his opponents' reasonable expectation that they may rely upon a written agreement the parties negotiated and this Court entered as an Order. Accordingly, the Court should deny Hogan's motion (without prejudice to his litigating any later disagreement

over whether any testimony is legitimately designated as confidential pursuant to the terms of the Confidentiality Order).

II. Hogan's Motion Fails on the Merits.

Florida's discovery rules evince a liberal policy regarding the videotaping of depositions. Rule 1.310(b)(4) permits that, with proper notice,[1] "*any* deposition may be recorded by videotape without leave of the court." Fla. R. Civ. P. 1.310(b)(4). *See also Roessler v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 So. 2d 376, 377 (Fla. 2d DCA 1999) ("Florida Rule of Civil Procedure 1.310(b)(4) allows *any* deposition to be recorded by videotape.") (emphasis added); *Ross v. Hobbs*, 705 So. 2d 955, 956 (Fla. 2d DCA 1998) (confirming that Florida law permits parties to video record depositions as of right). Hogan – who, as the party seeking a protective order must show "good cause" for its entry, *see* Fla. R. Civ. P. 1.280(c); *Towers v. City of Longwood*, 960 So. 2d 845, 848 (Fla. 5th DCA 2007) ("The burden of demonstrating good cause for the issuance of . . . a protective order . . . falls upon the party seeking that relief.") – has not demonstrated that simply *creating* a video recording of his deposition will cause him injury sufficient to warrant subjugating Gawker's presumptive right to video record it.

Hogan argues that a protective order preventing Gawker from video recording the deposition in the first instance or, in the alternative, sealing the video, is necessary because Gawker, as a media organization, hypothetically might disseminate the video, which distribution (Hogan asserts) would invade his privacy. The implication that a media defendant somehow has less right to videotape the deposition of its opponent in litigation is without merit. News organizations, including Gawker, regularly video record depositions for use in litigation. Hogan

[1] Hogan does not challenge the notice he received, and indeed Gawker provided ample advance notice that it intended to videotape his deposition.

offers no basis for holding media companies to a different standard than all other litigants in determining their rights during discovery.

Even if Gawker had made statements suggesting it would disseminate the video (which it has not), a protective order preventing its recording or sealing the video still would not be warranted. In *Condit v. Dunne*, 225 F.R.D. 113 (S.D.N.Y. 2004), the defendant was sued for defamation after implicating the plaintiff Congressman, Gary Condit, in the disappearance and death of a young female intern with whom the Congressman had had an affair. The defendant sat for videotaped deposition, but sought to seal the videotape of that deposition because the plaintiff's attorney had implied that he would disseminate the video to the news media. The court rejected his request. Noting a line of cases in which courts have "refused to apply a protective order" sealing videotape deposition recordings "[d]espite . . . *guarantee[s]* of *imminent* public dissemination," *id.* at 117 (emphases added), the court concluded that the mere possibility that the plaintiff's attorney would distribute the video to the press did not warrant its sealing, *id.* The court also ruled that defendant's fear that the media would misrepresent his testimony "through the use of sound bites" and thereby embarrass him, "does not warrant a protective order." *Id.* at 118. *See also Flaherty v. Seroussi*, 209 F.R.D. 295 (N.D.N.Y. 2001) (denying protective order limiting dissemination of mayor's videotaped deposition even though the opposing party repeatedly had acknowledged her intent to publicize the deposition and use it to humiliate the mayor).

The two cases Hogan cites offer him no harbor. In *Paisley Park Enterprises, Inc. v. Uptown Productions*, 54 F. Supp. 2d 347 (S.D.N.Y. 1999), for example, the court sealed a deposition video because the defendants' central purpose in seeking to record the deposition was commercial gain. *Id.* at 348 (noting defendants' intent to use the videotape "to generate

notoriety for themselves and their business ventures"). The defendants maintained a website whose *principal focus* was the subject litigation, and where they had posted pleadings, deposition notices, and press releases throughout the litigation. *Id. See also Pia v. Supernova Media, Inc.*, 275 F.R.D. 559, 561 (D. Utah. 2011) (distinguishing *Paisley Park* on this basis, among others, and denying protective order despite the fact that dissemination of the videotaped deposition might cause the deponent "some level of discomfort").

Similarly, *Forrest v. Citi Residential Lending, Inc.*, 73 So. 3d 269, 278 (Fla. 2d DCA 2011) (cited in plaintiff's motion at 3), concerned video deposition excerpts which the plaintiffs had posted on YouTube *after assuring the court that they would not*. *Id.* at 272-73. Moreover, *Forrest* involved private citizens with no public persona – people who, unlike Hulk Hogan, had not become wealthy by being in the public eye. *See, e.g.*, Am. Compl. ¶¶ 32-33 (alleging that Hogan has developed a "career as a professional champion wrestler, motion picture actor, and television personality," as well as "his universal goodwill, reputation, and brand").

Finally, Hogan has provided no support for his assertion that the video recording or any hypothetical publication of it could embarrass him – much less cause him significant harm. His submission falls far short of meeting his burden in that regard. *Cf. Jackson v. Jackson*, 2002 WL 32301735, at *3 (Ill. Cir. Ct. June 19, 2002) (granting motion to compel video recording of depositions in case between Rev. Jesse Jackson and his son, Jesse Jackson, Jr., where the opposing parties failed to submit affidavits or "specifics" "as to [they] would be harmed"). Hogan has not demonstrated – nor could he – that the every question asked of him would, if disseminated, invade his privacy or cause him embarrassment.

The only case Hogan cites in support of this aspect of argument, *Westmoreland v. CBS, Inc.*, 584 F. Supp. 1206, 1213 (D.D.C. 1984), *rev'd in part*, 770 F.2d 1168 (D.C. Cir. 1985),

involved entirely different circumstances. At the time of the deposition at issue in *Westmoreland*, the Federal Rules reflected a presumption *against* videotaping depositions, and a party seeking to record a deposition by means other than traditional stenography was required to secure permission from the court. *See id.* at 1211 & n.7 ("The history of Fed. R. Civ. P. 30(b)(4) indicates that the initial burden is upon CBS to apply for an order in advance to record the deposition 'by other than stenographic means,' and not upon [the deponent] to seek a protective order under Rule 30(d) against it."); *cf. also Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867, 870 (Fla. 1st DCA. 1979) (explaining that the Florida rules do not reflect the same presumption against video recording depositions as was reflected in the prior Federal Rules). Moreover, in *Westmoreland*, the deposition at issue was of the former Director the CIA during the Vietnam War, in which he was to be questioned about highly sensitive national-security-related issues. The deposition therefore implicated top-secret issues of national and international import, justifying the court's particular reticence to permit video recording. These extraordinary national security implications obviously are not present here. Hogan cites no authority in which a court – much less a Florida court applying the state's presumption in favor of videotaping depositions – has prevented a party from video recording the deposition of the opposing party.[2]

Even if Hogan had shown that he would suffer *some* embarrassment were the video of the deposition to be disseminated, "mere embarrassment, without a demonstration that the

[2] The closest Hogan comes is his citation to *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. 3d DCA 1985), *aff'd sub nom. Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533 (Fla. 1987), for the proposition that "protective orders are appropriate to regulate discovery inquiring into areas of constitutionally protected privacy." Motion for Prot. Order at 2. In *Rasmussen*, the court reviewed an order directing a blood bank which was not a party to the litigation to produce names and addresses of 51 volunteer blood donors. The court was concerned with protecting sensitive healthcare records of scores of people attenuated from the suit before it. Here, it is plaintiff – the very person who initiated the action – who now asks the Court to prevent Gawker from videotaping a deposition, in which much of the testimony is likely to involve facts that Hogan himself has discussed widely and in depth in a panoply of media appearances spanning many years.

embarrassment will be *particularly serious or substantial*, is not enough to demonstrate good cause for a protective order." *Morrow v. City of Tenaha*, 77 Fed. R. Serv. 3d 966, 2010 WL 3927969, at *3 (E.D. Tex. Oct. 5, 2010) (emphasis added). *See also U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2013 WL 1233699, at *1 (M.D. Fla. Mar. 27, 2013) ("the mere fact that [a court's refusal to seal portions of a deposition transcript] may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal" them); *United States v. Menominee Tribal Enters.*, 2008 WL 2273285, at *7 (E.D. Wis. June 2, 2008) (denying motion to prevent party from posting discovery materials, including deposition videos, on website where the moving party "assert[ed] only generalized concerns" regarding the harms that publication of the materials could cause); *Padberg v. McGrath-McKechnie*, 2005 WL 5190385, at *2 (E.D.N.Y. Apr. 27, 2005) ("the mere fact that some level of discomfort, or even embarrassment, may result . . . is not in and of itself sufficient to establish good cause to support the issuance of protective order") (brackets and quotation marks omitted). Hogan's meager showing does not come within striking distance of this high bar.

CONCLUSION

This Court should deny plaintiff's motion because (a) the relief Hogan seeks is governed by the Confidentiality Order already in place; (b) he has not otherwise demonstrated good cause to overcome the presumption that depositions may be videotaped as a matter of right; and (c) he proceeded to take videotaped depositions of defendants before raising this objection. For each of the foregoing reasons, the Court should deny plaintiff's second motion for a protective order.

Dated: October 18, 2013

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October 2013, I caused a true and correct copy of the foregoing to be served electronically upon the following counsel of record at their respective email addresses via the Florida Courts E-Filing Portal:

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