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, *et al.*,

Defendants.
_____/

GAWKER MEDIA, LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTION OF PRECLUSION ORDER

This is a remarkable motion. Plaintiff complains that he was unfairly surprised at his deposition by his own published autobiographies; advertisements for his own companies in which he himself appeared; and statements he made to newspapers, websites and radio stations. Without any authority in either rule or case law, he seeks to sanction defendant Gawker Media, LLC ("Gawker")[1] for not having produced such materials prior to his deposition, contending that both the items themselves and his deposition testimony about them should be precluded from any use at trial despite their central relevance to the legal issues at hand. In support of that motion, plaintiff asks the Court:

a. To find that, although Gawker's counsel gathered the materials at issue in preparing their case, they were somehow not attorney work-product protected from disclosure;

b. To conclude that such attorney work-product protection is somehow overcome because he needed the materials or because they may later be trial evidence;

[1] Although the title of plaintiff's sanctions motion seeks a preclusion order against "Defendants," his actual motion references only Gawker and its discovery responses. In addition, Gawker is the party that noticed his deposition and elicited the testimony to which he now objects. To the extent that plaintiff's motion is nevertheless deemed to be asserted against Defendant A.J. Daulerio, who also interposed a work product objection, or any of the other Gawker Defendants, they join in this opposition (with Kinja, KFT, which has challenged this court's jurisdiction over it, specially appearing to do so).

c. To disregard settled Florida Supreme Court authority and this Court's rules, both of which allow a party to depose its adversary about such work product materials without first producing them; and

d. To enter a sanctions order even though, under the governing rules, an order compelling disclosure – which was neither sought nor entered here – is a pre-condition to any order sanctioning a party for an alleged discovery violation, and would be entirely unwarranted under the circumstances here in any event.

BACKGROUND

1. Between May and December 2013, plaintiff served three sets of document requests on Gawker and another set on A.J. Daulerio, totaling 200 requests for production. All told, Gawker and Daulerio have produced more than 24,000 pages of documents.

2. On January 28, 2014, plaintiff propounded a fourth set of document requests on Gawker and a second set on Daulerio – specifically, supplemental requests demanding production of any "new" documents responsive to plaintiff's earlier document requests. Gawker and Daulerio timely served written responses on March 4, 2014, *see* Fla. R. Civ. P. 1.350; Fla. R. Jud. Admin. 2.514(b), in which they objected, *inter alia*, to the production of the work product gathered by their attorneys in preparing their defense. They advised, however, that they would produce any documents that had come into their *own* possession since the prior document production (and have since done so). *See* Exs. 1 and 2.[2]

3. At plaintiff's deposition on March 6 and 7, 2014, counsel for Gawker asked plaintiff about certain publicly-available materials containing plaintiff's own public statements

[2] In addition to incorporating by reference their objections to plaintiff's earlier 200 requests, and asserting their objection to producing protected attorney work-product, Gawker and Daulerio objected to the burden and expense of re-searching numerous email accounts since they had previously produced all documents concerning the writing and editing of posting at issue. Exs. 1 and 2.

that counsel for Gawker had gathered. *See* Pl. Mem. at 6-7 (identifying documents). Based on plaintiff's testimony during the deposition, Gawker's counsel determined which of the materials they had gathered to use, choosing to use some and electing not to use others.

4. Even though these questions involved plaintiff's own statements, he complains that he was so unfairly surprised by this questioning that an order should be entered precluding both those statements and his testimony about them from *any* use at trial. For the reasons below, plaintiff's Motion should be denied.

ARGUMENT

A. Documents Gathered by Counsel Constitute Protected Attorney Work-Product.

5. There can be no question that the information plaintiff now challenges was collected by Gawker's attorneys after the litigation commenced as part of its investigation into the case, as thus qualifies as work product. *See Surf Drugs v. Vermette*, 236 So. 2d 108, 112 (Fla. 1970) (Pl. Mem. at 8) (explaining that "'it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.'") (quoting *Hickman v. Taylor*, 329 U.S. 495 (1947)).

6. This longstanding protection for an attorney's work product shields both an attorney's mental impressions and conclusions (known as "opinion" work product), as well as "information which relates to the case and is gathered in anticipation of litigation" (known as "fact" work product). *Acevedo v. Doctor's Hosp., Inc.*, 68 So. 3d 949, 953 (Fla. 3d DCA 2011). Here, plaintiff's supplemental demands effectively sought every piece of information that

Gawker has collected about the plaintiff in connection with preparing its case. *See, e.g.*, Pl. RFP No. 1 ("All documents that relate to Plaintiff . . ."). Those documents, taken together, would unquestionably reveal Gawker's counsel's litigation strategy. It is precisely this type of wholesale rooting through counsel's investigative files, which reveals not only the facts gathered but the adversary's litigation strategy, that the work product doctrine was designed to prevent.

7. Thus, for example, in *Smith v. Florida Power & Light Co.*, 632 So. 2d 696, 697 (Fla. 3d DCA 1994), the Third District Court of Appeal sustained a work product objection to defendant's request for the entire set of documents obtained by plaintiff's counsel because the "very *grouping* of those . . . documents, which had been collected outside of the discovery process, would reveal his mental impressions." The Court reached this conclusion even though the documents in question (a) were factual documents originally created by the opposing party and (b) had not themselves been prepared in anticipation of litigation. *Id.* Indeed, the Court determined that "the selection and compilation of documents by counsel in preparation for pretrial discovery fell within the 'highly protected category of opinion work product,' because identification of documents as a group would reveal counsel's selection process." *Id.* at 698. Just as in *Smith*, plaintiff's omnibus demands for all documents defense counsel gathered about the plaintiff would improperly "lay bare that lawyer's protected thought processes." *Id.* at 698-699. *See also Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004) (disapproving of lower court decision requiring party to produce a collection of documents that "may indicate counsel's strategy").[3]

[3] Gawker does *not* claim the work product protection over documents about the plaintiff which came into the possession of Gawker itself or Daulerio after the commencement of the litigation. Indeed, Gawker and Daulerio have produced such documents, including in response to plaintiff's supplemental demands.

B. Plaintiff Cannot Overcome the Attorney Work-Product Protection.

8. Because it is obviously improper for a party to use its adversary's work to prepare its own case, a party can only overcome attorney work-product protection as to "fact work product" and then only where (a) the requesting party can make a showing of need and inability to otherwise obtain the information, Fla. R. Civ. P. 1.280(b)(4), or (b) the gathering party decides that it will use the information *at trial*, *see Northup*, 865 So. 2d at 1272. Opinion work product is, in effect, "absolutely" privileged. *Smith*, 632 So. 2d at 699; Fla. R. Civ. P. 1.280(b)(4).

9. First, plaintiff has not argued – and could not do so with a straight face – that he *needed* such information or that it was not otherwise available. Indeed, the evidence that plaintiff complains about consists of *his own public statements* that Gawker gathered from public sources, available to anyone. If, to prepare for his deposition, plaintiff wanted to review the available information about him, which is accessible online and available through other sources, he was free to collect that information himself. He is not, however, entitled to have Gawker do it for him. *See S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) (party is not entitled to benefit of "investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures").[4]

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[4] In this regard, plaintiff misapprehends Gawker's point that these documents are all public and readily available to plaintiff. In this context, that fact negates any claim that the work product protection is overcome by a showing of need. Indeed, even outside the context of analyzing whether work product protection is overcome, courts routinely hold that a party need not produce documents that are "equally available" to both sides. *See, e.g.*, *In re Pradaxa Prod. Liability Litig.*, 2014 WL 51621*3 (S.D. Ill. Jan. 14, 2014) ("The court will not compel production of documents equally available to both sides of the litigation"); *Bridgewater v. Sweeny*, 2012 WL 5387968*4 (E.D. Cal. Nov 1, 2012) (sustaining objection to production where documents were "equally available to plaintiff"); *Access 4All, Inc. v. W&D Davis Co., Ltd.*, 2007 WL 614091*3 (S.D. Ohio Feb. 21, 2007) ("defendant need not produce information readily available to the public"); *Tequila Centinela, S.A. de C.V. v. Bacardi & Co., Ltd.*, 242 F.R.D. 1, 11 (D.D.C. 2007) (discovery not required where documents "equally accessible" to all parties). Notably, in plaintiff's own responses to Gawker's document requests, he himself asserted this **very same objection** including in connection with requests seeking his own public statements. *See, e.g.*, Pl. Resp. to Gawker's RFP Nos. 20, 24, 25, 26, 35, and 36 (objecting and refusing to produce documents that are "equally available" to Gawker).

10. Second, any argument that the work product protection is overcome because Gawker intends to use the materials at trial, *see* Pl. Mem. at 8, is exceedingly premature. There is no obligation to produce "work product" before a deposition; it need be disclosed only before *trial* and only if it will be used at trial, as plaintiff's own authority confirms. *See Corack v. Travelers Ins. Co.*, 347 So. 2d 641, 642 (Fla. 4th DCA 1977) (Pl. Mem. at 8) ("if a party possesses material he expects *to use as evidence at trial*, that material is subject to discovery") (emphasis added).[5] *See also Huet v. Tromp*, 912 So. 2d 336, 339 (Fla. 5th DCA 2005) (work product protection "ceases once the materials or testimony are intended *for trial use*") (emphasis added; citation omitted).

11. Moreover, the Florida Supreme Court has specifically held that a party possessing work product that it may ultimately use at trial "has the right to depose the party or witness" about that evidence "before being required to produce" it. *Dodson v. Persell*, 390 So. 2d 704, 705 (Fla. 1980). In *Dodson*, after the litigation commenced, a defense investigator obtained surveillance footage of the plaintiff. *Id.* The high court recognized the "merit" of allowing a party who has gathered such evidence to "establish any inconsistency in a claim by allowing the party to depose [its adversary] after the . . . evidence [has been] acquired, but before [its] contents are presented for . . . pretrial examination" in response to a request for production. *Id.* at 708. *See also McClure v. Publix Super Markets, Inc.*, 124 So. 3d 998 (Fla. 4th DCA 2013) (rejecting challenge to order allowing defendant to withhold footage of accident until after plaintiff's deposition); *State Farm Mut. Auto Ins. Co. v. H Rehab, Inc.*, 56 So. 3d 55, 56 (3d

[5] The other two cases plaintiff cites, *see* Pl. Mem. at 8, involve factual responses to interrogatories, and reached the unremarkable conclusion that basic identifying information about witnesses and the like could not be withheld as work product. *See, e.g.*, *Surf Drugs, Inc.*, 236 So. 2d at 112 (facts in attorney's possession, such as identities of witnesses, could not be withheld as work product in response to interrogatories); *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. 4th DCA 1975) (two-word order denying petition for writ of certiorari on order requiring response to interrogatories concerning basic facts about surveillance film of plaintiff).

DCA 2011) ("State Farm is not required to produce the surveillance video prior to . . . the deposition of the plaintiff"); *State Farm Fire & Cas. Co. v. H Rehab, Inc.*, 77 So. 3d 724, 725 (3d DCA 2011) (granting writ because "circuit court violated a clearly established principle of law" by requiring production of video "prior to allowing [petitioner] the opportunity to depose the subject of the video").[6] These authorities are nowhere addressed in plaintiff's motion and are dispositive of his claim that it was improper to question him about the materials at issue. Indeed, it if is proper to question a party about a surveillance tape he has never seen and that is not otherwise publicly available, there can be no doubt that questioning plaintiff here about his own public statements in his autobiography and the like is permitted.

12. Given that counsel is unlikely to decide until much later in the process whether and to what extent they intend to use attorney work product materials at trial (and given that counsel's files likely include documents they may *never* use), this Court's own rules similarly confirm that such disclosures are not required until 60 days before the pretrial conference. *See* Sixth Jud. Cir. Admin. Order No. 2013-064 at ¶¶ 3, 5, 21 (requiring party to identify its trial exhibits 60 days before the pretrial conference, and reciting that, if the relevant evidence is not identified at that time, *then* it may be precluded).[7] No pretrial conference or trial date has been

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[6] *Target Corp. v. Vogel*, 41 So. 3d 962 (Fla. 4th DCA 2010) (Pl. Mem. at 10), is not to the contrary. It addressed the threshold question of whether a video of "the accident itself" – unlike materials compiled *after* litigation commences – was work product in the first place, holding that there was no abuse of discretion in finding it must be produced as "discoverable evidence." *Id.* at 963. *Target* also reaffirmed the general principle that materials legitimately covered by work product protection are exempt from disclosure unless and until those materials are "intended for use at trial" or the protection is otherwise overcome. *Id.* For present purposes, *Target* was a decision on a motion to compel; it provides no support for plaintiff's argument here that disclosure was automatically required and that failure to do so warrants the imposition of harsh sanctions, even absent a motion to compel. *See* Part C *infra*.

[7] *See also* "Important Deadlines to Diary for Jury Trials" for Courtroom of Hon. Pamela A.M. Campbell ("at least 5 days before trial: Attorneys to meet to exchange exhibits, prepare index of exhibits for the Court, and to prepare for marking exhibits with the Clerk prior to utilizing, and to prepare ONE Uniform Pretrial Conference Order.").

set. Under *Dodson* and its progeny and under these rules, plaintiff is wrong in asserting that Gawker was required to produce its work product materials prior to plaintiff's deposition.

C. <u>There is No Authority to Enter a Preclusion Order or Other Discovery Sanction.</u>

13. *Even if* plaintiff were somehow correct that these materials were not attorney work product, or that he could overcome that protection by showing need or by showing – in direct contravention of *Dodson* and this Court's own rules – that he was entitled to their production before his deposition, there would still be no basis to enter a sanctions order. Simply put, a party's violation of an *order* compelling discovery is a necessary prerequisite to an order imposing a sanction, including, as requested here, a sanction of preclusion. *See* Fla. R. Civ. P. 1.380(b) (providing for sanctions in the event of a "failure to comply with order"). As the comments to the Rule explain, "the proper procedure is to secure an order . . . to compel [discovery]. A refusal to obey such an order . . . will entail the consequences of" sanctions. *See also Horace Mann Ins. Co. v. Chase*, 51 So. 3d 640, 641 (Fla. 1st DCA 2011) ("sanctions were inappropriate . . . because Appellees did not prevail on a motion to compel"); *Stiles v. Bargeron*, 559 So. 2d 365, 367 (Fla. 1st DCA 1990) (award of sanctions was abuse of discretion where "appellee never filed a motion to compel").

14. Here, plaintiff filed no motion to compel, and thus obviously obtained no order compelling production. Particularly given the substantial authority expressly allowing a party not to disclose its work product prior to questioning the opposing party about it at deposition, *see* Paragraph 11 *supra*, plaintiff should not be permitted to skip the step of attempting to persuade the court that such documents must nevertheless be disclosed, and instead to jump straight to asking for sanctions. Because the rules make clear that an order compelling discovery is required as a prerequisite to any sanction, no sanctions order may issue here.

15. The two cases plaintiff cites offer him no support. Both *Southern Bell Tel. & Tel. Co. v. Kaminester*, 400 So. 2d 804, 806 (Fla. 3d DCA 1981), and *La Villarena, Inc. v. Acosta*, 597 So.2d 336, 338 (Fla. 3d DCA 1992) (Pl. Mem. at 14), involved appeals from jury verdicts. In *Southern Bell*, the court held that it was error for the trial judge to admit into evidence at trial information that had not been produced before trial. In *La Villarena*, the court approved of the trial court's order excluding evidence at trial that had not been produced in discovery *and* did not appear on the opposing party's exhibit list. Neither case says anything about the use of documents at deposition, or imposing sanctions under the circumstances here, and Gawker is aware of no other Florida case authorizing such an extraordinary order. *See Finestone v. Fla. Power & Light Co.*, 2006 WL 267330 (S.D. Fla. 2006) (declining to enter order precluding use of documents where they were "publicly available" and "eventually produced" in discovery).

16. Finally, even if the Court were to credit plaintiff's generalized assertion that the rules must be applied to prevent surprise, plaintiff cannot credibly claim to have been surprised by questions about *his own* public statements and public appearances *he himself* made, and which were easily and publicly available to him and his counsel should they have wanted to refresh plaintiff's recollection about them in advance. As the Special Discovery Magistrate witnessed himself at the deposition, plaintiff was able to answer, in some form or another, all the questions posed to him by Gawker's counsel. *See, e.g.*, T. Bollea Dep. at 34-35, 184-90 (discussing his autobiographies, Exs. 77, 82); *id.* at 174-175, 177-183 (discussing his advertisements, Exs. 80, 81); *id.* at 258-60, 590-618 (though not recalling all details, testifying about his appearances on the Bubba the Love Sponge radio shows, Exs. 83, 104-06).[8] The

[8] Even though this testimony involves plaintiff's own public statements, he has designated much of it as "CONFIDENTIAL" under the Agreed Protective Order entered in this action. Accordingly, it is not attached here but can be supplied to the Court or the Special Discovery Magistrate, if requested.

proper "remedy" in such circumstances is not to preclude material testimony about central legal issues, such as the degree to which plaintiff maintained his privacy or the extent to which the Gawker Story addressed an ongoing public controversy in which plaintiff himself participated. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1202 (Fla. 2d DCA 2014) (relying on plaintiff's public statements to conclude that challenged speech involved a matter of public concern protected by the First Amendment).

17. Rather, if plaintiff is later confronted with the testimony he claims was elicited through unfair surprise, he is certainly free to testify at trial that he was surprised at deposition and that, upon further reflection, his views have changed. *See, e.g.*, *Nash v. AMR Corp.*, 937 So. 2d 1205, 1211 (Fla. 1st DCA 2006) ("the exclusion of evidence is 'a drastic remedy which should pertain in only the most compelling circumstances,' and only where the court has made 'a case-specific determination as to whether admission of the evidence would result in actual procedural prejudice to the objecting party'"). Given the absurdity of plaintiff's assertion that he was surprised by his own public statements, it would seem unlikely that he would take such an incredible position at trial – further illustrating the hollowness of his claim of unfair surprise here.[9]

CONCLUSION

As demonstrated above, the materials in question were protected work product. Both settled law and this Court's rules allowed Gawker to ask plaintiff about those materials at deposition without first disclosing them, particularly because (unlike a surveillance video) they

[9] Gawker respectfully suggests that the equities also weigh strongly against an award of sanctions. For example, not only did plaintiff refuse to produce whole categories of information and documents until after his deposition, including those involving the FBI's investigation and his telephone records, but he has continued to blatantly violate the Court's April 23, 2014 Order requiring him to do so. *See* Ex. 3. Because Gawker believes that there is more than ample basis to reject this motion out of hand, it has not belabored this point here, but is prepared to address it in greater detail at the hearing if necessary.

were publicly and readily available to plaintiff. And, plaintiff is not entitled to a sanctions order – much less the draconian order sought here – where plaintiff did not seek and the Court did not enter an order compelling disclosure and where such an order would be far out of proportion to plaintiff's claimed harm in any event. Plaintiff's motion should be denied in its entirety.

Dated: May 2, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*

Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
Julie B. Ehrlich
Pro Hac Vice Number: 108190
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com
jehrlich@lskslaw.com

Counsel for Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May 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:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Christina K. Ramirez, Esq.
cramirez@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines, Esq.
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ *Gregg D. Thomas*
Attorney