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

Defendant Gawker Media, LLC ("Gawker") respectfully submits this reply brief in support of its motion to compel Plaintiff Terry Gene Bollea (a/k/a Hulk Hogan) ("Hogan") to comply with the Court's October 29, 2013 discovery rulings concerning the relationship between Hogan and Heather Clem, and for sanctions for his noncompliance.

1. In his Opposition, Hogan concedes that, at the October 29, 2013 hearing, "Judge Campbell ruled that the relationship between the Clems and Mr. Bollea is the proper subject of discovery." Opp. at 3; *see also id.* at 4 (quoting Judge Campbell's ruling: "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.") (quoting in turn Oct. 29, 2013 Tr. at 92:9-14); *id.* at 7 (conceding that ruling permitted "discovery of Mr. Bollea's sexual activities to his relationship with Heather Clem"). Indeed, Hogan explained that he was serving supplemental responses to two interrogatories – albeit some four months after that ruling and only in response to the instant

motion – because doing so was "consistent with Judge Campbell's decision to permit Gawker to take discovery of Mr. Bollea's sexual relationship with Heather Clem." *Id.* at 5. Despite this, Hogan contends that his delay in doing so should be excused, and that Judge Campbell's ruling may otherwise be ignored, because (a) the Court's oral ruling has not been reduced to a written order, (b) that ruling in no way required him to provide further discovery responses, (c) even if it did, he has in any event fully complied with the ruling, and, (d) at that hearing, the Court sustained his objections to *other* discovery. Each of these contentions is without merit.

A. Hogan Is Not Permitted to Ignore the Court's October 29, 2013 Ruling.

2. Hogan contends that because a written order has not yet been entered, he need not comply with the Court's October 29, 2013 ruling. That assertion is incorrect as a matter of law. *See, e.g.*, *Pompano Masonry Corp. v. Anastasi*, 125 So. 3d 210, 213 (Fla. 4th DCA 2013) ("A court's oral order is valid and binds the parties even though a written order has not been entered.") (citing *Lazy Flamingo, USA, Inc. v. Greenfield*, 834 So. 2d 413, 415 (Fla. 2d DCA 2003)); *see also Jamason v. State*, 455 So. 2d 380, 381 (Fla. 1984) (affirming contempt order for failure to comply with oral ruling, emphasizing that, while written orders are preferred, petitioners must "obey the orders of lawful authority the same as everyone else, even though they may disagree with the order"). That is particularly true here where (a) both parties quote the same passage of the transcript allowing discovery concerning the sexual relationship between Hogan and Heather Clem from 2002 to the present, (b) both parties' proposed orders used the same language to memorialize that ruling, and (c) both parties described that ruling as such at the later hearing on January 17, 2014, and (d) both parties agree that the Court reiterated that ruling at the January 17, 2014 hearing.

3. Moreover, despite contending that he "has not been ordered to do anything" with respect to matters adjudicated on October 29, 2013, Opp. at 4, Hogan has obviously understood that he in fact needs to comply with that ruling – scheduling his deposition for two days, rather than the one day he requested; agreeing that his wife, Jennifer McDaniel Bollea, may be deposed for five hours, rather than the two hours he requested; having his deposition videotaped; and providing a supplemental interrogatory response regarding his damages. *See* Oct. 29, 2013 Tr. at 90:1 – 96:12. (Excerpts of the relevant portions of the October 29, 2013 hearing transcript are attached hereto as Exhibit A.) Hogan also has no trouble expecting Gawker to abide by other aspects of that ruling – for example, that Gawker not disseminate the videotape of the depositions to anyone but its counsel. *Id.* at 90:7-18; *see* Opp. to Fifth Motion to Compel at 4.[1]

4. Hogan instead relies on the fact that the parties submitted "**competing proposed orders**" after the hearing. Opp. at 4 (emphasis in original). That is a red herring. The differences between those proposed orders involved a disagreement over Judge Campbell's rulings in connection with *other* discovery issues (addressed below). They cannot excuse his ongoing violation of a direct command of a court on the discovery here at issue, as to which there is no disagreement over what the Court held.

B. The October 29, 2013 Ruling Granted Gawker's Motion to Compel Supplemental Discovery Responses.

5. Hogan asserts that Judge Campbell's October 29, 2013, rulings "did not compel a further response from Mr. Bollea and instead [merely] imposed a limitation on Gawker's discovery." Opp. at 1; *accord id.* at 3-5. This is revisionist history. As the transcript makes

[1] For the same reasons, with the exception of one of Hogan's 200-plus discovery demands as to which it has sought reconsideration, Gawker has complied with the Court's oral rulings from the November 25, 2013 hearing even though Judge Campbell has not yet entered a written order and even though there is no press of imminent depositions, as there is here.

plain, at the October 29 hearing Judge Campbell first heard detailed argument, and then adjudicated, plaintiff's motions for protective orders *as well as* Gawker's motion to compel further discovery responses. *See, e.g.,* Oct. 29, 2013 Tr. at 5:13-17 (Hogan's counsel explaining that he would address "the types of discovery that we're seeking to have precluded," which are "covered in our two [motions for] protective orders" and that those arguments "bleed into our opposition to their motion to compel"); *id.* at 21:17-23 (Gawker's counsel noting that Hogan's counsel had "addressed . . . topics that were both in the motion for protective order as well as the motion to compel" and agreeing to "address all of those together"); *id.* at 90:1-5 ("So since we have mostly treated these by topics, I'm just going to give the topic and then my ruling as to the topic as opposed to going down *motion by motion*.") (emphasis added).[2] There can be no legitimate dispute that Judge Campbell's ruling adjudicated Gawker's motion to compel supplemental discovery responses, and therefore required Hogan to provide Gawker with information he had withheld concerning his relationship with Heather Clem. *See* Mot. at ¶¶ 4-6.

6. Indeed, Hogan's argument, *see* Opp. at 4-5, that he was only required to serve a supplemental response to Gawker's Interrogatory No. 12 (and not any others), is also belied by Judge Campbell's ruling. Judge Campbell stated explicitly that she was giving her rulings "by topic" and was not breaking them down on a request-by-request basis. She referenced certain specific interrogatories, as a means to illustrate her "topical" rulings. It was not an exhaustive run-down of all the discovery requests to which her topical rulings applied. *See* Oct. 29, 2013

[2] *See also, e.g.*, Notice of Hearing for October 29, 2013 (noticing Gawker's Motion to Compel for hearing); Oct. 29, 2013 Tr. at 4:14-21 (referencing "notice of hearing" for "the Motion to Compel Discovery from Plaintiff by Defendant Gawker Media"); *id.* at 71:6-14 (Hogan's counsel addressing what Gawker is "asking for [in] discovery" and "things that they've moved to compel on," including "his sex life"); *id.* at 91:24 – 93:5 (Judge Campbell ruling that plaintiff's objections, which prompted Gawker's motion to compel, are "overruled" or "sustained"). Moreover, Hogan's own Proposed Order from the hearing expressly referenced Gawker's motion to compel further discovery in the title and the first sentence of the preamble. *See* Ex. 2 to Gawker's Motion.

Tr. at 92:19 – 93:2 ("So questions pertaining to like, *for example*, interrogatory No. 10 . . . the objections would be overruled" (emphasis added)). As a result, the Court ruled, "those three parties" – *i.e.*, Hogan and the Clems – "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* . . . ." *Id.* at 93:2-9 (emphasis added).

7. Hogan's implication – that he was not required to supplement his responses, but rather Gawker was required to serve new requests – is completely unsupported by Judge Campbell's ruling, by the argument that preceded it or by the proposed order Hogan himself submitted. Indeed, it is telling that Hogan did not make such an argument in response to the three separate letters by Gawker's counsel requesting that he provide supplemental discovery responses as ordered. *See* Exs. 5-7 to Gawker's Motion (correspondence dated Dec. 12, 2013, Jan. 6, 2014, and Feb. 5, 2014). Plaintiff provided *no* response at all to any of those letters, let alone to advance the remarkable contention that Judge Campbell's ruling adjudicating Gawker's motion to compel somehow did not require him to supplement his discovery responses.

C. Hogan Has Not Properly Responded to the Outstanding Discovery, as Ordered.

8. Hogan contends that, even though he was under no obligation to do so, he has "fully responded to the discovery at issue." Opp. at 5. With the possible exception of his response to Interrogatory No. 9 – which plaintiff *just* served (even though the Interrogatory was served on him in June 2013, ordered by the Court to be answered in October 2013, and requested by Gawker to be answered in letters sent in December, January, and February) – he has not.[3]

[3] Hogan's claim that he served his amended response "promptly following the [parties'] meet and confer" is also incorrect. Following Hogan's failure to respond to those three letters, and only after Gawker was forced to file the instant motions, Hogan belatedly participated in a "meet and confer" on Tuesday, February 18, 2014. Hogan's supplemental responses to two interrogatories were not served until *after* he filed his opposition to Gawker's motion, at 3:30 p.m. on Friday, February 21, and *after* the deadline set by Judge Case for responding to that motion.

Hogan cannot seriously contend that the Court held a two-hour hearing on Gawker's motion to compel further discovery and overruled his refusals to provide discovery involving the relationship between himself and the Clems, but actually intended to allow Hogan to stand on his initial responses, as served before that hearing.

9. To the contrary, as the Court recognized in its ruling, the relationship among these three players is crucial to getting to the bottom of some of the questions at the heart of Hogan's privacy claims against Gawker, including: Did Hogan know he was being recorded? Did Hogan, who lived with the Clems for several months, know that they had cameras throughout their home, including because it was widely known by others? What was the nature of the conversations between Hogan and the Clems regarding his sexual relationship with Heather Clem? How long did their sexual relationship continue? Was plaintiff, as Bubba Clem previously alleged, himself in on the "stunt"? *See generally Gawker Media, LLC v. Bollea*, --- So. 3d ----, 2014 WL 185217, at *6 n.5 (Fla. 2d DCA Jan. 17, 2014) ("We are 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.'").

10. For his part, Hogan's responses to the discovery at issue here were designed to avoid providing any meaningful information that would shed light on these questions. In fact, he cannot even provide a straight answer on *when* the encounter depicted in the Video at issue occurred – first alleging in his Amended Complaint that the encounter was in 2006, *see* Am. Compl. ¶¶ 1, 26, 50; then stating under oath in a verified interrogatory response served in August 2013 that it occurred in 2008; and now stating under oath in his newest interrogatory response that, no, it was actually in 2007, *see* Opp. at 6. Hogan also refuses to answer whether, for example, he ever entered the bedroom of the Clems (despite the Clems being "personal friends"

whose home he visited on "numerous" occasions) or whether he ever spent the night there (despite his counsel's later representation to the Court that he lived there for a period, discussed below). Plaintiff's refusal to fully answer questions and provide documents on these topics – nearly four months after responses were required to be given and now less than two weeks from depositions – is wholly without justification.

11. Indeed, perhaps the best illustration of why it is important for Hogan to supplement this category of discovery responses is his just-served supplemental response to Interrogatory No. 9, which discloses information indisputably material to Gawker's defense and which was obtained only after a motion, a ruling, three letters and a second motion.[4] While Gawker should not be expected to re-litigate issues pertaining to the other discovery requests on this topic, since the Court has already granted its motion in this regard, it nevertheless addresses them once again and asks that Hogan's responses to them be immediately supplemented:

12. **Interrogatory No. 10:** This interrogatory seeks information concerning "all times [plaintiff] discussed having Sexual Relations with Heather Clem with her husband, Todd Alan Clem." As described above, Hogan has variously contended the tryst at issue occurred in 2006, then in 2008, then (just last week) in 2007. After shifting from 2006 to 2008, Hogan's counsel admitted at the October 29, 2013 hearing that "Hogan has been inconsistent in his allegations in this case" with respect to "2006 versus 2008," and attempted to explain this discrepancy as follows:

> When Hulk Hogan first said this happened six years ago, I think that my office took it literally rather than figuratively. . . . And so when we initially prepared the papers, we made a mistake and we said, okay, it's 2012, and then we go back six years, so that's 2006. And then in further talking to him about this, we got down the actual timeline based upon other things that were happening in his life,

[4] That information is not discussed here since it was designated as "Confidential" under the Agreed Protective Order entered in this action.

> including his separation. . . . So once we got him down on the timeline, it turns out it happened to be in 2008 rather than 2006. And I apologize, but that was an inadvertent error. . . . It means we goofed and we unfortunately had our client sign something that was under penalty of perjury that was off by two years. And I apologize for that.

Oct. 29, 2013 Tr. at 67:16 – 68:17. With respect, particularly given this representation to the Court, Hogan should not have waited until after he received three letters and a second motion before serving a response with yet another time frame for the conduct that is at the core of this case.

13. Of even greater concern is Hogan's ongoing refusal to identify any specifics about any communications between plaintiff and Mr. Clem on this central subject, whether (a) at the time it happened, be it in 2006, 2008 or 2007; (b) between then and 2012; (c) in early 2012 when a sex tape came to light; (d) in early October 2012 when the Gawker Story and Excerpts were published; (e) later that month when Hogan settled his lawsuit against Mr. Clem; or (f) since. Particularly in light of Hogan's ever-changing story about when these events occurred, and in light of his recent admission that there were "occasions [plural] when the two [Hogan and Heather Clem] had sexual relations," Opp. at 5, Gawker is entitled to a complete response to this interrogatory, detailing the conversations he had with Mr. Clem about his sexual relations with Mrs. Clem from each of these relevant periods. That Gawker can also "ask him questions about his communications with the Clems" at his deposition, *id.* at 6, does not relieve plaintiff of his obligation to fully answer interrogatories as directed by the Court – particularly where Hogan has sought and obtained a ruling presumptively limiting his deposition to two days. Especially given Hogan's repeatedly shifting story on key details under oath, he should not be allowed to limit the length of his deposition, refuse to provide full answers to interrogatories, and then argue that

Gawker should have to use its deposition time to obtain information that should already have been provided.

14. **Interrogatory Nos. 15-17:** These interrogatories seek information concerning the occasions on which plaintiff visited the Clems' residence, entered their bedroom, and spent the night. Plaintiff's initial responses, which he has not supplemented, state only that plaintiff "visited their residence numerous times," and "at some point in time," he "may have entered their bedroom" (Resp. to Interrog. No. 16) and "may have slept over" (Resp. to Interrog. No. 17), without further elaboration. These responses are wholly insufficient.

15. First, these interrogatories sought information for the time period 2002-2006, based on plaintiff's averment in his Amended Complaint that the liaison with Heather Clem depicted in the Video at issue occurred in 2006. In her ruling, however, Judge Campbell determined that he was required to provide discovery about his relationship with Heather Clem from "2002 to the present." Oct. 29, 2013 Tr. at 92:9-15. Supplementing his responses through the present is especially important given that plaintiff has now *twice* changed his story about when the encounter occurred, as explained above.

16. Second, the substantive responses are so vague as to be incredible. Gawker does not expect Hogan to recall every specific "detail[] regarding each time he visited the Clems' home." Opp. at 6. But it is difficult to believe, for example, that he cannot recall one way or the other whether, in any of his "numerous visits to their house," he *ever* entered the Clems' bedroom, *see id.* (quoting Pl.'s Resp. to Interrog. 16 (plaintiff "*may* have entered their bedroom")) (emphasis added), especially given that there is videotaped evidence that he was in their bedroom at least once during the encounter at issue. Likewise, Hogan responded to Interrogatory No. 17, which seeks information concerning occasions on which he spent the night

at the Clems' residence, stating only that "at some point in time during that period, he *may have* slept over" (emphasis added). This, too, is hard to accept given his counsel's concession to the Court at the October 29, 2013 hearing that Hogan "live[d] with the Clems for a short period of time, I think two weeks or two months or somewhere in between there. I never said that he didn't." Oct. 29, 2013 Tr. at 68:6-8. Despite the fact that Gawker expressly moved to compel on this issue in its original motion, *see* Motion to Compel filed Sept. 11, 2013, at 4-5, and the representation of Hogan's counsel to the Court in response, this interrogatory remains uncorrected. It should be supplemented with a full and complete response as ordered.

17. **Document Request Nos. 8, 9, and 11:** Hogan claims to have no additional documents responsive to these document requests, which seek documents related to his sexual relationship with Heather Clem. Opp. at 6. In addition to all the communications described above, *see* ¶ 14 *supra*, that position is at odds with the one he takes in response to Gawker's Fifth Motion to Compel being decided herewith or the action to enforce the subpoenas to his publicist. There, for example, Hogan does not claim that he has *no* documents related to his complaints to law enforcement about the allegedly surreptitious recording of sex with Heather Clem or *no* documents related to his various media appearances in which he discussed sex with Heather Clem; rather, he argues that such documents are privileged or irrelevant. It is also at odds with what Hogan told Howard Stern on October 9, 2012 – that he had received "terrible emails" from his ex-wife Linda Bollea about the video of his having sex with Heather Clem. Given these statements, his claim to have no more documents is difficult to accept.

18. **Interrogatory Nos. 4 and 5:** Hogan asserts that "Judge Campbell sustained [plaintiff's] objections" to Interrogatory Nos. 4 and 5, seeking information regarding recordings of Hogan having sex with others. Opp. at 7. Although he is correct that Judge Campbell ruled

that Gawker could not inquire about instances of him having sex with persons *other than* Heather Clem, her ruling made clear that these interrogatories must be answered in connection with recordings of sexual relations between him and Heather Clem. *See* Oct. 29, 2013 Tr. at 92:9 – 93:9 (questions that "relate[] to the sexual relations between Mr. Bollea and Ms. Clem for the time frame 2002 to the present" must be answered). As described to the Court at the January 17, 2014 hearing, there were news reports – including an interview of Hogan and his Nevada counsel, David Houston – describing comments on a sex tape involving Hogan and Heather Clem that are not on the video supplied to Gawker, namely, a "statement by Mr. Clem and Mrs. Clem to the effect of 'If we ever needed to get rich, now we have this tape.'" Jan. 17, 2014 Tr. at 25:17 – 26:5 (attached hereto as Exhibit B). In response, Judge Campbell expressly reiterated her earlier ruling about the scope of discovery. *See also id.* at 31:1-9 (counsel for Hogan agreeing that October 29, 2013 ruling allowed discovery concerning "words, testimony, documentation that would pertain to the relationship between Hulk Hogan and Heather Clem"). These interrogatories properly seek information in Hogan's possession, custody and control concerning recordings of all such liaisons, whether the Video in Gawker's possession or otherwise. Given that Hogan and his counsel participated in an interview about another such recording, his responses must be supplemented.

19. **Document Request Nos. 12 and 13:** These requests seek copies of sex tapes involving Hogan. Pursuant to the Court's October 29, 2013 and January 17, 2014 rulings, he was required to produce any tapes of his sexual activity with Heather Clem to Judge Case by February 6, 2014 for *in camera* review and, if necessary, transcription of relevant passages. *Id.* at 32:1-12; 33:18 – 34:25, 43:18 – 44:24. In his Opposition, plaintiff claims to have none. But this position cannot be squared with other (confidential) information Gawker has received in

discovery. Because this reply is being filed publicly, Gawker does not discuss this confidential information here, but will explain its position at the hearing on this matter and will separately provide the relevant confidential information to the Special Discovery Magistrate.

D. Hogan Mischaracterizes the Court's Ruling on *Other* Discovery Requests.

20. Hogan asserts that "Gawker's strategy was to serve a lot of inappropriate discovery," such as requests for information about his sex life, his medical history, and his financial affairs, only "to later claim that Mr. Bollea supposedly is being 'uncooperative' in discovery by declining to respond to inappropriate requests." Opp. at 3.[5] This argument completely mischaracterizes both Gawker's motion to compel and, more to the point, the Court's ruling. Gawker initially sought information about Hogan's finances and business activities based on the allegations in *his own complaint* that his "goodwill, commercial value, and brand have been substantially harmed as a result" of Gawker's conduct, Am. Compl. ¶ 31, and that Gawker engaged in "unauthorized commercial exploitation of his publicity rights," *id.* ¶ 34.[6] It likewise sought Hogan's medical records based on his own allegations that he has suffered "substantial emotional distress, anxiety, and worry." *Id.* ¶¶ 89, 97.[7] In response to Gawker's motion, counsel for Hogan substantially limited his claims *at the hearing*, disavowing theories of damages based on injury to his brand or business, or on having sought medical or psychological treatment, and

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[5] Hogan's claim that Gawker is "seeking to compel further private information about Mr. Bollea to exploit at its celebrity tabloid website," Opp. at 2, is unfounded. Gawker has complied fully with the confidentiality order entered in this case, and has not published anything it has received in discovery, whether confidentially or not.

[6] *See also, e.g.*, Am. Compl. ¶¶ 32-33 (discussing "considerable commercial value in his name, image, identity and persona," which has been "substantially diminished by Defendants' actions"); *id.* at ¶¶ 89, 92 (As a result of Gawker's "conduct, Plaintiff has suffered substantial monetary damages, including damages to his . . . professional reputation and career.").

[7] *See also, e.g.*, Am. Compl. ¶ 31 ("Plaintiff has suffered, and continues to suffer, tremendous emotional distress. His life was 'turned upside down' . . . and [he] continues to suffer from substantial emotional distress, on a daily basis, as a result."); ¶¶ 92, 107 (alleging that plaintiff suffered "substantial injury, damage, loss, harm, anxiety, embarrassment, humiliation, shame and severe emotional distress").

representing that plaintiff would not be pursuing such claims. *See* Oct. 29, 2013 Tr. at 94:43-14 (THE COURT: "Mr. Harder, . . . [i]t seems as though today in your oral presentation, you have significantly eliminated a number of theories of damages," which "eliminates a lot of areas of inquiry on the – for the defense."); *id.* at 63:15-19 (THE COURT, to Hogan's counsel: "you're very limited when we get to the ultimate trial. There's very limited testimony that the plaintiff has in that regard." MR. HARDER: "I understand, Your Honor.").[8] And while Judge Campbell limited the extent to which Gawker could inquire about plaintiff's sex life, Gawker's requests can hardly be considered "inappropriate" given that Hogan served identical requests to co-defendant Heather Clem. *See, e.g.*, Pl.'s Interrog. No. 2 to H. Clem ("Identify each person . . . who was recorded engaging in sexual conduct with you during the time that you were married . . . .").[9] The assertion that Gawker has pursued a course of inappropriate discovery, which would somehow justify disregarding a direct ruling for four months, is totally unfounded.

E. Gawker Should Be Permitted to Recall Hogan for Further Deposition If Necessary.

21. If Hogan is ordered to comply with Judge Campbell's October 29, 2013 ruling and to supplement his discovery responses, Gawker is unlikely to receive his supplemental responses meaningfully in advance of his deposition. While Gawker will make every effort to conduct a complete examination of him on the scheduled dates, Gawker must ask the Court to reserve the ability to recall Hogan if needed. This is particularly true given that, since Gawker filed the instant motion, Hogan's counsel unilaterally cancelled Hogan's deposition and then

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[8] *See also, e.g.*, Oct. 29, 2013 Tr. at 8:2-17 (despite allegations of amended complaint, plaintiff is "just asking for what's known in Florida law as garden variety emotional distress. . . . He did not seek medical treatment for distress relating to this tape. So we don't feel that anyone should have to go into all of the aspects of his medical history"); *id.* at 65:25 – 66:2 (despite allegations of amended complaint, plaintiff is not "seeking damages because of the harm to his career. That's not what we're seeking.").

[9] *See also* Oct. 29, 2013 Tr. at 61:21 – 62:3 (THE COURT: "Mr. Bollea[] is asking for stuff from Ms. Clem, which I believe she's objecting to. And on the other hand, he is objecting to some of the same stuff that [Gawker is] asking for. So I see some – a bit of an inherent conflict in some of it.").

subsequently insisted it proceed as initially scheduled. *See* Exhibits C & D attached hereto (emails to Judge Case regarding the same).[10] Under these circumstances, Hogan cannot be heard to complain that he might be recalled if circumstances warrant. Indeed, plaintiff's counsel *asserted this very same thing* at the depositions of Gawker's witnesses.[11]

F. Gawker Is Entitled to Relief from Hogan's Ongoing Violation of the Court's Ruling as Well as to Attorneys' Fees.

22. Hogan opposes Gawker's request for a tailored preclusion order on several grounds, but none has any merit. First, he argues that a party cannot be punished for failing to comply with an unsigned order. Opp. at 8-9 (citing *Akridge v. Crow*, 903 So. 2d 346, 350 (Fla. 2d DCA 2005). But, as plaintiff acknowledges, *Akridge* involved an unsigned court order (in that case a sentencing memo, or "snap out") that failed to "provide adequate notice to [its] recipients regarding what is expected." Opp. at 10. Here, however, as evidenced by Hogan's own proposed order and his counsel's description at the later hearing on January 17, 2014, Judge Campbell's October 29, 2013 ruling made perfectly clear that Hogan was required to respond to discovery about his relationship with Heather Clem from 2002 to the present.

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[10] Following each of these emails, Gawker *agreed* to extend the briefing schedule and to postpone the depositions scheduled for the week of March 3rd (and to set a mutually agreeable schedule for the balance of the litigation) in order to accommodate Hogan's concerns, including that Hogan might need to be recalled if additional discovery were later ordered. Although Hogan's counsel initially agreed, he later refused to confirm such an approach, insisting that the depositions proceed as scheduled.

[11] *See, e.g.*, Dep. of A.J. Daulerio (Ex. E) at 249:5 – 250:8 (MR. MIRELL (counsel for plaintiff): "To the extent that there are additional documents that are disclosed and that are discovered and are made available to us I want to reserve the opportunity to ask the witness additional questions about that information."); Dep. of S. Kidder (Ex. F) at 274:18 – 275:19 (MR. MIRELL: "There are pending motions to compel and in the event that those motions result in the production of any additional documents or information for which Mr. Kidder in his capacity as Gawker Media, LLC's corporate representative might be implicated, we are reserving the right to ask that he be recalled for a subsequent deposition."); Dep. of N. Denton (Ex. G) at 264:21 – 265:6 (MR. MIRELL: "I am going as a matter of form to ask that in light of pending motions to compel that we reserve the right to recall you as a witness for further deposition should that become necessary.").

23. Second, Hogan argues that his responses were sufficiently detailed and that "Gawker has moved to compel on several issues . . . that clearly are barred by Judge Campbell's ruling." Opp. at 9. Neither of these statements is true. Again, as explained in Part C *supra*, plaintiff's discovery responses are in no way "detailed" and, in fact, are seriously lacking. And Gawker has *not* moved to compel information that Judge Campbell has restricted. It specifically limited its motion in keeping with Judge Campbell's ruling. *See, e.g.*, Mot. at ¶ 10 (asserting that Interrogatory Nos. 4-5 and Document Request Nos. 12-13 "must be answered *in connection with any recordings of plaintiff and Heather Clem*") (emphasis added).

24. Third, Hogan argues that an order of preclusion would not be "commensurate with the violation," analogizing his ongoing conduct flouting a court ruling – one which has cost Gawker substantial sums and which has delayed the orderly progress of this case – to a mild case of "dandruff." Opp. at 9-10. But his refusal to provide the requested information about his relationship with Heather Clem (and the fact that the meager information he did supply did not come until some nine months after it was first requested, nearly four months after it was ordered produced, and less than two weeks before deposition) is a troubling – and still ongoing – violation. It cannot be seriously disputed that the facts surrounding his relationship with Heather Clem are at the core of this case. The discovery Gawker has sought is designed to ascertain whether his allegations hold water, including given that he himself has shifted his story over time and given that his best friend Bubba Clem repeatedly said he knew he was being recorded, was in on the stunt, and called him the "ultimate lying showman." Discovery going to these core facts is essential to Gawker's defense, and Hogan's steadfast refusal to provide it – even in the face of a ruling by the Court – entitles Gawker to an appropriately tailored sanction. *See* Mot. at ¶ 11. Indeed, at the October 29, 2013 hearing itself, Judge Campbell agreed that, in such

circumstances, if Hogan does not "give you any of the information," he is "not allowed to bring it up during trial." Oct. 29, 2013 Tr. at 94:10-14.

25. Third, plaintiff does not dispute the holdings of the cases cited by Gawker, *see* Mot. at ¶ 11, that a court "may limit plaintiff's introduction of evidence with respect to any of the matters embraced" by discovery requests to which the plaintiff had not adequately responded, *see Herold v. Computer Components Int'l, Inc.*, 252 So. 2d 576, 581 (Fla. 4th DCA 1971), or that "parties who evade their discovery responsibilities will not be permitted to benefit from such improper tactics," *see The Florida Bar v. Lobasz*, 64 So. 3d 1167, 1171-72 (Fla. 2011) (*per curiam*). Indeed, while Hogan correctly notes that *Herold* questioned the trial court's imposition of the sanction of *dismissal* ("striking the plaintiff's complaint"), Opp. at 10, the Court in fact recognized that sanctions are warranted when a party fails to comply with discovery orders. Upon remand, the trial court would be free to "reimpos[e] any sanction (including dismissal) as set forth in Rule 1.380 after full consideration of the criteria discussed." *Herold*, 252 So. 2d at 581. Contrary to Hogan's contention that "*Herold* does not permit the sanction sought by Gawker," Opp. at 10, the *Herold* Court expressly held that, "[a]s an alternative to dismissal the court may limit plaintiff's introduction of evidence with respect to any of the matters embraced by the answers to the propounded interrogatories." 252 So. 2d at 581. Certainly the circumstances here – where, despite his imminent deposition, Hogan has refused to provide discovery going to core issues in the case for nine months despite two motions, two hearings, and three follow-up letters – such a narrowly tailored sanction is warranted.

26. Finally, in his Opposition, plaintiff does not contest Gawker's request for an award of reasonable attorneys' fees and costs pursuant to Florida Rule of Civil Procedure

1.380(a)(4) and 1.380(b). *See* Mot. at ¶ 13. For the reasons stated in Gawker's Motion, that unopposed request should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons stated in its opening papers, Gawker respectfully requests (a) that its 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 25, 2014, (d) that Gawker retain it right to seek to recall plaintiff for additional deposition as needed to address late produced discovery, (e) that plaintiff be ordered to pay Gawker's reasonable attorneys' fees and costs in litigating this motion, and (f) any other relief that the Court finds just and proper.

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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