IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

REPLY IN SUPPORT OF PLAINTIFF TERRY GENE BOLLEA'S EXCEPTIONS TO SPECIAL MAGISTRATE'S RECOMMENDATION RE: GAWKER MEDIA, LLC AND A.J. DAULERIO'S FIFTH MOTION TO COMPEL

Gawker Media, LLC ("Gawker") seeks production of two categories of documents: (1) Mr. Bollea's personal phone records for the entire year of 2012; and (2) Mr. Bollea's communications made pursuant to an FBI investigation. As Mr. Bollea explained in his Exceptions to the Special Magistrate's recommendation, both categories are overbroad, not relevant or reasonably calculated to lead to the discovery of admissible evidence, an invasion of Mr. Bollea's privacy, and inconsistent with the Court's prior orders regarding the scope of discovery in this case. Gawker's Response to Mr. Bollea's Exceptions does nothing to credibly refute these points. The Court should reject the Special Magistrate's recommendation for at least the following reasons:

First, Gawker admits that it must establish **the necessity** of an entire year's worth of records of every single personal and business telephone call and text for the entire year 2012 in order to obtain those records in discovery. Gawker has failed to do so. Thus, Mr. Bollea's personal phone records cannot be compelled.

Second, Gawker has not established that Mr. Bollea's communications made pursuant to an FBI investigation are relevant or reasonably calculated to lead to the discovery of admissible evidence. They are not. In fact, the government's alleged recent confirmation that Gawker is not the subject or target of the investigation further shows only that the communications have no bearing on the issues in this case—namely, whether Gawker's unauthorized posting of a surreptitiously-recorded sex video of Mr. Bollea constitutes an invasion of his privacy and other related torts

Mr. Bollea is willing to submit to the Court the communications at issue, for an *in camera* review, to determine if they fall within the scope of discovery and should be compelled.

I. GAWKER CANNOT ESTABLISH THE NECESSITY OF TAKING BLANKET DISCOVERY OF MR. BOLLEA'S PHONE RECORDS

In Florida, a party seeking confidential information through discovery (such as the contact information of non-parties) must show that its need for the information overrides the privacy interests of the non-party. Gawker admits that it must establish the necessity of obtaining Mr. Bollea's records regarding all of the personal and business telephone calls and texts that he made during the entire year of 2012, but Gawker utterly fails to make that showing. Response at 2.

The Florida Court of Appeal's decision in *Berkeley v. Eisen*, 699 So. 2d 789 (Fla. 4th DCA 1997), is instructive. In that case, the court considered whether the moving party, the

Eisens, had "established a need for the information overriding the non-party's privacy rights" in their personal identifying information, which included their names and addresses. *Id.* at 791. The court held that the Eisens had failed to make that showing. *Id.* at 792. In making its finding, the Court explained that "[t]he party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information." *Id.* at 791 (quoting *Higgs v. Kampgrounds of America*, 526 So. 2d 980, 981 (Fla. 3d DCA 1988)). In *Berkeley*, the Eisens' stated necessity for the names and contact information of Berkeley's 75 other investors was to be able to depose the other investors in order to refute testimony by Berkeley that the Eisens wanted to concentrate on more speculative securities than Berkeley's other clients. *Id.* at 792. The Court found that the Eisens' efforts to refute the testimony would have little probative value, amounted to "little more than a fishing expedition," and did not "override the privacy rights of Berkeley's clients." *Id.*

Here, Gawker's stated necessity for an entire year's worth of Mr. Bollea's records of every single one of his personal and business phone calls and texts is "to determine the extent to which plaintiff spoke and texted with key witnesses, including Bubba and Heather Clem, during the relevant time period." Response at 2. Yet the request seeks **all** phone records for the **entire year of 2012** and is not limited to exchanges between the "key witnesses." Gawker fails to explain how such a broad request is at all relevant to the issues in this case—namely, whether Gawker's conduct in posting the sex video without Mr. Bollea's approval was tortious, whether that conduct was constitutionally protected, and the extent of Mr. Bollea's damages resulting from Gawker's conduct. Gawker further fails to explain why access to that information should override the privacy rights of the many **hundreds of people** who called or were called by Mr. Bollea, 99.99% (if not 100%) of whom are not "key witnesses" in this case and, instead, have

nothing to do with the case whatsoever. Those individuals have never waived their privacy rights or authorized discovery of their phone numbers. Gawker's statement that it needs Mr. Bollea's telephone records to "clarify" the allegedly "contradictory testimony about the extent to which [Mr. Bollea and Bubba Clem] historically communicated with each other via text" is akin to the Eisens' stated need in *Berkeley*—*i.e.*, to refute certain testimony. The *Berkely* court found that need insufficient to permit this intrusive discovery. This Court should do likewise. A desire to "clarify" the number of times Mr. Bollea and Bubba Clem texted each other in 2012 cannot justify the invasion of privacy of the hundreds of non-parties whose contact information will be disclosed through the requested telephone records. This is especially true when all of the **relevant** text messages between Mr. Bollea and Bubba Clem—*i.e.*, texts that relate to the sex video—**were already produced** and were the subject of **extensive deposition questioning**.

In addition, the cases examining the privacy interests of non-parties (several of which are cited in Mr. Bollea's Exceptions, pps. 5–6) do not limit their applicability to "subjects that are statutorily protected," as Gawker contends. Response at 3. For example, Gawker is incorrect in implying that the court's decision in *Berkeley* was based on an application of Fla. Stat. §517.2015. *Id.* That statute was not at issue in *Berkeley*. Rather, the *Berkeley* court's decision is rooted in Article 1, section 23 of the Florida Constitution, which "specifically provides a constitutional right of privacy broader in scope than the protection provided in the United States Constitution." *Id.* at 790. The *Berkeley* court cites to Fla. Stat. §517.2015 merely to show that the Florida legislature "has recognized the confidential nature of the exact type of information at issue" in that case—*e.g.*, names, addresses and telephone numbers of an investment firm's customers. The holding is not limited to their connection to financial information.

In sum, Gawker's request is impermissibly overbroad, fails to account for the privacy

interests of non-parties to this case and, as in *Berkeley*, amounts to little more than a fishing expedition. The telephone records should not be compelled.

II. COMMUNICATIONS RELATED TO THE FBI INVESTIGATION ARE NOT RELEVANT OR REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

Mr. Bollea's statements to law enforcement are not relevant to this litigation, and are not reasonably calculated to lead to the discovery of admissible evidence. Gawker's only stated reason for requesting the information is found in footnote 3 of its underlying Motion to Compel—accusing Mr. Bollea of having "several different versions" of the events in this case. As Mr. Bollea explains in his Exceptions (p. 12), this is a **groundless accusation** given that Gawker has not identified one single statement in which Mr. Bollea acknowledges or even implies that he knew he was being recorded having sex, or ever authorized the dissemination of the recording. The avalanche of evidence on this subject is that Mr. Bollea has repeatedly and consistently stated that he was filmed without his knowledge, never authorized any dissemination and, to the contrary, sought in every instance to have the sex video removed from the internet and destroyed. Gawker does not even address the purported relevance of the communications in its Response. Instead, Gawker focuses on the government's alleged stance on the privileged nature of the communications, which has no bearing on their relevance. If anything, the fact that the government apparently confirmed recently that Gawker is not a target or subject of any investigation is further evidence that the information is not relevant or reasonably calculated to lead to the discovery of admissible evidence in **this case** against Gawker.

Gawker also attempts to paint Mr. Bollea's refusal to produce these communications as

"substantial game playing." That is not the case. Gawker's Request 4 and Interrogatory 13 were propounded in June 2013. Plaintiff made objections and responses in and around August 2013 (following a 30 day extension). As of that date, Mr. Bollea's instruction from law enforcement was not to discuss or disclose any aspect of the investigation with anyone. Mr. Bollea and his counsel were not informed of the government's allegedly changed position regarding the documents within Mr. Bollea's possession until after Mr. Bollea's Exceptions were filed. Thus, Mr. Bollea's actions with respect to these communications were wholly consistent with his instructions from law enforcement, and were in no way an exercise in gamesmanship.

Because of the extremely sensitive nature of the communications, and the fact that Gawker is a gossip blog that has posted stories about this lawsuit, as well as the original sex video, and boasts publicly that it does not believe in other people's rights to privacy or confidentiality, Mr. Bollea requests that the Court conduct an *in camera* review of the communications at issue to determine whether any of them are relevant to this action or reasonably calculated to lead to admissible evidence. Mr. Bollea will defer to the Court's decision regarding whether they are sufficiently within the scope of discovery such that they should be produced.[1] As the Court will discover upon *in camera* review, however, these communications are **not** "about the very facts at issue in this case" (Response at 6), as Gawker contends, and as such, their production should not be compelled.

III. CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the Court **decline** to adopt the discovery magistrate's recommendation, and that Gawker's Fifth Motion to Compel be

[1] This Court has already found that the scope of discovery in this case is limited, and should not extend to collateral areas of dubious relevance that compound the invasion of privacy already suffered by Mr. Bollea. For example, the Court found that discovery could not extend to Mr. Bollea's sex life other than his relationship with Heather Clem. Tr. (10/29/13) at 91:21–92:14.

denied as to Mr. Bollea's telephone records from the entire year of 2012.

DATED: April 16, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 16th day of April, 2014 to the following:

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