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.
_____/

GAWKER MEDIA, LLC'S MOTION TO COMPEL FBI AUTHORIZATION OR, IN THE ALTERNATIVE, FOR AN ORDER OF PRECLUSION

Pursuant to Florida Rules of Civil Procedure 1.380, Defendant Gawker Media, LLC ("Gawker") respectfully moves this Court for an Order compelling plaintiff to provide an executed Certification of Identity and Authorization to Release Information to Another Person (the "Authorization") to obtain records related to plaintiff's request that the FBI investigate the creation and the dissemination of the tape at issue in this case. Plaintiff's statements under oath about the precise events at issue in this case, and the FBI's response thereto, are obviously highly relevant and discoverable. Gawker requires the Authorization to facilitate obtaining those records, and plaintiff has refused, without explanation, to provide it.

BACKGROUND

1. In this lawsuit, plaintiff Terry Gene Bollea, the professional wrestler known as Hulk Hogan, challenges the publication on the website "www.Gawker.com" of an article (the "Gawker Story") commenting on a video (the "Video") depicting him having sexual relations with the wife of his then best friend, along with brief and heavily edited excerpts from the Video ("the Excerpts"). Am. Compl. ¶¶ 1, 26, 28. The basic facts relevant to the publication of the

Gawker Story and Excerpts are set forth in numerous earlier motions, and Gawker repeats them here only insofar as necessary to provide context for this motion.

2. According to public reports, soon after Gawker published the Gawker Story and Excerpts, plaintiff contacted the Federal Bureau of Investigation ("FBI") to complain that his sexual encounter with Ms. Clem was unlawfully recorded and distributed and to request that the Bureau investigate. *See, e.g.*, http://www.tmz.com/2012/10/14/hulk-hogan-sex-tape-fbi/ (attached as Exhibit 1). In lodging his complaint with the FBI, plaintiff and/or his authorized representatives undoubtedly made statements setting forth his contentions with respect to the creation and dissemination of the Video at issue. Pursuant to federal law, plaintiff's reports to the FBI were made under oath. *See* 18 U.S.C. § 1001.

3. Plaintiff's statements under oath about the central facts at issue in this action, and the FBI's investigation in response thereto, are unquestionably relevant evidence in connection with the various claims he asserts against Gawker and the other defendants.

4. In light of the centrality of such evidence, Gawker seeks from the FBI "all documents relating to an investigation, or a request for investigation, in October 2012 regarding allegations of illegal recording(s) of Terry Bollea a/k/a Hulk Hogan engaged in sexual relations." However, Gawker understands that the FBI will not provide responsive materials unless Gawker submits a signed Authorization form executed by plaintiff.

5. Gawker accordingly requested that plaintiff sign a standard Department of Justice-issued Authorization. *See* Ex. 2 (form submitted to Hogan for signature). After failing to respond substantively for nearly three weeks to Gawker's request, plaintiff's counsel ultimately informed Gawker, without any further explanation, that his client would not provide an executed Authorization.

6. Gawker now asks this Court to direct plaintiff to provide an executed Authorization to facilitate Gawker's request for plainly relevant, non-privileged information.

MEMORANDUM OF LAW

The discovery rules contemplate broad pre-trial discovery "regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." Fla. R. Civ. P. 1.280(b)(1). It is "well within the power and discretion of [a] trial court" to direct a party to provide a signed records release, *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla. 1994), even where (unlike here) the records contain confidential medical information, *id.*

In *Rojas*, the Florida Supreme Court affirmed an order directing the plaintiffs to provide signed medical records releases to enable the defendant to obtain health information from the plaintiffs' medical providers. The Supreme Court not only approved the trial court's order but emphasized the court's *preference* for requiring parties to provide releases for relevant information because they ensure that the requesting party receives full and complete information:

> The order entered here accomplishes the discovery of the sought after medical records in the most expeditious and practical way possible, by having the records released directly to the Respondents. It burdens judicial resources the least, and does the most to ensure full disclosure so that defendants . . . can fully and fairly litigate their liability. In fact, orders such as this are regularly entered by trial courts, and acquiesced to by plaintiffs.

641 So. 2d at 857.

The court's reasoning in *Rojas* applies with equal force here. The information Gawker seeks from the FBI is indisputably relevant to the core facts at issue. This is particularly important where, as here, discovery to date has called into serious question the version of events alleged by plaintiff, as counsel for Gawker explained in detail at the October 29, 2013 hearing.

See Oct. 29, 2013 Hearing Transcript at 37:13 – 46:11 (non-confidential portions of which are attached as Exhibit 3). By way of example, plaintiff has offered several different versions of the events surrounding his tryst with Mrs. Clem, including when it occurred, whether he had ever lived at Bubba Clem's home, whether he was aware of the cameras in the Clems' house, whether he knew he was being recorded, and whether he had sex with Mrs. Clem once or multiple times. *Id.* And others with reason to know, including Bubba Clem, have suggested that plaintiff knew that he and Mrs. Clem were being recorded. *Id.* at 40:4-16. These multiple versions of the events at issue in this case make plaintiff's statements to the FBI, which necessarily would have been made upon penalty of perjury, *see* 18 U.S.C. § 1001, not only relevant but also critical.

Moreover, although documents may be discoverable notwithstanding their inadmissibility at trial, *see Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995) ("A party may be permitted to discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence."); Fla. R. Civ. P. 1.280(b)(1) (same), here the information sought is both relevant and admissible. Since plaintiff's statements to the FBI were made under oath, they may be used to impeach the plaintiff at trial. *See* Fla. Stat. Ann. § 90.608 ("Any party, including the party calling the witness, may attack the credibility of a witness by: (1) Introducing statements of the witness which are inconsistent with the witness's present testimony . . . ."); *Adventist Health Sys./Sunbelt, Inc. v. Watkins*, 675 So. 2d 1051 (Fla. 5th DCA 1996) (approving admission of prior inconsistent sworn statement to impeach witness); *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980) (holding that materials are discoverable if they are to be used for "substantive, corroborative, or impeachment purposes," a standard which at a minimum includes sworn statements about the precise facts at issue).

Finally, if plaintiff fails for any reason to provide the signed Authorization and Gawker therefore cannot obtain the requested records, Hogan should be precluded from presenting testimony at trial – whether from himself or other witnesses – regarding the circumstances of the creation and the dissemination of the tape at issue, the allegedly criminal nature of the conduct and any complaints he may have made to law-enforcement agencies. Hogan should not be permitted to offer such testimony while at the same time seeking to shield discovery of law enforcement records, including his own statements, regarding the precise facts that are central to this case. *See, e.g.*, *City of St. Petersburg v. Houghton*, 362 So. 2d 681, 685 (Fla. 2d DCA 1978) (affirming dismissal of civil claim by plaintiff who relied upon privilege "to avoid giving discovery in matters pertinent to the litigation"); *TheStreet.com, Inc. v. Carroll*, 20 So. 3d 947, 949 (Fla. 4th DCA 2009) (recognizing that it is improper to use privilege "as both a sword and a shield" where plaintiff is otherwise asserting "claims . . . seeking affirmative relief" on same facts).

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to Florida Rule of Civil Procedure 1.380, movant's counsel certifies that they have, in good faith, conferred with counsel for plaintiff about the specific issue of the Authorization in an effort to secure the discovery at issue without court action but have been unable to do so.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that its Motion to Compel be granted, that plaintiff be ordered to provide an executed Authorization to Gawker within three business days, that Gawker be awarded its costs and attorneys' fees incurred in connection with bringing this motion, and that the Court grants such further relief as it deems appropriate.

Dated: December 18, 2013

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December 2013, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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