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.
_____/

REPLY BRIEF IN SUPPORT FIFTH MOTION TO COMPEL DISCOVERY FROM PLAINTIFF (EXPEDITED)

Gawker Media, LLC and A.J. Daulerio (the "Gawker Movants" or "Gawker") hereby submit this reply brief in support of their Fifth Motion to Compel Discovery from Plaintiff Terry Gene Bollea (a/k/a Hulk Hogan) ("Hogan").[1] As explained in the Gawker Movants' opening papers and herein, the requested discovery is entirely proper. Hogan's failure to provide responses is just the latest in his pattern of thwarting Gawker's discovery efforts, *see* Mot. at ¶ 3, and should not be tolerated. He should be ordered to produce the requested discovery forthwith, and Gawker should be awarded its attorneys' fees in connection with litigating this motion.

[1] Hogan takes issue with Gawker's seeking "expedited" consideration of this Motion. First, Gawker filed this motion on February 13, 2014, and plaintiff was not required to submit his opposition until more than a week later, on February 21, for a hearing on February 24. Second, his claim that the "emergency" was of Gawker's own making is simply not true. Gawker served the discovery at issue in mid-December, in plenty of time for it to be produced before depositions in March. Hogan's requests for extensions of time to answer, failure to provide proper responses, and failure to respond to Gawker's request for a "meet and confer" are the cause of any "emergency." And, third, Hogan's assertion that he "has repeatedly stated his readiness and willingness to appear for deposition" is fanciful. Opp. at 5 n.1. On the very day that Gawker filed this motion, plaintiff emailed Judge Case and the parties purporting to unilaterally cancel his own deposition. As explained more fully in Gawker's Reply in Support of its Expedited Motion to Compel Plaintiff's Compliance with October 29, 2013 Discovery Rulings and for Sanctions ("Gawker's Fourth Motion to Compel Reply") at ¶ 21, Gawker proposed to extend the schedule for discovery motions and depositions (as well as an orderly schedule for the balance of the case), which Hogan's counsel ultimately refused, insisting that the depositions proceed as originally scheduled.

A. Discovery Relating to Plaintiff's Media Appearances About the Video and the Gawker Story.

1. Hogan describes Gawker's Document Request No. 51 as calling only for his "public statements" and "scheduling documents," and then argues that (1) his public statements (and reports of them) are equally available to Gawker and (2) plaintiff's scheduling documents are irrelevant, and thus he need not produce either. Opp. at 5. But this is both a mischaracterization of the request, which seeks "documents *in any manner referring or relating* to any media appearances" (emphasis added), and in any event an improper basis for refusing to respond. Thus, while reports of Hogan's media appearances and documents related to scheduling them are responsive, Hogan misses the mark in describing what Gawker seeks and why.

2. As explained in its Motion, Gawker is entitled to *all* documents concerning plaintiff's media appearances in October 2012 (just after the Gawker Story was published) as well as any media appearances in April 2012, around the time that rumors that a sex tape involving plaintiff began circulating. Such documents may include not only logistical (or "scheduling") items (travel records, calendar entries, booking details, etc.), but also more substantive communications, such as information exchanged with plaintiff's publicists, bookers for media outlets, reporters, and others. Both types of documents are relevant to Gawker's defenses and are certainly "likely to lead to the discovery of admissible evidence."

3. The "logistical" (or "scheduling") documents are relevant because Hogan undertook a national press tour within days after the Gawker Story was published. In his Opposition, he claims that this tour was pre-scheduled in connection with an upcoming wrestling event, rather than in an effort to enhance his career by talking about the sex tape scandal. It seems highly doubtful that plaintiff would land prime spots on the *Today* show, on *Piers Morgan*

Live, in *USA Today*, and in other national media outlets simply to discuss a routine pay-per-view wrestling event. Gawker is permitted to discover whether these appearances really were pre-scheduled, or whether, instead, they were later arranged – or modified – to take advantage of the publicity surrounding the sex tape. Communications with bookers, publicists and the like will undoubtedly reveal that information.

4. Moreover, Gawker also seeks substantive communications with his publicist (*e.g.*, talking points, notes, emails, texts, memos, etc.) concerning, among other things, how to handle inquiries about the sex tape and the Gawker Story – as well as communications he and his publicist had with others on this subject. The point of hiring a publicist is for assistance and expertise in dealing with matters such as this, including in managing public appearances. Hogan has conceded that he employed such a publicist, but has not even produced his engagement agreement with her, much less any substantive communications. And, to the extent that either he or his publicist had communications with bookers for media outlets, producers, reporters, and/or others about the sex tape, the Gawker Story, or his relationship with the Clems – or the scope of any discussion of those topics permitted during Hogan's many media appearances – those documents must be produced as well.[2] Hogan's Opposition does not even address this category of substantive documents, and he cannot seriously deny that information and documents reflecting his contemporaneous response and reaction to the publication of the Gawker Story –

[2] As noted in Gawker's opening papers, at 5 n.1, any material that is the possession of plaintiff's publicist is within his possession, custody or control. Nevertheless, because of plaintiff's refusal to produce relevant evidence, Gawker served New York subpoenas on plaintiff's New York-based publicist, Elizabeth Traub, and her public relations firm, EJ Media. Their response to the request was insufficient and improper – omitting a significant amount of information, heavily redacting documents and asserting a privilege, notwithstanding that none exists as between a celebrity and his publicist. Accordingly, Gawker obtained from the New York Court an Order to Show Cause by this Wednesday, February 26, 2014, "why an order should not be entered directing Respondents to produce, within three business days: (a) all documents responsive to Gawker's subpoenas that Respondents have not yet produced, (b) full copies of all documents which Respondents have produced in redacted form, and (c) the nine emails . . . listed in Respondent's privilege log." The Order to Show Cause, along with Gawker's Petition, Memorandum of Law and supporting declaration, are attached hereto as Exhibits 1-4.

and the public relations advice he received in connection therewith – is highly relevant to the facts at issue in this case. Particularly given the Second District Court of Appeals' suspicion that it was "hard-pressed to believe that Mr. Bollea truly desired the affair and Sex Tape to remain private or to otherwise be 'swept under the rug,'" *Gawker Media, LLC v. Bollea*, --- So. 3d ----, 2014 WL 185217, at *6 n.5 (Fla. 2d DCA 2014), full discovery of his public relations strategy should be required. At bottom, Hogan's contention that "this case does not turn on what Mr. Bollea did or did not say in public about the sex tape," Opp. at 5 n.2, could not be more wrong.

B. Discovery Concerning Hogan's and His Counsel's Communications With Law Enforcement Agencies.

5. Hogan's Opposition argues (a) that his and his counsel's communications with the FBI and other law enforcement agencies are protected by a law enforcement privilege, Opp. at 2, 7-8;[3] (b) that the Special Discovery Magistrate should wait until Judge Campbell rules on an analogous privilege objection he asserted in the different context of executing a FOIA records release – even though that sought *all* FBI records and not just Hogan's and his counsel's communications, *id.* at 7-8; (c) that his communications with law enforcement are neither "relevant to this litigation nor reasonably likely to lead to the discovery of any admissible evidence," *id.* at 8; and (d) that Gawker is seeking such communications in order to "obtain further salacious information to post at its tabloid website," *id.* at 9. Each of these contentions is demonstrably without merit:

6. First, Hogan contends that his and his counsel's communications with law enforcement officials are protected by the "law enforcement privilege" and that "Gawker should

[3] Hogan's responses also assert that such communications are protected by the attorney-client and attorney work product privileges, but his opposition does not address those privileges or explain how they could apply to communications with a third party such as a law enforcement official. To the extent Hogan's other objections are overruled, he should be required to log all documents that pre-date the filing of the instant action as to which he claims attorney-client and/or attorney work product privilege.

not be permitted to use civil discovery to interfere with a criminal investigation that could be targeting Gawker." Opp. at 2, 7-8. Gawker has no indication, from any source, of any "criminal investigation that could be targeting Gawker" in connection with the dissemination of the Video or any investigation that is, some eighteen months after the Gawker Story, targeting anyone else. In any event, Hogan does not have standing to assert a privilege belonging to law enforcement agencies and, even if he did, that privilege would not apply to his publicly-discussed communications with the agency (as distinguished, for example, from information identifying a confidential informant or other confidential law enforcement methods). *See* Mot. ¶ 10.[4] Hogan attempts to equate a FOIA request to the FBI for its file – as to which it can object if circumstances warrant – and the much narrower request for his and his counsel's communications with the FBI and other law enforcement agencies, a category of information and documents in no way privileged.[5]

7. Second, despite insisting that his deposition proceed next week, *see* note 1 *supra*, Hogan implores the Special Discovery Magistrate to wait until Judge Campbell adjudicates his objections to the Report and Recommendation on Gawker's Motion to Compel an FBI Authorization before addressing this part of the Gawker Movants' motion here. Particularly given that the information and documents sought from Hogan are likely a subset of the FBI's

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[4] The cases cited by plaintiff in his opposition, at 8, are not to the contrary. Rather, they too confirm that the law enforcement privilege may only be invoked by government law enforcement agencies. *See In re U.S. Dep't of Homeland Security*, 459 F.3d 565, 569 (5th Cir. 2006) (allowing DHS to invoke law enforcement privilege against "compelled production of *government documents* which could impact highly sensitive matters relating to national security") (emphasis added); *State v. Maier*, 366 So. 2d 501, 503 n.4 (Fla. 1st DCA 1979) (also concerning invocation of privilege by law enforcement agency).

[5] The Gawker Movants respectfully request that the Court dispose of Hogan's claims of privilege on the merits as described above. If for any reason the Court determines that the information and documents are otherwise discoverable, but not categorically unprotected by privilege, we respectfully request that, consistent with *State Farm Finance v. Coburn*, --- So. 3d ----, 2014 WL 539874 (Fla. 2d DCA 2014) (Opp. at 9), Hogan be ordered to provide a privilege log within 24 hours, so that any claims of privilege can be adjudicated, and documents produced, prior to next week's depositions.

(and other law enforcement agencies') complete file, Hogan's objection to providing a release for the latter should not preclude adjudicating a three-month-old request for the former. Indeed, were Hogan's proposal followed, Gawker would wait two months for Judge Campbell to adjudicate the FOIA release (plaintiff has noticed that hearing for April 23, 2014), plus whatever additional time it takes to enter an order. Then, and only then, the Discovery Magistrate would adjudicate this aspect of this motion, which may then the subject of a request for review once again by Judge Campbell. With respect, the Gawker Movants should not be forced to litigate this issue in two rounds as Hogan suggests, nor should they be deprived of their ability to obtain information and documents for use at Hogan's and the other witnesses' depositions simply because he has appealed a report and recommendation on a related (but arguably much broader) request. Indeed, a primary purpose of appointing a Special Discovery Magistrate in this action was to enable discovery disputes to be resolved quickly and efficiently without having to wait the months it often takes to schedule a hearing and to obtain a ruling from the circuit court. *See* Oct. 29, 2013 Tr. at 86:18 – 87:1 (attached hereto as Exhibit 5) (THE COURT: "I will tell you this. . . . I don't intend to be second-guessing [the Special Discovery Magistrate] and have whole days worth of hearings to go through some of that other stuff. So that truly is a waste because it's like two bites at the apple and it gets to be ridiculous.").

8. Third, what Hogan told law enforcement officials about the key facts at issue (*e.g.*, whether he was recorded without his knowledge, who he suspected of disseminating the tape, etc.) is obviously relevant to this lawsuit, in which plaintiff challenges Gawker's publication about that very recording. Moreover, Hogan's communications with law enforcement officials are likely to shed light on the conflicting statements that he and his representatives have made about the allegations underlying the complaint in this case. *See, e.g.*, Gawker's Fourth Motion to Compel Reply at ¶¶ 12, 16 (explaining inconsistent statements

concerning when his tryst with Ms. Clem occurred, whether he had ever lived at the Clems' home or been in their bedroom, whether he was aware of the cameras in the Clems' house, whether he knew he was being recorded, and the number of times he had sex with Ms. Clem); *see also Bollea*, 2014 WL 185217, at *6 n.5 (despite Hogan's allegations, questioning whether "Mr. Bollea truly desired the affair and Sex Tape to remain private"). To the extent that Hogan's communications with law enforcement bear on core issues such as *how* the tape came to be disseminated in the first place, or *who* disseminated it, Hogan should not be able to withhold the requested information and documents.

9. Finally, for these reasons, Hogan is totally out of bounds in suggesting that Gawker seeks to obtain his and his counsel's communications with law enforcement officials – communications that they have repeatedly discussed in public and that concern the very allegations that are at issue in this lawsuit – simply to find "salacious" content to post at its "tabloid" website. Opp. at 9. Gawker has scrupulously complied with the agreed protective order in place in this case and has not published any of the information it has received in discovery, whether confidentially or otherwise. Hogan's wholly unsupported attack on Gawker, its former editor, Mr. Daulerio, and, by extension, its counsel is not well taken. It should not deflect from plaintiff's failure to provide relevant and non-privileged discovery.

C. Discovery Concerning Hogan's Cell Phone Records.

10. Hogan asserts that Judge Campbell has implicitly ruled that Gawker is not entitled to his phone records because she precluded discovery about his "private" finances, medical history and sex life (except as respects Heather Clem). Opp. at 6-7. He then asserts that the phone records are irrelevant and suggests that Gawker is seeking them for an improper purpose. Each of these assertions is also demonstrably incorrect.

11. First, Judge Campbell has not addressed, one way or the other, whether Hogan's telephone records are a proper subject of discovery.

12. Second, Judge Campbell did not preclude inquiry into Hogan's finances and medical history over concerns about plaintiff's privacy or worries that Gawker would use the information for improper purposes. As explained in Gawker's Fourth Motion to Compel Reply at ¶ 20, Judge Campbell denied inquiry into those subjects because Hogan's counsel asserted at the October 29, 2013 hearing that, despite the allegations in his amended complaint, Hogan would not be seeking pecuniary damages based on harm to his career or lost business opportunities, and would not be claiming anything beyond "garden variety" emotional distress. Hogan's suggestion that a ruling on this issue "is essentially asking the Discovery Magistrate to overrule Judge Campbell's" earlier rulings is therefore not well taken. Opp. at 7.

13. Third, even if Judge Campbell's October 29 rulings had stemmed from privacy concerns, Hogan has made no showing that a request for telephone records (which do not contain substantive communications) implicates anywhere near the same privacy concerns as requests for information about his sex life, his finances or his medical and mental health history.

14. Finally, Gawker has no intention, as plaintiff suggests, *see* Opp. at 7, of calling the numbers contained in his phone records, and is willing to represent that it will not place any calls to persons identified from his phone records without prior permission from the Special Discovery Magistrate. Rather, Gawker's primary purpose in seeking this information is to determine the extent to which he spoke or texted with Bubba Clem and/or Heather Clem (and other key witnesses) during the relevant time periods. This inquiry is particularly relevant given Hogan's assertion that he cannot recall in any meaningful way his communications with them – including, just by way of example, during a window when Hogan sued the Clems only to settle with Mr. Clem almost immediately in exchange for a complete reversal of Mr. Clem's earlier

public statements about Hogan's knowledge and supposed involvement in the "stunt" that led to the supposed sex tape scandal. *See, e.g.*, Gawker Fourth Motion to Compel Reply at ¶ 14. In light of the foregoing, Gawker's request for twelve months of cell phone records, and corresponding account information, is hardly "outrageous," and is well within the bounds of permissible discovery. *See, e.g.*, *Gower v. JPMorgan Chase Bank*, 2007 WL [redacted] (M.D. Fla. Oct. 29, 2007) (requiring plaintiff to produce phone records for a limited time period); *Kamalu v. Walmart Stores, Inc.*, 2013 WL 4403903, at *2 (E.D. Cal. Aug. 15, 2013) (requiring plaintiff to produce phone records when relevant to dispute, and emphasizing in that regard that the term "relevance" is to be construed broadly in the context of civil discovery).

D. Gawker Is Entitled to Recover Attorneys' Fees and Costs in Litigating this Motion.

15. On December 19, 2013, Gawker served on Hogan a very narrow set of additional discovery requests (four document requests and two interrogatories). After obtaining a two-week extension of time to answer them, Hogan failed to provide any substantive response to all but *one*. As detailed above, Gawker's requests for information concerning his communications with publicists and media outlets *about the events of this case*, his discussions with law enforcement *about the dissemination of the video at issue in this case*, and his cell phone records *reflecting his communications with the other key witnesses in this case* are entirely proper and justified. Plaintiff's failure to properly and timely respond is without justification and warrants an award of attorneys' fees and costs, particularly in light of his prior pattern of discovery refusals necessitating motions practice.

CONCLUSION

For the foregoing reasons, Gawker respectfully request that its Motion be granted, that plaintiff be ordered to provide the requested discovery by February 25, 2014, that Gawker be awarded its 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 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th 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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