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.
_____/

PUBLISHER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 18 TO EXCLUDE EVIDENCE OR ARGUMENT RELATED TO DOCUMENTS WITHHELD AS WORK PRODUCT PRIOR TO DEPOSITION OF PLAINTIFF

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby oppose motion *in limine* No. 18 of plaintiff Terry Bollea, professionally known as "Hulk Hogan" ("Pl.'s MIL"), which seeks to preclude the Publisher Defendants from introducing any evidence or argument related to publicly available documents reflecting Hogan's own public statements and appearances because they were not produced prior to their use as exhibits at Hogan's deposition over a year ago.

Hogan's motion complains that the Publisher Defendants asked him at his deposition about materials consisting of his own autobiographies, his own statements in the media, his own advertisements, and other publicly available material that were gathered by the Publisher Defendants' counsel in preparing their defense for this lawsuit. The motion does not cite a single Florida case, or one from any other jurisdiction, that even remotely suggests there was anything improper about the Publisher Defendants questioning him about this material at his deposition. Indeed, six months before Hogan's deposition, his counsel did exactly the same thing at the depositions of each of the Publisher Defendants. And, when Hogan was deposed, his lawyer did

not raise any objections until about four hours *after* the Publisher Defendants' counsel began examining his client about such materials. Then, perhaps dissatisfied with his client's answers, he suddenly, and retroactively, purported to raise these objections, which are patently frivolous. That is the only "gamesmanship" at issue in this motion, and it should be denied.

BACKGROUND

In late September and early October 2013, Hogan deposed defendant A.J. Daulerio, defendant Nick Denton, and defendant Gawker's corporate designee (its Chief Operating Officer, Scott Kidder). At those depositions, Hogan's counsel introduced more than a dozen publicly available press articles and other similar materials that had not been produced to the Publisher Defendants. *See* Ex. 1 (Deposition of A.J. Daulerio (September 30, 2013) at 52:16-53:6, 61:2-9, 75:6-15, 160:6-19, 229:2-11 & Exs. 2-4, 11, 17); Ex. 2 (Deposition of Nick Denton (October 2, 2013) at 56:16-22, 79:19-21, 123:8-12, 181:9-25, 256:13-16 & Exs. 40-44, 47); Ex. 3 (Deposition of Gawker Corporate Designee Scott Kidder (October 1, 2013) at 65:6-13, 136:11-18 & Exs. 23, 24). Hogan's counsel never informed the Publisher Defendants' counsel that he intended to use these previously undisclosed documents. But given that such examination is entirely proper, the Publisher Defendants' counsel raised no objection.

Between May and December 2013, Hogan served three sets of document requests on Gawker. In response to those requests, Gawker produced tens of thousands of pages of documents.

On January 28, 2014, Hogan propounded a supplemental demand for any documents responsive to his earlier requests that Gawker had not previously produced. Gawker timely served written responses on March 4, 2014, in which it objected, *inter alia*, to the production of the work product gathered by its attorneys in preparing a defense. Gawker also specifically

informed Hogan's counsel that it reserved the right to ask his client about publicly available materials gathered by counsel. Nonetheless, Hogan did not file a motion to compel the production of any such materials prior to the deposition.

At Hogan's deposition on March 6 and 7, 2014, counsel for the Publisher Defendants asked Hogan about some public materials that Hogan himself had written, spoken, or generated, which were marked as exhibits during the deposition. *See* Pl.'s MIL ¶ 2 (listing exhibits at issue). Those materials, which were from public sources equally accessible to Hogan and his counsel, had been gathered and selected by the Publisher Defendants' attorneys as part of their investigation into the case after litigation commenced.

The first such exhibit was one of Hogan's autobiographies. Not only did Hogan's counsel raise no objection to its introduction, but the examination began as follows:

> Q. And just before the break, we had marked this book as Exhibit 77. You've seen that before?
>
> A. Yes, I have.
>
> Q. And that's called "My Life Outside the Ring" by Hulk Hogan?
>
> A. Yes.

Deposition of Terry Bollea (March 6, 2014) at 34:1-7. The Publisher Defendants' counsel then asked Hogan, again without objection, about a posting on his website, www.hulkhogan.com, and a newspaper article that quoted him. *Id.* at 49:9-16; 167:21-23.

About four hours after the Publisher Defendants' counsel had begun examining Hogan about the first such exhibit, Hogan's counsel suddenly, and purportedly retroactively, made the objection that is the basis of this motion *in limine*. *Id.* at 170:16-171:3. When the Publisher Defendants' counsel explained why the objection was baseless and noted that Hogan's counsel had done the same thing when he conducted depositions, Hogan's counsel did not contest that

but merely responded, "I don't know the timeline of events," and "you didn't make any objections and you still haven't." *Id.* at 172:9-13.

After the deposition, Hogan filed a motion to sanction Gawker by precluding it from using both the exhibits and his deposition testimony about them at trial, claiming he was unfairly "surprised" and "ambushed" at his deposition. Hogan contended then, as he does now, that "[s]uch gamesmanship, trickery, and surprise has no place in civil litigation (at least in Florida). The discovery rules exist to eliminate surprise and afford each side an opportunity to receive the documents in the case before being required to answer questions about them under oath." Pl.'s MIL ¶ 8; *see also* Pl's Mot. for Sanctions Order Precluding Defs. from Using Exs. Not Disclosed in Discovery as Evid. and Striking Dep. Testimony Based on Such Exs. ("Sanctions Mot.") at 2. In his motion, Hogan acknowledged that his counsel had done the same thing at the depositions of each of the Publisher Defendants. Sanctions Mot. at 13.[1]

On June 6, 2014, the Special Discovery Magistrate issued a Report and Recommendation recommending that the sanctions motion be denied, which became final ten days later by operation of law. That Recommendation was without prejudice to Hogan's ability to raise the same issues in a motion *in limine* prior to trial, which he has now done.

ARGUMENT

The Florida discovery rules simply do not support the absurd scenario that Hogan's arguments posit. The bottom line is that both parties in this case were free to examine each

[1] Unlike the Publisher Defendants' counsel, Hogan's counsel had not informed anyone in advance of the depositions that he reserved the right to question the Publisher Defendants about previously undisclosed material, and thus deprived them of their ability to file a motion to compel if they chose. Hogan's counsel justified this conduct because he had cleverly waited until after his document production to print the additional documents, and therefore was under no obligation to produce them. Given this, it is particularly troubling that he would accuse *defendants* of "trickery" and "unfair surprise."

other about their own public statements gathered by counsel. Hogan's motion *in limine* is baseless and should be denied.

Hogan argues, in effect, that the discovery rules require that any document that might be the subject of questions at a deposition must be disclosed in advance of depositions, even if they are the witness's own publicly disseminated materials obtained exclusively by counsel. But as Hogan's counsel's own conduct and arguments demonstrate, that proposition is simply false. Hogan's motion cites no case that supports that proposition, nor does the answer turn on what day of the week opposing counsel went to a bookstore to buy the deponent's autobiography or when she accessed the Internet to print the physical copy of an exhibit.

The principal cases Hogan relies upon actually undermine his position. *Target Corp. v. Vogel*, 41 So. 3d 962 (Fla. 4th DCA 2010), addressed the distinction between materials that were generated by a party as part of the underlying event – such as a party's own surveillance video of "the accident itself" – and materials gathered or compiled by an attorney after litigation commences, including even surveillance video, which it held is work product. *Id.* at 963. The analogous distinction here would be between the sex tape excerpts that Gawker originally posted online – which was produced long before Hogan's depositions – and subsequent materials gathered by counsel after this lawsuit was filed. *Target* also reaffirmed the general principle that materials legitimately covered by work product protection are exempt from disclosure unless and until those materials are "intended for use at trial" or the protection is otherwise overcome. *Id.*

Similarly, *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970), held that while a party has a duty to provide general information in interrogatory responses such as names of witnesses, even if that information was obtained by attorneys, the actual materials generated or compiled by attorneys are properly deemed to be work product. *Id.* at 112. Here, Hogan makes

no claim that Gawker's interrogatory responses improperly withheld anything. Moreover, both *Surf Drugs* and *Target* recognized these distinctions even though the material at issue in those cases was nothing like the other party's autobiography and statements to the media. Even Hogan recognized the common-sense difference the scenario at issue here presents, because his own responses to Gawker's document requests objected to and refused to produce documents that are "equally available" to Gawker. *See, e.g.*, Pl.'s Resp. to Gawker's Requests for Production Nos. 20, 24, 25, 26, 35, and 36.

In this case, Hogan's supplemental demand that he claims is at issue effectively sought every bit of information that the Publisher Defendants' counsel had collected about him in connection with the case. Each of the publicly available documents at issue in Hogan's motion *in limine* – including Hogan's own published autobiographies, advertisements in which he appeared, and statements he made to the media – were obviously not, standing alone, work product. But, taken together, those documents unquestionably would have revealed the Publisher Defendants' litigation strategy, and the Publisher Defendants properly objected to this request. "[A]n attorney's evaluation of the relative importance of evidence falls squarely within the parameters of" work product even if the individual pieces of evidence, "in and of themselves," are not work product. *Smith v. Florida Power & Light Co.*, 632 So. 2d 696, 698 (Fla. 3d DCA 1994) (holding that "the group of documents sought" merited protection as "opinion work product" even though individual documents it contained were not work product, because it "would reveal the attorney's assessment of the relative importance of each of those documents, and of their significance as a collection"). This is particularly true where, as here, the materials are publicly available and thus equally accessible to both sides. *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) ("[O]ne party is not entitled to prepare his case

through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.") (internal quotation marks omitted).

Moreover, with respect to the *timing* of when any work product must be disclosed, the Florida Supreme Court has expressly rejected Hogan's position. In *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980), the Court held that a party possessing work product that it may ultimately use at trial – in that case, surveillance footage created after the commencement of litigation – "has the right to depose the party or witness" about the evidence "***before being required to produce***" it. *Id.* at 705 (emphasis added). Far from constituting the sort of "surprise, trickery, bluff and legal gymnastics" the Florida Rules of Civil Procedure were intended to prevent, "***fairness requires***" that a litigant be allowed to use such materials "***to establish any inconsistency in a claim***" during a deposition. *Id.* at 707-8 (internal quotation marks omitted and emphasis added); *see also, e.g.*, *Hankerson v. Wiley*, 154 So. 3d 511, 512 (Fla. 4th DCA 2015) (holding that "the benefit of the surveillance video may be irreparably lost if the plaintiff is permitted to view the video before [the defendant] has an opportunity to question her"); *State Farm Fire & Cas. Co. v. H Rehab, Inc.*, 56 So. 3d 55, 56 (Fla. 3d DCA 2011) (reversing trial court order requiring defendant to produce surveillance video before deposition of plaintiff).

This authority, which Hogan makes no effort to address in his motion *in limine*, is dispositive of his claim that it was improper to question him about the materials at issue prior to producing them. If it is appropriate to question a party about surveillance footage that is not publicly available and has not yet been produced, surely questioning Hogan about his own autobiography, public statements and conduct was permissible. Instead, Hogan's motion relies on cases standing for the proposition that a party may not use an exhibit ***at trial*** without

identifying it in advance of ***trial***. Pl.'s MIL ¶¶ 11-13; *see also, e.g.*, *S. Bell Tel. & Tel. Co. v. Kaminester*, 400 So. 2d 804, 806 (Fla. 3d DCA 1981) (holding that trial court abused its discretion by admitting evidence not produced ***prior to start of trial***); *La Villarena, Inc. v. Acosta*, 597 So. 2d 336, 337 (Fla. 3d DCA 1992) (holding that trial court properly excluded surveillance video not produced ***prior to start of trial***); *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. 4th DCA 1975) ("any evidence to be used ***at trial*** should be exhibited upon proper motion") (emphasis added). But those cases all reinforce why Hogan's motion is meritless: the Publisher Defendants did, in fact, provide the exhibits at issue to Hogan more than a year in advance of the trial. *See, e.g.*, *Finestone v. Florida Power & Light Co.*, 2006 WL 267330, at *6 (S.D. Fla. Jan. 6, 2006) (declining to enter order precluding use of documents where they were "publicly available" and "eventually produced" in discovery).[2]

CONCLUSION

For the foregoing reasons, the Court should deny Hogan's motion *in limine* No. 18.

June 26, 2015

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

[2] Hogan's assertion that the exhibits at issue have no relevance, Pl.'s MIL ¶ 14, is also without merit. These materials are highly relevant to whether the facts published on Gawker's website were private, whether they were related to a matter of public concern, whether Hogan was damaged, and if so, to what extent.

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 Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 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 Luppen, Esq.
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
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

Gregg D. Thomas
Attorney for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio