EXHIBIT 3

to the

PUBLISHER DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE PLAINTIFF FROM CALLING GAWKER'S GENERAL COUNSEL AS A TRIAL WITNESS

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Gawker Media's Publication of the Terry Bollea (Hulk Hogan) Sex Tape Is *Not* Protected By the First Amendment

Gawker Media claims that its publication of the Terry Bollea (Hulk Hogan) sex tape is protected by the First Amendment. Gawker Media is wrong on the law.

Mr. Bollea was secretly filmed in a private bedroom in 2007. Gawker Media published to the Internet footage showing him fully naked and having sexual intercourse. Gawker Media was capable of blurring or pixilating the images, but failed to do so. Gawker Media claims that its actions were protected by the First Amendment because the **footage itself** showing Mr. Bollea fully naked and having sexual intercourse (**private** activities, which occurred in a **private** bedroom) is, according to Gawker Media "newsworthy" because it is "legitimate **public** concern."

Contrary to Gawker Media's legal contentions, prior to this case, **no court in America ever held** that the publication of naked images on a sex tape is either "newsworthy" or "legitimate public concern." The courts would be **making new law** in the area of First Amendment and privacy law if they were to enter such a ruling in *Bollea v. Gawker Media*.

Gawker Media's legal arguments are contradicted by the holdings of the U.S. Supreme Court and lower courts which **protect the Right to Privacy** in situations like this, and **limit** the First Amendment defense. A short explanation of some of these holdings follows:

In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the U.S. Supreme Court held that the media **could** publish excerpts of secret recordings of **union negotiators** discussing matters of public concern (pertaining to union negotiations with management), but **all nine Justices** of the Supreme Court held that the Court's holding **did not mean** that secret recordings of **purely personal activity** could be published, and **a majority of five Justices** said that the publication of **illegally recorded private celebrity sex tapes was not protected by the First Amendment**:

1. Justice Stevens' majority opinion exempted from its First Amendment holding "domestic gossip or other information of purely private concern".

2. Justice Breyer and Justice O'Connor stated that the First Amendment did not protect the publication of truly private matters involving celebrities or public figures, because those matters were not matters of public concern:

"This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, *i.e.*, communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters." Justice Breyer cited *Michaels v. Internet Entertainment Group* where an injunction was issued against the publication of the stolen Pamela Anderson-Bret Michaels sex tape.

3. Chief Justice Rehnquist, and Justices Scalia and Thomas, stated that the publication of illegal recordings was not protected by the First Amendment at all (whether or not the recordings contain matters of public concern) and laws prohibiting such publications are constitutional: "These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement [i.e., a requirement that the journalist know or should know that the recording is illegal] to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. These laws therefore should be upheld if they further a substantial governmental interest unrelated to the suppression of free speech, and they do."

In *City of San Diego v. Roe*, 543 U.S. 77 (2004), the U.S. Supreme Court held that a police officer's recording of himself engaged in sexual activity while wearing a police uniform was **not a matter of public concern**: "[T]here is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test.... Roe's activities did nothing to inform the public about any aspect of the [San Diego Police Department's] functioning or operation."

In *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (2009), the Eleventh Circuit U.S. Court of Appeals (which covers Florida) held that a magazine's publication of private, nude photographs of a female professional wrestler who was murdered was **not protected by the First Amendment**, and was **not a matter of public concern**. Even though the murder was a matter of public concern, and the wrestler was a public figure, the **photographs themselves** were **not** matters of public concern. The court held:

"[A]lthough an individual may be rendered subject to public scrutiny by some newsworthy event, [t]he extent of the authority to make public private facts is not unlimited.... **[E]ven public figures, like actresses, may be 'entitled' to keep private 'some intimate details such as sexual relations'**.... The line is to be drawn when **the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern**.... [T]he limitations are those of **common decency**, having due regard to the freedom of the press and its

reasonable leeway to choose what it will tell the public, but also **due regard to the feelings of the individual and the harm that will be done to him by the exposure**." (Emphasis added.)

The court further held that the magazine "may not make public private, nude images of [the female wrestler] that she, allegedly, **expressly did not wish made public**, simply because she once wished to be a model and was then murdered." By analogy here, Terry Bollea (Hulk Hogan) was secretly filmed in 2007, and when he first learned in 2012 about the existence of the sex tape, he objected repeatedly and forcefully to its publications. Gawker Media received his cease and desist letters the day after it published the sex tape, demanding its removal from the Internet, but Gawker Media rejected his demands and continued to post the sex tape for more than six months. Seven million people saw that sex tape, because of Gawker Media's actions.

In *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823 (1998), the U.S. District Court held that Pamela Anderson Lee and Brett Michaels were entitled to an **injunction prohibiting the distribution of their privately recorded, stolen sex tape**, and rejected the First Amendment defense by the company that sought to publish the tape against their objections. The court specifically held that the tape itself was not legitimate news, and the contents of the tape were not matters of public concern. "The Court notes that the **private matter at issue here** is not the fact that Lee and Michaels were romantically involved. Because they sought fame, Lee and Michaels must tolerate some public exposure of the fact of their involvement.... The fact recorded on the tape, however, is not that Lee and Michaels were romantically involved, but rather the **visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities**." (Emphasis added.)

In *Judge v. Saltz Plastic Surgery*, 330 P.3d 126 (2014), the Utah Court of Appeals held last year that a plaintiff was entitled to go to trial on her claim that topless "before and after" photos of her, as a patient at the defendant's cosmetic surgery clinic, were **not protected by the First Amendment** because they were **not a matter of public concern**. The Court expressly rejected the same argument that Gawker Media is making in the Bollea case, that because Bollea has discussed his sex life in the media, he can no longer assert his privacy rights. "Appearances can change. A college student may decide to play on the 'skins' side of a 'shirts versus skins' basketball game in a public park. By doing so, he may have made a public fact of what his torso looked like on that day in that park such that publication of a picture taken while he was playing would not be actionable. But by doffing his shirt, he would not lose the ability to argue that a future picture of his torso exposes a private fact. Our shirtless basketball player may be willing to make a public fact of his exercise-honed torso in his twenties but swim with his shirt on thirty years later to avoid revealing extra pounds, medical scars, or now-regretted tattoos."

Gawker Media's other main argument is that it excerpted 1 minute and 41 seconds out of a 30 minute sex tape. Gawker Media admits, however, that it **deliberately published** footage of **Mr. Bollea fully naked and having sexual intercourse**, and did not block or blur any of the images. The publication of even a small amount of incredibly invasive footage is **not protected by the First Amendment**. By analogy, the U.S. Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), rejected an argument similar to Gawker Media's. In Zacchini, television news station ran 15 second of footage of the plaintiff's "human cannonball" act performed at a local state fair. The Supreme Court held the footage was not protected by the

right of free press under the First Amendment. The Court also **rejected** a contention similar to that made by Gawker Media in the Bollea case, that reporting on Mr. Bollea's sex life, and showing video footage of it, supposedly are equally protected: "if [the TV news station] had merely reported that [Zacchini] was performing at the fair and described or commented on his act, with or without showing his picture on television [but without showing his performance], we would have a very different case."

Gawker Media wants the world to believe that Mr. Bollea is attempting to "substitute the judgment of the courts for the editorial judgment of journalists," and supposedly is "trampling on the First Amendment." But none of that is true.

First, Mr. Bollea has a Constitutional Right of Privacy. FLORIDA CONSTITUTION, Article I, Section 23. It is well-established that where a person's privacy is invaded by means of the publication of an illegal recording of private activity, a lawsuit for invasion of privacy does not violate the First Amendment. Courts view **very differently** recordings on matters of **legitimate** public concern, such as the Watergate tapes, and recordings that are **not** of legitimate public concern, such as private video of people having sex, even if the video depicts a celebrity. Second. Mr. Bollea's lawsuit poses no threat whatsoever to the First Amendment rights of journalists, because it stays completely within the well-established lines that have been drawn in prior cases.

Moreover, Gawker Media's position in this lawsuit poses a threat to First Amendment rights. Gawker Media claims that if a person talks publicly about sex, then that person gives up their privacy rights, and thus footage (even secretly filmed footage) showing them fully naked and having sex, can be played publicly, for the world to watch, against their objections. It should first be noted that there is **no legal authority whatsoever** supporting that position by Gawker Media. Second, if the courts were to accept that position, it would have a **chilling effect** on people in their public discussions about sex. Few people will wish to risk discussion of sexual activity if it could result in making video recordings of their sexual activity "legitimate public concern" and thus freely publishable by websites like Gawker.

As discussed above, Mr. Bollea did not waive his Constitutional privacy rights; Gawker Media does not have a legitimate First Amendment defense; and the wealth of legal authorities in America strongly favor Mr. Bollea's position.