

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

TERRY GENE BOLLEA professionally  
known as HULK HOGAN,

Plaintiff,

Case No. 12012447-CI-011

vs.

HEATHER CLEM, et al.,

Defendants.

---

**DEFENDANT GAWKER MEDIA, LLC'S EXCEPTIONS TO REPORT AND  
RECOMMENDATION ON ITS MOTION TO OVERRULE OBJECTIONS TO THIRD-  
PARTY SUBPOENAS AND PLAINTIFF'S MOTIONS FOR PROTECTIVE ORDERS**

Pursuant to Rule 1.490 of the Florida Rules of Civil Procedure, defendant Gawker Media, LLC ("Gawker") hereby files these exceptions to the Special Discovery Magistrate's Report and Recommendation entered on 11. That Report and Recommendation denied Gawker's Motion to Overrule Objections to Third-Party Subpoenas (which included (a) Gawker's Motion for Commissions for Out-of-State Subpoenas to Prince Marketing Group and Darren Prince and (b) Gawker's Motion for a Letter Rogatory and Commission for an Out-of-State Subpoena to World Wrestling Entertainment, Inc.) and granted Plaintiff's Motion for Protective Orders.

In support of its exceptions, Gawker respectfully incorporates by reference the arguments it made in its motion papers and at the hearing before the Special Discovery Magistrate and further states as follows:<sup>1</sup>

---

<sup>1</sup> A copy of the portion of the hearing transcript relating to these motions is submitted herewith as Exhibit A. Given the voluminous nature of both sides' submissions, Gawker has not re-filed the parties' briefs or exhibits, but will supply a complete set of the papers filed by Gawker and plaintiff to the Court. Those papers elaborate on the parties' arguments and the factual background relating to the subpoenas and plaintiff's objections.

1. In this case, plaintiff seeks to recover damages for, *inter alia*, “general emotional distress” and the “reasonable value of a publicly released sex tape featuring Hulk Hogan.” Pl.’s Third Supp. Resp. to Interrog. No. 12 (attached as Ex. 1 to Mot.) To defend itself against these claims and to test plaintiff’s damages theories, Gawker needs to take discovery of facts bearing on those alleged damages and plaintiff’s causes of action more generally. To that end, Gawker seeks to serve document subpoenas on third-party witnesses, including plaintiff’s agents, his wrestling employers, and his partners in two of the commercial ventures he pursued shortly after the Gawker posting.

2. Plaintiff has objected to subpoena requests and other discovery seeking:

- Records showing the value of Hulk Hogan videos and Hulk Hogan commercial appearances; and
- Records reflecting Hulk Hogan’s public image, including how plaintiff sought to portray himself to the public during the relevant period through advertisements, in media, and in other commercial appearances.

Plaintiff contends that these records are not relevant and their discovery was foreclosed by an order this Court entered following a hearing on October 29, 2013. *See generally* Pl.’s Opp.<sup>2</sup>

3. Gawker believes that the information requested by the subpoenas is relevant to:

- Determining the market value of a sex tape featuring Hulk Hogan, by learning the actual market value of his publicity rights around the time of the posting, *see* Gawker Mot. at 5, 8-14; Gawker Reply at 7-9, 10-11;
- Determining whether and to what extent plaintiff suffered emotional distress after the Gawker posting, by exploring, among other things, whether he saw the sex tape controversy as publicity to be exploited commercially, *see* Gawker Mot. at 13-20; Gawker Reply at 12-13; and

---

<sup>2</sup> Plaintiff also objected to a subpoena request for outtakes of an advertisement featuring him wearing a thong and parodying a sexualized Miley Cyrus music video. *See* Request No. 9 in Subpoenas to Tech Assets and Marc Hardgrove. Gawker believes that the requested footage is relevant to plaintiff’s assertion that he maintains his privacy and his claimed emotional distress, because it will show how he conducted himself in the making of such a video.

- Establishing whether any alleged commercial misappropriation damages are offset by opportunities and payments plaintiff received because of the Gawker posting, by finding out whether the posting of the sex tape increased the commercial value of Hulk Hogan's name and likeness, *see* Gawker Mot. at 14-17; Gawker Reply at 11-12.

4. One of plaintiff's principal arguments in response to Gawker's motion was that the Court's prior order foreclosed this discovery, and it is possible that the Special Discovery Magistrate felt constrained by that order. But, the Court's prior order does not foreclose this discovery. As to plaintiff's claims of emotional distress, this Court never ruled that Gawker could not use the discovery process to test his allegations of emotional distress. Rather, this Court ruled that Gawker could not take discovery into plaintiff's "medical records" and "names of physicians" because plaintiff announced that he would disclaim anything more than "garden variety" emotional distress. *See* Gawker Reply at 12-13; *see also* Feb. 26, 2014 Order (attached as Exhibit 16 to Gawker Mot.). In accordance with the law governing "garden variety" emotional distress, Gawker is permitted to take discovery designed to rebut plaintiff's claimed distress. *See* Gawker Reply at 13 (citing cases).

5. As to discovery into plaintiff's commercial dealings, many of the subpoena requests unquestionably do not seek plaintiff's "financial records," which is all that the prior order addressed. *See* Gawker Mot. at 5-10, 13; Gawker Reply at 5-6, 9-10.

6. Moreover, while this Court precluded wide ranging financial discovery into plaintiff's assets, tax returns, and the like, it expressly contemplated that Gawker could seek targeted damages discovery once plaintiff refined his damages theory, as the Court directed him to do at the October 2013 hearing. At the time of that hearing, plaintiff had not responded to an interrogatory asking him to articulate his damages theories. The Court ordered plaintiff to respond to that interrogatory and foresaw Gawker taking discovery bearing on plaintiff's damages after he had declared his damages theories. *See* Gawker Mot. at 5-13; Gawker Reply at

2-5, 10-11, 12 n.6. Now that plaintiff has set forth his damages theories, Gawker should be permitted to take targeted discovery bearing directly on those theories, including plaintiff's claims that he should be compensated for suffering "general emotional distress" and be paid the "reasonable value of a publicly released sex tape featuring Hulk Hogan."

7. Florida precedent provides that the requested information is not only discoverable, but admissible at trial. *See* Gawker Mot. at 10-12 (citing cases); Gawker Reply at 7-9, 13 (citing cases). It would be manifestly unfair to allow plaintiff to seek such damages, while precluding Gawker from uncovering admissible evidence on those very damages.

8. To the extent that the Special Discovery Magistrate was constrained by this Court's prior order, that order specifically provided that Gawker could take discovery on plaintiff's "financial records" upon "further order of the Court." Gawker Mot. at 13; Feb. 26, 2014 Order. To the extent necessary, Gawker respectfully requests that the Court enter a further order permitting it to take the discovery sought in its subpoenas. That discovery includes, among other things, (a) records reflecting the value of Hulk Hogan videos and Hulk Hogan commercial appearances in the two years preceding the Gawker posting and after the Gawker posting, and (b) records reflecting Hulk Hogan's public image, including records reasonably calculated to show whether plaintiff viewed the Gawker posting as a marketing opportunity and how he sought to portray himself to the public through advertisements, in media, and in other commercial appearances in the couple of years immediately preceding and after the posting.<sup>3</sup>

---

<sup>3</sup> Gawker seeks to take similar discovery from another third-party witness, Ron Howard, who handles another of plaintiff's business ventures. Likewise, co-defendant Nick Denton has served interrogatories and document requests asking plaintiff for similar information and documents, as well as information about the highest amounts he has been paid for media appearances, movies, other videos, and appearances in advertisements. The Special Discovery Magistrate's ruling would foreclose that discovery, as well. *See* Report & Recommendation ¶ 3.

9. If Gawker is not permitted to take discovery into these areas, and thus is hamstrung in its ability to offer evidence concerning the actual market value of Hulk Hogan's name and likeness and rebutting plaintiff's claim that he suffered emotional distress, at trial plaintiff should not be permitted to seek as damages the reasonable value of a sex tape featuring Hulk Hogan and from testifying that he suffered emotional distress from the Gawker posting. *See* Oct. 29, 2013 Hrg. Tr. at 93:24 – 94:14 (Court explaining to Gawker's counsel that "you mentioned a number of things today that I think would be fair game for you to know, especially for purpose of trial" and noting that if "they don't give you any of the information . . . they're not allowed to now bring it up during trial"). Accordingly, if the Report and Recommendation stands, Gawker anticipates filing a motion *in limine* seeking an order to that effect.

### CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Court (a) decline to adopt the Report and Recommendation, (b) grant Gawker's motion to overrule plaintiff's objections to its notices of intent to serve subpoenas, (c) grant Gawker's motions to issue commissions and/or letters rogatory, (d) deny plaintiff's motions for protective orders, (e) authorize Gawker to serve its proposed subpoenas as modified by agreement of the parties and as reflected in the attachments to its motion to overrule plaintiff's objections and as further noted in paragraph 5 of the Report and Recommendation, and (f) issue the commissions and letters rogatory Gawker requested.

Dated: November 12, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Gregg D. Thomas

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

601 South Boulevard  
P.O. Box 2602 (33601)  
Tampa, FL 33606  
Telephone: (813) 984-3060  
Facsimile: (813) 984-3070  
gthomas@tlolawfirm.com  
rfugate@tlolawfirm.com

and

Seth D. Berlin  
Pro Hac Vice Number: 103440  
Michael Sullivan  
Pro Hac Vice Number: 53347  
Michael Berry  
Pro Hac Vice Number: 108191  
Alia L. Smith  
Pro Hac Vice Number: 104249  
Paul J. Safier  
Pro Hac Vice Number: 103437  
LEVINE SULLIVAN KOCH & SCHULZ, LLP  
1899 L Street, NW, Suite 200  
Washington, DC 20036  
Telephone: (202) 508-1122  
Facsimile: (202) 861-9888  
sberlin@lskslaw.com  
msullivan@lskslaw.com  
mberry@lskslaw.com  
asmith@lskslaw.com  
psafier@lskslaw.com

*Counsel for Defendant Gawker Media, LLC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of November, 2014, I caused a true and correct copy of the foregoing to be served electronically upon the following counsel of record at their respective email addresses via the Florida Courts E-Filing Portal:

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

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

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

*Attorneys for Plaintiff*

Barry A. Cohen, Esq.  
bcohen@tampalawfirm.com  
Michael W. Gaines  
mgaines@tampalawfirm.com  
Barry A. Cohen Law Group  
201 East Kennedy Boulevard, Suite 1950  
Tampa, FL 33602  
Tel: (813) 225-1655  
Fax: (813) 225-1921

*Attorneys for Defendant Heather Clem*

Gregg D. Thomas  
*Attorney*