

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.

**PLAINTIFF TERRY GENE BOLLEA’S OPPOSITION TO FIFTH MOTION TO
COMPEL FILED BY GAWKER MEDIA, LLC AND A.J. DAULERIO**

I. INTRODUCTION

The actual issues in this case are very limited: (1) whether Gawker committed a tort by posting surreptitiously recorded footage of private sexual intercourse involving Mr. Bollea on the Internet; (2) whether Gawker had a First Amendment privilege to post the footage because it was supposedly “newsworthy”; (3) whether Mr. Bollea consented to Gawker’s posting of the footage (he certainly did not); and (4) what damages did Mr. Bollea suffer. Judge Campbell has already ruled that the parties to this case must stick to the issues and not extend discovery into collateral areas of dubious relevance, and that the privacy of Mr. Bollea, which was already invaded by Gawker’s dissemination of the sex tape, and Gawker’s refusal to take it down, must not be

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further invaded by the discovery in this action. Gawker has disregarded Judge Campbell's protective order and is now moving to compel production of categories of documents and information that are not remotely likely to lead to any admissible evidence and which trample on Mr. Bollea's privacy rights:¹

1. Gawker has full access to press reports of Mr. Bollea's public statements about the sex tape. Gawker has cited numerous of them in its court papers. However, the **scheduling** of the appearances is irrelevant. (In early October 2012, Mr. Bollea was on a promotional tour for a televised wrestling event scheduled to air on October 12, 2012, when news broke that Gawker had posted the sex tape to its website on October 4, 2012.)
2. Gawker's request for Mr. Bollea's cell phone records is outrageous. Gawker cites no authority whatsoever that it is entitled to find out every person that Mr. Bollea called, or that called him, during the year 2012. This request is in clear violation of Judge Campbell's earlier rulings protecting Mr. Bollea's privacy. Notably, Gawker is a celebrity tabloid site which boasts that it has no boundaries. Among other things, it posts surreptitiously-record sex tapes of people against their objections, and without

¹ Gawker asserts that the scheduled deposition of Mr. Bollea constitutes an "emergency" to justify an expedited ruling on its motion. However, the alleged "emergency" is of Gawker's own making. Gawker unilaterally canceled Mr. Bollea's motion last November; the parties rescheduled the deposition; and after the new deposition date of March 6-7, 2014 was selected, Gawker propounded new discovery that is now the subject of the instant motion. Moreover, despite what Gawker claims, the deposition is **not** dependent on the documents at issue in Gawker's three pending motions (two before this court and one filed in New York state). This case does not turn on Mr. Bollea's press schedule for a wrestling event, or every phone call made to him, or that he made, during all of 2012. Rather, Gawker is seeking to delay the prosecution of this case, and to overwhelm Mr. Bollea with irrelevant and unduly burdensome discovery and motions – to make this lawsuit cost prohibitive and unduly burdensome. Mr. Bollea has repeatedly stated his readiness and willingness to appear for deposition; nothing other than Gawker's unilateral cancellation of his deposition scheduled last November, and latest round of discovery and motions, is preventing the deposition from proceeding expeditiously.

blurring or blocking images of genitals or sexual conduct. Gawker should **not** have access to every telephone number that Mr. Bollea called, or that called him, throughout an entire year. To do so would be to invite Gawker to call everyone on the list and seek to interfere with Mr. Bollea's personal life and career, for the dual purpose of unduly interfering with this lawsuit **and** obtaining more "dirty laundry" about him to post to the Internet and profit from. Moreover, the list is simply not relevant nor **reasonably** calculated to lead to admissible evidence.

3. Gawker is not entitled to take discovery of Mr. Bollea's statements to law enforcement agencies. Such statements are privileged. Moreover, it would be inappropriate to allow Gawker to interfere with a criminal investigation that may be targeting Gawker. Also, Gawker's requests are vastly overbroad and go far beyond any information that even arguably could be relevant to this case.

Gawker, by engaging in this discovery, is trying to punish Mr. Bollea for filing a lawsuit seeking redress for Gawker's outrageous invasion of his privacy in posting to its website a surreptitiously recorded sex tape of him for the purpose of driving traffic (and accompanying revenues) to Gawker.com and its many other related websites, all of which link from the Gawker.com homepage whereat Gawker posted for six months a prominent headline and link to the "Hulk Hogan sex tape". Gawker's improper discovery tactics should be rejected, and the motion denied.

II. GAWKER'S MOTION MISREPRESENTS KEY FACTS TO THE DISCOVERY MAGISTRATE.

As it does in its pending fourth motion to compel, Gawker makes numerous misrepresentations of key facts. Mr. Bollea therefore is compelled to respond.

- A. Mr. Bollea is not in violation of any order regarding the first round of discovery. No order has been ordered by the Court, and the Court never discussed ordering Mr. Bollea to serve a supplemental response to **any** discovery, which the sole exception of Interrogatory No. 12 (not at issue in any pending motion), for which Mr. Bollea long ago timely served a supplemental response. Mr. Bollea has produced all responsive documents and information within his possession, except with respect to the requests and interrogatories that Judge Campbell indicated he was not required to answer, because she granted his motion for protective order.
- B. While Mr. Bollea understands that the Discovery Magistrate ruled against him on the issue of whether he should be required to sign a FOIA waiver with respect to the FBI files, Gawker's characterization of that extraordinary procedure as "routine" is ridiculous. Mr. Bollea cited case law in support of his position that the FBI records were and are **privileged** and his opposition to the motion, and filing of Exceptions to the recommendation, are hardly an "obstruction" to discovery.
- C. Mr. Bollea obtained relief from Judge Campbell on his protective order requests. Gawker's efforts to take discovery of Mr. Bollea's sex life generally, and his private medical information, and his finances, were all stopped by Judge Campbell's order. Mr. Bollea's deposition also was limited to a maximum of two days, and the depositions of his wife and ex-wife were limited to a maximum of five hours. A protective order was imposed regarding the video recordings of the depositions – to keep them out of Gawker's hands (though its counsel may have a copy).

III. THE REQUEST FOR MR. BOLLEA’S SCHEDULING DOCUMENTS IS NOT REASONABLY LIKELY TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE (DOCUMENT DEMAND 51).

Gawker clearly has extensively researched the public statements reportedly made by Mr. Bollea about the release of the sex tape, because Gawker repeatedly cites such statements in its pleadings and papers in this litigation (including in its moving papers here). Reports of Mr. Bollea’s alleged statements are available to Gawker by means of internet searches, as well as news databases like Lexis/Nexis. Gawker presumably intends to ask Mr. Bollea about such reported statements at his deposition.

However, Gawker’s request for documents related to the **scheduling** of Mr. Bollea’s media appearances is not relevant to the claims or defenses, nor reasonably calculated to lead to the discovery of anything admissible. It does not matter to this case whether Mr. Bollea gave an interview at 7:30 a.m. or 8:30 a.m., whether he called a reporter or the reporter called him, whether he flew United or Delta, or anything similar. Gawker already has taken discovery of the **content** of Mr. Bollea’s reported statements about the sex tape. By contrast, the **scheduling** documents do not seek any information relevant to the case.²

² Gawker criticizes Mr. Bollea and his publicist for not maintaining a press clippings file. However, there is no legal requirement that celebrities maintain one, and in this day and age, every media event can generate several hundred stories – all of which are searchable on the Internet. Gawker implies that not maintaining press clippings file constitutes some sort of nefarious spoliation of evidence. Hardly. Publicists charge clients to maintain press clippings files. Mr. Bollea has no need for such a file. Also, articles easily can be located through Google. Thus, Mr. Bollea reasonably chose not to pay for such a file to be kept for him.

Importantly, this case does not turn on what Mr. Bollea did or did not say in public about the sex tape – he certainly did not say that he knew about being filmed or approved the dissemination of the sex tape, on the contrary, his statements have been consent (and truthful) that he was secretly filmed and sought at every opportunity to have the video removed from the Internet. This case is about whether Gawker’s posting of the sex tape invaded his privacy and, if so, whether doing so was “newsworthy” and received First Amendment protection. Thus, the

IV. GAWKER SHOULD NOT BE PERMITTED TO INVADE MR. BOLLEA'S PRIVACY BY TAKING BLANKET DISCOVERY OF HIS MOBILE PHONE RECORDS (INTERROGATORY 10; DOCUMENT DEMAND 54).

Gawker's request for Mr. Bollea's cell phone records is outrageous. Judge Campbell has already ruled that Mr. Bollea's general financial, medical, and sexual history are **off limits** to discovery, and that his privacy must be protected in this litigation. On October 29, 2013, Judge Campbell rejected, on privacy grounds: (1) discovery into Mr. Bollea's financial dealings, including all of his employment contracts, (2) discovery into Mr. Bollea's medical records, (3) discovery into Mr. Bollea's divorce proceeding, and (4) discovery into Mr. Bollea's sex life (other than his relationship with Heather Clem). Gawker sought all of this discovery on the theory that such discovery **might** show that he was a hypocrite, did not value his own privacy, or consented to recordings of his sex acts. Judge Campbell rejected all of Gawker's many creative arguments.

“[T]he medical records of Mr. Bollea, the objection is sustained. For purposes of financial records of the plaintiff..., the plaintiff's objection is sustained.... [I]nformation regarding the divorce proceeding, as far as Mr. Bollea, the plaintiff's objections are sustained. As it pertains to Mr. Bollea..., 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....” Tr. (10/29/13) at 91:21-92:14.

Judge Campbell's rulings were an effort to ensure that Mr. Bollea, already victimized by the publication of the sex tape, would not suffer intrusive discovery into his private life, particularly when the discovery does not bear on whether Gawker invaded his privacy or could claim a First Amendment privilege.

quest to obtain every last news article on the subject of Gawker's release of the sex tape will have no bearing on the central issues in this case.

Gawker now is essentially asking the Discovery Magistrate to overrule Judge Campbell's carefully balanced rulings. Gawker has offered no plausible reason why Mr. Bollea's telephone records would bear on whether its conduct was tortious, whether it was constitutionally protected, or Mr. Bollea's damages. Even if Mr. Bollea spoke to someone on the phone regarding the sex tape during the period covered by Gawker's request (all of 2012), the cell phone records will disclose nothing other than the time of the call, the phone number and the call duration.

Gawker is hoping that it can open the floodgates to his private life, 99.99% of which has nothing whatsoever to do with this case. If mobile phone records are compelled and produced, Gawker – a highly intrusive celebrity tabloid site – can place calls to every person in Mr. Bollea's life – personal and professional – as part of a massive fishing expedition and serving the dual purpose of interfering with every aspect of his personal and professional relationships. The invasion of his privacy (the subject of this case) would be **multiplied** by Gawker's discovery. And at the end of the day, Gawker is highly unlikely to obtain any information that is actually relevant to **this** case. The Discovery Magistrate should deny Gawker's motion, and maintain the careful balance struck by Judge Campbell in her rulings.

V. **GAWKER SHOULD NOT BE PERMITTED TO USE CIVIL DISCOVERY TO INTERFERE WITH A CRIMINAL INVESTIGATION THAT COULD BE TARGETING GAWKER (INTERROGATORY 9; DOCUMENT DEMAND 52).**

As the Discovery Magistrate is aware, Gawker sought an order compelling Mr. Bollea to sign a Freedom of Information Act ("FOIA") waiver so that Gawker could try to obtain documents from the FBI relating to its criminal investigation that supposedly related to the dissemination of the sex tape. The Discovery Magistrate recommended that Mr. Bollea be

required to sign the FOIA waiver. That issue is currently being reviewed by Judge Campbell. Judge Campbell might rule that the FBI files are **not** discoverable. Judge Campbell also might rule that even if the files are discoverable, the preferred method of obtaining the FBI files is through a FOIA request, where the FBI has an opportunity to assert its available privileges and thereby prevent Gawker from interfering with a criminal investigation. Therefore, the Discovery Magistrate should await Judge Campbell's ruling before ruling on this portion of the pending motion.

If the Discovery Magistrate chooses not to wait, however, Gawker's motion to compel should be denied. Gawker's discovery requests represent a dangerous attempt to use a civil discovery process to interfere with a criminal investigation that Gawker might be the target of. Documents generated as part of ongoing law enforcement investigations are **not discoverable**. In *In re United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006), the court held: "[H]owever it is labeled, **a privilege exists to protect government documents relating to an ongoing criminal investigation.**" *Id.* at 570, n. 2 (emphasis added). Florida law recognizes the same privilege. *State v. Maier*, 366 So.2d 501 (Fla. 1st DCA 1979) (holding that law enforcement agency could decline to disclose identity of confidential informant).

Additionally, Mr. Bollea's statements to the FBI are not relevant to this litigation nor reasonably likely to lead to the discovery of any admissible evidence. Gawker's entire theory of relevance for this evidence is stated within a single footnote of its motion in which Gawker asserts, with **no citation to evidence**, that Mr. Bollea supposedly told inconsistent stories about whether he knew about the recording. But there exists no evidence of this at all. Gawker has not identified a single statement by Mr. Bollea where he indicates that he supposedly knew that he was being recorded, nor that he ever authorized the dissemination of the recording. (To the

contrary, and as Gawker is well aware, Mr. Bollea has **consistently** maintained, for the past 16.5 months, that he had **no knowledge** that he was being recorded, and gave **no authorization** for its dissemination. Mr. Bollea sent, through counsel, multiple cease and desist demands immediately after the tape was posted, followed shortly by the filing of this lawsuit and a motion for temporary injunction to remove the sex tape from the Internet, which Judge Campbell granted.)

If Mr. Bollea felt differently about the sex tape, why would he file suit? And why would he contact law enforcement? Gawker's arguments make no sense because its discovery is not "reasonably calculated" to obtain admissible evidence. Rather, it seeks to interfere with the FBI's criminal investigation, and is on a boundless fishing expedition in an effort to drive up Mr. Bollea's costs, delay the litigation, and obtain further salacious information to post at its tabloid website.

Gawker also seeks to mislead the Discovery Magistrate, and the trial court, in falsely asserting that under Florida law, not serving a privilege log supposedly waives all privilege objections, no matter how meritorious the objection. It does not. In *State Farm Florida v. Coburn*, 2014 WL 539874 at *1 (Fla. 2d DCA 2014), the Florida Court of Appeal held: "[A] party is required to file a [privilege] log only if the information is otherwise discoverable, and until a circuit court rules on the scope of discovery objection, the party responding to the discovery does not know what will fall into the category of discoverable documents.... Thus, prior to a ruling on a scope of discovery objection, "the obligation to file a privilege log does not arise.") (citations omitted). The documents requested are not discoverable, and therefore a privilege log is not required. In any event, the privilege objection has not been waived.

VI. THERE IS NO BASIS FOR MONETARY SANCTIONS.

Fla. R. Civ. Proc. 1.380(a)(4) does not permit a monetary sanction where a party's

position is substantially justified. Mr. Bollea has substantial justification for opposing a motion that seeks discovery of irrelevant materials that would be unduly burdensome to produce, and which seeks to invade his privacy by requiring the production of his private mobile phone records.

VII. CONCLUSION

For the foregoing reasons, Gawker's motion to compel and for sanctions should be denied in its entirety.

DATED: February 21, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service via the e-portal system this 21st day of February, 2014 to the following:

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