

EXHIBIT 26

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12012447CI-011

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

Defendants.

**PLAINTIFF TERRY GENE BOLLEA'S OPPOSITION TO FIFTH MOTION TO
COMPEL FILED BY GAWKER MEDIA, LLC AND A.J. DAULERIO**

I. INTRODUCTION

The actual issues in this case are very limited: (1) whether Gawker committed a tort by posting surreptitiously recorded footage of private sexual intercourse involving Mr. Bollea on the Internet; (2) whether Gawker had a First Amendment privilege to post the footage because it was supposedly "newsworthy"; (3) whether Mr. Bollea consented to Gawker's posting of the footage (he certainly did not); and (4) what damages did Mr. Bollea suffer. Judge Campbell has already ruled that the parties to this case must stick to the issues and not extend discovery into collateral areas of dubious relevance, and that the privacy of Mr. Bollea, which was already invaded by Gawker's dissemination of the sex tape, and Gawker's refusal to take it down, must not be

Gawker now is essentially asking the Discovery Magistrate to overrule Judge Campbell's carefully balanced rulings. Gawker has offered no plausible reason why Mr. Bollea's telephone records would bear on whether its conduct was tortious, whether it was constitutionally protected, or Mr. Bollea's damages. Even if Mr. Bollea spoke to someone on the phone regarding the sex tape during the period covered by Gawker's request (all of 2012), the cell phone records will disclose nothing other than the time of the call, the phone number and the call duration.

Gawker is hoping that it can open the floodgates to his private life, 99.99% of which has nothing whatsoever to do with this case. If mobile phone records are compelled and produced, Gawker – a highly intrusive celebrity tabloid site – can place calls to every person in Mr. Bollea's life – personal and professional – as part of a massive fishing expedition and serving the dual purpose of interfering with every aspect of his personal and professional relationships. The invasion of his privacy (the subject of this case) would be **multiplied** by Gawker's discovery. And at the end of the day, Gawker is highly unlikely to obtain any information that is actually relevant to **this** case. The Discovery Magistrate should deny Gawker's motion, and maintain the careful balance struck by Judge Campbell in her rulings.

V. **GAWKER SHOULD NOT BE PERMITTED TO USE CIVIL DISCOVERY TO INTERFERE WITH A CRIMINAL INVESTIGATION THAT COULD BE TARGETING GAWKER (INTERROGATORY 9; DOCUMENT DEMAND 52).**

As the Discovery Magistrate is aware, Gawker sought an order compelling Mr. Bollea to sign a Freedom of Information Act ("FOIA") waiver so that Gawker could try to obtain documents from the FBI relating to its criminal investigation that supposedly related to the dissemination of the sex tape. The Discovery Magistrate recommended that Mr. Bollea be

required to sign the FOIA waiver. That issue is currently being reviewed by Judge Campbell. Judge Campbell might rule that the FBI files are **not** discoverable. Judge Campbell also might rule that even if the files are discoverable, the preferred method of obtaining the FBI files is through a FOIA request, where the FBI has an opportunity to assert its available privileges and thereby prevent Gawker from interfering with a criminal investigation. Therefore, the Discovery Magistrate should await Judge Campbell's ruling before ruling on this portion of the pending motion.

If the Discovery Magistrate chooses not to wait, however, Gawker's motion to compel should be denied. Gawker's discovery requests represent a dangerous attempt to use a civil discovery process to interfere with a criminal investigation that Gawker might be the target of. Documents generated as part of ongoing law enforcement investigations are **not discoverable**. In *In re United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006), the court held: "[H]owever it is labeled, **a privilege exists to protect government documents relating to an ongoing criminal investigation.**" *Id.* at 570, n. 2 (emphasis added). Florida law recognizes the same privilege. *State v. Maier*, 366 So.2d 501 (Fla. 1st DCA 1979) (holding that law enforcement agency could decline to disclose identity of confidential informant).

Additionally, Mr. Bollea's statements to the FBI are not relevant to this litigation nor reasonably likely to lead to the discovery of any admissible evidence. Gawker's entire theory of relevance for this evidence is stated within a single footnote of its motion in which Gawker asserts, with **no citation to evidence**, that Mr. Bollea supposedly told inconsistent stories about whether he knew about the recording. But there exists no evidence of this at all. Gawker has not identified a single statement by Mr. Bollea where he indicates that he supposedly knew that he was being recorded, nor that he ever authorized the dissemination of the recording. (To the

contrary, and as Gawker is well aware, Mr. Bollea has **consistently** maintained, for the past 16.5 months, that he had **no knowledge** that he was being recorded, and gave **no authorization** for its dissemination. Mr. Bollea sent, through counsel, multiple cease and desist demands immediately after the tape was posted, followed shortly by the filing of this lawsuit and a motion for temporary injunction to remove the sex tape from the Internet, which Judge Campbell granted.)

If Mr. Bollea felt differently about the sex tape, why would he file suit? And why would he contact law enforcement? Gawker's arguments make no sense because its discovery is not "reasonably calculated" to obtain admissible evidence. Rather, it seeks to interfere with the FBI's criminal investigation, and is on a boundless fishing expedition in an effort to drive up Mr. Bollea's costs, delay the litigation, and obtain further salacious information to post at its tabloid website.

Gawker also seeks to mislead the Discovery Magistrate, and the trial court, in falsely asserting that under Florida law, not serving a privilege log supposedly waives all privilege objections, no matter how meritorious the objection. It does not. In *State Farm Florida v. Coburn*, 2014 WL 539874 at *1 (Fla. 2d DCA 2014), the Florida Court of Appeal held: "[A] party is required to file a [privilege] log only if the information is otherwise discoverable, and until a circuit court rules on the scope of discovery objection, the party responding to the discovery does not know what will fall into the category of discoverable documents.... Thus, prior to a ruling on a scope of discovery objection, "the obligation to file a privilege log does not arise.") (citations omitted). The documents requested are not discoverable, and therefore a privilege log is not required. In any event, the privilege objection has not been waived.

VI. THERE IS NO BASIS FOR MONETARY SANCTIONS.

Fla. R. Civ. Proc. 1.380(a)(4) does not permit a monetary sanction where a party's

position is substantially justified. Mr. Bollea has substantial justification for opposing a motion that seeks discovery of irrelevant materials that would be unduly burdensome to produce, and which seeks to invade his privacy by requiring the production of his private mobile phone records.

VII. CONCLUSION

For the foregoing reasons, Gawker's motion to compel and for sanctions should be denied in its entirety.

DATED: February 21, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service via the e-portal system this 21st day of February, 2014 to the following:

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