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.
_____/

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL THIRD CORPORATE DEPOSITION (OF JOHN COOK) AND MOTION FOR PROTECTIVE ORDER

Pursuant to Rules 1.280(c) and 1.380(a) of the Florida Rules of Civil Procedure, defendant Gawker Media, LLC ("Gawker") respectfully files this opposition to plaintiff's motion to compel a corporate deposition of John Cook, and also hereby moves for a protective order.

Plaintiff Terry Gene Bollea ("plaintiff") seeks to compel a third deposition of Gawker and to compel Gawker to produce – as a corporate designee – John Cook, a writer for Gawker.com. Although plaintiff asserts that Cook was involved in the publication at issue, he was not, and plaintiff offers *nothing* to support that assertion. In fact, plaintiff seeks a corporate deposition of Cook principally about a *later* article he wrote about this Court's decision granting a temporary injunction. This is both procedurally and substantively improper.

Although it is Gawker's position that Cook has nothing to do with this dispute (as explained below), plaintiff has, for better or worse, known about Cook as a witness since April 2013. Despite this, he and his counsel:

- ∑ did not include Cook in the discovery plan submitted to Special Discovery Magistrate Case in November 2014, a plan which formed the basis of the Court's

entry of a brisk schedule for completing discovery, summary judgment motions, motions *in limine* and trial;

- ∑ when in Fall 2013 plaintiff issued his first corporate deposition notice to Gawker, consisting of 51 separate topics, plaintiff did not include anything about Cook or that later article;
- ∑ when, in late 2013, Gawker produced its Chief Operating Officer, Scott Kidder, as its corporate designee for a full day, plaintiff did not ask him *any* questions about Cook or that later article;
- ∑ when plaintiff issued a second notice for a corporate deposition of Gawker in early 2015, containing an additional 36 topics, none of them addressed Cook or that later article; and
- ∑ when the parties engaged in two rounds of briefing before the Special Discovery Magistrate about the second corporate deposition, including both whether it could proceed (since Gawker had already been deposed) and the breadth of the 36 topics, plaintiff again said nothing about Cook or the later article.

Instead, plaintiff issued a New York subpoena for Cook personally in January 2015. Because plaintiff had served him with a New York subpoena issued by a New York court, and because Cook's writing and editorial processes in connection with a different article are protected against compelled disclosure under New York's statutory journalist's shield law, Cook filed in New York a motion to quash and for a protective order. While plaintiff mentions that in passing, he does not attach any of that briefing, and so Gawker submits herewith Mr. Cook's motion papers, plaintiff's opposition papers and Mr. Cook's reply. Exs. A, B and C. That motion is fully briefed, has been assigned to the Honorable Joan B. Lobis, and is awaiting decision. Plaintiff

states that "no hearing date has been scheduled on that motion," Mot. at 2, to suggest that its adjudication will be delayed. But plaintiff did not request a hearing, and therefore the motion is ripe for decision and has been for several weeks.

The two rounds of briefing over a Gawker corporate deposition, and a third round in New York over a deposition of Cook was not enough for plaintiff, who is now attempting to compel a deposition from Cook by issuing a third corporate deposition notice. Putting aside that a party can only obtain a deposition of a specific non-party by subpoena and cannot compel the attendance of a particular witness at a corporate deposition, *see, e.g.*, *Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 334-35 (Fla. 4th DCA 2013),[1] plaintiff's motion simply sidesteps the key issue, namely, that the testimony sought is privileged. Under N.Y. Civ. Rights Law § 79-h, any party seeking to obtain unpublished information, editorial processes, and/or newsgathering materials, even if *non-confidential*, must make "a clear and specific showing" that the information sought

(i) is *highly material and relevant*;

(ii) is *critical or necessary* to the maintenance of a party's claim, defense or proof of an issue material thereto; *and*

(iii) is *not obtainable from any alternative source.*

N.Y. Civ. Rights Law § 79-h(c) (emphases added). The application of that statutory privilege is explained in detail in the attached papers that Cook filed in New York. Suffice it to say, however, that the testimony cannot be compelled unless "the claim *virtually rises or falls* with the admission or exclusion of the proffered evidence." *Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 908 (N.Y. 3d Dep't 1997) (emphases added) (internal marks omitted). If that were the case

[1] This case is relied upon prominently by plaintiff in his Motion, but he neglects to inform the court of the portions of the decision that directly undercut his request to have this Court require that Cook himself be the corporate designee on the enumerated topics.

here, plaintiff would have included Cook in his discovery plan or in his first two corporate deposition notices, and would not have sought his testimony as an afterthought, including after two prior corporate deposition notices and two rounds of briefing about the scope of corporate deposition testimony.[2]

For his part, plaintiff's only argument, made in passing, is that the New York journalist's shield law does not apply because the statute applies only to "**sources** and **unreported** news," and "the discovery sought does not pertain to Gawker's sources, and also does not pertain to unreported news." Mot. at 7. Plaintiff does not tell the Court that he made the same argument in New York and that, in response, Cook cited numerous New York authorities making clear that the statute applies to editorial processes, including in connection with an article expressing an opinion. *See* Ex. C (reply brief citing, *inter alia*, *In re Eisenger*, 2011 WL 1458230, at *3 (S.D.N.Y. Apr. 12, 2011) ("New York courts have recognized that the Shield Law was enacted, in part to 'prevent intrusion into the editorial process.'"), *aff'd sub nom. Baker v. Goldman Sachs & Co.* 669 F.3d 105 (2d Cir. 2012) (citation omitted); *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 92 A.D.2d 102, 104 (2d Dep't 1983) (a "letters to the editor" column is within scope of the Shield because "many people read the letters to the editor column for the same reasons they read any other news column in the paper – to learn what is happening around them, and the reactions of other people to these events. The beneficial purposes served by the Shield Law would be

[2] Although plaintiff claims Cook was involved in preparing the Internet post at issue in this action, he was not. He played no role in writing it, no role in editing it and no role in deciding to publish it. Although he later served as editor of Gawker.com, he was not the editor at the time it was published. All of this is confirmed by the sworn deposition testimony of defendant A.J. Daulerio (the author and at the time editor of Gawker.com) and Emma Carmichael (the managing editor of Gawker.com, who copy edited the post), as well as sworn interrogatory responses and voluminous documents produced. The absence of any evidence of Cook's involvement is addressed extensively in the papers filed in New York, and submitted herewith. *See* Exs. A-C. In particular, in violation of the Agreed Protective Order entered in this action, plaintiff attached chats among Gawker's staff, which he heavily redacted (Gawker had provided them in unredacted form). *Id.* As explained to the New York court in detail, Cook's comments – *after* the post at issue was published – do not demonstrate *any* involvement in its writing or editing. *Id.*

unnecessarily restricted by removing the letters to the editor column from its aegis. It is in the public interest to hold that this column comes within the purview of 'news.'")).

The New York journalist's shield law applies to this article written in New York by a journalist working in New York because it represents an important public policy of New York. *See Matter of Holmes v. Winter*, 22 N.Y.3d 300, 980 N.Y.S.2d 357 (2013) (shield law reflects strong public policy of New York and protection applied to out-of-state subpoena seeking testimony in case involving mass shooting at Colorado theater). In any event, Florida has a virtually identical protection, nowhere addressed by plaintiff. If Florida's law were applied, the result would be the same. Under the privilege set forth in Florida Statutes § 90.5015, a journalist may not be compelled to testify concerning absent a "clear and specific" showing that

(i) the information is "relevant and material";

(ii) "the information cannot be obtained from alternative sources," and

(iii) "a *compelling interest* exists for requiring disclosure."

(emphasis added). *See also State v. Davis*, 720 So. 2d 220, 222 (Fla. 1998) (even apart from statute, Florida recognizes a privilege that applies to both confidential and non-confidential information, and movant seeking to overcome privilege must demonstrate that journalist possesses relevant information, that it is not available from alternative sources, and that the movant has a compelling need for the information). Florida's privilege applies to both confidential and non-confidential information, and in both criminal and civil proceedings. *See, e.g.*, *Mohammed v. State*, 132 So. 3d 176 (Fla. 2013). Like New York, Florida recognizes that a "compelling interest sufficient to satisfy the third prong of the test for overcoming the reporter's privilege" typically requires a showing that the "information . . . goes to the 'heart of the plaintiff's claim.'" *Id.* (citing with approval *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir.

1958)). Thus, for the same reasons already explained to Judge Lobis in New York, testimony from Cook about a different article – even one that comments on the injunction entered in this case – is privileged and may not be the subject of compelled testimony, whether under the law of New York or Florida.

Finally, plaintiff attempts to recycle an argument already rejected by Judge Campbell, to demonstrate that Gawker acted with malice by publishing a later article criticizing the Court's entry of a temporary injunction. That is improper for several reasons. First, plaintiff has not sued on the later article, nor could he, and he cannot use different conduct, especially conduct occurring after the fact, to prove his claims. That is true generally, but especially in the context of alleged torts arising from a publication. Under Florida law, a cause of action "for libel or slander, invasion of privacy, or any other tort founded upon any single publication *accrues at the time of the first publication* in [Florida]." *Putnam Berkley Grp. v. Dinin*, 734 So.2d 532, 533 (Fla. 4th DCA 1999) (quotation marks omitted; emphasis added) (citing Fla. Stat. § 770.07 ("The cause of action for damages founded upon a single publication or exhibition or utterance . . . shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state.")). Thus, plaintiff may not claim that a publication some seven months later is properly brought into the case, much less goes to the heart of his claims.

Second, Gawker was well within its rights to express its views that it disagreed with the entry of the injunction, and may not have its constitutionally protected expression commenting on a judicial ruling used against it here. This is particularly true given that the Court of Appeal both (a) found that the trial court erred by not staying that order, *see* Ex. C, and (b) unanimously reversed the entry of the injunction on the merits, *see Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (2d DCA 2013). Indeed, plaintiff has already fully litigated his contention that Cook's

article criticizing the injunction is evidence of bad faith. Plaintiff relied on that article and its message in moving to hold Gawker in contempt in May 2013. In response, Gawker explained that the appeals court had found that it was error for the trial court not to have stayed the injunction (the appeals court had not yet ruled on the merits at that time), such that there was no order to violate and that Gawker was within its rights to publish Cook's article. Crediting that argument, the court denied plaintiff's contempt motion. *See* Exs. D (contempt motion), E (transcript of contempt hearing) and F (order denying contempt motion). Just as plaintiff should not be able to re-litigate the journalist's privilege issue again, he should not be able to re-litigate his claims that the publication of Cook's article are evidence of misconduct.

CONCLUSION

For the foregoing reasons, defendants respectfully request that plaintiff's motion to compel be denied and that Gawker's motion for a protective order be granted.

Dated: March 16, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Rachel E. Fugate*
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

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael D. 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 Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th 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:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, , Esq.
shane.vogt@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
Sarah E. Luppen
sluppen@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, Esq.
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ Rachel E. Fugate
Attorney