EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GAWKER MEDIA, LLC, Petitioner, -against- EJ MEDIA GROUP, LLC and ELIZABETH ROSENTHAL TRAUB, Respondents.	Index No. _____ **MEMORANDUM OF LAW IN SUPPORT OF PETITION TO ENFORCE SUBPOENAS**

Petitioner Gawker Media, LLC, by and through its attorneys Levine Sullivan Koch & Schulz LLP, submits this memorandum of law in support of its Petition.

PRELIMINARY STATEMENT

This Petition seeks to enforce two subpoenas (the "Subpoenas") issued in New York County in connection with litigation pending in Florida, pursuant to CPLR § 3119. Petitioner Gawker Media, LLC ("Gawker") issued the Subpoenas to Respondents EJ Media Group, LLC ("EJ Media"), and its managing director, Elizabeth Rosenthal Traub ("Traub") (together "Respondents") in early January, in anticipation of Gawker's depositions of the plaintiff, and two other key witnesses, during the week of March 3, 2014. Respondents provide public relations services consulting to the professional wrestler known as Hulk Hogan (whose real name is Terry Gene Bollea), including in connection with a controversy over a sex tape of him having sex with his best friend's wife with his best friend's blessing which was the subject of a story published by Gawker (the "Gawker Story"). Although Respondents did not object to the Subpoenas and – after a two-week delay – produced a smattering of documents in response, their production was minimal and incomplete, omitting *any* documents related to a number of media appearances by Hogan concerning the controversy over the sex tape or the Gawker Story. Moreover,

Respondents' assertion of the attorney-client and work-product privileges, on which bases Respondents withheld nine emails from October 13-15, 2012, is misplaced. Finally, Respondents appear to have redacted a number of documents without either marking them as "redacted," or explaining the basis for the redactions in their privilege log.

Respondents' reliance on these privileges not only is improper but also threatens Gawker's ability to make full use of its depositions, which, again, will take place in just three weeks. Accordingly, and for the reasons that follow, Gawker respectfully submits that this Court should grant its Petition and direct Respondents to provide the nine 2012 emails, as well as any other outstanding documents, within three business days.

SUMMARY OF RELEVANT FACTS

Petitioner Gawker Media, LLC, is the publisher of www.gawker.com, a news and entertainment website. Pet. ¶ 6. Through this special proceeding, Gawker seeks to enforce two New York subpoenas Gawker issued in connection with litigation pending in Florida, using the procedures set forth in the Uniform Depositions and Discovery Act, as codified in New York Law. *See* CPLR § 3119; *see also id.* § 3119(e).

The underlying litigation, *Bollea v. Clem*, No. 12012447-CI-011 (Fla. 6th Jud. Cir.) (the "Florida Litigation"), concerns claims brought by Terry Gene Bollea, the professional wrestler known as Hulk Hogan, against Gawker (among others) relating to Gawker's publication of the Gawker Story in October 2012. Pet. ¶ 9. That story reported on a pre-existing controversy about a sexual liaison between Hogan and a woman later identified to be Heather Clem (the "Gawker Story"). *Id.* At the time of the tryst, Heather Clem was married to Hogan's best friend, radio shock-jock Bubba The Love Sponge Clem, who consented to – and indeed encouraged – his wife to have sex with Hogan. *Id.* Together with the Gawker Story, Gawker published brief excerpts

of the videotape of Hogan's tryst with Mrs. Clem (the "Excerpts"). *Id.* ¶ 10. The Florida state and federal courts have both held, in the context of Hogan's motions for preliminary injunctive relief, that the publication of the Gawker Story and Excerpts were newsworthy and protected by the First Amendment. *See id.* ¶ 11. While the original video ran to over 30 minutes, the Excerpts were only one minute and forty-one seconds long, and included fewer than 10 seconds of sexual activity in grainy black-and-white footage. The remainder was comprised of fairly banal conversation between Hogan and Mrs. Clem. *Id.* ¶ 10.

In connection with its ongoing defense in the Florida Litigation, on January 6, 2014, Gawker served the Subpoenas on Respondents pursuant to CPLR § 3119. *See* Affirmation of Julie B. Ehrlich, Esq., dated February 13, 2014 ("Ehrlich Aff."), Exhibits 1 & 2. The Respondents here provided public relations services to Hogan, including in October 2012, in connection with Hogan's response to the controversy surrounding the sex tape, and to the Gawker Story. Pet. ¶¶ 7-8. On February 4, 2014, Respondents responded to the Subpoenas by producing fewer than 90 pages of documents – a number of which were heavily redacted without explanation – and four audio files. *Id.* ¶¶ 14-15. Despite concededly providing public-relations services to Hogan, Respondents did not produce *any* documents whatsoever concerning Hogan's appearances in a number of media outlets in which he discussed the Gawker Story and the controversy over the sex tape about which it reports. These include, for example, appearances on *The Howard Stern Show*, the *Today* show, *TMZ Live*, *Piers Morgan Live*, and in an interview in *USA Today*. *Id.* ¶ 16. Respondents also produced no documents regarding the occasions on which Hogan discussed the Video at issue here as part of a media tour in October prior to the filing of his lawsuits; no documents regarding Traub and EJ Media's engagement to provide public relations support to Hogan (including in connection with the Gawker Story and Video);

and no documents in the nature of drafts, instructions, or other information she received from, or provided to, Hogan or those working on his behalf. *Id.* ¶ 17.

In addition, Respondents produced a privilege log. Ehrlich Aff. Ex. 3. The log, which lacks much of the information required under New York law, including the subject line of the emails and a brief description of their content, asserts that 21 communications between Respondents and Hogan's counsel, California attorney Charles Harder, are protected against disclosure under the attorney client and attorney work product privileges. *Id.* Of these 21 emails, nine date to October 13, 14, and 15, 2012 – the two days preceding the filing of the Florida Litigation and the day of filing (the "2012 Emails"). Pet. ¶ 19. Notwithstanding that no attorney-client relationship existed between Harder and Respondents in October 2012, Respondents have asserted the attorney-client privilege as to all nine of these 2012 Emails, and the work-product privilege as to four of the nine. *Id.* ¶¶ 19, 21. Finally, a number of documents produced by Respondents appear to be redacted, with significant portions of a page blocked from view. *Id.* ¶ 22. The documents do not however indicate that they are redacted, and the privilege log does not provide context or information about any of Respondents' redactions. *Id.*

On February 4, 2014, Gawker wrote to Respondents, explaining the deficiencies in their production. Ehrlich Aff. ¶ 4. Respondents did not reply. Pet. ¶ 23. Time is now short before Gawker's depositions of Hogan and the Clems in early March, including because Hogan's public relations efforts are of obvious relevance in a case involving claims of invasion of privacy and misappropriation of his right of publicity. Respondents' documents are necessary to permit full examination of these witnesses, and there is no basis in law or fact for Respondents' decision to withhold them.

ARGUMENT

Respondents – a public-relations firm and a publicist – have provided only partial responses to the Subpoenas; have produced redacted documents without explanation; and have refused to produce nine emails from mid-October 2012 on the grounds that each communication is protected by the attorney-client privilege, and, in four cases, by the work-product privilege as well. Gawker is entitled to full production in response to its Subpoenas, to production of the redacted documents, and to production of the ostensibly privileged communications dating to 2012, because no privilege attaches to Respondents' communications with Hulk Hogan's counsel.

I. Respondents Must Produce All Responsive, Nonprivileged Documents.

In the weeks both before and after his filing of the Florida litigation, Hogan appeared in a number of media outlets. *See supra* at 3. As Hogan's publicist at the time, Traub no doubt was involved in setting up and coordinating Hogan's press appearances. Indeed, the limited documents she and EJ Media have produced indicate that her responsibilities included acting as a liaison between Hogan and the media. Nevertheless, neither Traub nor EJ Media has produced *any* documents relating to a number Hogan's press appearances. Such documents no doubt exist and plainly are responsive to the Subpoenas. Respondents accordingly must produce them, or, if Respondents claim that any such documents are shielded by a privilege, must log them in a log that complies with the requirements of New York law.

II. Respondents Must Produce Unredacted Documents.

Respondents likewise must provide unredacted versions of the documents they have produced in redacted form, none of which is reflected in Respondents' privilege log. Under settled New York law, when a party produces a document that in part contains information the party believes to be privileged, the producing party may produce a redacted copy. However,

when doing so, the producing party must note the reason for the redaction in its privilege log. *See* 3 Robert L. Haig, *N.Y. Practice, Commercial Litig. in N.Y. State Courts* § 25:53 (3d ed.) ("The producing party . . . should provide a reason for the redaction, which should be noted on a privilege log."); *see also, e.g.*, *Bus. Relocation Servs., Inc. v. City of N.Y.*, 19 Misc. 3d 1114(A), 2008 WL 898934, at *3 (Sup. Ct. Kings Cnty. Apr. 3, 2008) (noting party's failure to "provide[] a privilege log to explain the redactions made in its documents" in response to discovery requests). In the absence of an appropriate assertion of privilege or other explanation for redaction, Gawker is entitled to the production of complete documents.

III. The Attorney-Client Privilege Does Not Apply.

Under New York law, which applies to this petition to enforce subpoenas issued within this State, *cf. Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 202 (2d Dep't 2013), "[t]he attorney-client privilege protects '(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.'" *McNamee v. Clemens*, 2013 WL 6572899, at *5 (S.D.N.Y. Sept. 18, 2013) (citation omitted). The privilege generally does not extend to public relations consultants. *See, e.g.*, *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 431-32 (S.D.N.Y. 2013) (applying New York law); *McNamee*, 2013 WL 6572899, at *5 (collecting cases and denying party's attempt to invoke attorney-client privilege to protect communications with publicist). While in certain circumstances, "[t]he privilege may be expanded to those assisting a lawyer in representing a client . . . the communication with the person assisting the lawyer [must have been] made in confidence and for the purpose of obtaining legal advice." *McNamee*, 2013 WL 6572899, at *5 (citations omitted). In other words, for this agency-based exception to apply, "[t]he communication itself must be primarily or predominantly of a legal character." *Id.* (quotation marks and citation omitted).

Gawker is aware of "no case applying New York law that interprets the agency exception [to the rule that the presence of a third-party vitiates the privilege] to include communications with public relations representatives." *Egiazaryan*, 290 F.R.D. at 431-32. Indeed, courts consistently have *rejected* parties' attempts to cloak their (or their attorneys') communications with publicists with the attorney-client privilege. For example, in *McNamee*, the court (applying New York law), concluded that the attorney-client privilege did not apply to communications by the defendant (Clemens) with his publicists because "such communications were not necessary so that counsel could provide Clemens with legal advice," and Clemens had "not shown that [the publicists] performed anything other than standard public relations or agent services for Clemens, nor has he shown that his communications with [the publicists] were necessary so that [Clemens's attorney] could provide [him] with legal advice." *McNamee*, 2013 WL 6572899, at *6.

Likewise, in *Egiazaryan*, the court held that the plaintiff's and his attorneys' communications with a public-relations firm – even one that had been retained by counsel – were not protected by the attorney-client privilege because the PR firm "was not called upon to "perform a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals – let alone a task that could be characterized as relating to the 'administration of justice.' Rather, it was involved in a wide variety of public relations activities aimed at burnishing [the plaintiff's] image." 290 F.R.D. at 432. *See also, e.g.*, *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, 2003 WL 21998674, at *2-3 (S.D.N.Y. Aug. 25, 2003) (applying federal law in a federal question case and rejecting party's invocation of attorney-client privilege even where public-relations consultant was hired to handle "media strategy as it impacted . . . litigation," because those were "standard public relations services"); *Calvin Klein*

Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000) (also applying federal law in federal question case and finding no privilege protecting communications between plaintiffs' counsel and public-relations firm or relevant documents held by publicists because "the possibility that communications between [the public-relations firm and plaintiffs' attorneys] may help the latter to formulate legal advice is not in itself sufficient to implicate the privilege"). Indeed, as courts applying New York law repeatedly have held, " [a] media campaign is not a litigation strategy," and the law accordingly does not protect press-related communications from discovery. *Egiazaryan*, 290 F.R.D. at 431 (citation omitted). Stated another way, "[s]ome attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice." *Id.* (quotation marks and citation omitted).

To be sure, in certain narrow circumstances not present here, courts applying *federal* law in federal question cases have applied the attorney-client privilege to communications with publicists. *See In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 325 (S.D.N.Y. 2003). However, in that case, the publicists were hired to achieve a primarily *legal* objective, *e.g.*, to minimize the risk of indictment of a grand jury's target by countering the 'media-conveyed message [encouraging indictment] that reached the prosecutors and regulators responsible for charging decisions." *Id.* at 323-24. Moreover, at least one court has concluded that *In re Grand Jury Subpoenas* conflicts with New York law, which treats communications with a non-lawyer as privileged "only in narrow circumstances in which the non-lawyer's services are *absolutely necessary* to effectuate the lawyer's legal services." *In re N.Y. Renu with Moistureloc Prod. Liab. Litig.*, 2008 WL 2338552, at *9 (D.S.C. May 8, 2008) (citing *People v. Edney*, 39 N.Y.2d 620 (1976)); *accord NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 141 (N.D.N.Y.

2007) (holding communications with a public relations firm "provid[ing] ordinary public relations advice and assist[ing] counsel in assessing the probable public reaction to various strategic alternatives" not privileged under New York law) (citation and internal quotation marks omitted); *Nance v. Thompson Med. Co.*, 173 F.R.D. 178, 182-83 (E.D. Tex. 1997) (applying New York law and concluding that attorney-client privilege was waived when otherwise privileged documents were shared with a public relations firm).

Here, there is no reason to believe that the communications between Hogan's attorney, Charles Harder, and Hogan's publicist, Respondent Traub, reflected anything other than standard public relations advice. Indeed, the limited documents that Respondents *did* produce reflect exactly that. None of these activities comes anywhere close to constituting the services so "indispensable" to an attorney that that are within the ambit of New York's narrowly drawn attorney-client privilege, and Respondent's incomplete privilege log does not come close to establishing that is the case. *See McNamee*, 2013 WL 6572899, at *5-6; *Egiazaryan*, 290 F.R.D. at 432-33.

IV. The Work Product Privilege is Not Available to Respondents.

Respondents' invocation of the work-product privilege in connection with four emails likewise is unavailing. Under New York law, the attorney work-product privilege "applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 190-91 (1st Dep't 2005); *see also* 44 N.Y. Jur. 2d Disclosure § 92 (attorney work product "applie[s] to materials prepared by attorney, acting as an attorney, which contain his or her analysis and trial strategy"). "The burden of establishing any right to protection is on

the party asserting it, and the protection claimed must be narrowly construed." *Brooklyn Union Gas*, 23 A.D.3d at 191.

Here, Respondents have not demonstrated any entitlement to the protections of the work-product privilege. As an initial matter, Respondents' privilege log is insufficient as a matter of law and does not provide Gawker or this Court with information needed to evaluate Respondents' assertions of privilege. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 104-05 (Sup. Ct. N.Y. Cnty. 2003) (explaining that "the following information [must] be included in a privilege log: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document"); *see also* CPLR § 3122(b); *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 381 (1991) (privilege log "lacking identification of persons, time periods *and* circumstances . . . do[es] not convey the information and analysis necessary to decide whether a particular document should be immunized from disclosure" as work product (emphasis added)).

What little information the log does contain does not indicate that the communications between Harder and Traub (sometimes among others) reflect any "legal research, analysis, conclusions, legal theory or strategy," as required by New York law. *Brooklyn Union Gas*, 23 A.D.3d at 190-91. Moreover, taking the log together with the content of the limited documents Respondents have produced suggests that it is highly unlikely that the four emails at issue contain actual attorney work product, let alone are comprised entirely of such sensitive materials. *See Cent. Buffalo Project Corp. v. Rainbow Salads, Inc.*, 140 A.D.2d 943, 943 (4th Dep't 1988) (report prepared by third-party consultant and conveyed to attorney is not protected work product and must be disclosed).

To the extent that the logged communications reflect drafts of public relations materials, for example, they certainly would not privileged. Although New York courts do not appear to have addressed the specific question, federal courts considering the same issue have held that public relations materials do not qualify for the privilege. *See, e.g.*, *Burke v. Lakin Law Firm*, 2008 WL 117838, at *3 (S.D. Ill. Jan. 7, 2008) (holding that "public relations materials are not privileged work product"); *McNamee*, 2013 WL 6572899, at *8 (documents reflecting work of and communications with publicists were not covered by the work product privilege even though they "played an important role" in the attorney's litigation strategy); *Calvin Klein* , 198 F.R.D. at 55 ("[A]s a general matter[,] public relations advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called 'work product' doctrine . . . because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally."); *Amway Corp. v. Procter & Gamble Co.*, 2001 WL 1818698, at *5 (W.D. Mich. Apr. 3, 2001) ("Although pending and prospective lawsuits are mentioned in these documents . . . the purpose of the discussion was to assess the public relations aspects of the lawsuits, not their legal import or merit.").

In any event, Respondents have not met their burden of demonstrating that the emails and any documents attached thereto constitute work product. *See Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980) (holding that the "the burden of proving each element of the privilege rests upon the party asserting it"); *John Blair Commc'ns, Inc. v. Reliance Capital Grp., L.P.*, 182 A.D.2d 578, 579 (1st Dep't 1992) (party asserting work-product privilege bears burden of proof). Accordingly, the documents must be produced.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition and direct the relief requested therein.

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New York, New York

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