

EXHIBIT 1

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

TERRY GENE BOLLEA,
professionally known as HULK
HOGAN,

Plaintiff,

Case No.
12-012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC, aka GAWKER MEDIA, et
al.,

Defendants.

_____ /

TELEPHONIC HEARING BEFORE
THE HONORABLE JAMES CASE,
without confidential sessions

DATE: February 24, 2014

TIME: 1:32 p.m. to 3:27 p.m.

PLACE: Riesdorph Reporting Group
601 Cleveland Street
Suite 600
Clearwater, Florida

REPORTED BY: Aaron T. Perkins, RPR
Notary Public, State of
Florida at Large

Pages 1 to 89

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I N D E X

PAGE

PROCEEDINGS	4
CONFIDENTIAL SESSION REMOVED	11
CONFIDENTIAL SESSION REMOVED	17
CONFIDENTIAL SESSION REMOVED	39
REPORTER'S CERTIFICATE	89

P R O C E E D I N G S

1
2 THE COURT: Judge Case here, and I think
3 we've got everybody we need.

4 MR. BERLIN: Is Rachel on as well?

5 THE COURT: Yes.

6 MS. FUGATE: Yes, I am, Seth.

7 MR. BERLIN: Your Honor, I apologize
8 for being just a minute late. I actually tried to
9 dial in once before, and I had a technical glitch
10 and got a fast busy, so --

11 THE COURT: No problem.

12 Charles, are you expecting anybody else on
13 your side?

14 MR. HARDER: No, I am not.

15 THE COURT: We've got Rachel. Anybody else?

16 MR. BERLIN: We are not expecting anybody on
17 our side, Your Honor, for the Gawker defendants.
18 And it is my understanding that because -- I don't
19 know this, but I'm surmising, because we have
20 tried to ascertain this but haven't heard anything
21 back -- that no one for Heather Clem are planning
22 on attending. They were served with the notice
23 and the papers.

24 THE COURT: All right. This is Judge Case,
25 and we're here on a couple of the defendants'

1 motions, and we'll start off with motion No. 1, if
2 you want to, Seth.

3 MR. BERLIN: Very well, Your Honor. I'm
4 happy to.

5 This is the first two of the served motions,
6 which is -- it's titled our Expedited Motion to
7 Compel Plaintiff's Compliance with the October
8 29th, 2013, Discovery Rulings and for Sanctions.

9 I think the court reporter got this, but I'm
10 Seth Berlin speaking on behalf of the Gawker
11 defendants.

12 Your Honor, on this motion I think what our
13 position is, is largely stated on paper, so I will
14 try just to hit the highlights, if I can.

15 But there is a little bit of a back story,
16 which I just wanted to put the highlights in, if I
17 may.

18 After serving discovery requests in June of
19 last year and receiving responses in August after
20 a 30-day extension, we filed a motion to compel
21 supplemental discovery responses, and we filed
22 that in early September.

23 The parties briefed that motion, and they
24 also briefed a companion motion that was filed by
25 plaintiff seeking a protective order. Then the

1 Court held a hearing and heard argument for more
2 than two hours on October 29th, 2013. At the
3 conclusion of the hearing Judge Campbell ruled,
4 and as is relevant here, that -- and I'm reading
5 her ruling here -- "As it pertains to Mr. Bollea
6 or, for that matter, Ms. Clem's sex life, the
7 questions that the Court will determine to be
8 relevant are only as it relates to the sexual
9 relations of Mr. Bollea and Ms. Clem for the time
10 frame 2002 to the present."

11 Judge Campbell then gave some examples of
12 things that would and would not be permitted,
13 adhering to that line that she had laid out. And
14 then she reiterated -- again, I'm quoting -- "So
15 as it to pertains to the three -- I guess we
16 really need to include Mr. Clem in that aspect --
17 those three parties are fair game for questions as
18 it pertains to each other. I think that pretty
19 much gives guidance as to all the different
20 interrogatories globally as to the sex life aspect
21 of it."

22 Following that ruling the parties submitted
23 competing orders. Both of them contained the
24 identical language tracking that ruling. There
25 were differences on other topics, but they are not

1 at issue in this motion.

2 Then in January, there was a second hearing.
3 The subject was discussed. It mostly involved
4 other issues. But the parties and the Court also
5 addressed a small piece of the discovery that I
6 had described in my earlier remarks, specifically
7 that sex tapes of the plaintiff and Heather
8 Clem -- specifically, the question was what to do
9 with the actual sex tapes of the plaintiff and
10 Heather Clem, other than the one that had been
11 supplied to Gawker. Plaintiff's counsel described
12 to the Court its earlier October 29th ruling as
13 encompassing -- and I'm quoting here Mr. Harder's
14 words -- "testimony and documentation that would
15 pertain to the relationship between Hulk Hogan and
16 Heather Clem."

17 Mr. Harder also proposed a compromise about
18 what to do with the tapes, which had three parts:
19 The first was that the tape should be preserved;
20 the second is that they should be inspected in
21 camera by Your Honor; and, third, that if you
22 identified relevant parts, those parts, would be
23 transcribed for the parties. And that would all
24 be done under the agreed confidentiality order
25 that's in place in the case.

1 Since that ruling in October, which was now a
2 few days shy of four months ago, we have tried
3 repeatedly to get plaintiff to comply with that
4 piece of it. Frankly, Your Honor, there are other
5 things that Judge Campbell has ruled on or that I
6 would like discovery on and things that should be
7 supplemented. But at this time, it seems like it
8 goes to several of the plaintiff's core
9 contentions, including when this encounter
10 happened, what he knew about the Clems' cameras,
11 and, by extension, the creation of this tape, and
12 whether this encounter happened other times, and,
13 if so, where and so forth.

14 We wrote letters on three separate occasions:
15 One is in December, one is January, one is in the
16 first few days of February. We received no
17 response. So after the third one, we filed this
18 motion. In response, Hogan contends, first, that
19 even though there was a ruling, he's not yet
20 obligated to comply because there is no written
21 order.

22 It seems pretty elementary that an oral
23 command of the Court carries it with the
24 expectation that it be obeyed. We've cited
25 authority for that proposition in our papers,

1 which I'm happy to discuss, but I'm not going to
2 go through the details unless Your Honor has any
3 questions.

4 Hogan next contends that the ruling by
5 Judge Campbell in October granted his protective
6 order with respect to sexual relations that either
7 he or Heather Clem had with other people, but it
8 no way was intended to compel supplemental
9 responses with respect to sexual relations between
10 him and Heather Clem. Again, that does not square
11 with other motions or the ruling described at the
12 hearing or by the parties and their counsel. And
13 it is curious, to say the least, that no such
14 argument was made in response to any of our
15 letters.

16 Excuse me.

17 So Hogan contends that he's already provided
18 full discovery, and there is nothing left to do.

19 I don't think Judge Campbell would have ruled
20 in October granting our motion to compel
21 supplemental discovery responses that meant the
22 plaintiff was entitled to stand on his original
23 responses. Although Judge Campbell has already
24 ruled on this point, we never -- we nevertheless
25 addressed in our papers each of the discovery

1 requests that are at issue to explain, once again,
2 why plaintiff's responses have major holes in
3 them. Unless Your Honor would like me to, I was
4 inclined to address that only if the Court has
5 questions or Mr. Harder raises certain points in
6 his argument, at time for rebuttal, just in an
7 effort to streamline things.

8 I would, however, like to address two
9 documents that were supplied to us in discovery,
10 but have been designated as confidential under the
11 agreed protective order. If it's acceptable to
12 Your Honor --

13 I'm sorry? What?

14 THE COURT: Yeah, go ahead.

15 MR. BERLIN: Oh, I thought I heard somebody
16 say something, and I didn't want to talk over
17 them.

18 If it's acceptable to Your Honor and
19 Mr. Harder, what I would like to do is ask that
20 the rest of what I am about to say, until we go
21 back into open session, be marked -- that that
22 portion of the transcript be marked confidential
23 and be bound in a separate volume so as to comply
24 with the protective order.

25 Is that acceptable to Your Honor?

1 THE COURT: It is acceptable.
2 And, Aaron, are you picking up on that?
3 THE REPORTER: Yes, Judge.
4 THE COURT: Okay.
5 MR. BERLIN: I just wanted to make sure also
6 that Mr. Harder had no objection.
7 MR. HARDER: Yes. This is Charles Harder.
8 No objection.
9 THE COURT: All right.
10 (Whereupon, by agreement of counsel,
11 commencing at 1:40 p.m. and continuing to 1:46
12 p.m., hearing proceedings have been marked as
13 confidential, removed from the hearing transcript,
14 and bound separately.)
15 THE COURT: All right. Mr. Harder, do you
16 want to make any comments before we move off of
17 the confidential stuff?
18 MR. HARDER: Sure, Your Honor.
19 MR. BERLIN: I have no objection -- I'm
20 sorry, Your Honor. I'm sorry to interrupt. I
21 have no objection to going back into the
22 confidential session while Mr. Harder makes his
23 remarks, if that would be easier.
24 THE COURT: Okay. We'll do it that way,
25 then.

1 All right. Then go ahead, Mr. Seth.

2 MR. BERLIN: In sum, Your Honor, we would ask
3 that the plaintiff be required to provide full
4 discovery on these topics immediately. In our
5 opening papers, we asked for that to be by today,
6 but, obviously, the hearing got pushed to today.
7 And I will expect that tomorrow, realizing that's
8 a quick turnaround, but we have depositions
9 starting on Monday and are trying to get, with the
10 various weather we've had up north, trying to ship
11 all our exhibits to Florida on Thursday, you know.

12 And because of the shortness of time, we
13 think we need to reserve the right to re-call the
14 plaintiff. We will make every effort not to do
15 so.

16 I also should add -- and I will add this,
17 Your Honor. I don't think that the discovery in
18 most cases needs to be an emergency. We proposed
19 to Mr. Harder that we would work out a less-rush
20 schedule for these motions for depositions and for
21 the balance of the case, and he ultimately refused
22 them and insisted that the depositions proceed.

23 So, as a result, we have essentially two
24 options. We can either proceed quickly with
25 discovery and depositions, or we could extend the

1 schedule. What we shouldn't have to do is have
2 the plaintiff insist on proceeding and refuse
3 discovery and drag his feet and then contend he
4 can't even recall that that discovery was ordered.

5 Finally, Your Honor, I want to address the
6 other relief we've requested. In my experience,
7 the pattern of delay of obfuscation is quite
8 serious. It's cost Gawker a lot of money, not
9 just in terms of litigating these motions, but
10 there are other aspects of the defense of this
11 case.

12 We've been told to obtain information from
13 other sources instead of simply receiving the
14 discovery to which we're entitled for plaintiff.
15 As we prepare for the depositions, we need to
16 devote extra time to filling in the gaps that the
17 plaintiff hasn't, because he's refused to respond
18 to discovery ordered by Judge Campbell. And
19 there's a couple significant things he's amended
20 at the 11th hour in his responses served on
21 Friday, which he did under the press of a second
22 motion. We have to recalibrate our deposition
23 questions and exhibits and so forth.

24 With all due respect, Your Honor, this is not
25 the way litigation is supposed to work. A

1 plaintiff is not excused from discovery simply
2 because he contends that his privacy was invaded.

3 Because of all this, we asked for a
4 preclusion order. We did not ask for a contempt
5 finding. We did not ask for a dismissal. We did
6 not ask for plaintiff's complaint to be stricken.
7 Instead, we asked for an appropriate sanction for
8 his long discovery refusals, refusals that are
9 continuing. We're asking only that he not be
10 permitted to advance contentions at trial on
11 subjects which he was ordered to provide discovery
12 but has refused.

13 Those fall into, basically, three related
14 points: one, that he was unaware that he was
15 being recorded on the video at issue, that he
16 didn't participate in making it, and he was not
17 aware that it would be shared with and viewed by
18 others.

19 Now, regardless of whether Your Honor decides
20 that that kind of appropriately tailored sanction
21 is warranted, at a minimum, Gawker respectfully
22 requests an award of fees and costs to bring this
23 motion. It should not have had to bring a second
24 motion to compel discovery already ordered by the
25 Court. And it should, pursuant to the applicable

1 rules, be awarded its reasonable fees and costs in
2 doing so.

3 Unless Your Honor has any questions, I will
4 stop, and I would ask to reserve an opportunity
5 for a brief rebuttal.

6 THE COURT: Okay. Mr. Harder.

7 MR. HARDER: Yes, Judge Case. Thank you very
8 much for the opportunity. I'm just trying to get
9 a sense where to begin.

10 I'm not going to necessarily go in the order
11 that Seth went in, but there were certain points
12 that he made pretty strenuously that I think are
13 pretty easy to respond to, and so I'm going to
14 respond to those first.

15 Mr. Berlin seems to think that my client,
16 Terry Bollea, is in possession of the sex tapes
17 and is refusing to produce those. That's not
18 true. He does not have possession of any sex
19 tapes at all, with the exception of things that
20 Gawker produced for us. That's the only thing
21 that we have.

22 Terry Bollea was secretly filmed. He never
23 received any tapes. He never received them from
24 anyone. Gawker seems to think that this was all
25 some sort of a plot that Terry Bollea was involved

1 in to try to sell a sex tape. That is simply not
2 the case. And so all of -- a lot of what we're
3 talking about here is just -- it's just a
4 different reality than what was presented to you.
5 Mr. Bollea does not have any sex tapes at all,
6 other than that what Gawker produced.

7 Another thing along the same lines that
8 Mr. Berlin just talked about was the settlement
9 agreement with Bubba Clem. Bubba Clem is the
10 husband of Heather Clem. He and Heather
11 encouraged Mr. Bollea over the course of about two
12 years to have Mr. Bollea engage in sexual
13 relations with Ms. Clem. And Mr. Bollea
14 consistently refused for a long period of time.

15 And then when Mr. Bollea was separated from
16 his wife and was in a very low point in his life,
17 these sexual encounters took place. They were
18 consensual with Ms. Clem, and they were
19 orchestrated by Mr. Clem. Mr. Bollea had no idea,
20 zero, that Mr. Clem filmed them. And, apparently,
21 that's why these encounters were encouraged.
22 We're just -- we're just kind of piecing it
23 together.

24 So Mr. Bollea sued Mr. Clem, as well as
25 Gawker Media, as well as Ms. Clem in connection

1 with this case. And there was an early resolution
2 of that, and we produced the settlement agreement.
3 Mr. Bollea provided to you, Your Honor, the
4 settlement. We'll have to go to confidential mode
5 while I discuss the terms of the settlement, if
6 that's okay with everybody.

7 THE COURT: All right. Aaron, have you got
8 that?

9 MR. BERLIN: No objection here, Your Honor.

10 THE COURT: Okay.

11 THE REPORTER: Yes, Judge, I've got it.

12 (Whereupon, by agreement of counsel,
13 commencing at 1:53 p.m. and continuing to 1:55
14 p.m., hearing proceedings have been marked as
15 confidential, removed from the hearing transcript,
16 and bound separately.)

17 THE COURT: Okay.

18 MR. HARDER: Let's talk about the prior
19 motion to compel. Mr. Berlin was accurate when he
20 said that in June they filed document discovery
21 requests including document requests. In August
22 we gave responses. They filed a motion to compel
23 in September, and there was a hearing in October.

24 The vast, vast majority of the discovery that
25 was sought by Gawker was denied as the judge

1 granted our protective order on those issues. And
2 we asked for sanctions, and the judge never gave
3 anyone any sanctions of any kind, although we
4 completely prevailed on that. The only issue that
5 is potentially in favor of Gawker on that is that
6 we, the Terry Bollea side, never opposed discovery
7 as it related to the sex tape that is at issue.
8 And the judge slightly expanded that and said, I'm
9 going to allow discovery regarding the
10 relationship between Terry Bollea and Ms. Clem and
11 the communications, although we never objected to
12 communications with Bubba Clem regarding the sex
13 tape at issue. But the judge slightly opened it
14 and said, Communication regarding the sexual
15 relationship in its entirety with Heather Clem was
16 acceptable discovery.

17 So what happened next was the parties
18 couldn't agree on what the judge had ordered. I
19 took a look at the transcript, and I took verbatim
20 quotes, or virtually verbatim quotes, from
21 Judge Campbell, and I created a proposed order.
22 And then the Gawker side added a lot of text that
23 was not in the transcript. And they said, We want
24 this to be the protective order. And we could not
25 come to an agreement because, from my perspective,

1 they were changing what the judge had said.

2 Specifically, when they say Judge Campbell
3 ordered Mr. Bollea to serve further responses to
4 discovery, the only thing that Judge Campbell
5 ordered was a further response to Interrogatory
6 No. 12, which gave us a specific date, and we
7 provided a further response to Interrogatory
8 No. 12. Judge Campbell did not order a further
9 supplemental response as to any other
10 interrogatories, and that includes those that are
11 at issue in the motion.

12 Now, what also was going on at the time is
13 that this hearing was in October, and the parties
14 had scheduled deposition in November. So it was
15 coming right up, that there were going to be
16 depositions. And I think Your Honor may even
17 recall where my office was saying we had blocked
18 these dates off for depositions four months in
19 advance, and we want to proceed with the
20 depositions so we can get them out of the way.

21 It's not easy to schedule all of these
22 depositions. It was not easy to do it four months
23 in advance and then just resetting them. I even
24 said it's probably going to another four months to
25 get them back on calendar, especially with the

1 holiday, in the order in which Gawker wanted to
2 take them. And I was assuming -- and I think
3 perhaps Judge Campbell was assuming -- that when
4 she made that order that certain -- that a certain
5 scope was permissible discovery, that the next
6 phase was going to be Gawker asking Mr. Bollea at
7 a deposition, which was scheduled, I think, a
8 couple of weeks later -- I think his deposition
9 was scheduled the week of November 12th, and this
10 hearing was October 29th.

11 So the next phase would be Gawker asking
12 questions of Mr. Bollea, When did you have your
13 encounters with Ms. Clem? What communications did
14 you have with Ms. Clem and with Mr. Clem regarding
15 these encounters? Questions about the sex tape:
16 Did you know about it? Did you authorize it? Did
17 you participate in it, and things like that, and
18 the answers, obviously, to all those questions.

19 Well, what happened was the depositions got
20 postponed. And then the holidays came, and then
21 we recalendared all of the depositions, and then
22 new discovery came in from Gawker. And then I
23 received several meet-and-confers all in a row
24 from Mr. Berlin. I expected we were going to have
25 a phone conference about them. And, instead, he

1 filed three motions to compel within about a week
2 of his meet-and-confer letters without having a
3 conference first.

4 I then said, Seth, why don't we have a
5 conference about this.

6 And he said, Okay.

7 Or maybe he suggested it, and I said okay.
8 But we had a conference. And the only thing --
9 the only thing that is responsive, that there is
10 anything new is three sentences that we provided
11 in a further response to No. 9, which said -- it's
12 three sentences. It says -- and Your Honor has
13 them. I have been working off of memory as to
14 what it says, but it's, essentially, these are the
15 times that Mr. Bollea and Ms. Clem had their
16 encounters.

17 Otherwise -- and then it's No. 10. We had
18 provided that response to No. 10 way back in
19 August, except we had a date wrong. Instead of
20 2008, it was mid 2007. And I apologize. And this
21 is actually -- and Seth is correct -- the second
22 time I have made an apology about the dates. I'm
23 trying to get it right. It's difficult when I
24 have a client who does not have documents
25 pertaining to these things, pertaining to when

1 things occurred, and he's working off of his
2 memory. And I get information as to when things
3 occurred based upon his memory, and it turns out
4 that we have to make a slight adjustment to the
5 date because we find out things.

6 So the only reason I'm kind of dancing around
7 this is I can't divulge attorney-client privileged
8 communications, so I have to avoid that. But it's
9 unfortunate. If I had -- if I could go into my
10 time machine and go back, I would have put the
11 correct dates in from the very beginning, which
12 is -- it's approximately mid 2007.

13 In any event -- in any event, we provided a
14 supplemental response to 9, which states when the
15 sexual encounters occurred, and we provided a
16 supplemental response to 10, which changed the
17 date. But, otherwise, back in August, we had said
18 the communications that Mr. Bollea can remember
19 having with the Clems. He can't remember every
20 single conversation he ever had with them, but
21 what we put in there is what he can remember.

22 In terms of documents, he doesn't have any.
23 He doesn't have any documents other than -- I
24 mean, we've produced some texts, and we produced
25 them way back in August. These are texts from --

1 I think it was around April-ish of 2012, and we
2 produced those. We're not holding back on
3 anything, except communications between Mr. Bollea
4 and litigation counsel, obviously. But I have an
5 agreement with Seth that neither side is going to
6 be logging litigation communications. We're
7 talking about things that happened before
8 litigation counsel was retained for this.

9 But this whole notion that Mr. Bollea or his
10 counsel -- myself, and maybe others -- are engaged
11 in some sort of a scheme or to try to hide the
12 ball, try to hide things, that's just not the
13 case. I mean, we have been fully producing
14 documents. There aren't a lot.

15 As you can probably imagine, if you're ever
16 in a bedroom and you're filmed without your
17 knowledge and then six years later you find out
18 that a highlight reel of the activity is up on the
19 Internet and you think back, Okay, what kind of
20 documents do I have relating to the things that
21 happened from the past six years about this sex
22 tape, you're not going to have much, if anything
23 at all. And that just happens to be the case. So
24 it's not that we're hiding anything or trying to
25 prevent anything. A lot of this stuff just

1 doesn't exist.

2 I would also like to -- I'm looking at my
3 notes, Your Honor, because I want to make sure I
4 address as much as I can of what Mr. Berlin said.

5 He said that we're taking the position that
6 the judge never made a ruling. I'm not really
7 taking a position that the judge never made a
8 ruling. I'm saying that because there were
9 conflicting proposed orders and she never entered
10 one, I'm not entirely sure what I need to comply
11 with and what I don't, except for what she said at
12 the hearing.

13 And what she said at the hearing is that the
14 activities between Mr. Bollea and Ms. Clem are
15 fair game for discovery, and Mr. Bollea was
16 required to, compelled to do a further response to
17 Interrogatory No. 12, which is not at issue in
18 these motions, and we did that. There is no other
19 order compelling him to do a further response to
20 any of the interrogatories. And perhaps the
21 reason was because we were about to go in the
22 deposition. So I kind of covered that.

23 There is another issue here, which is that
24 some of Gawker's discovery asks for things that
25 happened up until 2006, and some of their

1 discovery asks for things that happened all the
2 way until present day. And so we responded to
3 what was asked of us.

4 So if activities of 2006 were requested, we
5 provided that. If activities going all the way to
6 the present were requested, we provided that. One
7 of the things here is that -- is that Gawker never
8 asked us as to some of these activities. And they
9 were when Mr. Bollea visited the Clems' house. So
10 I will get more specific. The interrogatories 15,
11 16, and 17 say, Provide us details when Mr. Bollea
12 visited the Clems' residence between twenty -- I'm
13 sorry, 2002 and 2006.

14 And we provided the information that he could
15 recall. So we're going back 8 to 12 years.
16 That's the time frame, 8 to 12 years. And it's
17 just very general. Every single time he ever came
18 to the Clems' residence, did he ever sleep
19 overnight? Did he ever walk into the bedroom?

20 And the responses aren't particularly
21 detailed because he can't remember every single
22 time, and he doesn't remember if he walked into a
23 bedroom or didn't walk into a bedroom or if he
24 slept overnight or didn't sleep overnight 12 to
25 8 -- I'm sorry -- 8 to 12 years ago.

1 One of the problems, though, is that Gawker
2 never asked us for the same information after
3 2006, and it could have within the past several
4 months. And the motion to compel is seeking
5 information after 2006 when the interrogatory
6 itself doesn't ask for information after 2006.
7 And the judge -- excuse me -- Judge Campbell never
8 ordered us to supplement these interrogatories at
9 all and never said, You need to provide this
10 specific information after 2006.

11 Again, I'm just checking my notes. I just
12 want to make sure I cover everything.

13 In terms of the sanction, the reply brief
14 says that we didn't say anything in our position
15 to objecting to sanctions. And if you take a look
16 at our opposition, it actually is -- it goes on
17 for several pages saying sanctions are not
18 warranted here, monetary or preclusion order.

19 The preclusion order just -- I can't imagine
20 how a preclusion order could be ordered in
21 something like this where the order that they're
22 trying to seek is to change reality. They're
23 trying to take things that didn't exist and make
24 them so. Mr. Bollea was secretly filmed, but they
25 want a preclusion order that he can't say that in

1 trial, that he can't testify to the truth. I
2 don't see how that's warranted at all.

3 As far as monetary sanctions, I don't see how
4 that's warranted. At the very least, I think
5 we're substantially justified in the way that
6 things have occurred because Judge Campbell is
7 still taking under submission the parties'
8 conflicting proposed orders.

9 We have depositions that are coming up next
10 week, that Gawker is going to have two days to ask
11 questions of Mr. Bollea. Are you sure it happened
12 this year and not that year? Are you sure that
13 you didn't sleep over at the Clems' house in 2002
14 or '3 or '4 or '5? I mean, they are going to have
15 two days' worth of questions to ask, so they have
16 plenty of opportunities to obtain more
17 information.

18 This isn't their last opportunity. This
19 is -- they still have plenty of chances to ask him
20 questions directly face to face in light of the
21 information that we have provided, which is the
22 information that he can recall. These things
23 happened a long time ago, and he does not have
24 total recall of them, and he doesn't have
25 documents that would help him refresh things.

1 MR. TURKEL: Judge, if I can hop in. I don't
2 know if Charles is done. There were two things
3 that --

4 THE REPORTER: Who is speaking, please?

5 MR. TURKEL: It's Ken Turkel. I don't know
6 if Charles is done yet.

7 MR. HARDER: Go ahead.

8 MR. TURKEL: Judge, I just have two points.
9 And, you know, I generally sit silent on these
10 things as local counsel, but there is just a
11 couple points under Florida law, and I don't know
12 that we cited these exact cases, but I know Your
13 Honor is familiar with them.

14 Interrogatories are not meant to supplant
15 deposition, you know. Rules of civil procedure
16 require the least burdensome route of discovery
17 tailored to the specific facts of the case. There
18 is case law out there -- I think Cabrera vs. Evans
19 is one of the cases. It says very clearly that
20 it's not incumbent upon one party to do the
21 investigation for another party.

22 And after reading the briefs, both our
23 opposition brief and their initial brief, the
24 issue presented by them is an issue that they have
25 gotten no reply. So, in essence, they have gotten

1 a reply; they just don't like them. And the whole
2 purpose of a deposition -- you know,
3 interrogatories are largely framed to get
4 objective information. Theirs were fairly broad.
5 We vetted them out with Judge Campbell.

6 The idea is you take those to the deposition,
7 of which they have two full days. There was even
8 a dig in one of their motions about the idea that
9 we fought to restrict them to one full day, which
10 is completely reasonable I think in almost any but
11 the most complex of business cases. And we've
12 lost that as if that was some sort of obstruction
13 tactic to advocate for our client to try and
14 restrict a depo to one day. Under the federal
15 rules that's all you get is a default setting.
16 Anything past that is an exception.

17 And so --

18 MR. BERLIN: Your Honor? Your Honor, I'm
19 sorry to interrupt. This is Seth Berliner.

20 THE COURT: Okay.

21 MR. BERLIN: I'm very sorry to interrupt.

22 I was under the impression that, you know,
23 one person per each side would speak. And
24 Mr. Turkel is now going on about cases that are
25 not cited, and we haven't gotten copies. He's not

1 cited them. I just would like -- Your Honor,
2 obviously, will do whatever you're going to do,
3 but I would just like to lodge an objection to
4 that, to both those things, and then I will be
5 quiet.

6 MR. TURKEL: Judge, to be honest, I've
7 probably talked on these various discovery
8 hearings a total of ten minutes. And to be quite
9 clear, Judge, when someone is seeking sanctions
10 and is making these sort of pejorative comments
11 and I'm counsel of record, I feel like I have a
12 right to respond.

13 THE COURT: Well --

14 MR. TURKEL: And I don't have much more to
15 respond to, and I'll be done, and they get a
16 rebuttal.

17 But I think the point is, Judge, the rules of
18 civil procedure are at issue. And 1.280 is very
19 clear that someone is supposed to use the least
20 burdensome route of discovery. And it's not our
21 job to do their investigation for them nip and
22 tuck on interrogatories. That's the whole purpose
23 of allowing an alternative deposition, at which
24 you're going to be present. You're going to be
25 capable of hearing this and monitoring any

1 objections as to whether they are proper in scope
2 or otherwise.

3 But, you know, Judge Campbell literally told
4 us -- and this is in your briefs, Your Honor --
5 when there is competing orders, she takes copious
6 notes, and then she will look at the competings
7 and look at her order -- or her notes, and do her
8 own order.

9 And so we're sitting here vetting this out as
10 if some horrific discovery violations occurred.
11 Well, we haven't gotten her final version of the
12 order. Mr. Harder has made it clear in our papers
13 we provided responses that they, obviously, don't
14 like, but that's not the stuff of which motions to
15 compel are made of.

16 And one, in essence, is a motion in limine in
17 this stage of the case to preclude testimony of
18 something that we haven't even gotten a final
19 order on, as well as a request for the fees. I
20 mean, Judge, it's hard, I understand, that in a
21 vacuum to get these disputes compartmentalized.
22 But we've had our fair share of issues with their
23 conduct in discovery also.

24 And in whole I think -- and I know Charles
25 has made that point -- but these are, you know,

1 one, directed, really, at the quality of answers,
2 not the existence of answers. And, two, their
3 sanctions and preclusionary, essentially, Judge,
4 is an in limine request and is grossly premature
5 in this case, given the fact that, Your Honor,
6 that you're going to be in a position to sit there
7 and listen to the testimony against the
8 interrogatory answers and/or documents in
9 production they have received.

10 At the very least, Judge, I think that you're
11 in a position to perhaps reserve to let
12 Judge Campbell issue the final written order on
13 this after she consults her own notes and two
14 competing orders and to see if the context of the
15 actual deposition -- which, you know, I'm still a
16 little bit confused as to the idea that someone is
17 saying our attempts to limit it to one day were
18 somehow obstructionary, when, in essence, we're
19 just advocating for our client who is, obviously,
20 a national celebrity, and, you know, one day is a
21 lot for him, and they've got two.

22 So I think the context and the tone of the
23 arguments belies what's actually happened here,
24 Judge, in a lot of respects and that any order
25 right now would be both inappropriate given the

1 state of what we have provided and the procedural
2 status of the case. That's what I have got.

3 THE COURT: All right. Mr. Berlin?

4 MR. BERLIN: Your Honor, I'll try and be
5 brief.

6 I think there seems to be an agreement, which
7 is confirmed on this call, what the scope of
8 Judge Campbell said, the scope of discovery,
9 should be, and everybody agrees on that. Let me
10 address one. This issue of the year, which is
11 sort of something that Mr. Harder spoke to. It
12 addresses the scope. Let me speak to that, if I
13 may.

14 We wrote in our motion to compel -- and Your
15 Honor has binders of these materials so you can
16 look at those. We wrote in our motion to compel a
17 specific request that the discovery responses be
18 amended because there was this ambiguity of the
19 year, which came after the complaint and after the
20 discovery was served.

21 And your ruling -- which everybody agrees the
22 ruling is not limited now from 2002 to the
23 present. It was attempted to obviate that
24 problem. So we went from 2006 to 2008 and now to
25 2007. Judge Campbell just said, Look, the

1 relevant period is 2002 to the present. That's
2 the scope of the questions. All right. And so
3 that should be clear.

4 Now, if for some reason it was the
5 plaintiff's position that despite having been told
6 by Judge Campbell that is now the relevant scope
7 of time, the relevant time period, that they
8 objected to that in some way, the time to say
9 that -- because we've been writing letters about
10 this. We had a hearing, obviously, in October, at
11 the end of October, but we wrote a letter on the
12 12th of December. We wrote a follow-up on the 6th
13 of January. We wrote a follow-up on the 5th of
14 February. We heard nothing, you know, crickets,
15 radio silence, nothing, nada. And, you know,
16 that's not how this process is supposed to work.

17 Now, it comes with an order, right? The
18 way -- Mr. Harder said the parties couldn't come
19 to an agreement on the order. I would like to
20 make two points about this.

21 One is, as it pertains to the substance of
22 this motion and this discovery, there is no
23 dispute in the order. The transcript, their
24 order, our order, they were -- there was no
25 question of what happened in October, at the

1 January hearing. We're all in agreement, right?

2 The only -- the only -- there are other
3 things that are at issue in that order where the
4 parties couldn't come to an agreement. But I
5 would like to just say that in that instance, it
6 is correct that Mr. Harder drafted an order. He
7 sent it to us. We sent it back with some
8 suggested modifications. They are not extreme,
9 but there are differences, and I concede that
10 based on what we thought the judge had done.

11 Again, on other topics, we never heard back
12 from Mr. Harder. At that point, he submitted his
13 order and we were left to submit our order. So
14 the notion that the parties could, quote, unquote,
15 come to an agreement is illustrative of how this
16 has gone in the sense that we didn't even have --
17 you know, he didn't call us up; he didn't write us
18 back. It was just, Here, Judge Campbell. They
19 sent this back with changes that we don't agree
20 with. And because we assume we won't be able to
21 reach any agreement, we're sending you our own
22 order. I believe Your Honor may have those
23 e-mails in the binders. I'm really not sure.

24 But for present purposes, the substance of
25 the order is exactly the same, and, therefore, it

1 should not be something where you're saying, Jeez,
2 we don't know what Judge Campbell is going to do
3 on this point. And I guess it's theoretically
4 possible that she will, despite what she said in
5 two hearings and what both parties memorialized
6 identically. We will see if she will change that,
7 but that's not really likely. Yet at some point
8 we have to move forward. That's one of the
9 reasons why she appointed you, Your Honor.

10 In terms of the discovery itself, you know,
11 what we're being told is, I cannot possibly
12 identify with any specificity any communications
13 that I had with Mr. Clem about my sexual
14 relationship with Heather Clem either from the
15 time period that it happened, whether it's 2006,
16 2008, or 2007.

17 I can't identify any communications between
18 that and 2012. I can't identify any
19 communications or describe any communications that
20 happened when there was the first reports of the
21 sex tape in March and April of 2012. I can't
22 identify any communications between then and
23 October 2012 when Gawker published its story. I
24 can't identify any communications after Gawker
25 published the story but before Mr. Hogan sued

1 Mr. Clem. I can't identify any communications
2 after that time, and I can't identify any
3 communications since.

4 With respect, Your Honor, I have to say, you
5 know, in responding to Mr. Turkel's point about we
6 should do the discovery in the most efficient way,
7 the most efficient way is to be able to find out
8 what we can using written discovery. And that was
9 the whole pitch that Mr. Harder made to me during
10 our last telephone conversation, was that you're
11 supposed to use written discovery first so that
12 you can narrow the depositions.

13 That's exactly what we've tried to do here.
14 And instead of getting your reasonable response --
15 and, again, I don't expect everybody to remember
16 everything that ever happened. That's not true in
17 my life, as my wife could tell you. But I do
18 expect that somebody would give more than the very
19 paltry information that's been provided.

20 Interrogatories 15, 16, and 17 ask if he
21 lived there and asked if he slept there.

22 He said, I may have slept there.

23 It asked if he's been in the bedroom.

24 I may have been in the bedroom.

25 With respect, given the facts that are known

1 to us that have been conceded already, these
2 responses are bordering on, you know, bad faith
3 because they are not telling -- they're not even
4 making a reasonable effort to tell the whole truth
5 about what's going on.

6 Responses about, you know, communications for
7 a document request number 8, 9, and 11, which has
8 to do with documents related to the sexual
9 relationship with Mrs. Clem, you know. We have
10 the communications that we just talked about. We
11 have his media appearances, which are really the
12 subject of the next motion, but would also be
13 responsive to this.

14 We have his complaint for enforcement, which
15 is also the subject of the next motion but would
16 be responsive to this. For Interrogatories 4 and
17 5, which is information regarding other tapes, you
18 know -- I think it was March, but it might have
19 been April. The plaintiff appeared with David
20 Houston, who is also counsel in this case,
21 appeared on TMZ where they were asked about the
22 content of the tape that they now know is not on
23 Gawker's tape, because we don't have it, and there
24 is no information provided about that whatsoever.

25 And then, of course, there is the tapes

1 themselves, which would be covered by document
2 requests 12 and 13. And, you know, speaking to
3 the settlement through this portion, I would like
4 to apologize to the court reporter who has gone on
5 and off the confidential session. I would like to
6 just briefly go into confidential session once
7 more to just say that the settlement agreement --
8 if the settlement agreement -- is that okay, Your
9 Honor?

10 THE COURT: Yes.

11 (Whereupon, by agreement of counsel,
12 commencing at 2:22 p.m. and continuing to 2:24
13 p.m., hearing proceedings have been marked as
14 confidential, removed from the hearing transcript,
15 and bound separately.)

16 MR. BERLIN: And as far as the sanctions, any
17 kind of preclusion order, obviously, changes the
18 nature of the evidence. And the whole point of a
19 preclusion order is not to state a change in
20 reality, because that's assuming that what
21 Mr. Harder is describing is, in fact, reality.
22 The whole point of the adversarial process is that
23 we're entitled to take their allegations, which
24 are allegations and test them through the
25 discovery process. And that cross-examination and

1 testing is what leads to truth. And when you
2 corrupt that process by not providing your end of
3 the bargain, that is exactly why a preclusion
4 order is proper, because what it does is it
5 precludes the other side from saying, This is the
6 reality, without allowing Gawker or the other
7 defendants to test that.

8 And that's why we asked for that. We didn't
9 ask for it on every issue in the case or every
10 fact in the case. We didn't ask for a dismissal.
11 We didn't ask for all of that. We just asked for
12 it on the specific subjects that there has been
13 discovery refused.

14 And, you know, we do believe that taking
15 document discovery and written discovery before
16 taking depositions is appropriate and is, in fact,
17 to pick up with, as I understood
18 Mr. Turkel's remarks and without seeing the case
19 he cited, to be an efficient way of proceeding and
20 is particularly appropriate where there has been a
21 limitation placed on the length of time for which
22 the deposition can presumptively proceed.

23 And then, lastly, it was not my intent -- I
24 mean, before I get to "lastly," it should not be
25 the case that -- you know, the plaintiff's

1 argument is, essentially, with respect to the
2 deposition, you know, we're entitled to leave you
3 out on the written discovery because your remedy
4 is that you get to come and sit two days asking
5 our client questions. And that, with respect,
6 Your Honor, is not how discovery is supposed to go
7 in Florida or anywhere else that I have had the
8 privilege of practicing.

9 With respect -- and then the last point I
10 will make is that we did not argue that they did
11 not address sanctions. What we addressed was that
12 they did not address attorney's fees, and that is
13 not -- that was not opposed in our opposition.
14 But we think that, at a minimum, given that you
15 have to file two motions even just to extract the
16 last two interrogatory responses that we got, both
17 of which make substantive and material changes to
18 the core of their case, even if we got nothing
19 else but just getting that information by having
20 to file two motions and to take two hearings and
21 three letters would warrant an award of attorney's
22 fees under these circumstances.

23 At this point I have nothing to add. Thank
24 you, Your Honor.

25 MR. HARDER: And, Your Honor, this is Charles

1 Harder, if I could have just a couple of minutes
2 just to address those points.

3 MR. BERLIN: Before Mr. Harder speaks, Your
4 Honor, it occurred to me that I went briefly into
5 the settlement agreement and didn't go back into
6 the public session. This happened once before.
7 And I might ask that when we look at the
8 transcript -- and I think it will be obvious to
9 the reporter -- that we might just propose before
10 finalizing the transcript where that should be, go
11 back onto public session, and then Mr. Harder and
12 I, you know, should be able to agree on that. And
13 if not, Your Honor can certainly direct that most
14 of what I just said was meant to be a public
15 session. It was just that brief comment about the
16 specific confidential document. But I apologize
17 for -- to the reporter for not taking better order
18 of the transcript.

19 THE COURT: All right. Mr. Harder?

20 MR. HARDER: Yes, Judge Case. Thank you.

21 As far as the monetary things, we did oppose
22 the monetary sanctions. We cited cases in our
23 opposition as to why monetary sanctions were not
24 applicable here. So when Mr. Berlin in his papers
25 and now is saying that we didn't do it, we

1 actually did. We would request that you take a
2 close look at what we provided.

3 As far as Mr. Berlin's comments, he says they
4 wrote a whole bunch of letters over the course of
5 a long period of time and heard nothing.
6 Mr. Berlin and I have been litigating this case
7 for about 16 months now. And so what we -- the
8 practice that we have been doing is that we will
9 send one another a meet-and-confer letter, and
10 then after a certain period of time to allow the
11 person to digest it, we will send an e-mail
12 saying, Seth -- or he will say "Charles" -- when
13 is a good time for you to talk about the content
14 of my letter? And then I will or he will make
15 ourselves available to talk about the contents so
16 that we can have a meet-and-confer conference
17 before we have a motion.

18 That wasn't followed here, except the e-mail
19 that came from Seth asking me for a conversation
20 about this took place after their motion was filed
21 and not before. And the motion was filed, I
22 think, exactly seven days, with a weekend in
23 between, after the letter had come with another
24 letter and then another letter about a whole bunch
25 of different issues. So there are now three

1 discovery motions that are pending. And I have
2 got letters on all of those, as well as letters
3 about a whole bunch of other things, because I get
4 all kinds of letters from Seth's office.

5 So I would have been happy to have a
6 meet-and-confer conference with him before this
7 motion was filed. And the result would have been
8 that we would have talked about this, and he would
9 have pointed out that we needed to provide him
10 with some information as to interrogatory 9, and I
11 would have said, Yes, I agree with you there. And
12 that's exactly what we did.

13 One of the problems that we're dealing with
14 is that we both submitted orders to
15 Judge Campbell, and she hasn't ordered anything
16 yet, although it's under submission. But her
17 hearing transcript said that our -- it's a little
18 confusing, because she says that our objections to
19 interrogatory 9 are sustained, and at the same
20 time she says, But I'm going to allow questions of
21 Mr. Bollea as to the relationship with Heather
22 Clem.

23 I think that was contemplating that the
24 deposition was happening such that it sounded like
25 the judge was not ordering us to do a further

1 response to No. 9, and she never did say, You have
2 to do a further response to No. 9. She said, You
3 have to do a further response to No. 12. And we
4 did that, and that's not at issue. She never said
5 No. 9. So this motion to compel us to do a
6 further response to No. 9 based on the hearing
7 transcript is just not there in the transcript.

8 Nevertheless, just to clarify this, in my
9 meet-and-confer conference with Mr. Berlin six
10 days ago, which took place after the motion was
11 filed, I said, I will get you a further response
12 to No. 9 just so that you have it, but not because
13 I was ordered, but because I'm going to give it to
14 you. And we did that. It was three sentences.

15 Your Honor, they also talk about our response
16 to No. 10. I don't know if they ever provided you
17 our response to No. 10, and I don't know if I
18 provided you our response to No. 10. I can't
19 remember. It goes on and on about the
20 communication.

21 So when Mr. Berlin, five minutes ago, says
22 we've completely stonewalled him and never gave
23 any communications of any kind, that's not
24 accurate. I have 15 lines describing
25 communications that took place in the period

1 around 2006, 2007, possibly 2008 -- I think that
2 there was that confusion about the date -- but
3 communications that took place over a course of
4 two years leading up to the encounters that are at
5 issue.

6 And then also in the spring of 2012, when TMZ
7 wrote an article about the possibility of there
8 being a sex tape out there, without identifying
9 anyone who was involved in it, we provided
10 information about that. Mr. Bollea asked Mr. Clem
11 to explain. And I'm reading from our response.
12 Mr. Bollea asked Mr. Clem to explain the media
13 reports regarding allegations of a possible sex
14 tape involving Mr. Bollea. Mr. Clem denied having
15 any knowledge of or involvement in the sex tape.
16 At no time prior to or during the sexual
17 encounter -- now I'm starting to paraphrase.
18 There is plenty more stuff. I'm just trying to be
19 efficient with the time.

20 We provided them with the communications that
21 happened, with Mr. Bollea's recollection of
22 communications that have occurred over the course
23 of an eight-year period. He can't remember every
24 phone call that he had. He can't remember every
25 time he texted. He can't remember certain things

1 and to say when they happened, because this
2 happened a long time ago and this was not the most
3 important thing that's ever happened to him in his
4 life.

5 We have provided his texts. Those were the
6 things that he has, and so we produced them. We
7 did provide a summary of what he can recall about
8 the communications. If you were to order a
9 further response, I don't know what we would
10 provide you, Your Honor, in response to No. 10 or
11 in response to No. 9, because as far as I can
12 tell, we have provided a full response of
13 Mr. Bollea's memory. He doesn't have documents,
14 other than those we have produced, that would
15 allow him to refresh any other recollections. He
16 doesn't do e-mails, and he on occasion does texts,
17 but it's -- it's not very often. He's not a big
18 document type of person.

19 So leading into this request for sanctions --
20 well, before I get there, the reasonableness of
21 the response, I really think this is a situation
22 where Gawker wants more information than we are
23 capable of providing. And that's what the whole
24 motion to compel is about. But I don't know how
25 we can provide more information beyond what is in

1 our -- in Mr. Bollea's brain or beyond the
2 documents that we've already produced.

3 And as far as interrogatories 15 and 16, and
4 17, the time period in the interrogatories
5 themselves -- and I think that Gawker didn't
6 provide the interrogatories. The interrogatories
7 limit the time period to 2006. If Mr. Berlin
8 wanted me to provide the information after 2006,
9 he could have given me another interrogatory or we
10 could have had a conversation where he said, You
11 know what, I realize it says 2006. Let's -- can
12 you please supplement to go beyond? And I would
13 have been happy to do that. But, instead, he
14 files a motion that compels me to go beyond what
15 his interrogatory says. And I don't think that's
16 the right way of doing it, and I certainly don't
17 think that that's sanctionable.

18 If you look at the request for sanctions, I
19 don't think it's appropriate in any way. The
20 motion didn't need to be filed. And even if --
21 even with the motion in our responses, our
22 responses are pretty much full and complete. I
23 can't see how we can give any more information
24 than we've already given.

25 As of today -- and it's not because they

1 filed a motion, and it's not because the judge
2 made the comment that she gave; it's because we
3 have actually been forthcoming with the
4 information that we have. We have produced
5 documents. I haven't gone through all the
6 different documents that we've produced, but
7 whatever we have that's not privileged, we have
8 provided.

9 So sanctions, monetary ones, are not
10 appropriate here, Your Honor, because
11 Judge Campbell did not order a further response to
12 any of the discovery that's at issue here, and we
13 have been forthcoming with information. And when
14 Mr. Berlin did get on the phone with me after he
15 filed the motion, we did have a conversation. And
16 I told him I was going to get him further
17 information, the three sentences in interrogatory
18 9 relating to the occasions where Mr. Bollea and
19 Ms. Clem had sexual relations.

20 And that's all I have. Thank you.

21 THE COURT: Okay.

22 MR. BERLIN: Your Honor, if I may just -- I'm
23 not going to address the bulk of what Mr. Harder
24 just spoke about in terms of the conferring and
25 writing letters and not responding, because I

1 think that I made my position clear. I could say
2 more about it, but I don't think it's going to add
3 to this.

4 I did want to just speak to two things. One
5 is just as an example, this Interrogatory No. 10.
6 If you were to sit down and read the couple of --
7 you know, it's about two short paragraphs. If you
8 were to read it, a lot of it is just advocacy. It
9 doesn't actually answer questions. In other
10 words, we asked about what are the actual
11 communications. There is a couple sentences in
12 there that said, We had communications, in a very
13 generalized way. But it doesn't -- there is a
14 number of sentences that talk about, you know,
15 what they said, what they didn't say, and, you
16 know, what they would have done had something been
17 said and something had been done.

18 I mean, that's not really what we're talking
19 about. And the related -- and I know this bleeds
20 over to the next motion, but just as example, Your
21 Honor, you know, because we got such a barebones
22 response, we asked them for telephone records.
23 And, you know, one thing that you could do,
24 because we all have a cell phone in the modern age
25 and they keep track of who you call and who you

1 text, is to sit down and look at that and say,
2 Ah-ha, I now have information that I can give in
3 an interrogatory question or in a document request
4 about when I sent texts and when I sent phone
5 calls to the people that are key players in this
6 case. And --

7 MR. HARDER: And, Your Honor, this is Charles
8 Harder. I apologize for interrupting --

9 MR. BERLIN: Your Honor --

10 MR. HARDER: -- but that's the next motion.
11 We can maybe wrap up this motion and go on to the
12 next motion.

13 THE COURT: Mr. Harder, I --

14 MR. BERLIN: Well, I would like to wrap up.
15 I just wanted to use that as an illustration of
16 what's -- even without asking for phone records,
17 which we've now asked for because we've gotten
18 this response, a party in this situation could go
19 to their phone or account online and pull the
20 records, and you can sit down and look at them,
21 and then you can answer those questions.

22 And so when you say, We don't have any
23 ability to do anything more, I really think that
24 that's hard to swallow. And that's the only point
25 I wanted to make. But I'm otherwise happy to

1 reserve on the questions of the phone records
2 themselves to the next motion. But I wanted to
3 use that as an illustration of something that
4 could have and should have been done.

5 But after that, I will stop.

6 MR. HARDER: Your Honor, if I can address
7 that for 30 seconds. That's a new issue.

8 If Mr. Berlin had asked us to have Mr. Bollea
9 do that and to see if his phone records refreshed
10 his recollection so that he could provide even
11 more information than he already has regarding
12 interrogatory No. 10, I would have been happy to
13 do it.

14 But, instead, what I get are motions to
15 compel and motions to compel and motions to
16 compel. And it's just, in my view, not the right
17 way of doing it. I'm happy to provide the
18 information. We've been doing it for 16 months
19 now. We've been providing information.

20 MR. BERLIN: I'm sorry to laugh, Your Honor.
21 These are -- its not motions and motions; it's
22 letters and letters trying to engage and then
23 receive no response. So I think Your Honor has
24 the picture. I don't need to belabor the point.

25 MR. HARDER: And, frankly, on the issue of

1 phone records, I would be happy to have Mr. Bollea
2 take a look at his phone records from 2012 and see
3 if it refreshes his recollection on communications
4 that he had with the Clems'. And I will
5 supplement it. And I think that that's the
6 appropriate way of addressing the phone records,
7 rather than to force him to produce an entire year
8 of phone records to Gawker, which is a media
9 company that publishes things about people.

10 THE COURT: Okay. With respect to
11 defendant's expedited motion to compel plaintiff's
12 compliance with the October 29th discovery rulings
13 and for sanctions, the recommendation to
14 Judge Campbell on this issue would be to deny the
15 motion with a very strong caveat. And, that is,
16 Mr. Harder, I'm taking you for your word and your
17 client's word that he does not have any of the
18 information, that you have represented that he
19 does not, and that he doesn't have access to it
20 and that he's incapable of furnishing any of the
21 discovery that you have represented.

22 Subsequently to today, if determined that he
23 has been less than candid or honest with these
24 proceedings and with this Court, I think you can
25 fully expect the recommendation from me to

1 Judge Campbell in the strongest of words that a
2 preclusion order would be entered with respect to
3 what the defendant is seeking here today. I'm not
4 going to do it today, because, as I said, I'm
5 taking you and your client's word with respect to
6 your abilities to provide the discovery and have
7 been completed as far as they can possibly be.

8 So that being said, the other sanction
9 request will be denied. Motion to compel the
10 discovery will be denied.

11 MR. BERLIN: Your Honor, if we might, to the
12 extent of doing an order, that Mr. Harder is going
13 to do what he said he was going to do with respect
14 to the phone records.

15 THE COURT: I think that's going to come up
16 next.

17 MR. BERLIN: Well, the next one actually asks
18 for them to be produced. What he was offering to
19 do was to have his client review them.

20 THE COURT: That was -- if I understand
21 Mr. Harder correctly, that offer was in lieu of
22 producing the records.

23 MR. HARDER: Correct.

24 THE COURT: And I don't --

25 MR. BERLIN: They're not going -- I'm sorry,

1 Your Honor. I'll be happy to address it in the
2 next motion. But it would seem appropriate that
3 regardless of whether he produces them or not, if
4 they have records that would help them answer a
5 question, in light of what Your Honor just said,
6 that they would be obliged to do that. And that's
7 why I was asking.

8 THE COURT: That might be helpful if he
9 brought them to the deposition next week, but
10 that's not -- that's not in front of me right now,
11 anyway.

12 All right. Moving along.

13 MR. BERLIN: All right. So the next motion,
14 Your Honor, is a motion to compel discovery. We
15 served six discovery requests in December. Those
16 discovery requests were -- some of them actually
17 picked up on some earlier requests from last June,
18 and we tried to narrow them in response to some of
19 the objections that have been expressed by
20 Mr. Harder at the October hearing, basic
21 information designed to follow up on the discovery
22 and investigation to try and illuminate some more
23 detail about communications that the plaintiff may
24 have had with key players in this case either by
25 text or by phone call.

1 There should have been no difficulty in
2 getting responses to six requests before
3 depositions in March, and the request essentially
4 falls into three categories.

5 The first category seeks documents and
6 information concerning Hogan's many media
7 appearances. And, again, this is the kind of
8 thing where -- and this is also, as I said in my
9 last argument, responses to the other requests,
10 but there is a specific request pertaining to
11 this.

12 After the Gawker story was published, Hogan
13 went on a major media tour. And the 10-day window
14 between when Gawker published his story and when
15 he filed this lawsuit, Hogan appeared on the Today
16 Show, the Howard Stern show, Piers Morgan's show
17 on CNN, TMZ Live, and then an interview published
18 in USA Today, as well as a number of other media
19 outlets and they discussed the sex tape and the
20 Gawker story and all of that.

21 Now, we have been able to see the results of
22 the stories, but there is a lot of stuff that's
23 presumably going on behind the scenes.

24 In connection with all that, he used the
25 services of a New York-based publicist, Elizabeth

1 Rosenthal Traub -- for the court reporter's
2 benefit, that's T-r-a-u-b -- and her agency, which
3 was called EJ Media.

4 Hogan has produced no documents about those
5 media appearances, including his publicist has
6 with bookers, producers, reporters, or others. He
7 has produced no schedules, no talking points, no
8 calendar entries, no travel receipts, no notes.
9 He's produced no communications with his
10 publicist, be they e-mails, text, memos, not even
11 the agreement that -- of when he engaged her.

12 Obviously, as recognized by the Second DCA in
13 its recent opinion, what Hogan said publicly about
14 the very subject at hand is relevant to two
15 related ways.

16 First, Hogan's statements about the
17 underlying facts are obviously relevant
18 particularly in light of the story that has
19 continued to shift in a variety of ways.

20 Second, Hogan's publicity efforts are
21 relevant to his claims for invasion of privacy,
22 and his claims for emotional distress on his
23 intentional and negligent infliction claims, and,
24 of course, his right of publicity claim.

25 As noted in our papers, Gawker also had to

1 cover its bases by subpoenaing Hogan's publicist,
2 Ms. Traub and her firm directly, even though we
3 believe that her documents are within his
4 possession, custody, or control.

5 As it stands now, Ms. Traub and her firm have
6 been ordered to appear on Wednesday morning,
7 February 26th, and to show cause why they should
8 not be required to provide full responses to the
9 subpoenas. We'd also ask Your Honor to require
10 plaintiff to produce all documents within his
11 possession, custody, or control.

12 We've asked for Hogan's and his counsel's
13 communication with the FBI and other law
14 enforcement agencies. Your Honor, you've already
15 heard a detailed argument on plaintiff's claim of
16 privilege about this in our last hearing a couple
17 weeks ago, and I will not rehash that now unless
18 Your Honor has any questions.

19 I would add that even if there were a law
20 enforcement privilege and even if that's what the
21 plaintiff asserted, it would not apply to the
22 narrow category of plaintiff's own communications
23 with the FBI or those of his counsel with the FBI.

24 I will give an example. So, for example, a
25 grand jury, under federal civil procedure -- or

1 criminal procedure 6(e) -- I'm sorry -- or the
2 equivalent in Florida, the proceedings are secret,
3 even more so than an FBI file, which can be
4 obtained through a FOIA request.

5 But in the absence of a gag order, plaintiff
6 has made no claim here that he is under one. A
7 witness, including a complaining witness, is free
8 to disclose and discuss her testimony, his or her
9 testimony. In D.C., where I live, I have clear
10 memories of people like Monica Lewinsky, Vernon
11 Jordan and other witnesses appearing for testimony
12 before a grand jury and then immediately
13 afterwards taking to the microphones in front of
14 the courthouse to discuss with the media their
15 appearance.

16 And just as those people are not precluded
17 from doing so, there is no basis to preclude Hogan
18 and his counsel from disclosing their
19 communications. Ultimately, we request the
20 plaintiff be directed to immediately provide full
21 responses to areas in Interrogatory No. 9 and
22 Gawker's request for production No. 52.

23 And for the avoidance of any doubt, if the
24 plaintiff asserts that any such documents are
25 protected by the attorney-client privilege or the

1 attorney work product doctrine, in other words,
2 communications between him and his counsel and
3 that predate the filing of the lawsuit, we ask
4 that those -- that the plaintiff be directed to
5 immediately provide a privilege log so that those
6 claims can be evaluated and, if necessary,
7 addressed by Your Honor.

8 Finally, we request the plaintiff provide
9 account information for his cell phone or
10 accounts -- cell phone account or accounts, if he
11 has more than one, used through 2012 and records
12 of numbers called and texted during that period.

13 As we said in our papers, we have no
14 intention of calling those numbers, but we have
15 got a situation here where the plaintiff contends
16 that he can't remember much about his
17 communications even with key players such as Bubba
18 Clem.

19 We're asking for these records to assist in
20 our ability to ask witnesses about their
21 communications with one another and other related
22 parties and to assess plaintiff's contentions
23 about his communications. Those include his
24 communications with Heather and Bubba Clem during
25 the period when reports about a sex tape first

1 surfaced in March and April 2012 and that the
2 Gawker story published in early October of 2012,
3 and then later that month when Hogan and Mr. Clem
4 had a falling out publicly and ended up in
5 litigation and then quickly settled.

6 There are similar orders in similar
7 situations which we cited in our papers. And the
8 plaintiff here should be required to produce the
9 information and documents in these narrow
10 requests, specifically interrogatory No. 10 and
11 request for production No. 54.

12 And I will reserve some time for rebuttal,
13 but that's -- I wanted to try and keep this part
14 of it brief.

15 THE COURT: Okay. Mr. Harder?

16 MR. HARDER: Yes, thank you, Judge Case. I
17 will take them in different order. Let's start
18 with the phone record, because we have already
19 started talking about that.

20 I think that a reasonable accomodation would
21 be to have Mr. Bollea review his phone records and
22 then to provide a supplemental response that would
23 identify any phone calls that happened to be on
24 his phone records with Bubba or Heather Clem. I
25 don't think it would be appropriate for me to

1 identify phone calls that he has had with his
2 litigation counsel, because those will probably
3 show up in the 2012 phone records.

4 Beyond communications with litigation counsel
5 and litigation and Bubba and Bubba and Heather
6 Clem, I don't know that there is going to be
7 anything in the phone records that's pertinent to
8 the case.

9 Mr. Berlin just said that we didn't provide
10 any of the information about his 2012
11 communications with Bubba Clem. And that actually
12 is not totally accurate, because in our response
13 to Interrogatory No. 10, we say, In or about
14 spring 2012, Mr. Bollea asked Mr. Clem to explain
15 the media reports regarding allegations of a
16 possible sex tape involving Mr. Bollea. Mr. Clem
17 denied having any knowledge or involvement in the
18 sex tape.

19 So we identified that. I don't know why a
20 phone record is necessary, because we identified
21 it.

22 As far as all of the phone calls that have
23 ever been made to Mr. Bollea or from Mr. Bollea in
24 the year 2012, obviously, we're talking about
25 99-percent-plus phone calls that have nothing at

1 all to do with this case. So I just don't think
2 that any of that is appropriate, especially when
3 it's not like we are withholding information. We
4 are providing information.

5 Also, I mentioned earlier, about a half hour
6 ago, there were texts between Terry Bollea and
7 Mr. Clem on the subject of, What is all this about
8 a possible sex tape? We've produced those texts,
9 so Gawker has those texts. So everything that we
10 have we've produced.

11 But, again, I'm happy to have Mr. Bollea --
12 and going off of Mr. Berlin's statement that a
13 person who has a telephone account can go into his
14 account and look at the account for phone calls to
15 somebody -- a certain number or from a certain
16 number, if it's that easy, this is going to be
17 very easy. We can identify the phone company.

18 I don't even mind identifying by date and by
19 phone -- well, I would rather not identify by
20 phone number, but just say a phone call was made
21 to or a phone call was made from Mr. Clem's phone
22 or Terry Bollea to Mr. Clem or Mr. Clem to Terry
23 Bollea and the duration of that call and the time
24 in which that call took place.

25 I don't have any problem with that. I just

1 don't want to open the floodgates to all phone
2 calls that Mr. Bollea has ever had. I just think
3 that is completely inappropriate and not called
4 for, and it seeks things that are not relevant,
5 and it invades Mr. Bollea's privacy. So I think
6 that a reasonable accomodation could be reached
7 there.

8 As far as the FBI records, we kind of went
9 back and forth on this about -- what was it, a few
10 weeks ago? And Your Honor made the recommendation
11 to Judge Campbell. And with respect, Your Honor,
12 we filed an exception because we feel that the law
13 reads a certain way that we don't think that the
14 discovery should occur. But Judge Campbell has a
15 hearing scheduled on that issue for April 23rd,
16 which is her earliest availability. So we will
17 have her revisit that issue.

18 So as far as the FBI records and Mr. Bollea's
19 communications with the FBI, which are all part of
20 the same thing, we would recommend that
21 Judge Campbell hear all of this, and whatever your
22 recommendation may be, on the date of the hearing
23 that's been scheduled, which is April 23rd.

24 As far as the media appearances, Mr. Berlin
25 makes it sound like we're, again, we're hiding

1 things. And again, that's not the case.

2 Mr. Bollea uses a publicist for certain
3 things. This is not a publicist for all purposes
4 necessarily. When Mr. Bollea was doing a media
5 tour in early October, it was because he was
6 promoting a Pay-per-view wrestling event. He had
7 no knowledge whatsoever that Gawker was about to
8 launch a sex tape about him. No one ever bothered
9 to call Mr. Bollea, such as Gawker, to say,
10 Mr. Bollea, we're about to launch a sex tape. Do
11 you have any comment? Was this secretly, or
12 anything like that. Gawker just posted it.

13 So while Mr. Bollea was in the middle of a
14 media tour for a Pay-per-view event, the news
15 about a sex tape came out. And, obviously, he did
16 not have a media tour to promote the sex tape. I
17 think that's, if I'm reading it correctly, what
18 Mr. Berlin is suggesting, and that's just simply
19 not the case.

20 Now, as far as the documents relating to the
21 media tour, Elizabeth Traub didn't work on that
22 media tour. And I have talked to Mr. Berlin about
23 this, and I have said, Elizabeth Traub doesn't
24 have any documents at all about that media tour.
25 And I have checked and double checked and triple

1 checked, and that's the case because she didn't
2 work on it. So they're seeking to compel things
3 that she doesn't have. And they brought -- they
4 brought a petition in New York state court to have
5 her produce things that she doesn't have and also
6 to get into privileged communications. And,
7 unfortunately, the New York court has to deal with
8 that.

9 As far as documents that may be in
10 Mr. Bollea's possession, I have checked with him.
11 I haven't gotten anything. He's still checking to
12 see if he has, for example, a list of his media
13 appearances. These media appearances took place
14 16 months ago, possibly a little bit longer than
15 that. So these things were scheduled 16 to 17
16 months ago. Mr. Bollea is not the type of person
17 who gets a document and keeps it. He's the type
18 of person who gets the document, does a media
19 tour, and then probably throws out the media tour
20 lists soon after he does the media tour. And,
21 again, this is a media tour for a wrestling event;
22 it was not for the sex tape.

23 So in terms of what's the relevant scope of
24 documents, are we supposed to produce his plane
25 ticket? Are we supposed to produce his itinerary

1 of where he flew and when, of when he showed up to
2 which building and which address and who he was
3 speaking to? I don't know if he has any of that.

4 But then there is the other question of, Is
5 that really relevant? Is it relevant which
6 airline he flew on or which date he took a flight,
7 whether it was a 6:00 a.m. flight or a 10:00 a.m.
8 flight.

9 I would like to get some sense of whether
10 he's required to find that, because maybe he would
11 be able to find an old plane itinerary as opposed
12 to a media itinerary which could have been done by
13 a different person. I don't know.

14 But it's not that we're withholding anything,
15 because the relevant stuff is we all acknowledge
16 that he did talk with the press while he was on
17 this media tour for the wrestling event. And
18 Gawker seems to have found every single occasion
19 where he talked to a reporter, because when he
20 talked to somebody, there is an article about it,
21 a YouTube or wherever it happens to be. If he was
22 on the Today Show, then there is probably a tape
23 of some sort.

24 We don't have any of the tapes. For the
25 press clipping files, he doesn't keep one. His

1 publicist doesn't keep one. His publicist didn't
2 work on this particular event, in any event, so
3 she wouldn't have one even if they did keep press
4 clipping files on things she worked on, because
5 she didn't work on this one.

6 But from someone from Mr. Bollea's point of
7 view, there is so much media out there that -- and
8 it's all available at any time. You go to Google
9 and you type in "Terry Bollea Today Show 2012,"
10 you'll get probably a whole bunch of articles
11 about how he was on the Today Show. It's not just
12 from the "today.com" or the "nbctoday.com"; it's
13 from all kinds of folks, because everyone likes to
14 report on what other people reported on. And so
15 you just get this huge explosion of media reports.

16 I'm not sure that the things that Gawker is
17 seeking are relevant. I talked to Seth after he
18 filed the motion, and we had a meet-and-confer
19 conference after the fact. And I said if we have
20 any list of the media people that he spoke to, I'm
21 happy to get that to you. Elizabeth Traub doesn't
22 have it, and Mr. Bollea has not been able to find
23 it. And, Your Honor, if he can find it, I'm happy
24 to give that over to them. But it's not the type
25 of thing that he keeps, and if he -- it may not be

1 in his possession, so --

2 THE COURT: Okay.

3 MR. HARDER: And as far as sanctions,
4 obviously, we oppose sanctions. I don't want
5 anyone saying I don't oppose sanctions. I just
6 don't feel that anything is sanctionable here. I
7 don't think that we did anything wrong, and I
8 don't think that the motion was necessary. And
9 Mr. Berlin could have given me a call after he
10 sent his meet-and-confer letter and says, Let's
11 talk, and, What are you willing to give? And I
12 would have had this conversation with him and the
13 things that I am willing to do, such as look
14 through the phone records for the relevant phone
15 calls as opposed to giving over all of the phone
16 calls of 2012. I would have been happy to do
17 that.

18 And as far as -- and the schedule of
19 reporters that he spoke to, I told Mr. Berlin I'm
20 happy to give it to him when we find it, but the
21 publicist doesn't have it and he doesn't have it.
22 So that's kind of where we are. Thank you.

23 THE COURT: All right. Mr. Berlin?

24 MR. BERLIN: Your Honor, just to be helpful,
25 let me try and go through the order that

1 Mr. Harder used, even though it wasn't the order
2 that was in our motion or the order that was used
3 originally.

4 THE COURT: Okay.

5 MR. BERLIN: The phone records, I think that
6 there is sort of two issues.

7 One is we served an interrogatory that has to
8 do with communications. And if he can use
9 documents that are within his possession, custody,
10 or control to answer that question, he ought to be
11 asked to do so and not just say, you know, Here
12 are two sets that describe all of the
13 communications that I had in a two-month period
14 with Bubba Clem, which is what the current
15 interrogatory does.

16 As far as the records themselves, certainly,
17 calls with Bubba Clem and Heather Clem are
18 certainly relevant. Calls with, whether it's
19 Ms. Traub or if he has another publicist, since it
20 seems like from the publicity tour that he's
21 saying Ms. Traub didn't assist him in doing that,
22 then presumably someone else did. Those calls
23 would be relevant, certainly. Calls with people
24 with media organizations, directly would be
25 relevant.

1 And the problem that I want to avoid, Your
2 Honor -- and this is why we said we're not going
3 to start calling people but that we wanted to be
4 able to obtain these records -- is, you know, I'm
5 reluctant to say, Well, let me just have
6 Mr. Harder decide what's relevant or not relevant,
7 because he doesn't -- he has a different theory of
8 the case. He has, in many briefs that we have
9 filed back and forth, a different view of what's
10 relevant, you know. The briefs and these two
11 motions, he says, Here is what's relevant to this
12 case. And it's a fairly narrow description, and
13 it excludes the primary thing that we're trying to
14 do, which is to be able to test what the plaintiff
15 is saying in these various factual contentions.

16 So we think the appropriate thing is to be
17 able to review them. They, obviously, can be
18 produced pursuant to the confidentiality in this
19 case. And although Mr. Harder has alluded in both
20 his papers and earlier in this session, that
21 Gawker is a media company that publishes things,
22 we have not published anything that we have
23 received in discovery, whether it was designated
24 as confidential or otherwise, and have
25 scrupulously honored the confidentiality order and

1 would -- and would continue to do so.

2 But trying to have him guess what we think
3 would be important is a bad idea in discovery, and
4 that's not how it's supposed to work. And I think
5 also that you are -- your particular suggestion
6 was maybe that I ought to have the record at his
7 deposition so we can -- that one can ask him those
8 questions and is particularly important so we
9 can -- we can go through and ask them.

10 We would hope to do it and have the records a
11 little bit in advance so that we're not sitting
12 there going line by line saying, Whose number is
13 this? Whose number is this? Because he's not
14 likely to know that off the top of his head,
15 although some of them presumably, but a good
16 number of them he may not. So there has got to be
17 some way of getting that information.

18 On the FBI records, Your Honor, this is a
19 fairly narrow request. It's not -- the last time
20 we were here saying, Can we have a FOIA, the
21 privacy act, FBI authorization for the FBI's files
22 subject to whatever objections they might make?
23 It was calling for their whole file. Here it's to
24 the -- limited to the subject of either his or his
25 counsel's communications with them.

1 And, you know, again, this goes back to the
2 subject of -- we didn't really address it in the
3 last motion in detail, but, you know, we've gotten
4 fairly strident e-mails from Mr. Harder saying
5 that, first, the deposition was cancelled but then
6 was back on, but you couldn't re-call the witness,
7 and so forth.

8 And, you know, we had proposed that, you
9 know -- we've deferred the depositions by
10 something like 90 days and allow Judge Campbell to
11 rule on the objections to Your Honor's reported
12 recommendation that have already been filed and
13 any others that might get filed at that hearing in
14 April. And that was something that, ultimately,
15 Mr. Harder steadfastly opposed. So, obviously, we
16 are prepared to go forward.

17 But, you know, if this is something where if
18 we are able to obtain more records, either
19 directly from the plaintiff or the FBI, we would,
20 in fact, want to be able to re-call the plaintiff
21 and ask him about it, which we'll be penalized
22 for, you know, having to go through this process,
23 having offered to slow the thing down so that we
24 can do this once after Judge Campbell has an
25 opportunity to review the exceptions and then

1 having the plaintiff refute. That just doesn't
2 seem right to us.

3 With respect to the media appearances, we
4 literally have not a single record related to
5 the -- to the media tour, which, my understanding,
6 it started, actually, after the Gawker story was
7 published and it ended before this lawsuit was
8 filed. There is about an 11-day period. And
9 the -- we have no information from the plaintiff.
10 And I don't know who did that, if Ms. Traub didn't
11 do it. We understood her to the publicist. And
12 that's why we sent her a subpoena, which she has,
13 in fact, provided all the information related to
14 the publicity efforts in connection with this
15 lawsuit, that post dated the filing of the
16 lawsuit, but there was nothing that predated it.

17 And I don't where those documents are, but I
18 don't think I'm that naive to think that a
19 celebrity like Hulk Hogan goes on a major tour of
20 all these major media outlets and there is no --
21 there is literally no documentary evidence of it
22 anywhere, let alone -- you know, there is also an
23 interrogatory response, you know, that could be --
24 at least go to -- that we talked about already.

25 So I don't know where that comes from. But

1 these are -- you know, if you have -- if you have
2 exchanges with your publicist or if you have
3 exchanges with, if not Ms. Traub, with someone
4 else that is handling that for you, or if nobody
5 is handling it for you and you're doing it
6 directly -- and certainly, you know, it may be the
7 case that the plaintiff would not normally keep
8 records of this for, you know, a year and a half
9 if nothing else were going on.

10 But, in fact, within days of completing that
11 media tour, he filed this lawsuit and a companion
12 case in federal court against Gawker that was then
13 replaced with Gawker being brought into this case
14 a couple months later. And, you know, he would
15 have some obligation to retain those things even
16 if he wouldn't otherwise do so in a vacuum.

17 And so it is rather troubling that having
18 served discovery in December and then we have
19 depositions starting one week from today and we
20 still have the plaintiff checking to see what he
21 has. And -- but it is also concerning. And,
22 look, I am more interested in substantive
23 communication that he had media outlets and more
24 with his publicist about his media strategy, but
25 I'm also interested in understanding what he was

1 doing in this period, because I don't -- you know,
2 we know what we can find, but we don't know what
3 we can't find, and that's the whole point of
4 discovery.

5 So, you know, that's why we have also asked
6 for some of the logistical documents so that we
7 understand what was going on. So this is not
8 something -- I will say I don't like to go down
9 this road, but, you know, Ms. Smith was on the
10 call with me with Mr. Harder. We were supposed to
11 have the subject taken up on Friday, the 14th. It
12 was our effort to do it together over the weekend,
13 and Mr. Harder made himself -- he was not
14 available until the afternoon of Tuesday, the
15 18th.

16 This was done at his request after we had
17 sent our letter and after we had filed our motion.
18 And during that call, Mr. Harder didn't even want
19 to have a substantive conversation about the
20 discovery. He was frustrated with me on another
21 subject and wanted to hang up the phone. And I
22 had to encourage him and say, Look, you know, I
23 think -- you have asked for this. We should at
24 least try to talk about this.

25 But this is not what we talked about, you

1 know, should we need to file a motion, you know.
2 You ought to be able to, you know, serve what is
3 in our six discovery requests and not have to come
4 back with literally no substantive information for
5 five of them after a two-week extension.

6 And look, I'm happy to give you an extension,
7 but I don't want the fact that I gave you an
8 extension to be used against me, you know, to sort
9 of jam me with the upcoming depositions. And then
10 that is exactly where we are. That just doesn't
11 seem right to me.

12 We would respectfully request that the
13 discovery on these three topics be ordered as
14 requested -- or recommended to be ordered as
15 requested, I guess is the proper way to put it.

16 THE COURT: All right. Anything else?

17 MR. HARDER: Yeah, Judge. Just a couple of
18 minutes.

19 As far as the communications relating to
20 media, these are not things that were requested a
21 long, long time ago. These were things that were
22 requested in December. Seth and I have a kind of
23 a regular thing where, if we need a little bit
24 more time, we give each other a little bit more
25 time. He often asks for 30 days, and I -- or 15

1 to 30 days, and I routinely give them. I asked
2 for, I think, 15 days on the media things, and he
3 gave me the additional time. That put things
4 into, I think, either late January or early
5 February.

6 Ever since then, Mr. Bollea has been looking
7 to see if he has any communications relating to
8 the media appearances. And I have checked in with
9 him periodically, and I haven't gotten anything.
10 I don't think he has them. I don't necessarily
11 think that he's given up, but by this week, I'm
12 sure that I'm going to get to the bottom of it,
13 whether he has any of these things or not.

14 We are not intentionally withholding
15 anything. All that we're talking about here are
16 things like his schedule for the media promotional
17 tour back in October that related to a wrestling
18 event. That's what we're talking about. It's not
19 like we're talking about the smoking gun of the
20 case. We're talking about a promotional media
21 tour and a list of appearances.

22 I'm not withholding information from
23 Mr. Berlin about that media tour. Typically, what
24 happens -- and I assume it's the case here -- that
25 when a production company does a production, very

1 often the production company will have somebody
2 who handles the media tour. It could be in-house
3 in their media department or marketing, or
4 whatever they call it, or it could be an outside
5 publicist. I don't know who the person was who
6 was involved.

7 That information was actually never requested
8 in any of this discovery, but I don't know who the
9 person was. And I don't know what Mr. Bollea is
10 going to remember 16 months back: Oh, I think it
11 was James Smith. It would surprise me.

12 But it would have been the production company
13 that would know all this information because they
14 were the one who handled the scheduling of the
15 media appearances for the Pay-per-view wrestling
16 event. It's not something that we're trying to
17 keep from him. We just don't have it. And I feel
18 like we just keep getting pounded and pounded and
19 pounded on things that we just don't have.

20 As far as -- I don't even want to mention it,
21 but as far as the characterization of the
22 Valentine's Day conference that Seth and I had,
23 Seth was the one who sent me an e-mail saying,
24 Let's talk about the things that we filed a motion
25 over, and I said okay.

1 We get on the phone on Valentine's Day to
2 talk about that, and Seth wants to talk about
3 procedural issues rather than substantive issues,
4 and so we talked about procedural issues for 90
5 minutes. And he had a laundry list of things that
6 he wanted, including I wasn't allowed to file a
7 motion to compel; I had to agree to not have
8 discovery take place during certain times.

9 We had to have this long drawn-out calendar
10 where we would not have a trial date probably
11 until early 2015, if even then. And, ultimately,
12 we could not come to an agreement on this long
13 laundry list of things. And if it had been as
14 simple as, Let's postpone the depositions for a
15 month, or so, so that we can try to get to the
16 bottom of these discovery issues, that would have
17 been easy.

18 It's kind of too late now, because everybody
19 on my side is completely locked into these
20 depositions. People have bought their tickets,
21 and they are probably nonrefundable at this point.
22 They have reserved their hotels, and Mr. Bollea
23 has carved out next week for depositions. And it
24 would be very difficult to uproot his schedule and
25 try to go find dates where he and Ms. Clem and

1 Bubba Clem are all available in the exact order
2 that Gawker wants to take them in, because right
3 now they're scheduled for the exact order. And a
4 problem that we had back in November was that we
5 had everybody together, available for deposition.
6 But the ordering was slightly off and Gawker said,
7 No, we want this order. It has to be this. So
8 since we have everyone locked in, our point of
9 view is, Let's just get them done.

10 As far as this issue of Gawker is a media
11 organization that publishes information about
12 people, as far as I know, I think that Seth is
13 correct, that Gawker hasn't published anything
14 about Hulk Hogan relating to this case except for
15 when Judge Campbell issued her order enjoining the
16 sex tape. Gawker completely went off on
17 Judge Campbell when she issued that order. And,
18 otherwise, I think it's been quiet for the time
19 being.

20 But that's not to say that Gawker isn't
21 readying itself for some expose, either on a
22 one-time basis or on a long-term basis, of several
23 installments of talking about Mr. Bollea, and this
24 is the story of the sex tape lawsuit, and these
25 are all the things that we found out, and this,

1 that, and the other thing. And as far as I know,
2 there would be no way to stop them from that other
3 than to enforce the protective order, but that's
4 not the ideal situation.

5 So because of this, we have asked
6 Judge Campbell to help us to be very careful about
7 the types of information that Gawker can get into
8 and how that information can be treated.

9 And she's been very receptive, and I'm sure
10 Your Honor would be receptive as well, but I just
11 wanted to give some context to those issues.

12 THE COURT: All right.

13 MR. HARDER: That's all I have.

14 THE COURT: Thank you. All right.

15 MR. BERLIN: Your Honor, if I can just -- I
16 must just -- there is a couple things that
17 Mr. Harder stated that are just not right.

18 We mentioned this in our papers, but I just
19 wanted to give the Court the flavor of this. The
20 notion that this -- about media appearances and
21 public statements is a new discovery request is
22 not right. We mentioned this in our paper.

23 Putting aside the general request that have
24 to do with documents in any manner related to the
25 video and communications you had about the video

1 or the Gawker story -- which, obviously, that
2 whole media tour covers because he spoke about it
3 in every one of them -- those are requests that
4 date back to last June. But we also have requests
5 like request No. 25: Any and all documents
6 concerning any public statements made by you about
7 the video, any and all documents concerning any
8 public statements made by you about the Gawker
9 story.

10 I mean, these are the things that we asked
11 for, you know, prior. As we said, you know, there
12 was an objection that, you know, he doesn't have a
13 publicist who takes care of the actual statements
14 themselves, so we came back and we just wanted the
15 communication that led those. We'll go and find
16 them on our own. And we can't get them.

17 And so the notion that we start this process
18 in June and we're still -- now it's the second
19 request and, you know, followed by an extension,
20 followed by a letter, followed by no response,
21 followed by a phone call belatedly saying, you
22 know, Can we talk about this, which started with
23 a, "I don't even want to talk about this."

24 I mean, this is not the way discovery is
25 supposed to work. And I respectfully request that

1 the Court recognize and Your Honor recognize this
2 is not -- that these things are basically being
3 withheld or being told, We're following up, and,
4 you know, he's still checking. And, you know, we
5 are, at Mr. Harder's insistence, you know, a week
6 away from deposition. So I don't believe, as I
7 said earlier, that discovery needs to be an
8 emergency. But if you sit on your hands for
9 months and months, then you sort of have no choice
10 but to ask that it be done, you know, in an
11 expedited fashion so that you get the things you
12 need and move on.

13 We would have been happy to put this off, and
14 I think we had agreed that we would do that by
15 that, you know, by 90 days, which would allow
16 Judge Campbell a reasonable amount of time to hear
17 this in late April and to issue an order
18 thereafter and to get any discovery that she
19 ordered exchanged.

20 Having refused to do that and having
21 indicated that they were -- at least part of
22 whatever ruling, if Your Honor would be inclined
23 to agree with us on today's FBI ruling and
24 certainly last week's FBI ruling, and maybe other
25 rulings, there may be other things that we don't

1 have. And all we're asking for in that regard is
2 the ability to say, Okay, if that's what happened,
3 then we need to be able to reserve our right to
4 call a witness, because it's not fair to us
5 otherwise.

6 I otherwise will stand on what I had said
7 previously about the phone records and the FBI
8 records and, you know, on the media appearances.
9 We don't have anything that I would like to add.

10 THE COURT: All right.

11 MR. HARDER: Judge Case, like 20 seconds
12 about the issue of other discovery that's not part
13 of the motion to compel.

14 When they asked us for documents that
15 pertained to public statements that are made by
16 Mr. Bollea, we produced information and documents
17 that were responsive. I had no idea that when
18 they asked for documents regarding public
19 statements, that they were asking for a travel
20 itinerary. I mean, that was -- it's so far
21 removed from the discovery of last year. And they
22 never moved to compel on that old discovery,
23 because we produced and were responsive to what
24 they had asked for.

25 So the new stuff is the stuff that pertains

1 to -- and I don't know if it mentions travel
2 itineraries or not -- but just for the
3 meet-and-confer process and by reading their
4 motions, I have gleaned that that is what they are
5 after. So that's what we're talking about.

6 I just -- I just need to clarify that when
7 they characterize this as we're all stonewalling
8 them, it's just not the case. We're giving them
9 what they asked for. We don't have a whole lot.
10 They are also not clear about it or they are
11 giving us discovery that says one thing but they
12 mean another, and then in the motion they clarify
13 what it is they meant.

14 We're doing our best here. There really
15 isn't a need for motion upon motion on so much of
16 this discovery. And in terms of the
17 meet-and-confer conference that Mr. Berlin and I
18 had, he says that I was refusing to talk about the
19 substance. We did talk -- actually, the first
20 conversation was on Valentine's Day. And
21 Mr. Berlin didn't want to talk about the
22 substance; he wanted to talk about the procedure.

23 And then the next conversation that we had
24 was after the three-day holiday. My office was
25 closed on Monday. Most offices were closed on

1 Monday. We had a conference on Tuesday. And we
2 did have a substantive conversation on every
3 single point that's in both of these motions and
4 also the New York petition. And Mr. Berlin would
5 not compromise on a single point, nothing, nada.
6 He would not compromise on anything. And I
7 covered every single issue.

8 So, unfortunately, there is this two ways of
9 looking at it. I just wanted to clarify it
10 because he was bringing it up. Thank you.

11 MR. BERLIN: Your Honor, I will just say for
12 the record I disagree with that characterization
13 wholly, but I don't think any good purpose would
14 be served in enumerating why. So I just want to
15 memorialize on the record that I disagree with
16 that -- the characterization both of our earlier
17 discovery: Mr. Harder's statements about it at
18 the prior hearing about our earlier discovery and
19 about our meet-and-confer conversations. And I
20 will leave it at that, but I just wanted to
21 memorialize that on the record.

22 THE COURT: Thank you. With respect to the
23 fifth motion to compel discovery on an expedited
24 basis, I think that Gawker has made their case.
25 They have demonstrated the need for this. And I

1 am going to order that -- I will recommend that
2 the Court order that the relief that is sought in
3 the motion be granted as to all three areas: the
4 publicist, the FBI, and the cell phone records.
5 And I'm going to recommend that all of these
6 records be furnished to Gawker no later than 4:00
7 p.m. this Thursday, the 27th of February, to help
8 them prepare for these depositions that are coming
9 up starting next week.

10 MR. BERLIN: Thank you, Your Honor.

11 THE COURT: All right.

12 MR. BERLIN: We did this the last time, and
13 we would be happy to do it again. Would you like
14 us to prepare reports of your recommendations on
15 the two motions?

16 THE COURT: That would be greatly
17 appreciated.

18 MR. BERLIN: All right. We will do that.
19 And we will send them to Mr. Harder for his -- and
20 Mr. Turkel -- for their approval as to form. And
21 we'll try and get those to you -- we will try to
22 get those to you shortly.

23 THE COURT: All right. Thank you.

24 (Hearing concluded at 3:27 p.m.)

25

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, Aaron T. Perkins, Registered Professional Reporter, certify that I was authorized to and did stenographically report the above excerpted hearing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 25th day of February, 2014.

Aaron T. Perkins, RPR



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