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.
_____/

REPLY BRIEF IN SUPPORT OF GAWKER MEDIA, LLC'S MOTION TO OVERRULE OBJECTIONS TO THIRD-PARTY SUBPOENAS AND OPPOSITION TO MOTIONS FOR PROTECTIVE ORDERS

The subpoenas that defendant Gawker Media, LLC seeks to serve on third-party witnesses are reasonably calculated to discover admissible evidence about plaintiff's damages. The requests in those subpoenas are not foreclosed by Judge Campbell's earlier ruling. Rather, they are precisely the kind of discovery that ruling contemplated and reflect exactly the kind of evidence on market value and emotional distress that courts have held is admissible.

ARGUMENT

I. GAWKER'S REQUESTS FOR FINANCIAL INFORMATION ARE PROPER.

Plaintiff's position regarding the financial information Gawker seeks through the subpoenas is summed up in one sentence on the first page of his Opposition: Gawker's "requests are in **direct violation of Judge Campbell's February 26, 2014 Order**." Opp. 1. That position is not supported by the record leading to that order, the nature of the requests now before the Court, or the law governing damages. Indeed, and with all due respect, if plaintiff's position prevails, and he is allowed to ask a jury to award him the "reasonable value of a publicly

released sex tape featuring Hulk Hogan," after Gawker has been prohibited from taking discovery of facts bearing on the market value of plaintiff's appearances, endorsements, and celebrity, which bear directly on the damages plaintiff is seeking, any subsequent award would not be permitted to stand on appeal.

1. **Judge Campbell Did Not Foreclose The Discovery Gawker Seeks.** Plaintiff has built his Opposition on two passages snipped from prior briefs, a few lines plucked from a 100-plus page transcript, and just a small portion of what Judge Campbell actually said at an earlier hearing. *See, e.g.*, Opp. 8 (quoting the single line mentioning "market value" in plaintiff's opposition to Gawker's motion to compel); Opp. 2-3, 8 (citing two lines of transcript mentioning "market value"); Opp. 9 (providing a twenty-one word excerpt of Judge Campbell's many statements at hearing). A more comprehensive look at the dispute over the prior discovery requests and the resolution of that dispute provides a far different picture.

Early in the litigation, Gawker served very general discovery asking plaintiff for an array of financial information that would establish his net worth, both before and after the Gawker posting. *See* Opp. 6-7. Those requests were based on allegations in plaintiff's complaint stating that his "commercial value and brand have been substantially harmed" and "substantially diminished" as a result of the posting. *E.g.*, Am. Compl. ¶¶ 31, 33. Plaintiff objected to the requests on the grounds that they were overly broad and invaded his privacy.[1] Gawker then moved to compel, arguing solely that its requests were based on those allegations from plaintiff's complaint. *See* Opp. Ex. E.[2] At that point, plaintiff had not committed to any damages theory.

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[1] *See, e.g.*, Opp. Ex. F at 11 (complaining that Gawker "essentially [is] arguing that Bollea has no financial privacy whatsoever"); Oct. 29, 2013 Hrg. Tr. 11:6-11 (explaining that what plaintiff is "seeking to preclude are – general finances.").

[2] *See, e.g.*, Opp. 8 (quoting motion to compel, which argued that "'plaintiff is claiming that Gawker harmed his ability to exploit his name and image commercially, or to benefit

As Gawker explained at the hearing on its motion, it had served an interrogatory asking plaintiff to "tell us what your theories of damages are," but "we don't have an answer to that question." Oct. 29, 2013 Hrg. Tr. 28:9-13. (A full copy of the transcript is attached hereto as Appendix 1 and cited herein as "Hrg. Tr.")

At that hearing, plaintiff's counsel disclaimed the damages theories articulated in the complaint and acknowledged that Gawker was pursuing discovery based on theories that plaintiff now intended to forego: "Mr. Berlin talked a lot about – it sounds like he thinks that now our damages theory is that Hulk Hogan's career was damaged because of the sex tape being posted and we are seeking damages because of the harm to his career. That's not what we're seeking." Hrg. Tr. 65:21 – 66:2. Judge Campbell, however, understood Gawker's plight and responded to plaintiff's counsel: "But, see, they don't know." *Id.* 66:3; *see also id.* 14:6-7 ("[T]he time to let them know [plaintiff's damages theory] is now. We're doing the discovery now.").

Ultimately, in light of plaintiff's decision to disclaim the damages theories alleged in his complaint, Judge Campbell sustained his objections to requests seeking "financial records of the plaintiff, tax returns, whoever – the names of the people that prepare his taxes, any of those." *Id.* 91:21-23. After she rendered that decision, Gawker's counsel asked for guidance on "how we should prepare our case . . . , what that would look like for trial so that we can prepare and get the information we need, but not overstep the bounds of the Court's ruling." *Id.* 93:19-23. In response, Judge Campbell explained that "some of that is going to have to come up later on and maybe even more specific, because I think you mentioned a number of things today that I think

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economically through future business or employment opportunities'") (quoting Opp. Ex. E at 13); Hrg. Tr. 24:2 – 26:13 (explaining with respect to "economic damages, the complaint . . . talks about injury to the plaintiff's brand as a wrestler, as an actor, as a television personality" and then arguing that Gawker should be permitted to discover information about "how has the brand been affected"); Opp. Ex. E at 10 (arguing for discovery relevant to "claims of injury to his professional reputation, commercial value and his brand").

would be fair game for you to know, especially for purpose of trial." *Id.* 93:24 – 94:3. Judge Campbell further explained that if "they don't give you any of the information . . . they're not allowed to now bring it up during trial." *Id.* 94:12-14. The following exchange then took place:

> MR. BERLIN: . . . perhaps it's implicit in the Court's ruling, but I want to clarify this as well. There is an interrogatory – I think No. 12, but I may be mis-recalling that – that asked for the plaintiff to set forth his theories of damages. We have no meaningful answer to that. It would seem to me that the first step in going down the road that Your Honor just outlined would be to do that.
>
> THE COURT: I think that's a good idea.
>
> MR. BERLIN: Then we can bring the motion that you just described so that we're all on the same page and we won't have these problems.
>
> THE COURT: I think you're right. In interrogatory No. 12, it says, identify any and all damages purportedly suffered by you as a result of alleged actions by the Gawker defendant[s] and then explain with particularity the basis for your calculation of such alleged damages.

Id. 94:24 – 95:17. Consistent with this colloquy, the Court (1) ordered that "inquiry into . . . financial records . . . of Terry Bollea . . . is prohibited, absent further order of the court"; and (2) "consistent with the foregoing ruling," directed plaintiff to respond to an interrogatory "regarding the identity and basis of his damages claims." Mot. Ex. 16.

In sum, Judge Campbell contemplated that Gawker *would* be entitled to discovery relating to any damages plaintiff *is* seeking or plaintiff would *not* be able to present them at trial. She therefore laid out the following steps: Plaintiff would respond to Gawker's interrogatory and commit to a theory of damages. Gawker then would seek to take discovery tailored to plaintiff's stated damages theories. If there was a dispute, Gawker could bring a motion, and the Court would allow discovery on information that is "fair game" or would preclude plaintiff from seeking damages on that subject. That is exactly what has happened. Plaintiff responded to Gawker's interrogatory and declared that he is seeking the "reasonable value of a publicly released sex tape featuring Hulk Hogan." Mot. Ex. 1. Gawker then pursued the very course set

forth by Judge Campbell, first preparing subpoenas with specific requests targeted at discovering information bearing on plaintiff's refined damages theories and, after plaintiff objected, moving to enforce those subpoenas.[3]

2. **The Subpoenas Seek Information That Was Not Covered By Judge Campbell's Earlier Order.** Plaintiff's claim that Gawker's subpoenas seek the "exact documents" as its earlier discovery is wrong. Plaintiff's Opposition provides verbatim quotes of each of Gawker's earlier requests, but does not quote any of the requests in the subpoenas. *See* Opp. 6-7. As plaintiff notes, the earlier requests sought "documents concerning any employment"; "any contract or other agreement . . . for which you received compensation"; "all documents concerning the time and effort you have devoted to developing your career"; "all documents concerning your reputation, goodwill, and brand"; "your tax returns"; "all documents concerning your financial condition"; "any loan or mortgage application"; "all contracts . . . relating to the alleged 'commercial value' of your name, image, identity, and persona"; "the total amount of your gross annual income"; and "any and all accountant(s), bookkeeper(s), business

[3] Although the Opposition complains that "Gawker has failed to articulate any material change that would justify revisiting this issue," it overlooks that (1) plaintiff's interrogatory response belatedly setting out his damages theory is a "material change"; (2) Judge Campbell invited Gawker to pursue relevant discovery after he disclosed his damages theory; and (3) Gawker is not asking the Court to reconsider any prior ruling. Opp. 11. Even if Gawker's motion could be deemed a request for reconsideration, however, none of the cases cited by plaintiff would foreclose such a motion. Rather, they emphasize that a "trial court has inherent authority to reconsider any of its nonfinal rulings, and, if it deems it appropriate, to alter or retract them." *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997) (cited at Opp. 11); *see also Holloway v. State*, 792 So. 2d 588, 588 (Fla. 5th DCA 2001) (cited at Opp. 11) (denying motion for reconsideration of bail ruling as procedurally improper, but stating that "the denial is without prejudice to [the defendant] so that he can subsequently file a proper motion for modification"); *Coffman Realty, Inc. v. Tosohatchee Game Pres., Inc.*, 381 So. 2d 1164, 1167 (Fla. 5th DCA 1980) (affirming denial of petition for rehearing on summary judgment motion and holding only that "it is not *an abuse of discretion* for a trial judge to hold that an affidavit filed with a petition for rehearing is too late") (emphasis added).

attorney(s), and persons who prepared any tax form on your behalf" – all for the period from 2002 to the present. *Id.*

Nearly all of this information is *not* requested by the subpoenas Gawker now seeks to serve. Perhaps, that is why the Opposition does not quote a single subpoena request in arguing that they seek "the exact documents." The only possible overlap between those requests and the earlier discovery is that the subpoenas seek contracts and payments relating to plaintiff's appearances, endorsements, and licensing deals since 2011. *See* Mot. Ex. 17. That information is "fair game" because it is directly relevant to plaintiff's claim for damages for the market value of a sex tape featuring him. *See* Mot. ¶¶ 18-22; *infra* at 7-9.

Plaintiff similarly argues that Gawker is seeking "information from non-parties that was prohibited as to Mr. Bollea." Opp. 6. Leaving aside that plaintiff is misconstruing the scope of Judge Campbell's prior order, which covers only "*financial information . . . of Terry Bollea*," Mot. Ex. 16 (emphasis added), Gawker is not attempting to get information through the backdoor. Almost all the information Gawker seeks is held only by the third parties it would like to subpoena. For example, Gawker asks TNA and WWE for information about the profits and revenues they received from Hulk Hogan Videos, asks his business partners for their analysis of his market value, and asks plaintiff's agents for information about offers they have received and pitches they have made. *See* Mot. Ex. 17. Likewise, plaintiff is wrong in asserting that "Gawker has not sought to compel" similar "financial documents" from him. Opp. 3. Gawker has served plaintiff with a targeted set of interrogatories and document requests seeking information bearing on his damages theory and asking him for contracts and payment records that are encompassed by the subpoenas. Plaintiff sought an extension to respond to that discovery, which is now due on October 9.

3. **The Documents Gawker Seeks Are Relevant To Plaintiff's Damages Theory.**

Although plaintiff insists throughout his Opposition that the discovery Gawker seeks is not relevant to his damages theory, he is noticeably silent on what *is* relevant. Indeed, he has never provided any explanation of how the "reasonable value of a publicly released sex tape featuring Hulk Hogan" should be calculated. It was not in his briefing on the earlier motion to compel. *See* Opp. Ex. F. It was not in his argument at the hearing before Judge Campbell. *See generally* Hrg. Tr. It has not been in any of plaintiff's discovery responses, including his three amended responses to the interrogatory asking him to "explain with particularity that calculation of" his damages, which Judge Campbell already directed him to answer. Mot. Ex. 1. And, it is not in his Opposition brief.

Nor has plaintiff ever cited any cases to support his position that the value of prior authorized uses of a plaintiff's name or likeness is categorically irrelevant to assessing the value of an unauthorized use. In response to the Florida cases cited by Gawker demonstrating the opposite – *i.e.*, that such prior uses *are* relevant – plaintiff asserts only that those cases are "inapposite," suggesting that they addressed different damages theories. Opp. 12. He is wrong.[4]

In each of the cited cases, the plaintiff asserted a claim for misappropriation and sought as damages the value of the misappropriated use. And, in each case, evidence showing the value of authorized uses of the plaintiff's name and likeness was admitted at trial:

- In *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299 (M.D. Fla. 2010), the plaintiff filed suit for misappropriation because the defendant used her photograph in connection with a pornographic movie. As the Opposition notes, plaintiff

[4] To answer plaintiff's charge that "Gawker's arguments . . . misrepresent the legal authorities on which Gawker relies," Opp. 4, and for the Court's convenience, Gawker has attached copies of these three cases as Appendix 2 to this reply brief.

did seek "damages based on loss to her career." Opp. 12. But, the Opposition ignores that she also sought damages based on a lost "licensing fee." *Coton*, 740 F. Supp. 2d at 1311. In support of that theory of damages, the plaintiff offered evidence of fees she was paid for using her photos in mainstream books, which the Opposition also ignores. *Id.* at 1309. The only reason the court did not award that fee as a damage for misappropriation was because she had "already been compensated for the loss of a licensing fee in connection with her copyright infringement claim" and a second licensing fee award for the same use "would constitute an impermissible double recovery." *Id.* at 1311.

- In *Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990, 1002 (Fla. 4th DCA 2004), a famous baseball player sought "the royalty value of [his] name for [defendant's] uses" advertising interior design services. *Id.* At trial, each party presented evidence about what the player had been paid for authorized uses, including his "tax returns" and "past endorsement contracts," such as one with Reebok. *Id.* While the Opposition correctly notes the *Weinstein* opinion includes the phrase "what potentially could [the player] have lost in terms of potential for future endorsements," Opp. 12, that phrase was drawn from a single reference in testimony by the player's expert witness, *Weinstein*, 884 So. 2d at 1002. It did not reflect the player's actual theory of damages.

- In *Jackson v. Grupo Industrial Hotelero, S.A.*, 2009 WL 8634834, at *12 (S.D. Fla. April 29, 2009), a recording artist sought and won damages based on the "reasonable royalty for [defendants'] infringing use of his likeness" on a website advertising its nightclub. At trial, the artist presented evidence of his other endorsement contracts and licensing agreements. *See id.* at *4-5, *11.

Although the authorized uses in each of these cases were not "similar" to the unauthorized uses, the courts allowed evidence of their value to be presented at trial and considered that value in calculating damages. *E.g.*, *id.* at *11.

Here, just as in those cases, plaintiff seeks to recover the value of an unauthorized use of his professional name and image (*i.e.*, the "reasonable value of a publicly released sex tape featuring Hulk Hogan"). And, just as in those cases, evidence of the amount he has been paid for authorized uses is both discoverable and admissible. At the end of the day, plaintiff is free to argue that his endorsement deals are "not analogous" to Gawker's use, Opp. 13, but that argument addresses the weight of evidence. It should be directed to the finder of fact at trial. It is not a reason to block legitimate discovery.

II. RECORDS RELATING TO PLAINTIFF'S PUBLIC IMAGE ARE RELEVANT.

Plaintiff opposes Gawker's subpoena requests for records about his public image on four grounds, none of which has any merit.

1. Plaintiff first argues that these requests seek "the very financial documents and business agreements" covered by Judge Campbell's earlier ruling. Opp. 13. This argument, however, ignores what Gawker explicitly said in its motion: "Even if that ruling circumscribed Gawker's ability to obtain information about the commercial value of Hulk Hogan's media and commercial appearances, other documents that are responsive to these requests are relevant." Mot. 14 n.7. It also asks the Court to ignore the requests themselves. For instance, to make its argument, the Opposition selectively edited a request to suggest it is focused on financial records, even though it is not. *See* Opp. 13. It quoted only a portion of the request, excising the rest as follows:

> **Request No. 6:** ~~All documents referring or relating to marketing and advertising the Restaurant using Terry Bollea's or Hulk Hogan's name and likeness from January 1, 2012 to the present. Please note that this request does not seek any~~

> ~~documents reflecting Terry Bollea's or Hulk Hogan's~~ finances or contracts ~~with him, other than to~~ the extent they involve the amount Bollea and/or Hogan has been paid for licensing his name, likeness, and/or any trademarks in connection with ~~the Restaurant, as requested by Request No. 7~~.[5]

Here, the Opposition omitted the portion of the request stating that it "does *not* seek" a broad category of financial records and instead seeks other kinds of records. Despite plaintiff's claim, most of the "public image" requests do not seek any financial records at all. *See* Mot. Ex. 18 (list of "public image" requests). Nevertheless, to reiterate what Gawker made plain in its motion: Gawker believes its requests for financial records are proper, but, to the extent that the Court rules otherwise, that ruling would not – and should not – foreclose other requests and documents relating to plaintiff's public image.

2. Plaintiff next contends that Judge Campbell "previously rejected Gawker's 'relative fame' theory of relevance." Opp. 14. That is not correct. This theory was never presented to Judge Campbell, as plaintiff had not declared his damages theory at that time. In any event, the question is not *whether* plaintiff "is famous," Opp. 15, but how plaintiff's relative fame affects the value of a sex tape "featuring" him. At the earlier hearing, plaintiff's counsel claimed that "Paris Hilton and Kim Kardashian and folks like that have sex tapes out there that have made millions of dollars." Hrg. Tr. 15:11-13. To the extent that plaintiff seems to be claiming that the value of those sex tapes might offer a measure for the value of a tape "featuring Hulk Hogan," a comparison of those celebrities' fame to plaintiff's fame is relevant. After all, the relative fame of a celebrity helps establish the value of any product featuring his or her likeness – the more famous, the more valuable. *See Jackson*, 2009 WL 8634834, at *1 (noting

[5] Request No. 7, which is cross-referenced in Request No. 6, seeks "[a]ll documents referring or relating to licensing Terry Bollea's or Hulk Hogan's name, likeness, and/or any of his trademarks in connection with the Restaurant, including without limitation all documents referring or relating to any request or proposal by anyone affiliated with the Restaurant, or by Terry Bollea or Hulk Hogan (or any person acting on behalf of Terry Bollea or Hulk Hogan) in connection therewith." Mot Ex. 18.

that plaintiff's "world-wide notoriety and fame" give his name and likeness "substantial monetary value in the marketplace"). Thus, Gawker should be permitted to seek information about the extent to which the market sought to capitalize on plaintiff's celebrity around the time that Gawker posted the sex tape, including, for example, what kinds of products he endorsed, the types of media and events at which he appeared, and how companies sought to use him in their marketing and promotions. This information is necessary to compare plaintiff's fame to the fame of other celebrities who have been "featured" in sex tapes and assess the value of a tape "featuring Hulk Hogan" accordingly.

3. Plaintiff next contends that, in this case, mitigation of damages "does not apply." Opp. 16. In support of that contention, he highlights a sentence in the *Restatement* that addresses *defamation*. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 920). If plaintiff were seeking a remedy for harm to his reputation, his argument might have some merit. But, that is not the interest for which he is seeking a remedy. He is pursuing a claim for misappropriation. That tort remedies "commercial exploitation of the property value of one's name." *Loft v. Fuller*, 408 So. 2d 619, 622 (Fla. 4th DCA 1981); *Jackson*, 2009 WL 8634834, at *11 ("'one's name and likeness is an intangible property interest'") (citation omitted). Here, plaintiff seeks to recover damages for harm to that pecuniary interest. As he previously explained to the Court, Gawker allegedly "took something that they shouldn't have had, which is the value of a – market value of a sex tape of Hulk Hogan." Hrg. Tr. 15:15-18. Given this claim, Gawker is permitted to argue that in misappropriating "the property value of [plaintiff's] name," it simultaneously "conferred a special benefit" to that same pecuniary interest, which would offset any alleged loss. RESTATEMENT (SECOND) OF TORTS § 920. Thus, Gawker seeks to discover whether that "special

benefit" included giving the "property value of [plaintiff's] name" greater value by, for example, creating opportunities that plaintiff otherwise would not have received.[6]

4. Plaintiff argues that the public image requests also are not relevant to his separate claim that he suffered emotional distress because he "has not put damage to his career at issue." Opp. 17. This argument misses the point. Gawker is not seeking information about how plaintiff marketed himself to assess any "damage to his career"; rather, that information is being sought in connection with his emotional distress claims – in particular to show the "extent and duration of emotional distress produced by the tortious conduct" and "the sensitiveness of the injured person." RESTATEMENT (SECOND) OF TORTS § 905 cmt. i. Specifically, Gawker is seeking evidence about whether plaintiff changed the way he marketed himself after the posting. If his later marketing efforts focused on sexuality and other "private" aspects of his life, that would undermine his claim that he suffered emotional distress.

The Opposition further complains that this information "is not publicly available," Opp. 17, but that fact is what makes it the most relevant and most reliable evidence of plaintiff's true feelings. It is not surprising that plaintiff said he was distressed by the Gawker posting when he appeared in media interviews and press conferences as the cameras were rolling. What plaintiff and his agents said and did in private, however, will reveal whether he was *actually* distressed by the posting, or simply viewed it as a marketing opportunity. This post-tort conduct is directly

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[6] Throughout the Opposition, plaintiff seems to suggest that because he is not seeking "damages to his career," Opp. 16, all evidence that would be relevant to that theory becomes irrelevant. But, his decision to disavow one theory of recovery does not prevent Gawker from seeking that same evidence if it is relevant to the theories and claims he continues to pursue. Accordingly, whether plaintiff is "claiming harm to his career" is irrelevant to whether Gawker should be permitted to present evidence that would offset his alleged damages. *Id.* In fact, the apparent increase in the value of his name and likeness since the Gawker posting underscores that through the alleged misappropriation, he might have been "conferred a special benefit." RESTATEMENT (SECOND) OF TORTS § 920.

relevant to plaintiff's claims and is reasonably calculated to provide information about his sensitivity to the posting and publicity about his sexual practices and physical attributes, just as in the cases Gawker cited in its motion. *See* Mot. ¶ 34 (citing cases establishing that post-tort conduct inconsistent with emotional distress allegations is relevant to rebut damages claims).

Plaintiff cannot dodge this discovery merely by saying he is seeking "'garden variety' emotional distress damages." Opp. 18-19. That category of damages does not place discovery of his post-tort conduct off limits. Just as plaintiff still must prove he suffered distress, Gawker is permitted to present evidence *rebutting* that claim. *See, e.g.*, *City of Hollywood v. Hogan*, 986 So. 2d 634, 649-50 (Fla. 4th DCA 2008) (reversing award for "garden variety" emotional distress because amount was not commensurate with degree of emotional injury actually "proved"); *Stone v. Geico Gen. Ins. Co.*, 2009 WL 3720954, at *5-6 (M.D. Fla. Nov. 5, 2009) (defendant rebutted plaintiff's claim of "garden variety" emotional distress by showing plaintiff sought and obtained new employment shortly after being fired); *Bonner v. Normandy Park*, 2008 WL 4766822, at *6 (W.D. Wash. Oct. 29, 2008) (plaintiff "asserting 'garden variety emotional distress' . . . has the burden of proving these damages, and [d]efendants are likewise permitted to rebut these damages"). That is all Gawker seeks to do here.

III. THE OUTTAKES OF THE HOSTAMANIA ADVERTISEMENT ARE DISCOVERABLE.

Plaintiff opposes Gawker's request for the outtakes of the Hostamania advertisement because they "were never aired or made public in any way," Opp. 5, and "have no bearing" on whether plaintiff kept his sexual encounter with Ms. Clem private, *id.* at 19. The Opposition, however, fails to address the outtakes' relevance to plaintiff's claim that he suffered emotional distress. *See* Mot. ¶ 39. Any person who actually suffered distress because someone posted a video of him naked and engaged in sexual conduct surely would be reluctant to participate in

filming an advertisement while wearing a thong and feather boa and mimicking a naked Miley Cyrus swinging on a wrecking ball and engaging in overtly sexual conduct. Gawker seeks the outtakes of the Hostamania advertisement because that footage will reveal plaintiff's demeanor as he was being filmed and whether or not he was troubled by his appearance and the sexualized nature of the advertisement.

The outtakes also are relevant to plaintiff's claim that he closely guards his privacy about his anatomy and aspects of his sexuality. Most notably, the outtakes will establish whether and to what degree plaintiff sought to protect his privacy during filming in front of total strangers, as he claimed. *See* Mot. ¶ 38.

IV. PLAINTIFF IS NOT ENTITLED TO ATTORNEY'S FEES.

Plaintiff contends that he should be awarded the fees he incurred in defending against Gawker's motion because the motion "is an improper attempt to re-litigate an issue that was already decided." Opp. 20. His request should be denied. Gawker was "substantially justified" in making this motion given Judge Campbell's instructions at the earlier hearing, the issues that were actually litigated at that hearing, and plaintiff's subsequent response to Gawker's interrogatory asking him to set out his theory of damages. Fla. R. Civ. P. 1.380(a)(4); *see supra* at 2-5. Moreover, very little of the information requested by Gawker in the subpoenas is "financial information," let alone plaintiff's financial information, which is the only information covered by Judge Campbell's order. *See supra* at 5-6, 9-10. Any award of fees would be particularly unjust here, as Gawker is simply seeking evidence that other courts in Florida have allowed to be admitted at trial. *See supra* at 7-9.

CONCLUSION

For the foregoing reasons, and the reasons set forth in its motion, Gawker respectfully requests that the Court grant its motion and deny plaintiff's motions for protective orders.

Dated: October 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3d day of October, 2014, 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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