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.
_____/

MOTION FOR STAY PENDING APPEAL

Defendant GAWKER MEDIA, LLC ("Gawker"), by and through undersigned counsel, hereby moves the court for an order suspending and staying the temporary injunction orally entered in favor of Plaintiff on April 24, 2013. In support of this motion, Gawker states:

1. On April 24, 2013, this Court held a hearing on Plaintiff's Motion for Temporary Injunction and orally granted Plaintiff's Motion.

2. The Court directed the Plaintiff to submit a written order, which is expected to be entered shortly.

3. At the conclusion of the hearing, counsel for Gawker requested a stay of the temporary injunction so Gawker could pursue appellate remedies. The Court orally denied Gawker's request.

4. Rule 9.310 requires that a party seeking to stay a final or non-final order pending review file a motion in the lower tribunal.

5. Given the important First Amendment issue of prior restraint of the press, the Defendant requests that this Court stay its ruling granting a temporary injunction.

6. Failure to grant this motion for stay will cause Defendant irreparable harm primarily because the order is a presumptively unconstitutional prior restraint of the press. See Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1302, 1307 (1974) (granting media entity's motion to stay a trial court's order, due to the substantial possibility the order was an unconstitutional prior restraint of the media that would cause irreparable harm, and stating that prior restraints are presumptively unconstitutional).

7. Because this Court's order both upsets the status quo and causes irreparable harm, the motion for stay should be granted. See Perez v. Perez, 769 So. 2d 389, 391 n. 4 (Fla. 3d DCA 1999) (stating that appellate court has authority to grant a motion for stay to preserve the status quo, and may consider potential harm to the moving party if the motion is denied).

WHEREFORE, Gawker respectfully requests that this Court grant its motion for stay pending appeal.

Respectfully submitted,

THOMAS & LOCICERO PL

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Counsel for Defendant
Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April 2013, I caused a true and correct copy of the foregoing to be served by mail and email upon the following counsel of record:

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Attorneys for Defendant Heather Clem

/s/ Gregg D. Thomas

Attorney

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.
_____/

ORDER ON DEFENDANT'S MOTION FOR STAY PENDING APPEAL

This cause came to be heard on April 24, 2013 on Defendant Gawker Media, LLC's oral motion for stay, which was denied. Defendant Gawker Media, LLC having filed a written motion, and the Court having reviewed the Motion, and having been otherwise advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

Defendant's Motion for Stay Pending Appeal is hereby DENIED.

DONE AND ORDERED in Chambers, at ~~Clearwater~~ St. Petersburg, Pinellas County, Florida, this 25 day of April, 2013.

PAMELA A.M. CAMPBELL
Circuit Court Judge

Copies furnished to:
Counsel fo Record

EXHIBIT "B"

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

GAWKER MEDIA, LLC,

Defendant/Appellant,

vs.

Case No.: 12012447-CI-011

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff/Appellee.

_____/

FILED
2013 APR 25 AM 8:03
KEN BURKE
CLERK CIRCUIT COURT
PINELLAS COUNTY FLORIDA

NOTICE OF APPEAL OF A NON-FINAL ORDER

NOTICE IS GIVEN that pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B), Gawker Media, LLC, Defendant/Appellant, appeals to the Second District Court of Appeal, the order of this court rendered April 25, 2013. A conformed copy of the order is attached in accordance with Rule 9.130(c). The nature of the order is an order granting a temporary injunction.

Respectfully submitted,

THOMAS & LOCICERO PL.

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STATE OF FLORIDA, PINELLAS COUNTY
I hereby certify that the foregoing is a true copy as the same appears among the files and records of this court
This 26 day of APRIL 2013
KEN BURKE
Clerk of Circuit Court
By: _____ Deputy Clerk

EXHIBIT "C"

Of Counsel:
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Counsel for Defendant
Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April 2013, I caused a true and correct copy of the foregoing to be served by mail and email upon the following counsel of record:

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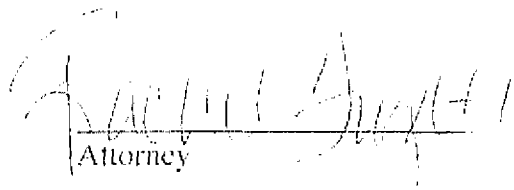
Attorneys for Defendant Heather Clem



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.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

This cause came before the Court on Plaintiff's Motion for Temporary Injunction (the "Motion"). The Court having reviewed and considered the Motion and Response papers, all oral argument at the hearing, and the Court file, and being otherwise fully advised,

IT IS ORDERED:

The Motion is GRANTED for the reasons stated on the record at the hearing held on April 24, 2013.

For the duration of the captioned action and until judgment is entered, Defendants 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, Blogwire Hungary Szellemi Alkotast Hasznosito KFT aka Gawker Media (collectively, the "Gawker Defendants") are hereby:

1. Ordered to remove the audio and video recording of Plaintiff Terry Gene Bollea in a private bedroom with Heather Clem, which recording includes depictions of Mr. Bollea naked and engaged in sexual activity (the "Sex Tape"), which is currently posted at *www.gawker.com* ("Gawker.com");
2. Ordered to remove from their websites, including Gawker.com, the written narrative describing activities occurring during the private sexual encounter, including: (a) all descriptions of visual images and sounds captured on the Sex Tape or any other video of this private sexual encounter; and (b) all direct quotations of words spoken during this private sexual encounter and recorded on the Sex Tape or any other video of this private sexual encounter;
3. Enjoined from posting, publishing, exhibiting, or broadcasting the full-length video recording, from which the Sex Tape was derived, and all portions, clips, still images, audio, and transcripts of that video recording;
4. Ordered to turn over to Mr. Bollea's counsel of record, Charles J. Harder, Esq. of Harder Mirell & Abrams LLP, all versions and copies of the full-length video recording, from which the Sex Tape was derived, and all portions, clips, still images, audio, and transcripts thereof within ten (10) days of the date of this Order; and
5. Mr. Bollea is not required to post a bond.

DONE AND ORDERED in Chambers at Pinellas County, Florida, this 25 day of April, 2013.

Pamela A. M. Campbell
Circuit Court Judge

Bellew v. Clerk/Gawker
12-012447 CI-11

Copies furnished to:
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Michael W. Gaines, Esquire
Gregg D. Thomas, Esquire
Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Kenneth G. Turkel, Esq.
Charles J. Harder, Esq.
David Houston, Esq.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

GAWKER MEDIA, LLC,

Defendant/Appellant,

vs.

Case No. 2D13-1951
L.T. No. 12012447-CI-011

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff/Appellee.
_____/

DEFENDANT/APPELLANT GAWKER MEDIA, LLC'S
***EMERGENCY* MOTION FOR STAY OF TEMPORARY INJUNCTION**

Pursuant to Rule of Appellate Procedure 9.310, Gawker Media, LLC ("Gawker") hereby moves on an emergency basis for a stay of the temporary injunction issued by the trial court on April 25, 2013. A1 at Tab A.[1]

Gawker is the publisher of a news and entertainment website, www.gawker.com. The court below issued a temporary injunction enjoining the publication of a news report and commentary (the "Gawker Story") about an extramarital affair by plaintiff/appellee Terry Gene Bollea, the wrestler known as Hulk Hogan ("Hogan"), which was accompanied by a brief excerpts of a video of the affair (the "Excerpts). The lower court's order was in error and should be reversed because it:

[1] Gawker has filed a two volume Appendix with the Court. References to the Appendix are designated as "A".

EXHIBIT "D"

a. was collaterally estopped by earlier decisions by United States District Judge James D. Whittemore about this *same* content in an earlier lawsuit between these *same* parties in connection with motions seeking this *same* preliminary injunctive relief;

b. constitutes a prior restraint that violates the First Amendment and the Florida Constitution;

c. ignored the clear holding of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in characterizing Gawker's speech as criminal and of *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577 (2010), in concluding that it was speech entirely unprotected by the First Amendment that could be enjoined;

d. separate and apart from the foregoing constitutional infirmities, failed to undertake any meaningful analysis of the factors for obtaining temporary injunctive relief;

e. was entered by a judge who expressly stated she did not watch the Excerpts at issue and did not plan to do so, and who chided the parties for including actual descriptions of the content at issue in their papers;

f. was entered against a number of parties who the judge below knew had not been served and/or were not able to control the content of Gawker.com;

g. enjoins the dissemination of a publication – the Gawker Story – that Hogan himself has repeatedly attached to public filings, including seven times in this case, *see* AI at Tab C, Harder Decl. Ex. A-G; and

h. failed to require the movant to post a bond in direct contravention of the mandates of Florida Rule of Civil Procedure 1.610.

Because Gawker is likely to succeed on the merits of its appeal for each of these reasons, because this order disturbed rather than preserved the *status quo*, and because Gawker's First Amendment rights are being irreparably injured, Gawker respectfully requests that this Court stay the order at issue pending the outcome of this appeal.

FACTUAL BACKGROUND

A. The Gawker Story and Excerpts

The Gawker Story at the center of this litigation was posted to the Gawker website more than six months ago, on October 4, 2012. AI at Tab B, ¶ 1; AI at Tab C, Harder Decl. Ex. A (the "Gawker Story"). The Gawker Story reports on the existence of a video recording featuring Hogan having sexual relations with an unidentified woman. *Id.* Hogan later admitted that the Video was recorded in 2006 and that the woman is Heather Clem, the wife of Hogan's then-best friend Bubba the Love Sponge Clem, aka Todd Alan Clem. *Id.*; AI at Tab C, Bollea Decl. ¶ 5; AI at Tab B ¶ 26. The Gawker Story reports that a DVD with the recording "was delivered to [Gawker] through an anonymous source," who did not ask for "payment." AI at Tab C, Harder Decl. Ex. A. Hogan has never maintained that Gawker played any role in recording the Video, or causing it to be made. *See* AI at Tab B, ¶¶ 26-28 (alleging that Mrs. Clem caused the Video to be recorded in 2006, while Gawker published the report about the Video in 2012).

By the time the Gawker Story was published, the existence of the Video was widely known, and had been the subject of considerable discussion and speculation in the press, including by Hogan himself, who stated in an interview that he had no idea who the woman in the Video was because he had sex with a lot of women during that period – adding, "During that time, I don't even remember people's

names, much less girls." *See* AII at Tab E, Fugate Decl., Exs. 8-9, 10-17, 19 (includes 4 minute interview with Hogan).

The Gawker Story was accompanied by short Excerpts from the Video on which Gawker was reporting. AI at Tab C, Harder Decl. Ex. A. As Judge Whittemore observed in one of his four orders denying Hogan preliminary injunctive relief in the prior federal action (described below) about this same content between these same parties: "[Gawker] did not simply post the entire Video – or substantial portions thereof, but rather posted a carefully edited excerpt consisting of less than two minutes of the thirty minute video of which less than ten seconds depicted explicit sexual activity." *Bollea v. Gawker Media, LLC*, --- F. Supp. 2d ---, 2012 WL 7005357, at *4 n.6 (M.D. Fla. Dec. 21, 2012) ("*Bollea II*") (AII at Tab E, Fugate Decl., Ex. 4). As Judge Whittemore further found, in describing the nature of the publication at issue in this case:

> Gawker . . . posted an edited excerpt of the Video together with nearly three pages of commentary and editorial describing and discussing the Video in a manner designed to comment on the public's fascination with celebrity sex in general, and more specifically [Hogan's] status as a "Real Life American Hero to many," as well as the controversy surrounding the allegedly surreptitious taping of sexual relations between Plaintiff and the then wife of his best friend—a fact that was previously reported by other sources and was already the subject of substantial discussion by numerous media outlets.

Id. at *2.

B. The Prior Federal Proceedings

Prior to coming to the trial court seeking injunctive relief in this case, Hogan sought an order enjoining publication of the Gawker Story and Excerpts on *five* separate occasions in federal court. As explained below, the issue of Hogan's entitlement to a prior restraint was conclusively adjudicated in the various rulings in that federal case.

Hogan's federal action (the "Prior *Bollea* Action") was filed in the Middle District of Florida on October 15, 2012, eleven days after the Gawker Story and Excerpts were posted. *See* AII at Tab E, Fugate Decl., Ex. 5, Dkt. 1. In his action, Hogan asserted against Gawker, as well as the seven other Gawker-affiliated defendants presently named as defendants in the lawsuit (collectively, the "Gawker Defendants"), essentially the same factual and legal claims asserted here. *See* AII at Tab E, Fugate Decl., Ex. 5 at Dkt. 1; *Bollea v. Gawker Media, LLC*, 2012 WL 5509624, at *1-2 (M.D. Fla. Nov. 14, 2012) ("*Bollea I*") (AII at Tab E, Fugate Decl., Ex. 2) (describing legal and factual basis for Prior *Bollea* Action). On the same day he initiated the federal lawsuit, Hogan filed this action, solely against Mr. and Mrs. Clem.

On October 16, 2012, the day after he filed his federal lawsuit, Hogan filed a motion for a temporary restraining order and a separate motion for a preliminary injunction, both seeking essentially the same relief granted by the trial court in this

case over six months later. All at Tab E, Fugate Decl., Ex. 5, Dkts. 4-5. On October 22, 2012, the federal district court denied Hogan's motion for a TRO, finding that Hogan "failed to show that immediate irreparable injury, loss, or damage will result before Defendants can be heard in opposition." *Id.* at Ex. 1.

On November 14, 2012, after full briefing and a lengthy hearing, *id.* at Dkts. 28-29, 41; Ex. 30 (transcript), the federal district court denied Hogan's motion for a preliminary injunction in a detailed written order. *See Bollea I*, 2012 WL 5509624. Judge Whittemore based his ruling on his threshold determination that Hogan had "failed to satisfy his heavy burden to overcome the presumption that the requested preliminary injunction would be an unconstitutional prior restraint." *Id.* at *3. In support of that determination, Judge Whittemore found that the Video Excerpts Hogan sought to enjoin were "a subject of general interest and concern to the community" because of Hogan's "public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video." *Id.*; *see also id.* ("Defendants' decision to post ***excerpts*** of the Video online is appropriately left to editorial discretion . . . ."). In addition, Judge Whittemore found that Hogan "ha[d] failed to introduce evidence demonstrating that he would suffer irreparable

harm if Defendants are not forced to remove the Video excerpts from the Internet, that the balancing of harm warrants entry of a preliminary injunction, or that the public interest would be served by the entry of a preliminary injunction." *Id.* at *4. Finally, Judge Whittemore noted that "[t]he Supreme Court has repeatedly recognized that even minimal interference with the First Amendment freedom of the press causes an irreparable injury." *Id.*

The next day, Hogan filed an interlocutory appeal from that order to the Eleventh Circuit. All at Tab E, Fugate Decl., Ex. 5, Dkt. 49. Four days later, on November 19, 2012, he filed a motion with the district court for a preliminary injunction pending appeal (request number three), which the district court subsequently denied, holding that "[p]laintiff has failed to demonstrate any of the four factors warranting the 'extraordinary remedy' of a preliminary injunction pending appeal." *Id.* at Ex. 3. On November 30, 2012, Hogan filed yet another motion seeking preliminary injunctive relief (number four), this time seeking to enjoin Gawker's purported copyright infringement, based on an amended complaint in which he asserted ownership of a copyright in the Video. *Id.* at Ex. 5, Dkts. 42, 60.

On December 14, 2012, while Hogan's latest preliminary injunction motion was still pending in the federal district court, he filed a Motion for Injunction Pending Appeal in the Eleventh Circuit (number five). *Id.* at Ex. 6. On December

21, 2012, Judge Whittemore denied Hogan's Motion for a Preliminary Injunction to Enjoin Copyright Infringement. *See Bollea II*, 2012 WL 7005357. As is relevant here, Judge Whittemore reiterated his prior holding that the Gawker Story and Excerpts involved a matter of public concern, *id.* at *2 & * 2 n.3, and, once again, declined to enter what he noted would constitute a "prior restraint in derogation of the First Amendment," *id.* at *4.

Having filed five motions for preliminary injunctive relief, and having had four of them adjudicated decisively against him, Hogan filed a notice of voluntary dismissal of the Prior *Bollea* Action on December 28, 2012. All at Tab E, Fugate Decl., Ex. 5, Dkt. 68. At the time, the Gawker Defendants' motion to dismiss was fully briefed and pending before the district court, *id.* at Ex. 5, Dkts. 63, 67, while Hogan's Motion for Injunction Pending Appeal was pending in the Eleventh Circuit, *id.* at Ex. 6. That same day, Hogan filed his Amended Complaint in this action, dropping Mr. Clem as a defendant and joining each of the Gawker Defendants to his pre-existing suit against Mrs. Clem. *See* A1 at Tab B. Gawker then removed this action to federal court, where it was remanded by to state court on March 28, 2013.

C. The Trial Court's Order

Three weeks later, on April 19, 2013, Hogan filed his motion for a temporary injunction against all the Gawker Defendants, seeking substantially the

same relief he sought in his five prior motions in federal court. AI at Tab C. At the time, only two Gawker defendants had been served -- Gawker Media, LLC and A.J. Daulerio, who, as was explained to the trial court, is no longer affiliated with Gawker. AI at Tab D, p. 1 n.1.

On April 24, 2013, a hearing was held before the Honorable Pamela A.M. Campbell of the Sixth Judicial Circuit Court. AII at Tab F. Judge Campbell began the hearing by chiding lawyers for both sides – but, particular, lawyers for Gawker – for including "offensive" language in their filings. *Id.* at 3:14-4:5. Later, the judge explained that what specifically "irritat[ed]" her about the "lawyers' pleading[s]" was their descriptions of the actual content of the Gawker Story and the Excerpts. *Id.* at 22:1-6. When asked by counsel for Gawker whether she had had looked at the Video prior to the hearing, Judge Campbell responded: "No. I'm not going to look at the tape. I don't think at this point in time I need to look at the tape." *Id.* at 24:1-7.

At the conclusion of the hearing, and without asking a single question of counsel for Hogan, Judge Campbell announced she was granting the entirety of the relief sought by Hogan. *Id.* at 32:20-22. Without any explanation beyond repeating the standard for temporary injunctive relief, Judge Campbell stated she was granting the injunction, "finding that plaintiff will suffer irreparable harm," that there "is no adequate remedy of law, the likelihood of success on the merits,"

and, as if to make an example of Gawker, "that the public interest will definitely be served by granting this *public* and temporary injunction." *Id.* at 32:13-19. The next day, Judge Campbell entered a written order submitted by counsel for Hogan at her request, in which she stated that she was granting Hogan's motion for a temporary injunction "for the reasons stated on the record at the hearing held on April 24, 2013." AI at Tab A. The order is directed to all of the Gawker Defendants and requires them to:

- remove the Video Excerpts from of their websites, including Gawker.com;
- remove the Gawker Story from their websites, including Gawker.com, including (a) "all descriptions of visual images and sounds captured" on the Video and (b) "all direct quotations of words spoken during this private sexual encounter and recorded" on the Video;
- refrain from "posting, publishing, exhibiting, or broadcasting the full-length video recording," from which the Video Excerpts were derived, "and all portions, clips, still images, audio, and transcripts of th[at] video recording"; and
- "turn over to [Hogan's] counsel of record . . . all versions and copies of the full-length video recording" from which the Excerpts were derived, and "all portions, clips, still images, audio, and transcripts thereof within ten (10) days of the date of this Order."

Id. In addition, at both the hearing and in the written order, the Court refused to require Hogan to post a bond. *Id.* (Hogan "is not required to post a bond."); AII at Tab F, at 34:2 – 35:2.

At the hearing Gawker orally moved for a stay for "time to go to the 2nd DCA to seek appellate review of [the court's] decision," which was denied. *Id.* at

35:4-11. The next morning, Gawker filed with the trial court a written motion for a stay pending appeal, which was denied later that day. All at Tab H. Gawker has now appealed, and moves for a stay of the lower court's order.

ARGUMENT

Florida Appellate Rule 9.310(f) provides this Court with authority to issue a stay in order to preserve the status quo pending appeal. *See Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999). This Court considers two factors in determining whether to grant such relief: "the moving party's likelihood of success on the merits, and the likelihood of harm should a stay not be granted." *Id.* (citing *State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980)).

Here, both those factors cut decisively in Gawker's favor. First, as detailed below, the trial court's order entering a temporary injunction in this case was clearly in error and Gawker is, for that reason, likely to prevail in the appeal, particularly given that Hogan had a high burden to establish an entitlement to temporary injunctive relief below and Gawker's appeal will necessarily be viewed through that prism. Second, failure to stay the trial court's order will cause irreparable harm to Gawker. Indeed, when a judgment acts as a restraint on activities protected by the First Amendment, as this one plainly does here, the Constitution mandates that the judgment must either be immediately reviewable or subject to a stay pending review. *Nat'l Socialist Party of Am. v. Village of Skokie*,

432 U.S. 43, 43-44 (1977); *In re Grand Jury Presentment*, 534 So. 2d 905, 907 (Fla. 1st DCA 1988).

I. The Trial Court's Order Was Plainly Erroneous And Will Likely Be Overturned On Appeal.

A. The Relief Provided By The Trial Court Is Barred By Principles Of Collateral Estoppel.

"Collateral estoppel is a judicial doctrine which prevents identical parties from relitigating the same issues that have already been decided." *Carnival Corp. v. Middleton*, 941 So. 2d 421 424 (Fla. 3d DCA 2006). Where, as here, the relevant prior decision was issued in federal court, Florida courts apply federal collateral estoppel principles. *Amador v. Fla. Bd. of Regents ex rel. Fla. Int'l Univ.*, 830 So. 2d 120, 122 (Fla. 3d DCA 2002).

Under federal collateral estoppel principles, "a preliminary injunction ruling has preclusive effect with regard to subsequent motions for preliminary injunction." *Hayes v. Ridge*, 946 F. Supp. 354, 364 (E.D. Pa. 1996), *aff'd*, 216 F.3d 1076 (3d Cir. 2000). As a leading treatise on federal law explains, a prior ruling on a preliminary injunction motion is properly given estoppel effect where "the same showings are made and . . . *nothing more is involved than an effort to invoke a second discretionary balancing of the same interests*." 18A Charles A. Wright, Arthur R. Miller, *et al.*, *Federal Practice & Procedure* § 4445 (2d ed. 2012) (emphasis added). *See also, e.g.*, *Bridal Expo, Inc. v. Van Florestein*, 2009

WL 255862, at *4-5 (S.D. Tex. Feb. 3, 2009) (collateral estoppel barred plaintiff's attempt to relitigate entitlement to preliminary injunction); *Hayes*, 946 F. Supp. at 366 (denying second motion for preliminary injunction on collateral estoppel grounds where there were no "substantial considerations" not raised in the prior proceeding); *Dairymen, Inc. v. FTC*, 1981 WL 2140, at *1 (W.D. Ky. Aug. 5, 1981) (principles of collateral estoppel barred plaintiff from obtaining temporary injunction where same request had been made and denied in prior federal proceeding); *Lyon Ford, Inc. v. Ford Mktg. Corp.*, 337 F. Supp. 691, 695 (E.D.N.Y. 1971) (denying second request for preliminary injunction on collateral estoppel grounds, where first request was denied on the merits after "full and fair" hearing).[2]

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[2] At the hearing, Hogan's counsel attempted to counter this authority by citing two cases, *David Vincent, Inc. v. Broward County*, 200 F.3d 1325 (11th Cir. 2000), and *Abbott Laboratories v. Andrx Pharmaceuticals, Inc.*, 473 F.3d 1196 (Fed. Cir. 2007), which he represented held "that a ruling on a preliminary injunction" does not have preclusive effect "because it is not a ruling on the merits of the case." All at Tab F, 4:17-5:12. But those cases, which were not provided either to opposing counsel or the Court, do not support that general proposition. *David Vincent* held only that a ruling on a *preliminary* motion does not necessarily preclude a subsequent grant of a *permanent* injunction based on a full adjudication on the merits, 200 F.3d at 1331; it did not address the situation here where a party files successive motions for preliminary injunctive relief. *Abbott Labs* held that an earlier preliminary injunction ruling was not preclusive because it was based merely on a tentative assessment of plaintiff's likelihood of success against different parties, rather than a conclusive determination. 473 F.3d at 1206. Here, on the other hand, Judge Whittemore denied Hogan's motion for a preliminary injunction based on its threshold and dispositive determination that the relief

In this case, Hogan had a full and fair opportunity to litigate his claims before the prior forum – and, in fact, did so multiple times. The trial court erred in giving him yet another "bite at the apple."[3]

B. The Trial Court's Order Operates As An Unconstitutional Prior Restraint.

Even if principles of collateral estoppel did not bar the relief granted here, the First Amendment certainly does. The Supreme Court has long emphasized that a request to enjoin a publication – *i.e.*, a prior restraint – comes to a court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *State ex rel. Miami Herald Publ'g Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1976) (same). Prior restraints constitute "one of the most extraordinary remedies known to our jurisprudence" and are universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559,

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sought would constitute "unconstitutional prior restraint," *Bollea I*, 2012 WL 5509624, at *3, a holding reiterated in three other orders.

[3] Gawker's argument that collateral estoppel precluded Hogan from relitigating his entitlement to preliminary injunctive relief is explained in greater detail in its Opposition to Plaintiff's Motion below, Tab D, Part I, as is its argument that an order granting Hogan's motion would constitute a prior restraint, *id.*, Part II, and that its conduct was not criminal, *id.*, Part III.A.2. We incorporate those arguments by reference and respectfully refer the Court to that brief for additional authority.

562 (1976); *see also CBS, Inc. v. United States District Court*, 729 F.2d 1174, 1177 (9th Cir. 1984) ("the first amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave"). Indeed, some two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of just the sort of prior restraint on a media outlet granted here. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

Yet, that is precisely the kind of relief that was granted here. At the hearing, the position of the trial court appeared to be that the speech at issue here is not the kind worthy of constitutional protection because it potentially invades Hogan's privacy. *See* AII at Tab F, 23:18-19. But there is no rule that permits prior restraints to issue where alleged privacy interests are at stake. In fact, the Supreme Court has made clear that "privacy concerns give way when balanced against the interests" protected by the First Amendment. *Bartnicki*, 532 U.S. at 534. Florida courts faced with claims purportedly asserted to protect privacy rights have consistently followed this principle and reached the same conclusion. *See, e.g.*, *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 611-12 (Fla. 5th DCA 2007) ("time after time, when the high court has been called upon to consider whether the free exercise of speech under the First Amendment may be curtailed to protect privacy rights, it has not been hesitant in resolving the

ostensible conflict in favor of the exercise of free speech"); *In re Branam Children*, 32 So. 3d 673, 674 (Fla. 3d DCA 2010) (reversing order restricting dissemination of photographs of and information about minor children because it did not overcome strong presumption against prior restraints); *In re Fullwood*, 35 Media L. Rep. (BNA) 1547, 1549 (Fla. Cir. 2007) (protecting privacy interests of children did not justify restraint on publishing images of murdered child where similar information had already been released); *Miami Herald Publ'g Co. v. Morphonios*, 467 So. 2d 1026, 1030 (Fla. 3d DCA 1985) (reversing prior restraint on broadcasting testimony of minor victim of sex abuse).

C. The Court's Conclusions that the Speech was Criminal and that it Was Unprotected by the First Amendment Were in Error.

At the hearing, the court appeared to conclude that Gawker's speech is not constitutionally protected because it is somehow "criminal." *See* AII at Tab F, 24:4-20 (likening Gawker's speech to someone who hires bikini models to beat up homeless men and then sell videos of the crime). In going down this path, the court was following the lead of counsel for Hogan who, referencing Florida's Video Voyeurism Act, repeatedly described Gawker's speech as "criminal" and therefore unprotected. *See id.* at 7:2-11:25 (citing *Aguilar v. Avis Rent-A-Car Sys. Inc.*, 21 Cal. 4th 121 (1999)).

First, to the extent that *recording* the full Video ultimately received by Gawker arguably violates either Florida's Wiretap Act or Video Voyeurism

Statute, Gawker played no role in its creation, and Hogan has not alleged otherwise. *See, e.g.*, A1 at Tab B, ¶ 26.

To the extent that both Hogan's counsel and the court below were focused on Gawker's *dissemination* of Excerpts of the Video, in connection with the Gawker Story's reporting and commentary, the Supreme Court made clear in *Bartnicki* that the criminal laws cannot be constitutionally enforced to punish the publication of a communication about a matter of public concern where the defendants played no role in recording or intercepting it. 532 U.S. at 528, 535. Indeed, *Bartnicki* is the latest in a series of Supreme Court decisions finding it unconstitutional under the First Amendment to sanction the retransmission of information that was lawfully obtained even if someone else earlier violated a statute or court order. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (no liability for publication of identity of rape victim when such information was obtained from police report released by law enforcement agency in violation of Florida statute); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) (invalidating West Virginia statute prohibiting publication of identity of juvenile defendant without first obtaining court order; reiterating that a state cannot restrain a person from reporting information that he did nothing unlawful in obtaining); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (invalidating Georgia law

restricting publication of rape victim's name because defendant had obtained information lawfully despite statute's prohibition against its release).

Thus, to the extent that the court determined that Gawker's posting of excerpts from the Video is not constitutionally protected because there may have been some crime in the creation of the original Video, which Gawker played no part in, or in the dissemination of the Video, which under settled law cannot be criminalized in these circumstances, that was plain error.[4] Moreover, at the hearing, Hogan's counsel argued and the court apparently adopted the notion that, because the Gawker Story and the Excerpts was arguably unlawful, "the speech that is at issue . . . is not constitutionally protected speech" *at all*. Tab F, at 6:25 - 7:1. Such a conclusion is plain wrong. Indeed, the Supreme Court has long made clear that only "well-defined and narrowly limited classes of speech" fall outside the protection of the First Amendment, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (including obscenity, incitement, fighting words, threats),

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[4] Moreover, even apart from the constitutional concerns articulated in *Bartnicki*, the Video Voyeurism Act cannot support an injunction because on its face the statute has not been violated. First, the statute does not create a private right of action and Hogan has not asserted one. *See Kamau v. Slate*, 2012 WL 5390001, at *9 (N.D. Fla. Oct. 1, 2012). Second, the statute does not apply on its face because: (a) at the time the Video was recorded six years ago, the statute did not apply to recordings made in the "interior of a residential dwelling" (that language was added in 2012, *see* Amended Notes to Fla. Stat. § 810.145); and (b) therefore any "dissemination" was not "knowing" or with "reason to believe" that the Video was "created" in violation of the statute, as required by Fla. Stat. § 810.145(4)(a).

and recently reaffirmed this categorical approach to defining unprotected speech in *United States v. Stevens*, 130 S. Ct. at 1584 ("These historic and traditional categories long familiar to the bar . . . are well-defined and narrowly limited classes of speech.") (citations omitted). As explained below and herein, an alleged invasion of privacy – whether under common law or statutory principles, even those that purport to criminalize publication – is not one of those well-defined categories of unprotected speech that can be enjoined without running afoul of the First Amendment.[5]

D. The Trial Court Failed To Undertake The Necessary Analysis.

In addition to the defects noted above, the trial court, in issuing its order, failed to undertake any of the analysis required before issuing an injunction. The law is clear that "a temporary injunction is an extraordinary remedy, to be granted sparingly *and only after the moving party establishes the following criteria*: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) consideration of the public interest." *Avalon Legal Info. Servs., Inc. v. Keating*, --- So. 3d ---, 2013 WL 843033, at *4 (Fla. 5th DCA Mar. 8, 2013) (citation omitted and emphasis added).

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[5] Plaintiff has never alleged, nor could he, that either the Gawker Story, or the brief and grainy Excerpts, qualify as "obscenity" under *Miller v. California*, 413 U.S. 15 (1973), nor has he ever alleged that the speech at issue here somehow falls into one of the other well recognized categories of unprotected speech.

In this case, the court engaged in *no* analysis of any of these criteria, and, instead, provided only conclusory statements as to each factor in connection with announcing the court's ruling. AII at Tab F, 32:13-19. Indeed, the court did not even indicate which of Hogan's causes of action supports his entitlement to a temporary injunction, even though she was required to assess Hogan's "likelihood of success" on the merits as part of her determination. This too was plain error warranting reversal. *See Coscia v. Old Florida Plantation, Ltd.*, 828 So. 2d 488, 490 (Fla. 2d DCA 2002) ("Trial courts are required to set forth sufficient facts to support each element that entitles the moving party to a temporary injunction."); *City of Jacksonville v. Naegele Outdoor Adver. Co.*, 634 So. 2d 750 (Fla. 1st DCA 1994) ("An order granting a temporary injunction must contain more than conclusory legal aphorisms. . . . [It must] do more than parrot each line of the four-prong test. . . . Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction.").

E. The Court Did Not Fairly Evaluate The Challenged Speech, As Demanded By First Amendment Principles.

At the hearing, the judge made abundantly clear that she personally found the speech in question offensive, going so far as to say that she found it "irritating" that the parties quoted from the Gawker Story and the Excerpts in their papers. AII at Tab F, 22:2-6. The Constitution mandates that our courts act as bulwarks

against such attitudes, rather than embodying them. *See, e.g., United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions . . . outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

The United States Supreme Court has emphasized that "[t]he arguably inappropriate or controversial character of a statement is irrelevant to the question of whether [the statement] deals with a matter of public concern," and, thus, is "at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215-16 (2011) (internal quotation marks and citations omitted). Accordingly, the Court has underscored that judges have a special obligation in the First Amendment context "to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 1216 (quoting *Bose Corp. v. Consumer Union of the United States, Inc.*, 466 U.S. 485, 499 (1984)); *see also id.* at 1219 (courts must protect against "the suppression of . . . vehement, caustic, and sometimes unpleasant expression"). Here, the judge refused even to "look at" the Video Excerpts she ultimately ordered taken down. All at Tab F, 24:4-6. It is difficult to

imagine an approach more contrary to what the First Amendment requires.[6] And, as for the Gawker Story, the injunction below creates the absurd result that a person interested in reading the story can obtain it from the publicly available docket in this case, and in the Prior *Bollea* Action in federal court, just not from Gawker's website. That result, too, is constitutionally prohibited. *See Cox Broad. Corp.*, 420 U.S. at 496 (court may not constitutionally enjoin publication of information in official records).

F. The Trial Court Issued An Injunction Against Parties Who Had Not Been Served, And Who Have No Control Over Gawker.com.

In its opposition papers, Gawker brought to the trial court's attention both (1) that only two of the Gawker Defendants – Gawker and A.J. Daulerio – had been served, and (2) that, of the Gawker Defendants, only Gawker itself is in a position to control whether the content at issue is published (indeed, three of the Gawker Defendants are dissolved companies). AI at Tab D, p. 1 at n.1. Yet, the trial court entered its injunction against all of the Gawker Defendants nonetheless. AI at Tab A.

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[6] Justice Potter Stewart famously declared, in analyzing First Amendment protection for an allegedly obscene film, "I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Although the Supreme Court as a whole has employed more rigorous standards for evaluating whether speech is obscene, it would be hard to imagine any judge attempting to evaluate First Amendment protection available to challenged speech without even looking at it.

First, as to the unserved defendants, the law is clear that an injunction may not be enforced against parties over whom a court lacks personal jurisdiction. *See Smith v. Knight*, 679 So.2d 359, 361 (Fla. 4th DCA 1996) (court "may not use its contempt power against the defendant to enforce" an injunction unless it "has acquired personal jurisdiction over [that] defendant by service of process"). The injunction is defective for that reason.

Second, as to the defendants who lack of power over whether the content at issue is published or not, the law provides that where a person or entity "does not have the ability to comply with the injunction, . . . the injunction is improper." *Abbey Park Homeowners Ass'n v. Bowen*, 508 So. 2d 554, 555 (Fla. 4th DCA 1987). Indeed, this issue highlights the absurd over-breadth of the injunction put in place in this case. The injunction issued by the trial court states that *all* of the Gawker Defendants – including Mr. Daulerio, who no longer works at Gawker – must remove the Gawker Story and Excerpts from Gawker.com, even though he has no ability to do so. Moreover, under this order, Mr. Daulerio is enjoined from posting on his personal weblog any recollections he might have from having watched the Video for purposes of drafting the Gawker Story. Such dramatic over-breadth is obviously contrary to the First Amendment.

G. The Failure To Require Hogan to Post a Bond Renders the Injunction Fundamentally Defective.

The trial court did not require Hogan to post bond as a condition of obtaining the injunction. Florida Rule of Civil Procedure 1.610(b) clearly states that: "*No temporary injunction shall be entered* unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." (emphasis added). Indeed, "[a]n injunction is defective if it does not require the movant to post a bond. 'The trial court cannot waive this requirement nor can it comply by setting a nominal amount.'" *Florida High Sch. Activities Ass'n v. Mander ex rel. Mander*, 932 So. 2d 314, 315-16 (Fla. 2d DCA 2006) (quoting *Bellach v. Huggs of Naples, Inc.*, 704 So. 2d 679, 680 (Fla. 2d DCA 1997)). *See also Braswell v. Braswell*, 881 So. 2d 1193, 1202 (Fla. 3d DCA 2004) (reversing and remanding where trial court denied defendant's request for evidentiary hearing on injunction bond). Accordingly, particularly given Hogan's repeated assertion that Gawker is profiting from the Gawker Story and Excerpts, the court's order was fatally defective because it failed to require a bond.

Given the foregoing grave errors in issuing the ruling below, Gawker is likely to succeed on the merits of its appeal.

II. The Prior Restraint Issued By The Trial Court Will Cause Irreparable Harm.

In addition, Gawker will suffer irreparable harm if the stay is not lifted. The United Supreme Court has explained that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Indeed, a "prior restraint is not constitutionally inoffensive merely because it is temporary." *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005) (Sotomayor, J.). "Rather than having no effect, 'a prior restraint, by . . . definition, has an immediate and irreversible sanction'" on the media defendant. *Proctor & Gamble*, 78 F.3d at 226.

Indeed, the purpose of temporary injunctive relief is to preserve the status quo. *Perez*, 769 So. 2d at 391 n.4. "Where the freedom of the press is concerned, . . . the status quo is to 'publish news promptly that editors decide to publish. A restraining order *disturbs* the status quo and impinges on the exercise of editorial discretion.'" *Proctor & Gamble*, 78 F.3d at 226 (citation omitted) (emphasis added). So, too, is the Court's order to turn over Gawker's property to Hogan, without any protection for it while the case pends. *See* U.S. Const. amend. XIV, § 1 (prohibiting deprivation of property without due process of law).

This is particularly the case where injunctive relief against Gawker would be ineffectual given that the contents of the full Video have been described in prior reports and depicted in screen shots. Excerpts of the Video have since been posted

on many other websites, AI at Tab B, at 8 ¶ 30, and the Gawker Story is available elsewhere (including in electronic court dockets). *See, e.g., Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (because the documents at issue had been "transmitted over the internet via [other] websites. . . all over the world," court concluded that the "'cat is out of the bag'" and the requested injunction would not "serve its intended purpose") (citation omitted); *In re Zyprexa Prods. Liab. Litig.*, 474 F. Supp. 2d 385, 426 (E.D.N.Y. 2007) ("[p]rohibiting five of the internet's millions of websites from posting the documents will not substantially lower the risk of harm posed to" the complaining party and "would be a fruitless exercise of the court's equitable power"), *aff'd*, 617 F.3d 186 (2d Cir. 2010). Indeed, as the federal court previously found in denying Hogan's second of five attempts to secure injunctive relief, "this is an example of where the proverbial 'cat is out of the bag,' rendering injunctive relief ineffective in protecting the professed privacy rights of the Plaintiff. Thus, even if Plaintiff's privacy concerns could arguably justify injunctive relief, [it] is not apparent that entry of the requested preliminary injunction would serve its intended purpose." *Bollea I*, 2012 WL 5509624, at *4 (citations omitted).

In sum, this factor strongly favors granting the stay as well because Gawker will suffer irreparable harm so long as the prior restraint remains in place.

CONCLUSION

For the foregoing reasons, Gawker's Emergency Motion for a Stay of Temporary Injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April 2013, I caused a true and correct copy of the foregoing to be served by mail and email upon the following counsel of record:

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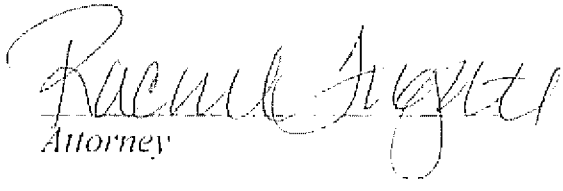

Attorney

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

April 26, 2013

CASE NO.: 2D13-1951
L.T. No. : 12012447-CI-011

Gawker Media, L L C	v.	Terry Gene Bollea, A/k/a Hulk Hogan
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

The appellee is ordered to respond to the appellant's emergency motion for stay of temporary injunction within 10 days of this order.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Rachel E. Fugate, Esq.
Kenneth G. Turkel, Esq.
D. Keith Thomas, Esq.
Ken Burke, Clerk

Gregg D. Thomas, Esq.
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ag

James Birkhold
Clerk

EXHIBIT "E"

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

GAWKER MEDIA, LLC,

Defendant/Appellant,

vs.

Case No. 2D13-1951
L.T. No. 12012447-CI-011

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff/Appellee.
_____/

DEFENDANT/APPELLANT GAWKER MEDIA, LLC'S *EMERGENCY* MOTION FOR CLARIFICATION

Gawker Media, LLC ("Gawker") hereby moves on emergency basis for clarification of this Court's April 26, 2013 Order setting a standard response deadline for Gawker's Emergency Motion for Stay. Gawker requests either a temporary stay of the underlying injunction until the Motion for Stay is adjudicated or expedited consideration of its stay motion. In support of this Motion, Gawker states as follows:

1. Gawker is currently subject to a presumptively unconstitutional prior restraint issued by the lower tribunal. Specifically, the lower tribunal issued a temporary injunction enjoining the publication of a news report and commentary (the "Gawker Story") about an extramarital affair by plaintiff/appellee Terry Gene

EXHIBIT "F"

Bollea, the wrestler known as Hulk Hogan ("Hogan"), which was accompanied by a brief excerpts of a video of the affair (the "Excerpts). (A. at Tab A, F.)[1]

2. It cannot be disputed that the injunction at issue is a prior restraint – a finding already made by the federal court in which Appellee originally presented his claims. Indeed, before proceeding to state court, Hogan sued Gawker in federal court in the Middle District of Florida and was denied the very relief at issue multiple times.

3. With respect to the injunctive relief Hogan ultimately obtained in the lower tribunal, the Middle District of Florida originally determined that Hogan had "failed to satisfy his heavy burden to overcome the presumption that the requested preliminary injunction would be an unconstitutional prior restraint." *Bollea v. Gawker Media, LLC*, 2012 WL 5509624, at *3-4 (M.D. Fla. Nov. 14, 2012); *see also Bollea v. Gawker Media, LLC*, --- F. Supp. 2d ---, 2012 WL 7005357, at *4 n.6 (M.D. Fla. Dec. 21, 2012) (again declining to enter a "prior restraint in derogation of the First Amendment").

4. Despite these findings, the lower tribunal subsequently entered the prior restraint on April 25, 2013, without any discussion or findings about why this

[1] Gawker previously filed a two volume appendix with its Notice of Appeal and Emergency Motion for Stay.

presumptively unconstitutional relief was warranted.[2] (A. at Tab A, F.) Not only did the Court enjoin Gawker's publication of brief video excerpts that the federal court repeatedly refused to enjoin, but the court below also enjoined the publication of an article that Hogan and his counsel have made publicly available in the file of the court below and in the federal court's electronic docket. This leads to the absurd result that a member of the public can read the article in either court's docket, but not on Gawker.com. Finally, the lower tribunal has directed that Gawker transfer to Hogan a videotape, property which was never owned by him and which is evidence central to his lawsuit, within ten days – *i.e.*, before this Court will adjudicate Gawker's stay motion.

5. The day after the lower tribunal issued the temporary injunction, Gawker filed a notice of appeal in this Court and an emergency motion to stay the injunction. The Court issued a standard response order, directing Appellee to respond within ten (10) days, but did not otherwise address the substance of the stay motion.

6. This standard response times places Gawker in the untenable position of complying with an unconstitutional prior restraint or risking being held in contempt of court to exercise its First Amendment rights.

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[2] Some two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of just the sort of prior restraint on a media outlet granted here. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

7. However, when a judgment acts as a restraint on activities protected by the First Amendment, as the injunction plainly does here, the Constitution mandates that the judgment must either be immediately reviewable or subject to a stay pending review. *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43-44 (1977); *In re Grand Jury Presentment*, 534 So. 2d 905, 907 (Fla. 1st DCA 1988). *See also Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1302, 1307 (1974) (granting media entity's motion to stay a trial court's order, due to substantial possibility order was an unconstitutional prior restraint that would cause irreparable harm, and stating that prior restraints are presumptively unconstitutional).

8. For example, in *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994), Justice Blackmun issued a stay of a prior restraint enjoining a broadcast that purportedly included video footage that the courts below found had been obtained "through the calculated misdeeds of CBS," in violation of state criminal laws. On February 8, 1994, the South Dakota Supreme Court scheduled oral argument on CBS's petition for a writ of mandamus several weeks later. *Id.* at 1316. The very next day, Justice Blackmun issued a stay, even in the absence of any reviewable, substantive order by the state's high court, because "where a prior restraint is imposed, . . . each passing day may constitute a separate and cognizable infringement of the First Amendment." *Id.* at 1317 (citing *Nebraska Press Ass'n v. Stuart*, 423 U.S.

1319, 1329 (1975)); *see also id.* at 1315 (noting the "time pressure involved in resolving this emergency application"). In issuing the stay where the state court had failed to act with dispatch, he found that "[i]f CBS has breached its state law obligations, the First Amendment requests that [plaintiff] remedy its harmed through a damages proceeding rather than through suppression of protected speech." *Id.* at 1318.

9. Similarly, in this case, a temporary stay – or at the very least an expedited briefing schedule on the motion for stay – is warranted to preserve the *status quo* and protect Gawker from the irreparable harm that flows from an unconstitutional prior restraint.

10. Indeed, the purpose of temporary injunctive relief is to preserve the status quo. *Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999). "Where the freedom of the press is concerned, . . . the status quo is to 'publish news promptly that editors decide to publish. A restraining order *disturbs* the status quo and impinges on the exercise of editorial discretion.'" *Proctor & Gamble*, 78 F.3d at 226 (citation omitted) (emphasis added).

11. More importantly, however, a "prior restraint is not constitutionally inoffensive merely because it is temporary." *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005) (Sotomayor, J.). "Rather than having no effect, 'a prior

restraint, by . . . definition, has an immediate and irreversible sanction'" on the media defendant. *Proctor & Gamble*, 78 F.3d at 226.

12. Therefore, Gawker requests that this Court clarify its order establishing a standard, ten-day response time to its Emergency Motion for Stay. Because of the irreparable and irreversible harm caused by even a moment's application of a prior restraint, Gawker requests that this Court temporarily stay the injunction pending full determination of its stay motion. Alternatively, Gawker requests expedited consideration of its emergency stay motion.

13. Finally, a temporary stay (or expedited consideration) will not prejudice Appellee given that the Gawker Story and Excerpts had been posted for almost seven months and, even if taken down from the Gawker website, is publicly available on other websites and public court files.

WHEREFORE, Gawker respectfully requests that this Court clarify its order setting a standard response time to its Emergency Motion for a Stay of Temporary Injunction and issue a temporary stay pending full resolution of the stay motion or expedite consideration of the Motion.

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April 2013, I caused a true and correct copy of the foregoing to be served by mail and email upon the following counsel of record:

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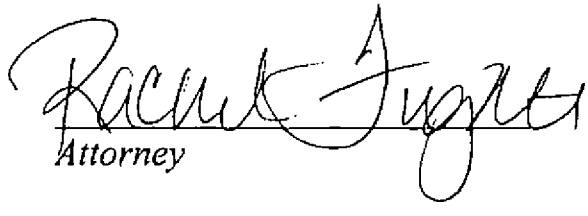

Attorney

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

April 29, 2013

CASE NO.: 2D13-1951
L.T. No. : 12012447-CI-011

Gawker Media, L L C	v.	Terry Gene Bollea, A/k/a Hulk Hogan
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

This court's order of April 26, 2013, is vacated and replaced with the present order. The appellant's motion for clarification is granted to the extent delineated herein.

Within 10 days of this order, the appellee shall respond to the appellant's emergency motion for stay of temporary injunction. A provisional stay of the order granting plaintiff's motion for temporary injunction is hereby imposed pending final review of the stay motion. Exceptionally, paragraph 3 on page 2 of the order is not stayed and remains in force pending final review of the stay motion.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Rachel E. Fugate, Esq.
Kenneth G. Turkel, Esq.
D. Keith Thomas, Esq.
Gregg D. Thomas, Esq.
Michael W. Gaines, Esq.
Christina K. Ramirez, Esq.
Barry A. Cohen, Esq.
David Houston, Esq.
Charles J. Harder, Esq.
Ken Burke, Clerk

ag

James Birkhold
Clerk

EXHIBIT "G"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

May 15, 2013

CASE NO.: 2D13-1951
L.T. No. : 12012447-CI-011

Gawker Media, L L C v. Terry Gene Bollea, A/k/a Hulk Hogan

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

The appellant's emergency motion for stay of temporary injunction is treated as a motion to review the trial court's order denying stay of the injunction. The motion to review is granted. The trial court's order denying stay is disapproved. The order granting plaintiff's motion for temporary injunction is hereby stayed pending the resolution of this appeal or until further order of this court.

The appellant's motion for leave to file reply is denied. The reply to the response to the stay motion is stricken.

The appellant's motion for permission to cite previously filed appendix is granted. In preparing their briefs, the parties may cite to the appendix attached to the emergency motion for stay filed by the appellant.

The initial brief shall be served within 15 days of this order.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Rachel E. Fugate, Esq.
Kenneth G. Turkel, Esq.
D. Keith Thomas, Esq.
Ken Burke, Clerk
ag

Gregg D. Thomas, Esq.
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Christina K. Ramirez, Esq.

Barry A. Cohen, Esq.
David Houston, Esq.
Charles J. Harder, Esq.

James Birkhold
Clerk

EXHIBIT "H"