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.

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

Defendants.
_____/

Case No. 12012447 CI-011

REPLY OF TERRY BOLLEA IN SUPPORT OF EMERGENCY MOTION FOR LEAVE TO CONDUCT DISCOVERY CONCERNING POTENTIAL VIOLATION OF PROTECTIVE ORDER

Plaintiff Terry Bollea, known professionally as Hulk Hogan ("Mr. Bollea"), replies to the Joint Opposition as well as the Supplemental Opposition of Gawker Media, LLC ("Gawker"), Nick Denton ("Denton"), A.J. Daulerio ("Daulerio") (collectively, "Gawker Defendants"), and their counsel, to Mr. Bollea's Emergency Motion to Conduct Discovery Concerning Potential Violation of Protective Order as follows:

I. INTRODUCTION

Gawker Defendants' efforts to misdirect the Court from the significant evidence pointing to them as the source of a highly confidential transcript leaked to The *National Enquirer* are unavailing. The timing of the leak, and Gawker Defendants' comments about it, belie their after-the-fact finger pointing. Gawker Defendants were the only ones with a clear motive and the opportunity to leak the transcript. Gawker Defendants were the only ones who benefited from the leak and its devastating impact on Mr. Bollea. All signs point to Gawker Defendants as the *National Enquirer*'s source. Therefore, the requested, limited discovery to confirm the source of the leak is warranted.

The brazenness with which Gawker Defendants foretold the leak of Mr. Bollea's "real secret," only to taunt him with its aftermath, is particularly damning. The *National Enquirer/Radar Online* posted excerpts from the sealed transcript at **6:38 a.m.** on July 24, 2015. **Fourteen (14) minutes later**, defendant Daulerio's new tabloid website, Ratter.com ("Ratter")—a site in which defendants Gawker and/or Denton are substantial investors and shareholders—tweeted a link to Radar Online's post, in which Daulerio referenced Mr. Bollea's twitter account followed by "XOXOXOXO" [hugs and kisses]. (*See* **Exhibit A**) To remind the Court, defendant Daulerio also is the former Editor-in-Chief of Gawker.com who edited and posted the sex video of Mr. Bollea at issue in this lawsuit.

Gawker Defendants would like this Court believe that even though Denton threatened the leak, and the leak occurred only a few days later, and Daulerio then mocked Mr. Bollea with the leak as it was being reported by an editor at the *National Enquirer* who is a long time friend and close colleague of Daulerio, Gawker Defendants supposedly played no role. Stated simply, Gawker Defendants ask this Court to ignore reality and common sense, and blindly take their word for it and disallow discovery which would uncover the truth of Gawker Defendants' true level of involvement.

A sealed transcript designated by court order at the highest levels of confidentiality was leaked to the press. Mr. Bollea and the Court are entitled to know who violated this Court's Protective Order. The only way to uncover the truth is through the limited discovery that Mr. Bollea requests.

If Gawker Defendants (or any of them, directly or indirectly) were the source, then there should be severe consequences. On the other hand, if, as Gawker Defendants claim, they had nothing whatsoever to do with the leak, then they have nothing to worry about from the requested,

limited discovery. They should provide their records and answer questions on the issue, knowing they (supposedly) will be fully vindicated.

Gawker Defendants' arguments as to why such reasonable discovery should not proceed are unpersuasive. First, Gawker Defendants claim they did not have access to the leaked material. But this is not true— Gawker Defendants had access to at least two different documents, as well as an audio recording, containing the offensive language, and there are only minor differences between the version published by the *Enquirer* and the transcripts that were produced to Gawker Defendants in discovery.

Second, Gawker Defendants claim that one of the authors of the *Enquirer* story tweeted that "Gawker" is not the source. However, this tweet is unsworn and inadmissible hearsay, and the *Enquirer* has asserted the Shield Law and refuses to provide any admissible, sworn evidence, identifying its source. (See **Exhibit B**) Regardless, Mr. Bollea should not be denied legitimate discovery on the basis of an unsworn and unverified tweet.

Third, Mr. Bollea's discovery is not overbroad. It is narrowly-tailored to determine whether Gawker Defendants leaked the information. Privileged material will and should be screened out by the protocol proposed by Mr. Bollea for the e-discovery expert appointed by the Court. Gawker Defendants will have an opportunity to object and have their objections heard before any materials are produced.

Fourth, Gawker Defendants incorrectly state the law regarding discovery relating to contempt. A heightened threshold showing applies only when the discovery is sought **after the case is closed**. Obviously that is not our situation. This Court has full power to investigate possible contempt.

Gawker Defendants seek to leave Mr. Bollea with **no remedy at all** for the disclosure of extremely sensitive, sealed discovery that has severely harmed Mr. Bollea and substantially benefitted Gawker Defendants in this case and in their business, and which Gawker's CEO publicly stated would happen only days in advance. If Gawker Defendants were not involved in the leak, then they have nothing to fear. The only reason to oppose the requested discovery is knowledge of guilt, and fear of accountability. Thus, the great lengths that Gawker Defendants are going to keep their relevant records a secret, speaks volumes. Mr. Bollea's reasonable discovery requests should be granted.

II. THE *NATIONAL ENQUIRER* PUBLISHED EXCERPTS FROM A SEALED TRANSCRIPT

The foundation of Gawker Defendants' Opposition rests on the misguided notion that other people saw illegally-recorded video footage of Mr. Bollea, including Mr. Bollea making offensive statements, several years ago, and could have provided the material to the *Enquirer*. Gawker Defendants thus accuse **other people** (law enforcement, the Court, other members of the media) of being the source of the leak.

Gawker Defendants' misdirection is called into question by the *National Enquirer* articles themselves. The articles state that they are based upon a sealed transcript leaked from this case:

> "… he had Jamie Fox coming in on the 22nd track," Hogan brazenly raved, according to ***a transcript*** of the expletive laden conversation provided to *The Enquirer*
>
> …
>
> ***According to the transcript, filed under seal in a Florida court…***

(See **Exhibit C**)

> Nik [Richie][1] said he does not have a copy of the tape, nor did he provide **the transcript** to *The Enquirer.*

(See **Exhibit D**)

In fact, on the cover if its August 10, 2015 hard copy publication, the *National Enquirer* boasts:

> INSIDE THE ***ONLY*** TRANSCRIPT OF HIS COMPLETE TIRADE

(See **Exhibit E**)

The fact that the *Enquirer* **knows** what transcripts have been sealed in this case points only to Gawker Defendants. The fact that the *Enquirer* claims it obtained a copy of a sealed transcript from this case points only to Gawker Defendants.

III. GAWKER DEFENDANTS HAD ACCESS TO THE HIGHLY CONFIDENTIAL MATERIAL THAT WAS PUBLISHED BY THE *ENQUIRER*

Gawker Defendants' argument that they supposedly did not have access to the transcript excerpts published by the *Enquirer* simply is not true.

The "Davidson[2] transcript" (the summary prepared by the extortionist) contains virtually identical language to that used in the *Enquirer* story, including all the basic elements of what the *Enquirer* reported. The "Sting Audio" and the "Radio Timeline"[3] contain portions of the material as well. Gawker Defendants had access to all three of these sources.

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[1] Nik Richie runs the website TheDirty.com. Gawker Defendants accuse Mr. Richie of being the source of the leak, but ignore the *Enquirer's* confirmation that Mr. Richie does not have the tape and did not provide the transcript to the *Enquirer*.

[2] Keith Davidson, the source of this transcript, has already provided a verified statement attesting that he did not retain a copy of it. (See **Exhibit F**)

[3] In fact, Gawker Defendants' argument regarding the "Radio Timeline" and the "Sting Audio" cuts against the contention that someone else leaked the information to the *Enquirer*. After all, many of the people that Gawker Defendants identify as potential leakers, including, for instance, people in the Tampa and New York radio communities, **did not have access** to the "Davidson transcript", which was prepared and provided as part of the extortion attempt investigated by the FBI. These individuals could not have been the *Enquirer*'s source, because the *Enquirer* report contains content

The fact that none of these sources is an exact word-for-word match to the *Enquirer* report is of no consequence. The differences between the "Davidson transcript" and the *Enquirer* report are non-substantive, and either the *Enquirer*, or the source itself, could have modified the language of the "Davidson transcript" to protect the source's identity.

The fact of the matter is, there are only a limited number of sources who could have leaked the transcript to the *Enquirer*, and Gawker Defendants and their counsel stand out prominently atop that short list. None stood to benefit more than Gawker Defendants.[4] Also, as far as the timing of the leak, it occurred at the very moment that Gawker Defendants needed a "game changer" for their business, due to their media scandal associated with an article about an executive of a major media company, the resulting exodus of Gawker's senior editorial staff, the associated loss of certain of Gawker's major advertisers, Gawker's obvious inability to raise capital, and the upcoming trial in this case.

Gawker Defendants' undeniable **desire** and **motive** to leak the sealed transcript singles them out amongst all other supposed "sources." None of the other sources had either the obvious desire or motive to leak. Moreover, for more than a year in this lawsuit, Gawker Defendants sought repeatedly, persistently, and ultimately unsuccessfully, to inject the offensive language into this

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from the "Davidson transcript" which is **not contained** in the "Radio Timeline" or the "Sting Audio". Gawker Defendants and their lawyers are among the few people who had access to both documents and the audio and (unlike the Court or law enforcement personnel) had a motive and incentive to leak the offensive language.

Gawker Defendants' suggestion that law enforcement leaked the transcript is absurd and disingenuous. Before the *Enquirer* published its story, Gawker Defendants were saying precisely the opposite, accusing law enforcement of colluding with Mr. Bollea to keep the offensive language a "secret." Gawker had to sue the FBI and EOUSA just to get access to the materials under FOIA. For Gawker Defendants to now suggest that law enforcement leaked these very same materials is wholly contradictory and absurd.

[4] Gawker Defendants filed a supplemental opposition speculating that additional individuals might have seen the sex videos depicting Mr. Bollea. However, there is no evidence that any of these inviduals either had access to the "Davidson transcript" or the motive to leak it.

case and "play the race card" for the purpose of destroying Mr. Bollea's career and hurting him before the jury. The leaked offensive language was ruled inadmissible at trial by this Court shortly before the leak, thus putting Gawker Defendants in a situation where their only hope of bringing it to the attention of potential jurors (and to the public--to destroy Mr. Bollea's career) would be by leaking the material to a fellow tabloid publication friendly to them. Compounding this strong evidence of guilt, the leak occurred while Gawker was embroiled in a public relations nightmare over another scandalous story, which caused its senior editors to resign, its major advertisers to drop Gawker, and its potential financiers to lose interest, and which led Mr. Denton to make public statements very harmful to Gawker's defense in this case, in order to address its PR crisis. Simply put, Gawker Defendants needed a "game changer" – and the leak of the offensive language, and resulting destruction of Mr. Bollea's career, and the news media's new focus on Mr. Bollea rather than the free fall in Gawker's business, was just the ticket.

Gawker Defendants' accusations that others were responsible for the leak does not add up. Any third parties who allegedly possessed knowledge of the content of video of Mr. Bollea had possessed that knowledge since 2012. Several even reported about "rumors" of it in 2012. Their stories about rumored offensive language died years ago. There is only one reasonable explanation as to why, out-of-the-blue, a three-year old story would resurface in mid-2015: Gawker Defendants' direct involvement. Denton's blog post that Mr. Bollea's "real secret" was in the FBI documents (when Denton was not even permitted access to the FBI documents) and would soon be revealed, even **telegraphed** what Gawker Defendants were about to do.

Gawker Defendants obviously could not publish the material themselves, given the Court's orders in this case. Thus, they needed to leak it to someone else, and who better than their fellow celebrity tabloid publication with close connections to Daulerio (and possibly Denton as well) and

sympathetic to Gawker Defendants' views about the lack of privacy rights of celebrities, and which could assert the journalist's Shield Law to seek to protect the anonymity of the leaker? True to form, the *National Enquirer* and *Radar Online* have asserted the Shield Law and advised Mr. Bollea that they will not reveal their source. (See **Exhibit B**)

The facts here, as discussed herein and in the Motion, point most evidently to Gawker Defendants being the source of the leak and are **more than sufficient to permit discovery on this important issue**.[5] Gawker Defendants threatened to leak it were the only ones with motive to leak it, benefited from leaking it, and immediately taunted Mr. Bollea once it was leaked. Given these facts, Gawker's disdain for secrecy and professed transparency certainly support **discovery** to uncover the truth.

IV. THE *ENQUIRER*'S TWEET DENYING THAT "GAWKER" WAS THE SOURCE IS MEANINGLESS

Gawker Defendants argue that the *Enquirer* denied they were the source of the leak. This supposed denial appeared in a tweet, the veracity of which Mr. Bollea cannot test because the *Enquirer* refuses to disclose its source under the Shield Law. (See **Exhibit B**) Even if the denial could be credited, it would only mean that "Gawker" did not send the information directly to the *Enquirer*. It does not mean, however, that Daulerio (no longer part of "Gawker") did not leak the information to his close contacts at the *Enquirer* who broke the story, nor that Daulerio, Denton or possibly others at Gawker indirectly or anonymously leaked the sealed transcript.

[5] Gawker Defendants offer a ridiculous explanation as to how Denton's blog post was supposedly not about the offensive language, relying entirely on Denton's self-serving statement that his blog post was based on court filings and press reports. In reality, Denton appears to have already known exactly what was in the sealed discovery, and was merely fabricating his own alibi to try to protect himself while threatening Mr. Bollea to gain leverage in the case.

V. THE DISCOVERY REQUESTED BY MR. BOLLEA IS NOT OVERBROAD

Gawker Defendants' argument that electronic discovery is available under Florida law only in cases of spoliation is wrong. In *Antico v. Sindt Trucking, Inc.*, 148 So.3d 163 (Fla. 1st DCA 2014), for example, the court upheld an order requiring the plaintiff to produce his cell phone to the defendant's e-discovery expert, where there was evidence that the plaintiff could have been texting at the time of the automobile accident that was at issue in the lawsuit. The court held that because the issue of whether the plaintiff was texting was relevant to the lawsuit, and there were strict controls that permitted the plaintiff to receive only relevant records after screening by the e-discovery expert, electronic discovery was permissible.

Antico controls here. The violation of a court order in pending litigation certainly warrants discovery. Mr. Bollea has made an ample evidentiary showing that Gawker Defendants had the motive and the opportunity to leak to the *Enquirer*, and were top among a very short list of individuals and entities with access to the information.

Mr. Bollea is not proposing that he directly examine Gawker Defendants' computers, devices and electronic storage. As set forth in his proposed order submitted herewith, Mr. Bollea proposes using an e-discovery expert who would search for and obtain potentially relevant evidence under strict protocols, and then provide those results to Gawker Defendants' counsel to screen out privileged material before production.

Other cases cited by Gawker Defendants hold that electronic discovery is permissible in cases of spoliation **or** where there has been "thwarting of discovery." *Holland v. Barfield*, 35 So.3d 953, 956 (Fla. 5th DCA 2010). In *Strasser v. Yalamanchi*, 669 So.2d 1142, 1145 (Fla. 4th DCA 1996), the court held that a showing that a party had thwarted the discovery process, along with evidence that relevant information could be retrieved by permitting the e-discovery, would justify

an order requiring that computers be produced to an expert for review, with safeguards in place to prevent disclosure of legitimately privileged information. Here, the Protective Orders issued by this Court were for the purpose of protecting the parties in connection with information produced in discovery. Any breach of such Protective Orders therefore would constitute the thwarting of discovery.

The search parameters proposed by Mr. Bollea are narrowly tailored to obtain materials demonstrating whether Gawker Defendants were the source of the leak to the *Enquirer*.[6] The protocol then allows for Gawker Defendants to screen out privileged documents and produce a privilege log. Mr. Bollea and his counsel would not see any materials until they have been screened for privilege, and Gawker's objections to production, if any, are heard and resolved. Moreover, the expert will be bound by a confidentiality order. The process is designed to ensure that legitimately privileged information will never reach Mr. Bollea or his counsel.[7]

Gawker Defendants also object to Mr. Bollea obtaining any electronic discovery of their counsel. However, the cases cited by Gawker Defendants do not support their contention that Mr. Bollea's proposed discovery is improper. *Eller-ITO Stevedoring Co. v. Pandolfo*, 167 So.3d 495, 496-97 (Fla. 3d DCA 2015), holds that a party seeking to take the deposition of opposing counsel must make a special showing of relevance and that the information is not available

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[6] *Gyrodata, Inc. v. Gyro Technologies, Inc.*, 2010 WL 4702363 at **2-3 (D. Conn. Nov. 12), held that further electronic discovery be cut off **after** the propounding party was permitted to inspect the relevant e-mail files on the respondent's computer system and was unable to find evidence to substantiate its claims. Gawker Defendants, in contrast, seek to pretermit any electronic discovery whatsoever.

[7] Gawker Defendants argue that it is improper for the e-discovery expert to even attempt to screen privileged documents, as this will vitiate the privilege. To be clear, Mr. Bollea neither seeks privileged documents nor wishes to preclude Gawker Defendants from asserting any privileges that might properly apply to particular documents. Indeed, Mr. Bollea's proposed procedure permits Gawker Defendants to assert a privilege and have such privilege claims adjudicated **before** any production to Mr. Bollea.

elsewhere. Mr. Bollea has not sought to depose Gawker Defendants' litigation counsel, and the heightened standard is met in this case anyway. *Steinger, Iscoe & Greene, P.A. v. GEICO General Insurance Co.*, 103 So.3d 200, 206 (Fla. 4th DCA 2013), holds that written discovery of litigation counsel is proper so long as a factual predicate is established that they have relevant evidence.

Lastly, Judge Case would be empowered to supervise the electronic discovery. Thus, reasonable concerns about scope, overbreadth, privilege, and similar issues can be raised with and resolved by Judge Case. Regardless, these concerns are insufficient to preclude discovery from going forward at all. This is a very serious matter, which caused severe harm. Discovery is certainly appropriate to determine who violated the Court's Protective Order.

VI. THERE IS NO HEIGHTENED STANDARD FOR DISCOVERY OF CONTEMPT UNLESS THE UNDERLYING LITIGATION HAS TERMINATED.

Gawker Defendants' argument that discovery regarding contempt is disfavored misstates the law. The cases cited by Gawker Defendants were all **closed cases**, and motions were made to **re-open** the lawsuit to allow discovery of the alleged contempt. The standard for re-opening a closed case obviously bears no relevance to a pending case like ours that has not yet even gone to trial. *800 Adept, Inc. v. Murex Securities, Ltd.*, 2007 WL 2412900 at *1 (M.D. Fla. Aug. 21) ("800 Adept fails to persuade the Court that it has requisite authority to allow discovery in a case that is closed, with a judgment on appeal, and no pending motion for contempt or other collateral relief."); *N.W. Controls, Inc. v. Outboard Marine Corp.*, 349 F. Supp. 1254, 1256 (D. Del. 1972) ("a final judgment was entered almost a year ago"); *Privitera v. Amber Hill Farm, L.L.C.*, 2012 WL 1900559 at *1 (M.D. Fla. May 24) ("The case was fully settled in April, 2012 when the parties made and entered into a written settlement agreement…."); *State of Florida ex rel. Butterworth v. Jones Chemicals, Inc.*, 1993 WL 388645 at *2 (M.D. Fla. Mar. 4) (" the underlying litigation has been dismissed").

Unlike the cases cited by Gawker, our case is not closed. This case is scheduled to be tried before a jury, the pool for which may have been severely tainted by the leak of sealed discovery. Thus, no heightened standard applies here. Instead, the general standard of discovery relevance applies, and Mr. Bollea has more than sufficiently established a basis for discovery under this standard.

VII. CONCLUSION

For the foregoing reasons and those stated in the moving papers, the Court should grant the limited, narrowly-tailored and reasonable discovery requested by Mr. Bollea.

Dated: August 28, 2015

Respectfully submitted,

/s/ Kenneth G. Turkel

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 28th day of August, 2015 to the following:

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