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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM, *et al.*,

Defendants.
_____________________________________/

EXCEPTIONS TO RULING PRECLUDING DISCOVERY ABOUT MEDIA REPORTS BEARING ON WHETHER THE GAWKER PUBLICATION ADDRESSED MATTERS OF PUBLIC CONCERN

Pursuant to Rule 1.490 of the Florida Rules of Civil Procedure, defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio hereby file exceptions to a ruling made by the Special Discovery Magistrate during a deposition on March 2, 2015. That ruling precluded defendants from taking discovery about the extensive media attention devoted to plaintiff's sex life. The Special Discovery Magistrate mistakenly concluded that this ruling was compelled by the Court's February 26, 2014 Protective Order limiting discovery about plaintiff's "sexual and/or romantic relationships" to his relationship with defendant Heather Clem. The deposition ruling was plainly erroneous.

During the deposition, defendants did not seek any information about plaintiff's sex life. Rather, defendants sought to take discovery designed to show that plaintiff's sex life has been the subject of long-standing public interest and pervasive press coverage. Far from being off limits, those topics are at the heart of one of the central issues in this case – whether Gawker's publication about the Hulk Hogan sex tape (the "Gawker Publication") addressed matters of public concern. Indeed, in previously holding that the Gawker Publication addressed matters of

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public concern, the District Court of Appeal for the Second District expressly relied on the very kind of materials – prior published media reports about plaintiff's sex life – that the Special Discovery Magistrate ruled out of bounds. Simply put, both the text of this Court's Order on this issue and the appellate court's opinion make plain that the Special Discovery Magistrate's ruling was incorrect.

Defendants respectfully request that the Special Discovery Magistrate's Report and Recommendation – as embodied in his March 2, 2015 oral ruling and recorded in the transcript of that deposition – be overruled.

THE SPECIAL DISCOVERY MAGISTRATE'S RULING

The ruling in question was rendered during the deposition of Elizabeth Rosenthal Traub, a "PR professional" specializing in "[m]edia relations." Ex. A (Traub Dep.) at 18:22-23. Traub has handled public relations for plaintiff and his family since 2004. *See id.* at 31:20 – 32:20. During the deposition, Traub testified that there is considerable media interest in plaintiff and that he is a celebrity who is "part of the national consci[ousness]." *Id.* at 34:19 – 35:6. She further explained that he is "known" for his "wrestling," his reality television shows, and "his personal drama." *Id.* at 35:16-21. Traub thus conceded that plaintiff's "personal" and "family" life are "[a]t times" covered by the press, including "the tabloids." *Id.* at 43:16 – 45:12.

Counsel for defendants followed up this testimony by asking Traub about specific instances in which plaintiff's personal life has been the subject of tabloid media coverage. First, Traub was asked about an article published on the entertainment website *E! Online*, which she testified was an example of press coverage about plaintiff's divorce. *Id.* at 45:19 – 47:5; Ex. B (Traub Dep. Ex 114). Then, when defendants' counsel asked Traub about press coverage of plaintiff's 2007 affair with Christiane Plante, she acknowledged that the press covered "his

relationship with her." *Id.* at 47:6-12. At that point, defendants' counsel sought to ask Traub about a specific tabloid article – an article in *The National Enquirer* breaking news about the Plante affair – but plaintiff's counsel objected. *Id.* at 47:18 – 48:8; Ex. C (Traub Dep. Ex. 115). Plaintiff's counsel argued that this line of questioning violated the Protective Order because "[s]exual relationships with people other than Hulk Hogan, Terry Bollea, and the Clems is outside of the scope of discovery." Ex. A (Traub Dep.) at 47:23 – 48:8.

The Special Discovery Magistrate heard argument from both sides and then sustained the objection. He explained: "I'm constrained with Judge Campbell's restrictions saying that no other sexual activity with anyone other than the Clems' has anything to do with this case." *Id.* at 51:24 – 52:4. On that basis, the Special Discovery Magistrate ruled that defendants could not ask the witness about the *public media coverage* of plaintiff's sex life. *See id.* at 47:23 – 58:18 (complete argument on objection).

After sustaining plaintiff's objection, the Special Discovery Magistrate raised the possibility of "revisit[ing]" plaintiff's objection "with Judge Campbell." *Id.* at 56:19-22. Plaintiff's counsel then represented that, if defendants filed exceptions and such questions were permitted, the witness would be made available again. *See id.*at 57:11-16. In accordance with the Special Discovery Magistrate's suggestion, defendants now file these exceptions.

ARGUMENT

The Special Discovery Magistrate's ruling was in error and should be overruled. As an initial matter, the excluded line of questioning did not in any way conflict with the Protective Order. That Order, which pre-dated the Special Discovery Magistrate's involvement in this case, was entered to shield plaintiff from having to identify all people with whom he had engaged in sexual relationships and to disclose the intimate details of those relationships. *See* Ex. A (Traub

Dep.) at 50:2-5 (remarks of plaintiff's counsel explaining that the protective order was sought in response to discovery asking about "every single [sexual] relationship [plaintiff] ever had," and "[t]hat's where the Judge drew the line"); Ex. D at 6:15-19 (excerpt from Oct. 29, 2013 hearing on motion for protective order in which plaintiff's counsel sought to prevent discovery into "everything about every person he's had sex with in the course of several years, the details of all of those sexual encounters, everything you can imagine pertaining to his sex life"). Specifically, the Protective Order barred "inquiry into . . . all sexual and romantic relationships of Terry Bollea and Heather Clem, respectively, with the sole exception of the sexual and/or romantic relationship between Terry Bollea and Heather Clem (as to the time period January 1, 2002 to the present) . . . absent further order of the [C]ourt." Ex. E (Protective Order) at ¶ 4.

The Protective Order was not designed to foreclose inquiry into published and widely-circulated media reports about plaintiff, even if those publications were about his sex life. Indeed, in arguing for the Protective Order, plaintiff's counsel recognized this distinction, objecting to discovery into the details of plaintiff's sexual relationships, but acknowledging that "press stories" were an appropriate field of discovery. *See* Ex. D (Oct. 29, 2013 Hrg. Tr.) at 70:23 – 71:5 (explaining that plaintiff "does not keep press stories," but "[i]f they want press stories, they can do a search. Lexis-Nexis has a database. Google has a database. They're a news organization. I assume they know how to get news stories. And we're not hiding anything. It's – those types of things are available.").

As such, defendants' questions did not violate the Protective Order in any way. Defendants did not seek to inquire into plaintiff's sexual history. They did not seek any intimate details about plaintiff's sexual relationships. They did not ask, and did not plan to ask, Traub to testify about plaintiff's sex life or about the facts underlying published news reports. Defendants

simply did nothing to violate the Protective Order's intent or its terms. Rather, defendants' focus was exclusively on whether plaintiff's sex life was the subject of *media coverage* and the extent, nature, and tenor of that coverage.

By excluding this line of questioning, the Special Discovery Magistrate's ruling treated these two separate inquiries – one into the details of plaintiff's sex life and one about the public press attention devoted to his sex life – as the same. *See* Ex. A (Traub Dep.) at 56:8-9 (suggesting that defendants were "trying to come in the back door of Judge Campbell's ruling"). The Protective Order undoubtedly precludes discovery into the details of plaintiff's sexual relationships other than with Heather Clem. But, defendants did not seek the details of any sexual relationships or even ask whether the press coverage of plaintiff's sex life was accurate. That was not the focus of the questions. The Special Discovery Magistrate's ruling thus misapprehended the line of inquiry defendants were pursuing, and, more fundamentally, overlooked the specific relevance of facts about the *media coverage* of plaintiff's sex life to this case.

One of the central issues in this litigation is whether the Gawker Publication addressed matters of public concern. That issue is case dispositive: If the Gawker Publication addressed matters of public concern, plaintiff cannot prevail on any claim.[1] The opinion rendered by the

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[1] *See, e.g.*, *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (required element of claim of publication-of-private-facts claim is that the publication is not of "legitimate concern to the public"); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219-1220 (2011) (First Amendment bars recovery for claims for intrusion upon seclusion and intentional infliction of emotional distress where speech at issue addresses matters of public concern); *Jacova v. So. Radio & Television Co.*, 83 So. 2d 34, 36 (Fla. 1955) (unauthorized use of a plaintiff's name or likeness in connection with the dissemination of news or other matters of public interest cannot give rise to liability); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (First Amendment bars liability for publication of illegally obtained information if publisher obtained information lawfully and publication addresses matter of public concern).

Court of Appeal in resolving the earlier temporary injunction appeal squarely addressed this issue and made clear that the discovery sought by defendants is relevant.

In concluding that the Gawker Publication *did* "address matters of public concern," the Court of Appeal explicitly relied on the long history of news coverage of and public interest in plaintiff's sex life. *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1200-01 (2d DCA 2014). For example, the Court noted that plaintiff himself "openly discussed an affair he had while married to Linda Bollea in his published autobiography and otherwise discussed his family, marriage, and sex life through various media outlets." *Id.* at 1201. In fact, the appeals court pointed to the publicity surrounding the very extramarital affair that sparked plaintiff's objection at Traub's deposition. *See id.* at 1200 & n.4 (citing pages 187-88 of plaintiff's autobiography, where he described his first kiss with Plante and the number of times they had sexual relations).[2]

The dubious nature of plaintiff's objection, and the error in the Special Discovery Magistrate's subsequent ruling sustaining it, is underscored by the fact that the objection was made to questioning about *The National Enquirer*'s reporting about the Plante affair – reporting that plaintiff discussed in his autobiography. There, plaintiff wrote that, following *The National Enquirer*'s breaking of the story, the Plante "affair became national news. I don't think there's a blog or entertainment show in America that didn't run with the story of Hulk Hogan cheating on his wife." Ex. F at 253 (excerpt from *My Life Outside the Ring*). The Court of Appeal cited this discussion in plaintiff's book in ruling that the Gawker Publication addressed matters of public concern. *See Bollea*, 129 So. 3d at 1200 n. 4 (citing page 253 of *My Life Outside the Ring*). Here, that *National Enquirer* report and other national news about plaintiff's sex life were the

[2] To the extent that the Protective Order could somehow be read to restrict discovery about public press reports about plaintiff's sex life, that aspect of the Order cannot stand in light of the appellate court's subsequent decision explicitly discussing why those published reports are relevant and, in defendants' view, case dispositive.

subject of defendants' questioning of Traub, a witness who has handled public relations for plaintiff and his family for more than a decade and who handled "publicity surrounding [plaintiff's] book." Ex. A at 45:2-9. The Special Discovery Magistrate's ruling sustaining objections to questions about this press coverage runs directly counter to the Court of Appeal's opinion, which considered this very evidence to be both relevant and dispositive.

In arguments before the Special Discovery Magistrate, plaintiff's counsel attempted to dismiss the significance of the Court of Appeal's prior decision, contending that it was made in the "temporary injunction" context, "before there was any discovery." Ex. A (Traub Dep.) at 50:16 – 51:5. His contention is meritless. Even if the *record* might have been different at the temporary injuction stage, the appellate court's *legal analysis* of how to approach the public concern issue expressly outlines the kind of facts that are relevant for developing a full record after that initial stage, facts that include prior *public* and *widely-circulated news coverage* of plaintiff and his sex life. Yet, the Special Discovery Magistrate foreclosed that discovery and improperly curtailed the development of that very record. It makes no sense that media materials that were considered *determinative* of the public-concern issue by the appellate court at the temporary injunction stage would not even be *discoverable* in this Court at the merits stage. Nonetheless, that is precisely the result of the deposition ruling.

Nor was counsel for plaintiff on any firmer ground in contending that prior media reports about plaintiff's sex life were irrelevant to determining whether the Gawker Publication about his sex life addressed matters of public concern. *Id.* at 54:11-21. Even apart from the precedential nature of the legal analysis in the appellate court's decision itself, that Court followed well-established precedent in holding that whether a publication addresses matters of public concern must be assessed by looking at the broader media context and the surrounding

public interest in the general subject matter of the challenged report. *See, e.g.*, *Loft v. Fuller*, 408 So. 2d 619, 620-21 (Fla. 4th DCA 1981) (relying on prior reports which "received extensive publicity by the news media" in concluding that book involved matter of public concern and affirming order dismissing right of publicity claim on that basis); *see also Snyder*, 131 S. Ct. at 1216, 1219-20 (explaining that public-concern determination must be made based on the "content, form, and context" of challenged speech, and concluding, based on the broader context, that protest signs at private funeral addressed matters of public concern). Indeed, such an approach is especially warranted in a case such as this one, where the challenged publication addressed a celebrity plaintiff's sex life, making the question of the extent of the press's and public's interest in his sex life a key issue in the case. *See, e.g.*, *Michaels v. Internet Entertainment Group, Inc.*, 1998 WL 882848, at *9-10 & n.4 (C.D. Cal. Sept. 11, 1998) (publication that included sex-tape excerpts addressed matter of public concern because of extensive prior media interest in both that celebrity's sex life in general and the sex tape in particular); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309, at *5 (C.D. Cal. Mar. 19, 1997) ("the sex life of Tommy Lee and Pamela Anderson is . . . a legitimate subject for an article," and sexually explicit pictures of the couple accompanying the article were "newsworthy," especially given prior reports and statements by plaintiffs about their sex lives). The Special Discovery Magistrate's ruling impermissibly foreclosed discovery directly relevant to that inquiry.

Because the Special Discovery Magistrate's ruling was not compelled by the Protective Order governing this case and was plainly erroneous given the law governing whether a

publication addressed matters of public concern, and the facts relevant to that analysis, it should be overruled.[3]

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Special Discovery Magistrate's March 2, 2015 Report and Recommendation, as embodied in his oral ruling on that date and recorded in the transcript of Traub's deposition, be overruled.

Dated: March 9, 2015

Respectfully submitted,

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[3] To the extent that the Court interprets the Protective Order to bar discovery into press coverage of plaintiff's sex life, defendants respectfully request that it permit that discovery consistent with the Order's provision permitting discovery related to plaintiff's "sexual and romantic relationships" upon "further order of the [C]ourt." *See* Ex. E (Protective Order) at ¶ 4.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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