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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
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**PLAINTIFF TERRY GENE BOLLEA'S REPLY IN SUPPORT OF FIRST MOTION FOR PROTECTIVE ORDER**

## I. INTRODUCTION

Gawker Media and Daulerio want to make this case about any subject other than the actual subject of the case, namely: whether they had the right to publish a secretly created video of Plaintiff Terry Bollea fully naked and engaged in private sexual relations in a private bedroom, without his knowledge or permission, and a narrative description of Bollea's genitals and Bollea having sexual intercourse, and Bollea's damages regarding same. Accordingly, the coordinated discovery that Gawker Media and Daulerio have served, and the depositions they wish to take, are directed towards embarrassing Bollea, besmirching his character, forcing him to expose his private affairs, driving up his litigation costs, and punishing him for bringing this lawsuit. Bollea's motion for protective order is an attempt to bring sanity and efficiency to this

litigation, to streamline the issues, and to prevent Gawker Media and Daulerio from putting Bollea's private life on trial. The motion for protective order therefore should be granted.

## II. ARGUMENT

### A. The Fact That the Parties Stipulated To a Standard Protective Order Does Not Waive Bollea's Right To Object To Discovery of Private Matters That He Should Not Be Required To Disclose Even Under a Confidentiality Stipulation.

Gawker Media and Daulerio argue that because a stipulated protective order has been negotiated, Bollea cannot interpose any privacy objections to discovery. This position is nonsensical. Stipulated protective orders obviously serve an important purpose in litigation—sometimes private and confidential matters are directly relevant to the claims in the action, and the procedure for designating documents or testimony as confidential facilitates discovery. However, as set forth in Bollea's moving papers, the Florida Constitution protects the right to privacy, Fla. Const. Art. 1 § 23, and imposes a heightened burden before there can be **any** discovery of private matters, *South Florida Blood Service, Inc. v. Rasmussen,* 467 So.2d 798, 801 (Fla. 3d DCA 1985). "[T]he party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information." *Higgs v. Kampgrounds of America*, 526 So.2d 980, 981 (Fla. 3d DCA 1988) (reversing order compelling disclosure of taxpayer's private financial information). This is separate and apart from the issue of limiting the **use** of private information disclosed in discovery once it is produced, which is the purpose of stipulated protective orders. See Fla. R. Civ. P. 1.280(c) (granting courts discretion to enter orders precluding discovery from taking place, as well as placing conditions on discovery).

Gawker Media and Daulerio argue that Bollea somehow acted improperly by not raising the issue of a protective order limiting discovery into Bollea's sex life and private financial affairs as part of the process of negotiating the confidentiality stipulation. However, this is

completely empty formalism: given that Gawker Media and Daulerio have opposed this motion **and** moved to compel on their written discovery, there is no basis to believe that they would have agreed to insert substantive limits into the protective order. Nor can Gawker Media or Daulerio identify any statement or conduct by Bollea that would lead any reasonable litigant to believe that by stipulating to a procedure for the designation of information as confidential, Bollea was waiving any right to object to discovery on privacy grounds. *See Taylor v. Kenco Chemical & Manufacturing Co.*, 465 So.2d 581, 587 (Fla. 1st DCA 1985) ("The essential elements of waiver are (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right.").

The cases cited by Gawker Media and Daulerio are not to the contrary. *Westchester General Hospital, Inc. v. Ramos*, 754 So.2d 838, 840 (Fla. 3d DCA 2000), specifically stated that the trial court was **not** requiring production of sensitive financial information such as financial statements or documents; rather, the Court of Appeal simply noted that if anything sensitive **was** contained in the relevant documents that were being produced, they could be marked confidential. *Homeward Residential, Inc. v. Rico*, 110 So.3d 470, 471 n. 1(Fla. 4th DCA 2013), a one paragraph denial of certiorari review, holds that the party seeking certiorari review of an order compelling discovery of confidential financial information failed to meet his burden of showing that the order would cause substantial harm. The court's one-sentence discussion of the confidentiality stipulation is dicta. *Laser Spine Institute, LLC v. Makanast*, 69 So.3d 1045, 1046 (Fla. 2d DCA 2011), contains no discussion of why the discovery of the petitioner's trade secrets was proper (the only analysis is on the issue of whether the petitioner is entitled to a stay of discovery until a confidentiality stipulation is reached) and therefore stands only for the proposition that where private information is directly relevant to the case, it can be disclosed

once a confidentiality stipulation is agreed to (a proposition that Bollea does not contest). Finally, in *Columbia Hospital (Palm Beaches) Ltd. v. Hasson*, 33 So.3d 148, 151 (Fla. 4th DCA 2010), the defendants established "reasonable necessity" (the standard for obtaining disclosure of a trade secret) for learning the amount a hospital typically charged for emergency treatment where the reasonableness of the amount billed was at issue, and thus were permitted to take discovery once a confidentiality stipulation was in place. Nothing in *Hasson* holds that a confidentiality stipulation precludes a trial court from denying discovery outright on privacy grounds; indeed, presumably, if the court had ruled that the defendants had not shown "reasonable necessity", the discovery would have been denied despite the fact that a confidentiality stipulation could be negotiated and filed.

**B. Bollea's Private Sex Life, Other Than Specific Facts Relating to the Encounter Depicted in the Sex Tape Published By Gawker Media, Is Not Discoverable.**

Gawker Media and Daulerio's arguments as to why they should be able to take extensive, limitless discovery of Bollea's sex life are without merit:

First, Gawker Media's and Daulerio's contention that Bollea has opened the door to examination of his sex life by propounding requests to Heather Clem that related to sex is without merit. Bollea's discovery requests to Heather Clem are limited to inquiries regarding how the Sex Tape came to be recorded and disseminated. Thus, Bollea has asked Ms. Clem to disclose her practices regarding recording of sexual activities. These limited questions do not waive Bollea's objections to Gawker Media's and Daulerio's broad discovery requests regarding Bollea's private life.[1]

Second, Gawker Media and Daulerio argue that their First Amendment defense centers

[1]In any event, Gawker Media's and Daulerio's argument amounts to nothing more than a hypocrisy charge, not a legal argument. Gawker Media and Daulerio cite no authority that a party waives the right to seek a protective order regarding discovery of private matters merely because that party's own discovery requests are allegedly overbroad.

around the claim that the publication of the Sex Tape and Sex Narrative was a commentary on Bollea's sex life, alleged hypocrisy, and extramarital affairs, and that this means they are entitled to extensive discovery of Bollea's private life. Bollea has shown in other proceedings before this Court that none of these arguments justify publishing explicit contents or details from a sex tape (as opposed to simply reporting on its existence); however, it is enough in this proceeding to simply note that **Gawker Media and Daulerio do not need any of the evidence that they seek to make this argument**. Gawker Media and Daulerio can still make their argument that the publication of the Sex Tape and Sex Narrative was protected as legitimate commentary on Bollea's sex life whether Bollea had zero affairs with women or 1,000. Indeed, Gawker Media and Daulerio **will** make this argument anyway whether or not they are permitted to take this discovery and whatever the discovery discloses, as the argument turns **not** on whatever Bollea did in his sex life but rather on whether the content of what Gawker Media published is constitutionally protected as a matter of public concern. Gawker Media and Daulerio are simply using a legal argument that they are going to make anyway and which does not actually depend on Bollea's conduct as an excuse to dig through Bollea's private life in an attempt to embarrass him because he filed this lawsuit. They should not be permitted to do this.

Nor is Bollea's alleged hypocrisy, and alleged failure to live up to his public pronouncements, relevant to this case. Unlike, say, a case involving the unauthorized use of a celebrity's name or likeness in a product advertisement (where the celebrity's unpopularity and inability to obtain commercial endorsements would be relevant to the damages claimed), the popularity of a sex tape does not depend on whether a celebrity is viewed positively or negatively. The mere fact that the celebrity is famous makes the sex tape valuable. [2]

[2]Gawker Media and Daulerio cite Judge Whittemore's order in the federal case between Bollea and Gawker Media; however, this Court has already rejected Gawker Media's collateral

Additionally, the fact that Bollea has given interviews where he has discussed sex is not a sufficient justification for extensive discovery of his private life. *Tylo v. Superior Court*, 64 Cal. Rptr. 2d 731, 737 (Cal. App. 1997). Gawker Media and Daulerio attempt to distinguish *Tylo* as a pregnancy discrimination case. However, the central holding of *Tylo* is that an actress / celebrity does not waive her privacy rights (thereby making intrusive discovery questions fair game) just because she grants an interview to some media outlet and discusses her sex life. That holding is just as applicable in the area of privacy litigation.

*Condit v. Dunne*, 225 F.R.D. 100 (S.D.N.Y. 2004), cited by Gawker Media and Daulerio, is distinguishable. *Condit* was a defamation case. Thus, the **truth** of what was published, and not simply its invasive nature, was at issue, and this can sometimes justify intrusive discovery that is not permissible in a privacy case. For instance, if a celebrity sued Gawker Media for defamation over a report that he had an affair, parts of his sex life (including whether he had affairs) could be discoverable. However, Bollea has not contended in this litigation that Gawker Media's Sex Narrative was false or that the Sex Tape was a fake; he contends that Gawker Media invaded his privacy by publishing them. *Condit* is very clear that even in the defamation context, discovery of the plaintiff's sex life is limited to information of direct relevance to the claim asserted: "[A]ny inquiry on discovery into Condit's sexual relationships is limited to information relevant to Dunne's possible defense of substantial truth, mitigation of damages, and impeachment as to the truthfulness of plaintiff. To be perfectly clear and allay plaintiff's fears of overly salacious discovery, no fishing expeditions will be tolerated by this Court, nor by Magistrate Judge Ellis who will supervise the parties' depositions." *Id.* at 111. The holding of *Condit* supports Bollea's claim that fishing expeditions into his sex life are impermissible.

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estoppel arguments, and in any event Judge Whittemore was ruling on what he viewed to be the probable validity of Gawker Media's First Amendment claim. Nothing in Judge Whittemore's ruling endorses extensive discovery into Bollea's private sex life.

Gawker Media and Daulerio further argue that because Bollea must prove that Gawker Media's conduct was "offensive" to establish an invasion of privacy, Gawker Media and Daulerio should be permitted to take discovery Bollea's sex life to show that he was not really "offended" by discussions about it. This is a non sequitur. Bollea is not arguing that any public discussion whatsoever of his sex life is tortious; he is arguing that publishing an explicit clandestinely-recorded sex tape without permission is offensive. It does not follow that just because a celebrity might discuss aspects of his private life in interviews, this means that he or she can be secretly recorded having sex and have the tape posted on the Internet.

Finally, Gawker Media and Daulerio argue that they should be able take discovery of Bollea's private sex life to prove that he lied about sex, which they then intend to use to impeach Bollea at trial. However, Gawker Media and Daulerio cite no authority that a litigant's alleged lies about private sexual activity are discoverable for impeachment purposes, and this sort of impeachment on collateral matters is inadmissible under Florida law. *See, e.g., Foster v. State*, 869 So.2d 743, 745 (Fla. 2d DCA 2004) ("Generally, impeachment on a collateral issue is impermissible.").

### C. Bollea's Medical Records And Mental Health History Are Not Discoverable.

Bollea has made a very straightforward claim for emotional distress damages—that the publication of a recording of a private sexual encounter taped without the person's knowledge would cause **any** reasonable person to suffer emotional distress. Bollea is not claiming that he went to the hospital, or had to endure extensive psychiatric treatment, or anything of the sort.

There is no legal basis for allowing extensive discovery of a plaintiff's entire medical history simply because he is asserting damages resulting from conduct that would cause **any** reasonable person to suffer emotional distress. Bollea is not putting his entire medical history at issue; he is simply asking that the jury be allowed to consider that he suffered emotional distress

that is reasonable under the circumstances. This is exactly the situation that the "garden variety emotional distress" doctrine addresses. *See Olges v. Dougherty*, 856 So.2d 6, 12 (Fla. 1st DCA 2003) (citing cases).[3]

Gawker Media and Daulerio argue that *Olges* supports its position. However, while the plaintiff in *Olges* did drop his separate mental anguish claim, the Court made clear that garden variety emotional distress claims do not require an invasive examination of the plaintiff's mental state, citing with approval *Bjerke v. Nash Finch Co.*, 2000 WL 33339658 at *1 (D.N.D. Feb. 1), for that proposition. *Bjerke* rejected a motion for a mental examination of a plaintiff in an employment discrimination case: "Plaintiff does not intend to offer expert testimony, since her claimed emotional distress is a general loss of self esteem rather than a serious mental or psychiatric injury. She no longer makes any separate claim for infliction of emotional distress; it is simply a component of her compensatory damages for discriminatory treatment. Under these circumstances, defendant has failed to make a showing of good cause and a mental examination is not warranted." *Id.* Like the plaintiff in *Bjerke*, Bollea is merely seeking damages for general emotional distress, not a serious psychiatric injury, caused by an independently tortious act. He has not placed his mental health at issue in this litigation.

The cases cited by Gawker Media and Daulerio are distinguishable. *Nelson v Womble*, 657 So.2d 1221, 1222-23 (Fla. 5th DCA 1995), involved two plaintiffs seeking emotional distress arising out of a personal injury claim who had sought care from a psychiatrist as a result

[3]Gawker Media's and Daulerio's argument that they should have the right to challenge Bollea's contention by tracking all of the possible causes and symptoms of emotional distress in Bollea's life is without merit. Bollea will argue to the trier of fact that he suffered the same emotional distress that **any** reasonable person would suffer if a recording and explicit description of a private sexual encounter was posted on the Internet and viewed by millions of people. This argument is simply not dependent on what Bollea's mental state was before the Sex Tape was published or what other factors in his life might be causing him emotional distress.

of their injuries. Unlike the plaintiffs in *Nelson*, Bollea has not sought care from any mental health professional and is merely claiming that the nature of Gawker Media's conduct would cause any reasonable person to suffer emotional distress.[4] The brief opinion in *Scheff v. Mayo*, 645 So.2d 181, 182 (Fla. 3d DCA 1994), contains little reasoning and merely rejects a claim of psychotherapist-patient privilege by a plaintiff claiming mental anguish. Bollea has not sought care from a psychotherapist and *Scheff* thus has no application here.[5] *Wheeler v. City of Orlando*, 2007 WL 4247889 at *3 (M.D. Fla. Nov. 30), applies federal law and, like *Scheff*, merely holds that there is no psychotherapist-patient privilege in actions for intentional infliction of emotional distress, a non-issue here because Bollea has not asserted one. Gawker Media and Daulerio misstate the holding of *Chase v. Nova Southeastern University, Inc.*, 2012 WL 1936082 at *4 (S.D. Fla. May 29), which does not hold that merely pleading a claim for intentional infliction of emotional distress puts a plaintiff's mental state at issue, but rather holds that this is one factor in a five-pronged balancing test.[6]

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[4]*Nelson* was limited by *Partner-Brown v. Bornstein*, 734 So.2d 555, 556 (Fla. 5th DCA 1999), which held that despite *Nelson*, plaintiffs who merely plead a loss of enjoyment of life as a result of a personal injury do not place their mental states at issue in the case.

[5]*Arzola v. Reigosa*, 534 So.2d 883, 883 (Fla. 3d DCA 1988) also concerns the psychotherapist-patient privilege and is identical to *Scheff*.

Importantly, the Colorado Supreme Court reviewed the holdings of *Scheff* and other cases and determined that making generic claims for mental anguish that did not exceed the suffering an ordinary person would likely experience under the circumstances does not put the plaintiff's mental state at issue. *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999).

[6]The five prongs are "(1) stating a tort claim for intentional or negligent infliction of emotional distress; (2) alleging a specific mental or psychiatric injury or disorder; (3) alleging unusually severe emotional distress; (4) intending to offer expert testimony to support a claim for emotional distress damages; and/or (5) conceding that his or her mental condition is in controversy". *Chase*, 2012 WL [redacted] at *4 (holding that claim that defendant discriminated against plaintiff on the ground of mental disability did not put plaintiff's mental health at issue). Of the five factors set forth in *Chase*, all of them except for pleading an IIED claim militate in favor of Bollea's position that his mental state is not at issue.

Gawker Media's and Daulerio's argument that a garden variety emotional distress claim

### D. The Deposition of Bollea Should Be Limited To One Seven-Hour Day.

Bollea does not deny that counsel for Gawker Media and Daulerio, and counsel for Heather Clem, are entitled to take his deposition. However, Gawker Media's and Daulerio's opposition to this motion and their motion to compel show that they are dead-set on punishing Bollea for bringing this suit and turning his deposition into a free-for-all of questioning about his private sex life, marriages, mental health and medical history, and finances, rather than the issues of this case. Imposing a presumptive time limit on Bollea's deposition will ensure that the lawyers taking the deposition stay on topic.

The **actual** issues in this case will be unlikely to take up anywhere near seven hours of deposition time. These issues include (1) Bollea's lack of knowledge that he was being recorded; (2) Bollea's lack of consent to the recording and the dissemination of the recording; (3) Bollea's emotional distress; and (4) any lost business opportunities that Bollea is claiming as damages in this litigation. While Gawker Media and Daulerio are correct that Heather Clem's counsel also will have the right to ask questions, there is no reason why both lawyers will need to re-cover the same ground at the deposition, as opposed to the second questioner merely following up where needed.

Gawker Media's and Daulerio's other arguments against a time limitation are without merit. First, Bollea deposed Gawker Media's representatives, and each deposition took only one day (seven hours or less). This speaks volumes because it is **Gawker Media's conduct** that is at

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cannot give rise to a substantial damages award is entirely premature. Bollea is entitled to present his claim to the trier of fact which can fix a proper valuation for the distress that a reasonable person would suffer as a result of the posting of a private, clandestinely recorded sex tape on the Internet. If Gawker Media and Daulerio contend that the damages awarded are excessive, they can make this argument in a post-verdict motion. Gawker Media's and Daulerio's attempt to pretermit the amount of damages that Bollea may recover on his emotional distress claim should be rejected by the Court.

the center of this case. Gawker Media and its employees obtained, edited and posted the Sex Tape and wrote and posted the Sex Narrative at issue.[7] Moreover, the private lives of Gawker Media employees are not being put at issue. Bollea's counsel did not attempt to embarrass them with questions about their private sex lives, whereas that is very much a danger if the Bollea deposition is not strictly time-limited.

Finally, Gawker Media and Daulerio claim that it has been difficult to schedule depositions in this case due to logistical issues related to the travel schedules of parties and counsel, and they argue that should further questioning of Bollea be needed, there may be difficulties in arranging such questioning. This argument is both inaccurate and grossly premature. Gawker Media and Daulerio have not established that they will be unable to complete Bollea's deposition in seven hours, and Bollea has not violated any court order or obstructed his deposition. Were Bollea to do so, the Court would have the power to order his appearance at a second session of his deposition, and such an order would be effective to compel his appearance.

### E. Jennifer Bollea's Deposition Should Be Limited to Two Hours and Gawker Media Should Not Be Permitted to Depose Linda Bollea.

Bollea has conceded that Jennifer, his current wife, has information regarding the emotional distress he suffered as a result of the posting of the Sex Tape and Sex Narrative. There is no reason examination on those topics (including the harm to his marriage) is likely to take longer than two hours.

Gawker Media and Daulerio argue that Jennifer has all sorts of other relevant evidence in this action, but in fact, none of it is discoverable. For instance, Gawker Media and Daulerio argue that Jennifer has evidence about Bollea's public image and brand, efforts at maintaining

[7]Gawker Media has designated 11 different employees or managers as corporate designees in this case.

privacy, relationship with Bubba Clem, and public appearances. However, Jennifer is not an expert witness and there is no reason to believe she has a basis to give admissible opinion testimony on the value of her husband's brand or whether he has legally waived his privacy rights. Additionally, any information about any of these topics that she obtained through communications with her husband is privileged under Florida law and non-discoverable anyway. Fla. Stat. § 90.504(1).

The danger of permitting a longer deposition of Jennifer is quite high: Gawker Media and Daulerio should not be permitted to harass and embarrass a woman who had nothing to do with her husband's encounter with Heather Clem (which occurred before they were married) by extensively questioning her about her husband's sex life. Two hours is enough to ask her about the emotional distress her husband suffered and the damage that the Sex Tape and Sex Narrative caused to the marriage.

With respect to Bollea's ex-wife Linda, she has no relevant evidence, as she had long since divorced Bollea at the time the Sex Tape and Sex Narrative were published. Gawker Media and Daulerio are explicit that they intend to question her regarding Bollea's sex life and alleged adultery, specifically identifying the fact that she wrote a book on that subject as a justification for allowing a deposition.[8]

Outrageously, Gawker Media also insinuates, without citation to any evidence whatsoever, that "plaintiff may believe that Linda Bollea has information about how the Video at issue here came to be disseminated". *Opposition* at 14. This scabrous allegation, made without any support, has no place in a court filing, and is at any rate insufficient to justify the discovery

[8]Gawker Media and Daulerio also say they will question her regarding the value of her ex-husband's brand, but as she is not an expert witness and the information that she did obtain about her ex-husband's brand was likely obtained through confidential communications with her husband covered by the spousal privilege, there is no basis for Gawker Media and Daulerio to ask her questions about this subject either.

Gawker Media and Daulerio seek.

Gawker Media argues that Bollea has no standing to object to the subpoena of his ex-wife. However, Bollea has invoked a different procedure—under Fla. R. Civ. P. 1.280(c), he **does** have standing to move for an order that a form of discovery not take place. *See, e.g., Jerry's South, Inc. v. Morran*, 582 So.2d 803, 804-05 (Fla. 1st DCA 1991) (reversing order denying motion brought by party to case for protective order that third party not be deposed and stating that protective order should have been granted); *Peisach v. Antuna*, 539 So.2d 544, 546-47 (Fla. 3d DCA 1989) (reversing order denying wife's motion for protective order in child support enforcement case where husband sought to depose wife's gynecologists). Bollea has moved for a protective order on grounds of privacy and relevance. The cases cited by Gawker Media and Daulerio do not hold that this procedure is not available. *Tootle v. Seaboard Coast Line Railroad Co.*, 447 So.2d 1009, 1010 (Fla. 5th DCA 1984), holds that under **federal** law a litigant had no standing to challenge a deposition subpoena directed to her psychotherapist. It says nothing about moving for a protective order. *Engel v. Rigot*, 434 So.2d 954, 957 (Fla. 3d DCA 1983) (Pearson, J., concurring), is a concurring opinion and is not controlling authority; it does not say anything about moving for a protective order, and in any event does not even support Gawker Media's and Daulerio's characterization as to objections to a subpoena, because it carves out an exception to the lack-of-standing rule where the party "claims some personal right or privilege." Bollea, herein, is asserting his constitutional right to privacy as a basis to object to Linda's deposition.

## III. CONCLUSION

For the foregoing reasons and those stated in the moving papers, Bollea respectfully requests that the Court grant his motion for a protective order.

DATED: October 24, 2013

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email this 24th day of October, 2013 to the following:

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