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.
_____/

EXPEDITED MOTION TO COMPEL PLAINTIFF'S COMPLIANCE WITH OCTOBER 29, 2013 DISCOVERY RULINGS AND FOR SANCTIONS

Pursuant to Florida Rule of Civil Procedure 1.380(b), Defendant Gawker Media, LLC ("Gawker") respectfully moves this Court for an Order (a) compelling plaintiff to comply with the Court's October 29, 2013 discovery rulings, (b) imposing sanctions for his repeated failure to do so, and (c) awarding Gawker its reasonable attorneys' fees and costs in bringing this motion.

As explained below, plaintiff has steadfastly refused – for almost nine months – to provide information about his sexual encounters with Heather Clem despite their being at the core of his claims – refusals which have continued for more than three months since the Court ruled on October 29, 2013 that he was required to provide such discovery. Gawker believes that plaintiff's months-long violation of the court's ruling should result in an order limiting his contentions at trial. At a minimum, Gawker seeks an order directing immediate compliance (in the hopes that full discovery will be provided meaningfully in advance of the depositions scheduled for the week of March 3, 2014), or in the alternative allowing Gawker to recall plaintiff (and as needed other witnesses) to address any late-produced discovery. Finally, since

this is now the second motion to compel seeking the same discovery, plaintiff should also be ordered to pay Gawker's attorneys' fees and costs in litigating this motion.

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 have been set forth in numerous earlier motions, as well as in the Second District Court of Appeals' recent opinion, and Gawker repeats them here only insofar as necessary to provide context for this motion. *See Gawker Media, LLC v. Bollea*, --- So. 3d ----, 2014 WL 185217 (Fla. 2d DCA 2014).

2. Since June 2013, the parties have engaged in extensive discovery and have litigated numerous discovery disputes. Gawker and its co-defendant, former Gawker editor A.J. Daulerio, have responded to 200 document requests, 19 interrogatories and 28 requests for admission, and Gawker's witnesses have been deposed for multiple days.

3. For his part, plaintiff has continually stonewalled Gawker's efforts to obtain information about him.[1] In June 2013, Gawker served discovery requests on plaintiff, seeking information about key facts in the case, including as is relevant here, his relationship with defendant Heather Clem. After obtaining an extension of time, plaintiff responded by objecting

[1] The instant motion is Gawker's fourth motion to compel. The first motion to compel was heard on October 29, 2013, as described herein. The second motion to compel sought production of settlement communications between plaintiff and Bubba Clem, and was adjudicated on January 17, 2014. The third motion to compel requested plaintiff and his counsel to execute an authorization to obtain FBI records, which Judge Case, acting as Special Discovery Magistrate, recommended be granted. Gawker also intends to file shortly a fifth motion to compel, which seeks an order directing plaintiff to provide complete responses to its second set of discovery requests served on plaintiff on December 19, 2013.

to all the requests and by refusing to provide any substantive answer or documents responsive to more than half of them. As a result, Gawker moved to compel, and plaintiff moved for a protective order. These motions were both adjudicated by Judge Campbell on October 29, 2013.

4. At the hearing, counsel for Gawker presented substantial argument about the need for discovery into the sexual relations between plaintiff and Heather Clem, and their relevance to the various factual claims alleged in plaintiff's Amended Complaint. *See* Oct. 29, 2013 Hearing Tr. at 37-51 (attached hereto as Exhibit 1). Following additional argument by plaintiff's counsel, Judge Campbell ruled that, while Gawker was not entitled to discovery concerning the sex lives of Plaintiff or Heather Clem generally, Gawker *was* entitled to discovery concerning the sexual relationships involving plaintiff and Heather Clem – as well as Bubba Clem – because that subject was directly at issue. Specifically, the Court ruled:

> THE COURT: . . . As it pertains to Mr. Bollea, or for that matter, Ms. Clem's sex life, the questions that the Court would determine to be relevant are only as it relates to the sexual relations between Mr. Bollea and Ms. Clem for the time frame 2002 to the present . . . . So questions pertaining to like, for example, interrogatory No. 10, identify any and all times you discussed having sexual relations with Heather Clem and her husband, Todd Alan Clem [i.e., Bubba Clem], during the relevant time period stating for each time the date, approximate time, location and substan[ce of] discussion, the objections would be overruled. Plaintiff's objections would be overruled. So as it pertains to the three – and I guess we really need to include Mr. Clem in that aspect – those three parties are fair game for questions as it pertains to each other. . . . I think that pretty much gives guidance as to all the different interrogatories globally as to the sex life aspect of it.

Oct. 29, 2013 Hearing Tr. at 92:9 – 93:9.

5. Following the hearing, the parties submitted competing proposed orders to Judge Campbell regarding her various rulings from October 29, 2013. Although the orders differed with respect to other issues, both parties' proposed orders reflected that Court had ruled that the relationship between plaintiff and Mrs. Clem was a proper subject of discovery. *See* Plaintiff's

Proposed Order ¶ 4 (attached hereto as Exhibit 2) (sustaining objections as to plaintiff's sex life generally but authorizing discovery regarding the "sexual and romantic relationships of Terry Bollea and Heather Clem (as to the time period of January 1, 2002, to the present)"); Gawker's Proposed Order ¶ 4 (attached hereto as Exhibit 3) (same). Thus, following the October 29, 2013 hearing, there was no dispute that the Court had granted Gawker's motion to compel such discovery, and had denied plaintiff's motion for a protective order precluding it.

6. Although Judge Campbell has not yet signed an order from the October 29, 2013, hearing, she reaffirmed that the relationship between Heather Clem and plaintiff was a proper subject of discovery at a subsequent hearing on January 17, 2014. *See* Jan. 17, 2014 Hearing Tr. at 32:1-12, 33:18 – 34:25, 43:18 – 44:24 (ordering that all video footage of Heather Clem and plaintiff together be preserved and submitted to Judge Case for review); *see also id.* at 31 (counsel for plaintiff, explaining to Judge Campbell that her October 29, 2013, ruling encompassed "words, testimony, and documentation that would pertain to the relationship between Hulk Hogan and Heather Clem") (attached hereto as Exhibit 4).

7. Despite these undisputed rulings, plaintiff steadfastly has refused to supplement his discovery responses as ordered. Gawker has repeatedly written to counsel plaintiff to request compliance, including on December 12, 2013, January 6, 2014 and February 5, 2014. *See* Exhibits 5, 6, and 7. Gawker has received no response to any of these letters.

8. Specifically, plaintiff has not provided supplemental interrogatory responses to requests for information concerning:

- ∑ "all times [plaintiff] had sexual relations with Heather Clem, including the date, approximate time, and the location of the occurrence" (Gawker Interrog. No. 9);
- ∑ "all times [plaintiff] discussed having Sexual Relations with Heather Clem with . . . [Bubba] Clem, during the Relevant Time Period [since 2002], stating

for each the date, approximate time, location and substance of the discussion" (Gawker Interrog. No. 10); and

- ∑ the number of times plaintiff was in the Clems' home and bedroom, including the purpose of the visit and the duration of the visit, and the dates on which he slept at the Clems' home (Gawker Interrog. Nos. 15-17).

9. Plaintiff likewise has failed to supplement his document production, or to provide supplemental written responses, to Gawker's requests for any and all documents related to:

- ∑ *all* sexual encounters between plaintiff and Heather Clem, and any communications about such encounters (RFP Nos. 8-9); and

- ∑ *all* communications with Bubba Clem about *all* sexual encounters between plaintiff and Heather Clem (RFP No. 11).

10. Finally, plaintiff has also failed to supplement his responses to Gawker's requests for specific information and documents concerning recordings of plaintiff having sexual relations, and any documents concerning such recordings (Gawker Interrog. Nos. 4-5 & RFP Nos. 12-13), which must be answered in connection with any recordings of plaintiff and Heather Clem. Obviously, such discovery is at the core of this case and, separate and apart from any other documents, plaintiff was directed at the January 17, 2014 hearing to turn over any such recordings to Judge Case for review by February 6, 2014.

11. Given that the parties and the court are in complete agreement that Gawker is entitled to proper responses to these discovery requests (which were made almost nine months ago, and ruled upon nearly four months ago), Gawker is entitled to relief for plaintiff's ongoing violation of the Court's ruling. First, Gawker seeks an order limiting the evidence plaintiff may offer on the subject of the discovery at issue. The discovery plaintiff refused to provide is directly relevant to one of plaintiff's core contentions in this action, namely, plaintiff's awareness of the circumstances of the recordings at issue. Gawker sought this discovery based on its understanding, from the plaintiff's and/or Bubba Clem's public statements, that

(a) plaintiff lived at the Clems' house for several months, (b) he had multiple sexual encounters with Heather Clem, (c) plaintiff was aware he was being recorded, which Bubba Clem asserted widely before he settled with plaintiff, and (d) the recording was not surreptitiously made, but, rather, specifically for the purpose of being viewed and shared. Plaintiff's steadfast refusal to provide discovery going directly to this core issue both flies in the face of his discovery obligations and violates an undisputed ruling of this Court. Accordingly, Gawker respectfully requests the entry of an order precluding plaintiff from contending that he was unaware he was being recorded on the video at issue, did not participate in making it, and was not aware that it would be shared with and viewed by others. *See* Fla. R. Civ. P. 1.380(b)(2); *see also, e.g.*, *Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576, 581 (Fla. 4th DCA 1971) (as alternative to sanction of dismissal, lower court "may limit plaintiff's introduction of evidence with respect to any of the matters embraced" by the discovery requests to which the plaintiff had not responded adequately); *The Florida Bar v. Lobasz*, 64 So. 2d 1167, 1171-72 (Fla. 2011) (*per curiam*) ("parties who evade their discovery responsibilities will not be permitted to benefit from such improper tactics").

12. Second, Gawker is entitled to receive the discovery that was ordered. In light of the depositions scheduled for the week of March 3, 2014, Gawker respectfully requests that the Court order plaintiff to provide full discovery responses by no later than February 24, 2014, one week before the depositions begin, so that Gawker and its counsel can meaningfully prepare. In addition, in light of plaintiff's discovery refusals on this and a number of other issues, *see* note 1 *supra*, Gawker respectfully requests that the Court allow it to recall plaintiff (and as needed the other witnesses being deposed that week) to question them about any late-produced discovery. *See, e.g.*, *Aboujaoude v. Poinciana Dev. Co. II*, 2007 WL 3343076 (S.D. Fla. 2007) (ordering

that party may "continue the deposition of [his opponent] with respect to newly produced documents"); *Blair v. Oakwood Park Su Casa*, 606 So. 2d 740, 742 (Fla. 1st DCA 1992) (concluding that trial court abused discretion by allowing record to be supplemented with additional evidence but refusing to permit deposition to allow questioning concerning same).[2]

13. Finally, since this is now the second motion that Gawker has had to file to obtain the requested discovery and is being filed to secure compliance with a ruling already adjudicating this issue more than three months ago, Gawker requests an order, pursuant to Florida Rule of Civil Procedure 1.380(a)(4) and 1.380(b), awarding its costs and fees incurred in connection with bringing this motion. *See, e.g. USAA v. Strasser*, 492 So. 2d 399, 403 (Fla. 4th DCA 1986) (affirming award of attorneys' fees under Rule 1.380 where opposing party's discovery responses were late and deficient); *Boca Investors Group, Inc. v. Potash*, 832 So. 2d 197, 198 (Fla. 3d DCA 2002) (*per curiam*) (affirming award of attorneys' fees as sanction for "willfully failing to comply with discovery"). If this portion of Gawker's motion is granted, Gawker will submit an affidavit from its counsel detailing its fees and costs.

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to Florida Rule of Civil Procedure 1.380, movant's counsel certifies that they have, in good faith, attempted to confer with counsel for plaintiff about the foregoing in an effort to secure the discovery at issue without court action but have been unable to do so. Specifically, counsel for movant has sent several letters to plaintiff's counsel about the discovery ordered to be produced on October 29, 2013, including on December 12, 2013, January 6, 2014, and February 5, 2014. *See* Exs. 5, 6, and 7. Gawker has received no response from plaintiff.

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[2] Although the Court presumptively limited plaintiff's deposition to two days in its ruling at the hearing on October 29, the Court also held that additional time may be obtained "with court approval." Oct. 29, 2013 Hearing Tr. at 90. Certainly, if there are any circumstances that warrants approval of continuing the deposition, it is flouting the Court's discovery ruling for more than three months.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests (a) that this motion be granted, (b) that plaintiff be precluded from contending that he was unaware he was being recorded on the video at issue, did not participate in making it, and was not aware that it would be shared with and viewed by others, (c) that plaintiff be ordered to provide full discovery responses, as previously ordered, by no later than February 24, 2014, (d) that Gawker be authorized to recall plaintiff for additional deposition as needed to address late produced discovery, and (e) that plaintiff be ordered to pay Gawker's reasonable attorneys' fees and costs in bringing this motion.

Dated: February 12, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February 2014, 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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