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 et al.,

Defendants.
_____/

OPPOSITION TO RENEWED MOTION TO COMPEL
RE: DAMAGES CALCULATIONS

I. INTRODUCTION

Gawker's and Denton's[1] motion to compel additional responses to interrogatories is based on a false premise—that Mr. Bollea has retained experts who have determined the damages calculations that Mr. Bollea intends to present at trial. In fact, Mr. Bollea has retained one consultant so far, and it is possible that he will retain additional consultants, but has not decided as to which persons he will offer as expert witnesses, and the calculations that Gawker is seeking have not been completed by the consultants yet. Once calculations are made and the decision to designate one or more consultants as trial experts is made, Mr. Bollea intends to comply with the Florida Rules of Civil Procedure and Florida law by offering those experts for deposition and producing relevant documents.

However, Florida law does not vitiate the work product doctrine based solely on the other party's **speculation** that particular damages calculations have been completed or that particular consultants will be designated as experts. Mr. Bollea has answered Denton's interrogatories truthfully—the calculations of damages have not been finalized, the experts have not been

[1] Technically, Gawker has no standing to move to compel responses to Denton's interrogatories.

designated, and while Mr. Bollea can provide (and has provided) a detailed description of the **nature** of his damages, the calculations have not been completed.

Were Gawker's and Denton's position accepted by the Court, it would potentially lock Mr. Bollea into damages calculations that he, in consultation with his lawyers, may decide not to present, either because they are inaccurate, strategically unwise, not credible, or any other reason. This is the purpose of the work product doctrine and is consistent with Florida case law—attorneys are permitted to explore, with their consultants, potential avenues of expert testimony without having to reveal their interim work product with the other side, in order to encourage a free, open, and honest determination of the merits of the case and to not unfairly bind a party to preliminary analyses that may turn out to be inaccurate. However, once it becomes reasonably likely that the information will be used at trial, it is subject to discovery. Mr. Bollea will comply with this obligation, but forcing him to reveal information that may not even be presented at trial would be a clear invasion of his counsels' ability to do their jobs.

There is no prejudice to Gawker from adherence to this established procedure. Indeed, the parties negotiated a set of deadlines for fact and expert discovery, agreeing to commence the exchange of expert information on March 6, with depositions in March and April. Thus, this motion is simply an attempt to jump the gun.

Gawker and Denton rely on statements by Judge Campbell taken out of context about the importance of discovery of damages theories. Those statements, however, related to information about the **nature** of damages, not their calculation. That discovery was provided by Mr. Bollea in response to the Court order, and Mr. Bollea has continued to supplement his response to Interrogatory 12 (requesting his damages theories) as he has obtained additional information. However, it has always been understood by all parties that the value of Mr. Bollea's rights that

Gawker violated, and the calculation of the benefits that Gawker obtained as a result of its publication of the Sex Video, would be calculated by expert witnesses.

II. ARGUMENT

Under black letter Florida law, the work product of lawyers is not discoverable absent a showing of compelling need, and the thoughts, impressions, and conclusions of lawyers are never discoverable. Fla. R. Civ. P. 1.280(b)(4). Further, "[d]iscovery of facts known and opinions held by experts, otherwise discoverable . . . and acquired or developed in anticipation of litigation or for trial, may be obtained **only**" by use of the procedures for expert witness disclosure and discovery under the Florida rules. Fla. R. Civ. P. 1.280(b)(5) (emphasis added).

These longstanding rules, which are patterned after the Federal Rules of Civil Procedure, resolve the basic tension relating to discovery of the opinions and analyses and calculations of experts—on the one hand, before they become reasonably likely to be used at trial, they are not discoverable (because they are work product under Rule 1.280(b)(4) and will not be discoverable during percipient discovery under Rule 1.280(b)(5)); on the other hand, when a party decides to engage an expert for testimony at trial, these opinions, analyses, and calculations become discoverable and are subject to disclosure during the expert discovery process.

Importantly, materials must be **likely** to be used at trial before they become discoverable. In *Bishop ex rel. Adult Comprehensive Protective Services, Inc. v. Polles*, 872 So.2d 272, 274 (Fla. 2d DCA 2004), an interrogatory seeking all materials that conceivably could be offered in evidence at trial was held to be overbroad under the work product doctrine. "[I]tems a party reasonably expect[s] or intend[s] to utilize at trial are fully discoverable. However, this interrogatory requests items that a party might conceivably offer as evidence at trial, which do not meet the standard and are, accordingly, not discoverable." *Id.* (internal quotations omitted);

accord Kranias v. Tsiogas, 941 So.2d 1173, 1174-75 (Fla. 2d DCA 2006) (party not required to serve response or privilege log in response to document demand requiring production of all documents that relate to an allegation in the complaint, where demand is not limited to documents reasonably likely to be presented at trial).

Gawker and Denton have not made the requisite showing that Mr. Bollea has withheld any materials that are **likely** to be used at trial. Gawker speculates that Mr. Bollea has retained experts who have completed damages calculations, but this is not the case. Mr. Bollea has informed Gawker of the theories that he is likely to present at trial, and when he retains experts for the purpose of giving trial testimony and the calculations are made, that discovery will be provided to Gawker as well pursuant to Rule 1.280(b)(5) and the Court's scheduling order regarding expert discovery, which Gawker stipulated to. However, as of now, the information sought is still protected by the work product doctrine.

Gawker and Denton's reliance on *Northup v. Acken*, 865 So.2d 1267 (Fla. 2004), is misplaced. *Northup* is not inconsistent in any way with *Bishop*, simply stating that where evidence is reasonably expected to be used at trial, at that point (and not before) it loses its work product protection. *Id.* at 1272 ("**Only at such time** as the attorney should reasonably ascertain in good faith that the material may be used or disclosed at trial is he or she expected to reveal it to the opposing party.") (emphasis added).

Gawker and Denton cite *Behm v. Cape Lumber Co.*, 834 So.2d 285 (Fla. 2d DCA 2002), in support of their argument that damages evidence is discoverable, but *Behm* did not involve the discovery of expert **analysis**. *Behm* held that a trial court erred in not permitting discovery of what payments and credits were received by the party alleging nonpayment in a breach of

contract case. There was no work product issue and *Behm* does not stand for the proposition that **expert calculations** of damages are discoverable outside of the expert discovery process.

Finally, Gawker's and Denton's arguments that Mr. Bollea is in violation of a court order are simply a rehash of their argument that they are entitled to an early preview of Mr. Bollea's lawyers' and consultants' work product. Nowhere did Judge Campbell ever rule that Mr. Bollea was required to produce material protected by the work product doctrine, or the work of consultants employed to work on damages issues. Gawker and Denton are essentially claiming that Judge Campbell ordered expert discovery almost two years before trial. That contention obviously has no merit.

III. CONCLUSION

For the foregoing reasons, the motion to compel should be denied.

DATED: February 12, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 12th day of February, 2015 to the following:

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