

## **EXHIBIT 3**

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

Defendants.

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**OPPOSITION BY GAWKER MEDIA, LLC AND A.J. DAULERIO  
TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

Gawker Media, LLC and A.J. Daulerio (collectively, "Gawker") hereby respectfully submit their opposition to Plaintiff's Motion for Protective Order. Plaintiff's motion seeks to severely restrict Gawker's ability to obtain essential discovery and should be denied.

**BACKGROUND**

As this Court is aware, this case challenges a report and commentary (the "Gawker Story") published on Gawker.com by Gawker Media, LLC, concerning an extramarital affair that the celebrity publicly known as Hulk Hogan conducted with Heather Clem, the wife of his then-best friend (Bubba the Love Sponge Clem, himself also a celebrity), with Mr. Clem's blessing. It also challenges the publication, along with the Gawker Story, of brief excerpts (the "Excerpts") of a longer video (the "Video") depicting the encounter. Based on the Gawker Story and the Excerpts, plaintiff alleges claims against Gawker for invasion of privacy, for violation of his publicity rights, for negligent and intentional infliction of emotional distress, and for violation of the publication prong of Florida's wiretap statute. He also has asserted similar

claims against Ms. Clem, who is separately represented, alleging that she played some role in making and disseminating the Video.

In connection with plaintiff's claims against it, Gawker has pursued several avenues of discovery. It served plaintiff with document requests and interrogatories aimed at, among other things, obtaining information about the privacy claims alleged in his complaint and the damages he claims to have suffered. It noticed the deposition of plaintiff for two days, after consulting with Ms. Clem's counsel, who advised that he needed at a minimum a day to question plaintiff apart from whatever Gawker's counsel might need. And Gawker noticed the depositions (for one day each) of plaintiff's current wife, Jennifer Bollea, and has attempted to schedule the deposition of his former wife, Linda Bollea; both women obviously possess relevant knowledge concerning this dispute. Indeed, Jennifer Bollea submitted a factual affidavit in support of plaintiff's motion for a temporary injunction.

In response to these discovery requests, plaintiff filed his motion for protective order. In it, plaintiff seeks to seriously inhibit Gawker's discovery efforts by arguing (1) that Gawker is entitled to virtually no discovery about plaintiff's personal life, including the extent to which he maintained the privacy of his sex life (which is obviously relevant to his privacy claims) or his medical and mental health history (which is obviously relevant to his claims of having suffered severe "emotional distress" as the result of the Gawker Story), (2) that Gawker and Ms. Clem together should be limited to one day to depose plaintiff (even though he is subject to discovery on multiple topics, he is subject to questioning by both Gawker and Ms. Clem, and Gawker has readily agreed to make *its* corporate representative available for two full days), and (3) that the deposition of plaintiff's ex-wife should be precluded entirely and that both Gawker and Ms.

Clem should, together, be permitted only two hours to take the deposition of plaintiff's current wife.

Because the discovery plaintiff seeks is proper in this context of this case, and is necessary to Gawker's defense, plaintiff's arguments should be rejected, and his motion denied.

## ARGUMENT

### A. **Gawker Is Entitled to Information About Plaintiff's Personal Life.**

Plaintiff contends that he should not have to provide *any* discovery about his personal life or *any* discovery about his medical and mental health history on the grounds that these matters are (1) "private," and (2) not relevant to the issues to be decided in this case. Pl.'s Mot. at 4-8. Both of these arguments fail for the reasons explained in Gawker's Motion to Compel (filed Sept. 11, 2013). In order to avoid burdening the court with redundant briefing, Gawker does not repeat its arguments here in full, but rather, incorporates by reference the arguments set forth in that Motion to Compel at 16-21 (concerning plaintiff's medical and mental health history) and at 23-30 (concerning plaintiff's personal life, including the extent to which he has – or has not – maintained the privacy of his sex life as it relates to his privacy claims), and summarizes those arguments briefly below.

**First, plaintiff's privacy concerns can be alleviated by the protective order for confidential information in place in this case.** Gawker understands that information about plaintiff's medical and mental health history and personal life may be sensitive. Indeed, it was precisely for this reason that Gawker initiated the entry of an agreed protective order, the terms of which were carefully negotiated with plaintiff. Thus, to the extent that plaintiff believes that his responses to this line of discovery requests should be maintained as confidential, he may avail himself of the protective order. That is the proper course in these circumstances. *See*

*Westchester Gen. Hosp., Inc. v. Ramos*, 754 So. 2d 838, 840 (Fla. 3d DCA 2000) (rejecting petitioner’s objection to production of sensitive information by noting that “there is a protective order preserving the confidentiality of that information”); *see also Homeward Residential, Inc. v. Rico*, 110 So. 3d 470, 471 n.1 (Fla. 4th DCA 2013) (*per curiam*) (dismissing privacy-based discovery objection and noting that “the court entered a confidentiality order as to the documents produced”); *Laser Spine Inst. v. Makanast*, 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011) (party seeking protective order preventing disclosure of confidential information was only entitled to stay of production “until the parties had an opportunity to negotiate a proper protective order or confidentiality agreement,” not general relief from disclosure); *Columbia Hosp. (Palm Beaches) Ltd. Partnership v. Hasson*, 33 So. 3d 148, 151 (Fla. 4th DCA 2010) (*per curiam*) (same).

Indeed, here, after Gawker served its discovery requests, and realizing that some of the information the parties would seek from each other might be sensitive, Gawker worked with counsel for the other parties to submit to the Court an Agreed Protective Order, which the Court entered. Even though plaintiff already had before him Gawker’s discovery requests, at no time during that process, which lasted many weeks, did plaintiff’s counsel advise that, instead of responding to discovery under the confidentiality order, he intended to have that order entered, accept Gawker’s discovery of sensitive information thereunder, and then turn around and object completely to producing plaintiff’s information. This is not how the process is supposed to work, and this Court should rely on the jointly-submitted order it has already entered in requiring plaintiff to produce discovery going to central issues in the case, even if it is sensitive.

**Second, information about plaintiff’s medical and mental health history is obviously relevant to his claims for damages.** Plaintiff argues in his motion that discovery concerning his medical and mental health “is not permitted” in connection with the type of “garden variety”

emotional distress claim he is making. Pl.'s Mot. at 8. This argument is incorrect. Under Florida law, a plaintiff who claims emotional injuries, as plaintiff has undeniably done here,<sup>1</sup> necessarily puts his mental condition at issue. *See, e.g., Nelson v. Womble*, 657 So. 2d 1221, 1222-23 (Fla. 5th DCA 1995); *Scheff v. Mayo*, 645 So. 2d 181, 182 (Fla. 3d DCA 1994) (*per curiam*); *Arzola v. Reigosa*, 534 So. 2d 883, 883 (Fla. 3d DCA 1988) (*per curiam*); *see also, e.g., Wheeler v. City of Orlando*, 2007 WL 4247889, at \*3 (M.D. Fla. Nov. 30, 2007) (rejecting assertion that plaintiff was asserting “garden variety” emotional distress that did not permit discovery into mental and physical health on ground that “a claim for Intentional Infliction of Emotional Distress . . . puts . . . mental health directly into controversy”); *Chase v. Nova Se. Univ., Inc.*, 2012 WL 1936082, at \*4 (S.D. Fla. May 29, 2012) (asserting a claim for intentional or negligent infliction of emotional distress places plaintiff’s mental condition “in controversy”).

Indeed, as explained in greater detail in Gawker’s Motion to Compel, claims of “garden variety” emotional distress are limited to those circumstances where, unlike here, the primary injury is something other than emotional distress and any recovery for distress suffered *along with* such other injury is an award of nominal damages. *See* Gawker Mot. to Compel at 19-20 (citing cases). Because plaintiff here is seeking substantial damages (his federal court complaint initiating this dispute sought \$100,000,000.00) for a number of torts where the sole recovery

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<sup>1</sup> Plaintiff has alleged that Gawker’s actions caused him “tremendous emotional distress,” Am. Compl. ¶ 31, and each of his causes of action is premised on that contention. *See* Am. Compl. ¶ 64 (alleging “severe emotional distress” and “anxiety,” among other things, in connection with plaintiff’s “private facts” claim, Count Three), ¶ 74 (same with respect to his “intrusion” claim, Count Four), ¶ 83 (same with respect to his “publicity” claim, Count Five), ¶¶ 85-93 (asserting claim for intentional infliction of emotional distress, Count Six), ¶¶ 94-99 (asserting claim for negligent infliction of emotional distress, Count Seven), ¶ 107 (asserting emotional distress in connection with his “wiretap” claim).

available to him is for emotional distress, any supposed limitation on discovery in cases in which a plaintiff seeks only “garden variety” emotional distress does not apply here.<sup>2</sup>

Nor can plaintiff avoid discovery of his medical and mental health history on the grounds that he “is not claiming that he was forced to seek medical treatment.” Pl.’s Mot. at 8. Even assuming this is true, Gawker is still entitled to information about his medical and mental health records, and his healthcare providers, in order to determine, *inter alia*, (a) whether plaintiff was experiencing emotional distress from other causes prior to the events giving rise to the lawsuit; (b) whether there was any change in plaintiff’s physical or mental health following those events; and (c) whether there were other circumstances affecting plaintiff’s medical and mental health at that time that might have also caused emotional distress of which he complains. *See* Gawker Mot. to Compel at 20-21 & n.7. Indeed, as demonstrated by plaintiff’s public statements, including passages in his autobiography detailing a near suicide attempt that pre-dated the Gawker Story, it would be manifestly unfair to allow plaintiff to seek substantial damages for alleged emotional distress purportedly caused by Gawker without allowing Gawker to explore other causes and the surrounding circumstances. *Id.* Simply put, plaintiff cannot be allowed to allege core claims for mental distress and then refuse to provide discovery related to such claimed distress.

**Third, information about plaintiff’s personal life and sex life is relevant to his claims that Gawker invaded his privacy.** Despite plaintiff’s arguments to the contrary, information about his personal and sex life (including, among other things, whether he engaged in affairs

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<sup>2</sup> In his motion, plaintiff cites *Olges v. Dougherty*, 856 So. 2d 6 (Fla. 1st DCA 2003) (Pl.’s Mot. at 8), but that case *supports* the discovery Gawker seeks. The only reason the court denied discovery into plaintiff’s mental and medical condition in *Olges* was because plaintiff had “abandoned his original efforts to recover damages for mental anguish, emotional distress and other emotional damages.” 856 So. 2d at 12. Here, plaintiff continues to seek such damages, and the discovery is therefore warranted. *See* Gawker Mot. to Compel at 18-20.

other than with Heather Clem and whether he made other sex tapes) is directly relevant to his claims for invasion of privacy. Indeed, plaintiff's *own* discovery requests to defendant Heather Clem make clear that he recognizes that the nature of this case involves discovery into otherwise sensitive areas. For instance, plaintiff has served on an interrogatory on Ms. Clem that asks her, for the period in which she was married to Bubba Clem, to identify each person, other than Mr. Clem, with whom she was recorded engaging in sexual relations. *See* Ex. A, attached hereto (Plaintiff's First Set of Interrogatories to Defendant Heather Clem) at No. 2.

To sustain his privacy-related claims, plaintiff must establish (and Gawker must have the opportunity to refute) that the Gawker Story and Excerpts are private, the disclosure was highly offensive under the circumstances, and was not newsworthy. *See, e.g., Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (essential elements of "private facts" claim is that disclosed information is private, the disclosure was "highly offensive" and "not of public concern"); Gawker Mot. to Compel at 23.<sup>3</sup> In his motion, plaintiff cites *Tylo v. Superior Court*, 64 Cal. Rptr. 2d 731 (Cal. Ct. App. 1997), for the proposition that discovery on sex-related issues may be limited. *See* Pl.'s Mot. at 6. But *Tylo* is inapposite here because it was a pregnancy discrimination case, and plaintiffs in discrimination cases typically do not have to show that the information is private or lacks "newsworthiness," as plaintiffs alleging invasion of privacy must show.

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<sup>3</sup> Gawker believes the issue of the newsworthiness of the Gawker Story and Excerpts is issue has already been adjudicated decisively against him. *See Bollea v. Gawker Media, LLC*, 2012 WL 5509624, at \*3 (M.D. Fla. Nov. 14, 2012) (determining that the "Video is a subject of general interest and concern to the community" because, among other reasons, plaintiff derived publicity from a reality show about his personal life, from an autobiography describing a (different) extramarital affair, and from his own "public discussion of issues relating to his marriage" and his "sex life"); Gawker Mot. to Compel at 28-30. But to the extent that plaintiff disagrees and contends that newsworthiness remains a live issue, Gawker is entitled to full discovery related to this topic.



Here, the information Gawker seeks concerns the very issues plaintiff himself has placed at issue and is therefore discoverable. *See Condit v. Dunne*, 225 F.R.D. 100, 111 (S.D.N.Y. 2004) (in lawsuit involving publication about sex life of plaintiff Gary Condit, defendants are entitled to discovery concerning plaintiff's sexual relationships). Just as plaintiff cannot put his mental state at issue and then refuse to provide information on that very topic, he cannot be allowed to claim that Gawker's conduct invaded his privacy without allowing Gawker the ability to take discovery on the extent to which plaintiff treated such conduct as private – including by having other extramarital affairs, recording other sex tapes, and sharing information about such topics with others – or whether his conduct and public statements – as well as other prior news reports – made the publication newsworthy and not highly offensive under the circumstances.<sup>4</sup>

At bottom, plaintiff asserts that, because his privacy has been invaded by the Gawker Story, it should not be further invaded by discovery in this case. *See* Pl.'s Mot. at 2. Even putting aside that plaintiff equates the *publication* of the Gawker Story with the *discovery under a protective order* sought here, his argument puts the cart before the horse because it assumes that he has already established his case with respect to the publication. In actuality, this case is still early in discovery, one purpose of which is to allow the Gawker to obtain the information it needs to challenge the factual *allegations* of plaintiff's complaint, including that plaintiff's privacy was invaded. While sensitive information can be produced pursuant to a protective order (Gawker has also produced its own sensitive information to plaintiff in that manner), outright denial of discovery going to essential elements of plaintiff's causes of action, on which he bears

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<sup>4</sup> In addition to being relevant to plaintiff's privacy claims, information about plaintiff's sex life is also likely to be needed for impeachment purposes, given plaintiff's oft-changing public statements about his marital fidelity, and thus is discoverable on that basis as well. *See* Gawker Mot. to Compel at 30, 34.

the burden of proof, is fundamentally unfair. *See Westchester Gen. Hosp.*, 754 So.2d at 840 and other cases cited *supra* at 4.

**B. Defendants Are Entitled to a Full Deposition of Plaintiff.**

Plaintiff next argues that both Gawker and Heather Clem, together, should have just one day in which to take his deposition. This position runs contrary to practice in this *venire*, in which depositions of key parties routinely extend for multiple days, and is unjustifiable for several reasons.

**First**, plaintiff has alleged six separate causes of action against Gawker and, by doing so, has put at issue a number of topics. Obviously, Gawker is entitled to ask plaintiff about the liability issues in this case, including the affair at issue, the recording of the Video, the nature of his relationship with the Clems, his knowledge about the Clems' home surveillance system, his knowledge about other recordings of Ms. Clem having sexual relations with someone other than her husband, and the extent to which he maintained the privacy of his affair with Ms. Clem (and other similar affairs). *See* Gawker Mot. to Compel at 23-29, 33-37. Gawker is also entitled to ask him about his claimed damages, including (a) the emotional distress he claims to have suffered and whether it was caused in whole or in part by other circumstances, (b) the injury he claims to have suffered to his "brand" and/or "commercial value" (*see* Am. Compl. ¶ 31), including the "commercial value" of "Hulk Hogan," the value of his "brand," and the efforts plaintiff made to maintain his image, brand and value, as well as specific opportunities he claims he lost because of the Gawker Story, and (c) any efforts to mitigate either of these alleged categories of damages. *See* Gawker Mot. to Compel at 7-16. These subjects alone could involve more than a day's worth of questioning by Gawker's counsel (not even accounting for Ms. Clem's attorney's planned questioning), particularly given that, as detailed in Gawker's Motion

to Compel, plaintiff's responses to written discovery requests seeking such information were sorely lacking. Indeed, a number of these topics will require more extensive questioning in light of the fact that plaintiff has produced virtually no documents or information as to them. *See generally* Gawker Mot. to Compel.

**Second**, Gawker is not the only party seeking to depose plaintiff. Plaintiff has also named Heather Clem as a defendant in this lawsuit, and has asserted five causes of action against her based on conduct separate from Gawker's. She will have different defenses, different exposure, and, presumably, potentially be subject to a different damages calculation than Gawker. Ms. Clem is fully entitled to pursue her own line of questioning, and indeed, her counsel has already indicated that his intended questioning of plaintiff alone "will last a minimum of one day." *See* Ex. B, attached hereto (email from B. Cohen to C. Harder, dated July 16, 2013).

**Third**, it would be manifestly unfair to limit the time Gawker is allowed to depose the plaintiff to one day, when Gawker itself has agreed – without any objection – to produce its own corporate representative for two full days, recognizing its obligations to provide broad disclosure and to cooperate in the discovery process. Moreover, not only is Gawker making its corporate representative available for two days, but it also has not objected to the separate depositions of three *other* current or former Gawker employees, *in addition to* the corporate representative, each of them for a full day.<sup>5</sup> Plaintiff argues in his motion that significant discovery from Gawker is necessary to cover the issues surrounding Gawker's conduct and the resulting damages to which plaintiff claims he is entitled. Pl.'s Mot. at 9. But it is just not reasonable to

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<sup>5</sup> In addition to the Gawker corporate representative, plaintiff is scheduled to take the depositions of A.J. Daulerio, the former editor-in-chief of Gawker.com who wrote the Gawker Story; Kate Bennert, a former video editor at Gawker.com who edited the Excerpts; and Nick Denton, the president of Gawker Media, LLC.

assume that plaintiff needs *five days* with Gawker witnesses while at the same time contending that Gawker should be limited to *one* day with plaintiff (which it must share with another defendant). Gawker certainly has no less need to question plaintiff than plaintiff has to question it.

In addition, as a matter of practicality and logistics, it does not make sense to place an artificially short time limit on plaintiff's deposition. The depositions to occur in Florida in this case (including plaintiff's, his wife's, and Ms. Clem's) were scheduled this past summer after considerable efforts among counsel to schedule a time when all parties and counsel were available for consecutive days. This was no small feat considering that counsel for plaintiff will be traveling from California and Nevada and counsel for Gawker will be traveling from Washington, DC. Limiting plaintiff's deposition, only to inevitably determine later that further questioning is warranted, would cause unnecessary inconvenience and burden for all involved.

Plaintiff should be required to make himself fully available to defendants, just as they have made themselves available to him.

**C. Defendants Are Entitled to Full Depositions of Plaintiff's Wife and Ex-Wife.**

In addition to seeking to limit his own deposition, plaintiff seeks to limit the deposition of his wife to two hours (which, according to him, must be split between Gawker and Heather Clem) and to prevent the deposition of his ex-wife entirely. He should not be permitted to do either.

**1. Jennifer Bollea, plaintiff's wife**

Plaintiff seeks to limit the deposition of Jennifer Bollea on the grounds that she only has information relevant to plaintiff's damages and not to the making or dissemination of the Video at issue. Pl.'s Mot. at 9-10. Gawker disagrees that Jennifer Bollea's testimony is likely to focus

only on plaintiff's claimed damages. In addition to information about damages, Jennifer Bollea can provide evidence concerning the plaintiff's public image, his brand, his efforts at maintaining privacy, his relationship with Bubba Clem, and his public appearances, among other things. But, even if she *were* only to testify about damages, this would not be a basis for limiting her deposition to just two hours, split between Gawker and Heather Clem. Indeed, she apparently has a significant amount to say about plaintiff's alleged damages, particularly his claim to have suffered emotional and mental distress. She herself submitted an affidavit in this case (dated April 18, 2013) in which she asserted (a) that the Gawker Story and Excerpts have caused "a significant strain on [her] marriage," ¶ 2, (b) that the publication has caused her to have "nightmares" and "lose sleep," ¶ 4, and (c) that, when she is out in public with her husband, strangers often come up to them and ask them about the Video, ¶ 5.

Moreover, in plaintiff's own public statements about the Gawker Story, he has focused repeatedly on the harm that Gawker allegedly caused to his marriage. For instance, on the Howard Stern Show, he summed up his unhappiness about the publication by saying, "On a personal level, I pray to God that Jennifer can hang in there with me," adding, later in the interview, that most wives would have left over something like this. *See* Howard Stern Show: Terry Bollea Interview, October 9, 2012, *available at* [http://www.youtube.com/watch?v=RjmC\\_M\\_I71o](http://www.youtube.com/watch?v=RjmC_M_I71o) at 23:50-24:00, 28:48-28:56. On the *Today* Show, he said the whole experience has left his wife "rattled." *See* Today Show: Terry Bollea Interview, October 9, 2012, *available at* <http://www.today.com/entertainment/hulk-hogan-devastated-release-sex-tape-vows-find-out-whos-1C6360386> (Today Show) at 2:10-2:15. To the extent that plaintiff asserts he has suffered emotional distress as the result of conflict in his marriage, and intends to present testimony about that at trial (as he did at the temporary injunction stage), Gawker is entitled to take discovery

necessary to prepare itself, including, for example, to probe whether that claimed injury arose from Gawker's publication or the underlying affair it described.

Although Gawker does not anticipate that its questioning of Jennifer Bollea will be lengthy, there is no legitimate reason for imposing an artificial time limit of two hours shared between two separately represented parties. (And the logistical/practical concerns counseling against limitation, outlined *supra* at 11, apply just as strongly to Jennifer Bollea as to plaintiff himself.) Plaintiff's request to limit the deposition of Jennifer Bollea should be denied.

## **2. Linda Bollea, plaintiff's ex-wife**

Finally, plaintiff argues that Gawker should be prohibited *entirely* from taking the deposition of his ex-wife, Linda Bollea, on the grounds that she does not possess *any* relevant evidence. Pl.'s Mot. at 9-10. As an initial matter, plaintiff does not have standing to object to the deposition of a Linda Bollea, a third-party witness. *See Tootle v. Seaboard Coast Line R.R. Co.*, 447 So. 2d 1009, 1010 (Fla. 5th DCA 1984) (“[O]nly the person being compelled to testify who enters a protest on his own . . . has standing to challenge the compulsion of his testimony.”); *Engel v. Rigot*, 434 So. 2d 954, 957 (Fla. 3d DCA 1983) (Pearson, J., concurring) (“It is apodictic that one who is a party has no standing to object to a subpoena issued to a non-party witness unless the subpoena asks for documents in which the party claims some personal right or privilege or asks for documents in the party's possession.”) (citing cases). Plaintiff's efforts to thwart the deposition of Linda Bollea should be rejected for this reason alone.

Moreover, contrary to plaintiff's assertion that Linda Bollea has no relevant evidence, she in fact possesses significant information about plaintiff's efforts to create and maintain a public persona, the alleged damage to which forms the basis of many of plaintiff's claims in this lawsuit. Indeed, Linda Bollea has written an entire autobiography focusing largely on her

marriage to plaintiff and reflecting on, among other things, plaintiff's public image and the newsworthy discrepancies between that image and plaintiff's actual conduct, including what she describes his serial adultery. Given her long marriage to plaintiff, she also likely has information about the extent to which he attempted to maintain his privacy over time – including in the multi-season reality television series about their family's personal life – and about his mental health and emotional state (which plaintiff claims was disturbed by Gawker's conduct). She likewise has information about the nature of the couple's relationship with the Clems and their knowledge of the Clems' house and surveillance system. In addition, it is Gawker's understanding from discovery to date that plaintiff may believe that Linda Bollea has information about how the Video at issue here came to be disseminated.

### CONCLUSION

For the foregoing reasons, Gawker respectfully requests that this court deny plaintiff's motion for protective order.

Dated: September 18, 2013

Respectfully submitted,

THOMAS & LOCICERO PL

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