

EXHIBIT 9

to the

**MOTION FOR AN ORDER DECLARING THAT
PLAINTIFF HAS IMPROPERLY DESIGNATED CERTAIN
DISCOVERY MATERIALS AS “ATTORNEYS’ EYES ONLY”**

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Superior Court of California
County of Los Angeles

APR 20 2015

Sherri R. Carter, Executive Officer/Clerk
By Raul Sanchez, Deputy

5 Attorneys for
6 TERRY GENE BOLLEA pka Hulk Hogan

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

10 TERRY GENE BOLLEA professionally known
11 as Hulk Hogan,

Case No.: BS154295

12 Plaintiff,

**OPPOSITION OF TERRY BOLLEA TO
PETITION TO ENFORCE SUBPOENA;
REQUEST FOR MONETARY
SANCTIONS; DECLARATION OF
CHARLES HARDER**

13 vs.

14 HEATHER CLEM, GAKWER MEDIA, LLC
15 a/k/a Gawker Media; et al.,

DATE: May 1, 2015
TIME: 8:30 a.m.
DEPT: 31

16 Defendants.

Hon. Samantha P. Jessner

Date Action Filed: March 13, 2015
Trial Date: N/A

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20 **I. INTRODUCTION**

21 The petition filed by Gawker Media, LLC ("Gawker") to enforce the subpoena served on
22 non-party Keith Davidson, Esq. is procedurally defective and substantively meritless. The
23 petition is procedurally defective for two reasons: First, the fact discovery cut-off in the
24 underlying Florida action passed on April 10, 2015. The Florida trial court specifically ruled that
25 "fact discovery after April 10, 2015 shall be permitted only as allowed by the Special Discovery
26 Magistrate, by the Court, or by stipulation of the parties." Exhibit 1 at 5.

27 Gawker has been aware of the identity of Attorney Davidson since at the latest May 8,
28 2014, but Gawker did not issue a subpoena to him until December 2014; did not serve the

1 subpoena until January 2015; and did not file its petition to enforce until March 2015. Gawker
2 has not asked the Florida trial court or the Special Discovery Magistrate to extend the fact
3 discovery cut-off so it can take this discovery. Second, Gawker failed to serve the required
4 separate statement that must be filed with any discovery motion, pursuant to California law.

5 Substantively, Gawker seeks documents of no relevance to the underlying Florida
6 proceedings. The civil action in Florida arose out of Gawker's unlawful publication of a secretly
7 recorded video of Terry Bollea (Hulk Hogan) engaging in a private, consensual sexual encounter,
8 in a private bedroom (the "Sex Video"). Gawker posted the video at its celebrity tabloid site,
9 gawker.com, where millions of people viewed it. The video leaves little to the imagination—it
10 shows Mr. Bollea fully naked and engaged in sexual intercourse. Mr. Bollea sued for invasion of
11 privacy and related claims, and the case centers on three issues (1) whether Mr. Bollea can
12 establish an invasion of his privacy; (2) whether Gawker's publication of the Sex Video is
13 protected by the First Amendment as a "matter of public concern"; and (3) Mr. Bollea's damages.

14 The discovery that Gawker seeks from Attorney Davidson does not concern **any** of these
15 issues. There is no evidence that Attorney Davidson possesses any evidence that affirms or
16 negates Gawker's First Amendment defense, or possesses any evidence relating to Mr. Bollea's
17 damages claims. Rather, Attorney Davidson was involved in an FBI investigation relating to an
18 attempt to extort money from Mr. Bollea by threatening to release recordings depicting Mr.
19 Bollea if Mr. Bollea did not pay money. Gawker is attempting to find out if there are **other** sex
20 tapes—which Gawker has never seen before, and is not entitled to see—and to obtain copies of
21 any such tapes if they exist. Such additional video footage, if it even exists, has nothing to do
22 with what **Gawker** did to Mr. Bollea. Moreover, Gawker's celebrity tabloid site, gawker.com,
23 has already posted the Sex Video depicting Mr. Bollea, and presumably is attempting to obtain
24 additional secretly-filmed sex footage of Mr. Bollea, for purposes of posting that new footage at
25 gawker.com and thereby further violating Mr. Bollea's rights (and profiting from the millions of
26 people who would watch it at gawker.com).

27 Moreover, the Florida trial court has imposed strict limits on Gawker's discovery of Mr.
28 Bollea. The Florida trial court entered a protective order that prohibits discovery of any sexual

1 relationship involving Mr. Bollea other than his relationship with Heather Clem, the woman
2 depicted in the Sex Video. A second protective order was entered prohibiting Gawker from
3 obtaining any sex tapes in discovery other than the tape that it published.¹

4 Additionally, Attorney Davidson raises the Fifth Amendment constitutional privilege
5 against self-incrimination (because the FBI investigated him in connection with a possible
6 extortion attempt). Attorney Davidson also raises the attorney-client privilege in objecting to the
7 subpoena, because the subpoena seeks to obtain communication between Attorney Davidson as
8 his client(s). Mr. Bollea joins in those objections as well, for two reasons: first, because the
9 materials sought, including alleged sex videos, are private and should not fall into the hands of
10 Gawker, which runs a celebrity tabloid site that already published the Sex Video and would
11 potentially have the ability to post more secretly filmed sex footage in violation of Mr. Bollea's
12 rights, and second because if evidence that is obtained in violation of a constitutional or attorney
13 client privilege or work product is obtained and introduced, it could lead to potential reversal of a
14 judgment.

15 For the foregoing reasons, and as discussed below, the Court should deny Gawker's
16 petition in its entirety. Moreover, because the petition lacks substantial justification, and violates
17 the Florida court's orders regarding the discovery cut-off and Mr. Bollea's privacy, the Court
18 should order Gawker to reimburse Mr. Bollea's for the reasonable attorney's fees that he was
19 required to incur to oppose the petition, in the amount of \$6,140. Harder Decl. ¶9.

20 **II. STATEMENT OF FACTS**

21 The Florida action was filed in October 2012 after Gawker published at gawker.com a
22 surreptitiously recorded, explicit video depicting Mr. Bollea engaging in private, consensual
23 sexual relations in a private bedroom. Mr. Bollea asserted causes of action for invasion of
24 privacy and related torts, and sought compensatory and punitive damages and injunctive relief.
25 Mr. Bollea moved for a temporary injunction in early 2013, and the parties set forth their
26 respective positions with respect to Gawker's conduct: Mr. Bollea argued that Gawker's conduct
27

28 ¹ If any other sex tapes are discovered to exist, they must be turned over to the Special Discovery Magistrate in the action, and reviewed for any relevant evidence.

1 constituted a tortious public disclosure of private facts, while Gawker argued that posting the Sex
2 Video was protected by the First Amendment because it was a “matter of public concern”.

3 During Fall 2012, Mr. Bollea participated in an FBI sting operation relating to persons
4 who claimed to have recordings of Mr. Bollea engaged in sexual relations, and who were
5 attempting to extort money from Mr. Bollea in exchange for the delivery of those recordings.
6 Attorney Davidson, the witness herein, represented certain parties involved in that FBI sting.

7 Discovery has gone on in the Florida action for two years. Repeatedly in the discovery
8 process in Florida, Gawker sought broad discovery of Mr. Bollea’s sex life generally, even though
9 his general sex life has nothing to do with Gawker’s publication of the Sex Video. On February
10 26, 2014, the trial court in Florida entered a protective order prohibiting any discovery of Mr.
11 Bollea’s sexual relationships, other than his relationship with Heather Clem, the woman depicted
12 in the video. Then, on May 14, 2014, the trial court entered a further order that any video
13 recordings of sexual activity that were disclosed in discovery **other than** the 30 minute sex video
14 that was sent to Gawker would have to go to the Special Discovery Magistrate (i.e., discovery
15 referee) in the case would view the video, determine if any content was relevant and, if so,
16 provide a written transcript of the relevant material to the parties.

17 Mr. Bollea produced his communications with the FBI in discovery on May 8, 2014.
18 These communications revealed Attorney Davidson’s identity and his involvement in the FBI
19 investigation. Nonetheless, Gawker failed to issue its subpoena until December 2014; failed to
20 serve it until January 2015; and failed to move to enforce it until March 2015.

21 The Florida trial court entered an order setting a fact discovery cut-off of April 10, 2015.
22 The jury trial has been scheduled for July 6, 2015. Gawker has not sought any relief with the trial
23 court in Florida to have the discovery cut-off extended in order to seek the nonparty discovery at
24 issue from Attorney Davidson.

25 **III. THE SUBPOENA VIOLATES THE FLORIDA DISCOVERY CUT-OFF.**

26 The Florida trial court ordered that all fact discovery in the case be completed by April 10,
27 2015, except by order of the Court or the Special Discovery Magistrate or stipulation of the
28 parties. (The expert discovery cutoff was set for April 13, 2015). The fact discovery cutoff has

1 now passed. Gawker has no basis for seeking fact discovery from Attorney Davidson after the
2 cut-off, and therefore is in violation of the Florida trial court's order by doing so. (This is not the
3 first time that Gawker has ignored and violated the Florida trial court's order in this action; in
4 April 2013, Gawker refused to comply with the Florida trial court's temporary injunction order
5 requiring the removal of the Sex Video at issue and an accompanying narrative. See Harder Decl.
6 ¶ 4.)

7 Gawker knew the identity of Attorney Davidson on May 8, 2014, when Mr. Bollea
8 produced his communications with the FBI to Gawker. However, Gawker did not issue a
9 subpoena at that time. Instead, Gawker delayed for months. It eventually issued a subpoena in
10 December 2014, then waited to serve it until January 2015, and then waited to file a petition to
11 enforce it in March 2015. By delaying in this manner, Gawker pushed the subpoena at issue far
12 past the fact discovery cut-off.

13 Gawker also has been aware since March 2015 that Mr. Bollea asserts the fact discovery
14 cut-off in opposition to the petition at issue. However, Gawker has failed to seek any relief from
15 the Florida trial court or the Special Discovery Magistrate (as required by the Florida court order)
16 to permit Gawker to complete the discovery at issue of Attorney Davidson's records. Having not
17 asked for or obtained relief from the Florida court order, the discovery at issue is prohibited by
18 the fact discovery cutoff.

19 Enforcement of the discovery cut-off in these circumstances is particularly important,
20 because (1) the Florida trial court entered the cut-off as part of a comprehensive case management
21 order, and its determinations regarding the timing and sequence of discovery are entitled to
22 deference; and (2) the jury trial is set for July 6, 2015, and continued discovery proceedings will
23 seriously impede the parties from being able to prepare for trial – which was the entire point of
24 having a discovery cut-off in the first place.

25 **IV. GAWKER'S PETITION SHOULD BE DENIED BECAUSE GAWKER FAILED**
26 **TO SUBMIT A SEPARATE STATEMENT, AS REQUIRED BY THE**
27 **CALIFORNIA RULES OF COURT.**

28

1 Pursuant to California Rule of Court 3.1345(a)(3), Gawker is required to file a separate
2 statement in support of its petition to enforce its subpoena. This statement is necessary to set out
3 the precise discovery at issue, and the precise reasons why such discovery should be compelled.
4 Gawker failed to comply with this order, thereby prejudicing Mr. Bollea and Attorney Davidson,
5 and severely inconveniencing this Court and counsel for Mr. Bollea and Attorney Davidson. The
6 petition should be denied on this ground as well. *See Mills v. U.S. Bank*, 166 Cal. App. 4th 871,
7 879 (2008) (where moving party's separate statement failed to comply with predecessor to Rule
8 3.1345(a)(3), the trial court was well within its discretion to deny the motion to compel discovery
9 on that basis).

10 **V. GAWKER'S PETITION SEEKS DISCLOSURE OF SENSITIVE, PRIVATE**
11 **MATTERS THAT ARE NOT RELEVANT TO THE FLORIDA ACTION AND**
12 **HAVE BEEN RULED OFF LIMITS BY THE FLORIDA TRIAL COURT.**

13 As set forth above, the discovery at issue does not concern the claims and defenses in the
14 case. Attorney Davidson has no evidence that would affect Gawker's First Amendment defense,
15 or evidence that relates to Mr. Bollea's damages. Gawker appears to be hoping that it can
16 discover from Attorney Davidson the existence of **additional** alleged sex footage (i.e., beyond the
17 sex footage that Gawker previously received), which would be a continuation of Gawker's
18 attempts to invade Mr. Bollea's privacy. The discovery is not relevant, is invasive of Mr.
19 Bollea's privacy rights (which are constitutionally protected in Florida as they are here in
20 California), and is inconsistent with several court orders entered in the Florida action.

21 The discovery sought is not relevant for the simple reason that it does not relate to the
22 claims and defenses in the case and is not reasonably likely to lead to the discovery of admissible
23 evidence. Gawker's petition does not articulate **how** continued discovery into the extortion
24 matter will assist it in asserting its First Amendment defenses at trial or negating Mr. Bollea's
25 damages. Fla. R. Civ. Proc. 1.280(b)(1) (discovery must be relevant to the subject matter and
26 reasonably calculated to lead to the discovery of admissible evidence). Indeed, as the moving
27 party, **Gawker bears the burden** on this issue, and fails to meet that burden.

28

1 Gawker argues that the documents are “potentially relevant,” but does not articulate any
2 theory why, instead simply noting that the Florida court compelled production of Mr. Bollea’s
3 communications with the FBI (which Mr. Bollea produced). However, Gawker fails to articulate
4 any theory as to how the Davidson documents that it seeks would be actually relevant, as opposed
5 to “potentially” relevant, to the Florida law.

6 In addition, the discovery touches on private sexual matters that are not discoverable
7 under Florida law (or California law, for that matter) absent the strongest showing of relevance.
8 Florida’s Constitution, like California’s, recognizes a right to privacy. Fla. Const. Art. 1 § 23.
9 Thus, private sexual matters are nondiscoverable absent the strongest showing of relevance.
10 *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798, 801 (Fla. App. 1985) (identities
11 of donors to blood bank non-discoverable because discovery could reveal donors with STD’s and
12 thus disclose their private sex lives). California’s Constitution, Article I, Sec. 1, states: “All
13 people are by nature free and independent and have inalienable rights. Among these are enjoying
14 and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and
15 obtaining safety, happiness, **and privacy**.” (Emphasis added.) *Tylo v. Superior Court*, 55 Cal.
16 App. 4th 1379 (1997) (holding that intrusive questions about actress’ sex life were impermissible
17 in a wrongful termination action).

18 In recognition of the strict standards for discovery of private sexual matters under Florida
19 law, the trial court entered two protective orders strictly limiting Gawker’s discovery of such
20 material. First, Gawker was not permitted to discover **anything** related to any relationships Mr.
21 Bollea had with any person other than Heather Clem. Second, Gawker was not permitted to
22 discover the contents of any other sex tapes that were disclosed in discovery; rather, such tapes
23 would only be viewed by the Special Discovery Magistrate who would then decide whether to
24 provide the parties with a written transcript of any content therein which he deemed relevant.

25 Gawker’s discovery requests to Attorney Davidson are an attempt to circumvent these
26 orders and invade Mr. Bollea’s privacy by attempting to obtain discovery of **other** alleged sex
27 footage (i.e., not merely the video that Gawker received). This material, if it even exists, would
28 have nothing to do with Mr. Bollea’s lawsuit or Gawker’s defenses thereto, and would contain

1 private sexual matters that are not discoverable under Florida law and the Florida trial court's
2 orders. Thus, discovery should be denied.

3 **VI. MR. BOLLEA JOINS IN DAVIDSON'S OBJECTIONS TO THE SUBPOENA.**

4 Attorney Davidson has interposed serious objections to the subpoena based on the Fifth
5 Amendment to the U.S. Constitution, and also the attorney-client privilege and attorney work
6 product doctrine. Mr. Bollea joins in those objections.

7 **VII. THE COURT SHOULD ORDER GAWKER TO PAY MR. BOLLEA'S**
8 **ATTORNEY'S FEES.**

9 Gawker's motion was filed and maintained in clear violation of the fact discovery cut-off
10 in Florida. Moreover, Gawker's substantial and unjustified delay in both serving, and seeking to
11 enforce, its subpoena caused this matter to extend until the fact discovery cutoff. Moreover,
12 Gawker's subpoena seriously violates Mr. Bollea's privacy rights and attempts to thwarts the
13 privacy protections put in place by the Florida trial court. Accordingly, Gawker's motion lacks
14 substantial justification. Code Civ. Proc. § 2023.010(h); *Espinoza v. Classic Pizza, Inc.*, 114 Cal.
15 App. 4th 968, 975-76 (2003) (service of second subpoena in violation of court's order merited
16 discovery sanction). Gawker therefore should be ordered to reimburse Mr. Bollea for the
17 attorney's fees that he was required to incur to oppose the petition, as a monetary sanction, in the
18 amount of \$6,140. Harder Decl., ¶ 9.

19 **VIII. CONCLUSION**

20 For the foregoing reasons, Gawker's petition should be denied in its entirety, and this
21 Court should order Gawker to pay Mr. Bollea's reasonable attorney's fees.

22
23 DATED: April 20, 2015

HARDER MIRELL & ABRAMS LLP

24
25 By:


26 JENNIFER J. MCGRATH

27 Attorneys for TERRY GENE BOLLEA
28 professionally known as Hulk Hogan