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.
_____/

FIFTH MOTION TO COMPEL DISCOVERY FROM PLAINTIFF (EXPEDITED)

Pursuant to Florida Rules of Civil Procedure 1.380, Defendants Gawker Media, LLC ("Gawker") and A.J. Daulerio (collectively, the "Gawker Movants") respectfully move this Court for an Order compelling plaintiff to provide proper responses to the discovery served on him on December 19, 2013. Plaintiff has refused almost entirely to produce any records or information in response to the Gawker Movants' limited and narrow requests. Because the requested information and documents are properly discoverable, not burdensome and not privileged, this Court should order the discovery produced immediately, in advance of the depositions scheduled for the week of March 3, 2014.

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 the Gawker Movants repeat 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. Plaintiff, however, has made a practice of thwarting Gawker's efforts to take discovery from him, including by, for example:

a. refusing to produce documents that were ordered to be produced more than four months ago, *see* Gawker's Expedited Motion to Compel Plaintiff's Compliance with October 29, 2013 Rulings and for Sanctions;

b. refusing to execute a simple release so that Gawker could pursue a routine FOIA request, *see* Gawker's Motion to Compel FBI Authorization; and

c. seeking (unsuccessfully) to limit plaintiff's deposition to one day, to preclude his ex-wife from being deposed, to severely limit the deposition of his wife, and to prevent Gawker from videotaping the depositions even though plaintiff videotaped the depositions of Gawker's witnesses, *see* Plaintiff's First and Second Motions for Protective Order.

4. Continuing this pattern, plaintiff has now, after obtaining an extension of time to answer, failed to provide proper responses to a limited and narrow set of discovery requests served by the Gawker Movants on December 19, 2013. Through those requests, the Gawker

Movants sought information and documents concerning (1) plaintiff's media appearances at which he discussed the "Video and/or the Gawker Story" (Request for Production ("RFP") No. 51), (2) his communications with law enforcement about the allegedly illegal recording(s) of his sexual encounter(s) with Heather Clem (RFP No. 52 and Daulerio Interrog. No. 9), (3) photographs published in April 2012 of a sexual encounter between plaintiff and Heather Clem (RFP No. 53), and (4) telephone records from 2012 (RFP No. 54 and Daulerio Interrog. No. 10). A true and correct copy plaintiff's responses to Gawker's Second Set of Requests for Production are attached hereto as Exhibit A, and a true and correct copy of plaintiff's responses to A.J. Daulerio's Second Set of Interrogatories are attached hereto as Exhibit B.

5. The Gawker Movants attempted to address plaintiff's deficiencies in a letter to plaintiff's counsel dated February 5, 2014 (attached hereto as Exhibit C), and asked that plaintiff's counsel respond promptly in light of the depositions scheduled for the week of March 3, 2014. To date, more than a week later, the Gawker Movants have received no response. Given the forthcoming depositions, Gawker is constrained to file this motion and to seek expedited consideration.

THE DISCOVERY AT ISSUE

A. Discovery concerning plaintiff's media appearances.

> **Document Request No. 51:** Any and all documents in any manner referring or relating to any media appearance at which you discussed the Video and/or the Gawker Story, including, but not limited to, documents referring or relating to the scheduling of such appearances.
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> **Plaintiff's Response:** Responding Party objects to this Request to the extent that it seeks documents protected from disclosure by the attorney-client privilege and/or attorney work product doctrine. Responding Party objects to this Request on the ground that the requested documents are not identified with reasonable particularity. Responding Party objects to this Request on the ground that it is vague and ambiguous.

6. By way of background, Gawker initially requested information about plaintiff's public and media appearances more broadly in its first set of discovery requests served in June 2013. Specifically, Gawker requested documents concerning plaintiff's writings, public statements made about his sex life, and news articles about him. Plaintiff objected on myriad grounds, including burden, overbreadth and relevance, and at the hearing on Gawker's motion to compel, his lawyer stated: "I'm not going to produce documents of every time he goes anywhere, every time he talks to anyone, every time he's interviewed. I mean, sometimes he's interviewed probably six – six times in a day." *See* Oct. 29, 2013 Hearing Tr. at 72 (relevant portions attached hereto as Exhibit D.) Curiously, despite a litigant's obligation to preserve relevant documents, he also indicated that "we don't keep those documents." *Id.*

7. In an attempt to narrow the scope of its requests, Gawker propounded Document Request 51 (above), limiting the request to documents related to media appearances concerning the Video or the Gawker Story. Despite the specificity of this request, plaintiff objected generally on grounds of vagueness, even though the request was specifically limited to the Video and Gawker Story at issue in this lawsuit. Plaintiff objected on grounds of privilege, but provided no privilege log. Plaintiff did not identify any documents that he had not kept (as required by the instructions); he was certainly required as a litigant to preserve documents related to the Gawker Story and the Video at issue, when he filed suit about them roughly ten days after the Gawker Story was published. All told, plaintiff provided no documents at all in response to this request.

8. It is inconceivable that plaintiff has no information or documents (no email, no calendar entries, no texts, no talking points, no logistics sheets, no travel receipts, no notes, no correspondence with his publicist, etc.) about the many times he appeared on television and radio

discussing the Gawker Story and accompanying Excerpts as well as his relationship with the Clems – including, just by way of example, on *The Howard Stern Show*, the *Today* show, *TMZ Live*, *Piers Morgan Live*, and in an interview in *USA Today*. Indeed, as plaintiff's counsel himself noted, he was sometimes interviewed "six times a day." To the extent that such information is maintained by plaintiff's publicist (or someone else working for plaintiff), it nevertheless remains in plaintiff's possession, custody or control, and must be produced by him.[1] His objections are baseless, and his (apparent) claims to have no documents are not credible, particularly since he has offered no explanation for not retaining such documents in connection with litigation he filed.[2]

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[1] Notwithstanding that plaintiff should produce the material himself, Gawker also served New York subpoenas on plaintiff's New York-based publicist, Elizabeth Traub, and her public relations firm, EJ Media. In response, Traub and her firm (who are now represented by plaintiff's counsel) produced a few email exchanges with reporters and others at the time the initial lawsuits in this case were filed on October 15, 2012, but she produced little else. For example, Traub and her agency produced (a) no documents regarding plaintiff's media appearances in April 2012, when he discussed the existence of a sex tape, (b) no documents regarding the occasions on which plaintiff discussed the Video at issue here as part of a media tour in October prior to the filing of his lawsuits, (c) no documents regarding her engagement to provide public relations support to plaintiff (including in connection with the Gawker Story and Video), and (d) no documents in the nature of drafts, instructions, or other information she received from, or provided to, plaintiff or those working on his behalf. Traub and her agency also asserted a specious claim of privilege, contending that her communications with counsel for plaintiff – communications long before he also represented her – are privileged and protected work product. As a result, Gawker has been left with no choice but to file a special proceeding in New York in order to enforce a proper and full response to subpoenas it should never have had to serve in the first place.

[2] At the time that plaintiff was conducting his media tour about the existence of the sex tape, he told Howard Stern (on October 9, 2012) that he had received "terrible emails" from his ex-wife Linda Bollea about the matter. Plaintiff never produced any such emails. Even if those particular emails are not specifically responsive to requests concerning plaintiff's media appearances (despite expressly describing them on *The Howard Stern Show*), they are certainly responsive to other earlier requests made by Gawker (including, for example, RFP No. 4, requesting documents related "to any communications [plaintiff] had about the Video"). Plaintiff's failure to produce them calls into serious question plaintiff's contention elsewhere that he has no responsive documents.

B. Discovery concerning communications with law enforcement:

Daulerio Interrog. No. 9: Describe in detail every communication you or someone acting on your behalf had with any law enforcement agency, or any employee thereof, concerning any recording of you having sexual relations with Heather Clem, including without limitation the date of the communication, the participants to the communication (or if a written communication the sender(s) and all recipients), the substance of the communication, and any response to the communication.

Plaintiff's Response: Responding Party objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege and/or attorney work product doctrine. Responding Party objects to this Interrogatory on the ground that it seeks information protected by the law enforcement investigatory privilege. Responding Party further objects to this Interrogatory on the grounds that it is not reasonably likely to lead to the discovery of admissible evidence. Responding Party objects to this Interrogatory as invasive of Responding Party's privacy and the privacy of Heather Clem. Responding Party further objects to this Interrogatory on the grounds of overbreadth.

Document Request No. 52: Any and all documents in any manner referring or relating to communications between you or anyone acting on your behalf and any law enforcement person or agency concerning any recording of you having sexual relations with Heather Clem, including without limitation any documents referring or relating to communications identified in Plaintiff's Response to A.J. Daulerio's Interrogatory No. 9.

Plaintiff's Response: Responding Party objects to this Request to the extent that it seeks documents protected from disclosure by the attorney-client privilege and/or attorney work product doctrine. Responding Party objects to this Request on the ground that the requested documents are not identified with reasonable particularity. Responding Party objects to this Request on the ground that the documents sought are not reasonably likely to lead to the discovery of admissible evidence. Responding Party objects to this Request on the ground that the Request is overbroad and burdensome in that it potentially sweeps within its scope documents of little relevance to the case. Responding Party objects to this Request on the ground that it is so broad on its face that it requires production of irrelevant documents and information. Responding Party objects to this Request on the ground that it is vague and ambiguous. Responding Party further objects to this Request on the ground of the law enforcement investigation privilege, and on the grounds of privacy.

9. Shortly after the Gawker Story and Excerpts were published, the press began reporting that plaintiff's "lawyer says he has contacted the FBI to track down the sex tape leaker . . . and bring that person to justice" and that plaintiff "plans to meet with FBI agents on Monday" (*see* http://www.tmz.com/2012/10/14/hulk-hogan-sex-tape-fbi/, also noting

communications with local police). But instead of providing any documents or information related to communications with the FBI or with other law enforcement agencies, plaintiff simply offered boilerplate objections on grounds of vagueness, overbreadth, and relevance, even though such objections obviously cannot apply to Gawker's specific, narrow requests for communications about the Video which is the very subject of this lawsuit (or another sex tape of him that was being shopped earlier during 2012).[3]

10. Plaintiff also objected to the requests on grounds of a law enforcement privilege, but, as Gawker explained in connection with its Motion to Compel FBI authorization (which Judge Case recommended be granted), no such privilege is available here for several reasons:

a. First, the "law enforcement privilege" cannot be asserted by a private party. It is a form of executive privilege that allows the *government* to withhold certain information. *See JTR Enters., LLC v. An Unknown Quantity of Colombian Emeralds, Amethysts & Quartz Crystals*, --- F.R.D. ---, 2013 WL 6570941, at *6 (S.D. Fla. Dec. 10, 2013); Fla. Stat. Ann. § 119.071(2)(c) (Florida's open-records law exempting agencies of the State from disclosing certain sensitive law-enforcement information relating to active criminal investigations).

b. Second, the "law enforcement privilege" (even if it could be asserted by a private party) does not protect the information that the Gawker Movants seek here. Rather, the state law enforcement privilege protects the State's ability "to withhold the identity of a confidential informer." *State v. Zamora*, 534 So. 2d 864, 867 (Fla. 3d DCA 1988); *accord State v. Carter*, 29 So. 3d 1217, 1219 (Fla.

[3] As Gawker explained in it Motion to Compel FBI Authorization, information about what plaintiff told police is particularly important because 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 the Clems' 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.

2d DCA 2010). The corresponding federal privilege likewise applies only to the "identities of confidential informants," as well as, *inter alia*, information that would, for example, "endanger witness and law enforcement personnel." *FTC v. Timeshare Mega Media & Mktg. Grp., Inc.*, 2011 WL 6102676, at *3-4 (S.D. Fla. Dec. 7, 2011) (discussing narrow contours of federal common law law-enforcement privilege).

c. Third, even assuming *arguendo* that the law enforcement privilege would apply and that a private party could invoke it (neither of which is correct), plaintiff has waived his ability to rely on the privilege by failing to log any of his or his counsel's communications with law enforcement as to which he claims a privilege. *See TIG Ins. Corp. of Am. v. Johnson*, 799 So. 2d 339, 340-41 (Fla. 4th DCA 2001) (affirming finding of waiver of attorney-client privilege where party did not log relevant communications).

11. Finally, plaintiff asserts a "privacy" objection. But any privacy concerns can be easily remedied by producing the information and documents pursuant to the protective order in place in this case. None of plaintiff's objections withstands reasonable scrutiny, and he should be ordered to produce the discovery immediately.

C. <u>Discovery regarding cell phone records:</u>

> **Daulerio Interrog. 10:** For any cellular phone account (including without limitation any texting service) you had at any time during 2012 or any telephone landline you had at any time during 2012, identify the account, including without limitation the service provider, the phone number, the account number, and the person in whose name the account was held.
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> **Plaintiff's Response:** Responding Party objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege and/or attorney work product doctrine. Responding Party further objects to this Interrogatory on the grounds that it is not reasonably likely to lead to the discovery of admissible evidence. Responding Party objects to this Interrogatory as invasive of

Responding Party's privacy. Responding Party further objects to this Interrogatory on the grounds of overbreadth.

Request No. 54: All records from 2012 referring or relating to the cellular phone accounts and telephone landlines identified in Plaintiff's Response to A.J. Daulerio's Interrogatory No. 10, including without limitation monthly paper and/or online billing statements.

Plaintiff's Response: Responding Party objects to this Request to the extent that it seeks documents protected from disclosure by the attorney-client privilege and/or attorney work product doctrine. Responding Party objects to this Request on the ground that the requested documents are not identified with reasonable particularity. Responding Party objects to this Request on the ground that it is not reasonably likely to lead to the discovery of admissible evidence. Responding Party objects to this Request on the ground that the Request is overbroad and burdensome. Responding Party objects to this Request on the ground that it is so broad on its face that it requires production of irrelevant documents and information. Responding Party objects to this Request on the ground that it is vague and ambiguous. Responding Party further objects to this Request on the ground of privacy.

12. Plaintiff has objected to these requests and has refused to provide any information whatsoever regarding his phone records from 2012 – the time period during which the video(s) of plaintiff and Heather Clem were circulating, as well as during which plaintiff contends he was in regular contact with Bubba Clem, then had a falling out, and then had a rapprochement.

13. Before addressing the substance of the discovery requests themselves, the Gawker Movants note that plaintiff's refusal here is especially egregious given his repeated delays in responding to these requests. Specifically, the Gawker Movants agreed to a two-week extension of the other requests above expressly conditioned on plaintiff's production of his telephone records and account information earlier so that they could follow up as needed prior to the upcoming depositions. Despite this, plaintiff twice sought additional time to provide those documents and information, only then to advise that he was simply going to rely on his earlier-served objections and would not be producing any records or information at all. (A true and correct copy of this email exchange is attached hereto as Exhibit E.) The Gawker Movants object to plaintiff's transparent effort to run out the clock on their ability to gather relevant

information prior to the depositions, and, as a result, seek an order that, in addition to compelling production of the documents and a supplemental interrogatory response, also permits the Gawker Movants to recall plaintiff and the other witnesses as needed to ask about such information and documents, including any follow up with his telephone providers.

14. Turning to the substance of these discovery requests seeking telephone records and related account information, plaintiff's refusal to provide the requested discovery has no basis in law. He has asserted objections based on privilege, burden and privacy. But he has not produced any privilege log establishing how any of the information could possibly be privileged. (And, despite his objection, it is hard to imagine how, for example, the names of telephone service providers or his account information, requested in Daulerio Interrogatory No. 10, could possibly be privileged.) He has not explained how producing just 12 months of phone records could be burdensome. And to the extent that any privacy interests may be implicated, those can easily be addressed if needed by designating the interrogatory response and responsive documents "CONFIDENTIAL" under the protective order already in place in this case.

15. Obviously, information about who plaintiff spoke to and texted with during the period around when the images from the sex tape(s) first appeared online and around when Gawker posted the story at issue here is of central relevance. Indeed, in all the discovery provided to date, plaintiff has produced a total of *one* series of texts, despite numerous requests for all documents related to this controversy. Production of information about plaintiff's cell phone provider and records of his calls and texts are clearly designed to lead to the discovery of admissible evidence and should be produced.[4]

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[4] Plaintiff's responses to this set of discovery requests raises one additional issue. Plaintiff produced various communications with others who had reported on the sex tape, but offered no explanation why those documents were not produced nine months ago in response to earlier requests. Plaintiff should be required to explain his failure to respond to those earlier requests as required.

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to Florida Rule of Civil Procedure 1.380, movants' 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, as noted in Paragraph 5, above, counsel for movant wrote a detailed letter to plaintiff's counsel on February 5, 2014, and asked for a prompt reply in light of forthcoming depositions. To date, they have received no response.

CONCLUSION

For the foregoing reasons, the Gawker Movants respectfully request that their Motion be granted, that plaintiff be ordered to provide the requested discovery forthwith, that the Gawker Movants be awarded their costs and attorneys' fees incurred in connection with this motion in an amount to be determined, and that the Court grant such further relief as it deems appropriate.

Dated: February 13, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th 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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