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.

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

Defendants.
_____/

PLAINTIFF'S MEMORANDUM REGARDING BUBBA THE LOVE SPONGE CLEM'S MOTION TO QUASH SUBPOENA FOR TRIAL

Plaintiff submits this Memorandum regarding Bubba the Love Sponge Clem's Motion to Quash and the potential issues that may arise should Mr. Clem assert his Fifth Amendment right privilege at trial. Presuming the Court does not quash the subpoena and requires Mr. Clem to personally assert his Fifth Amendment rights, then the following issues are, or may become, relevant.

I. Procedure for Mr. Clem to invoke his Fifth Amendment Rights

A hearing should be held outside the presence of the jury to determine whether Mr. Clem is properly invoking his Fifth Amendment rights. A witness is entitled to invoke his Fifth Amendment privilege against self-incrimination if he has "reasonable grounds to believe that his answers would provide a 'link in the chain of evidence needed to prove a crime against him.'" *DeLeo v. Wachovia Bank, N.A.*, 946 So.2d 626 (Fla. 2d DCA 2007) (*citations omitted)*. In turn, a party is entitled to move to compel the witness to answer the questions to which he posed an objection. *Id.* It is then necessary for the Court to conduct a hearing. *Id.* At such hearing, "if

the self-incriminating nature of the question is not apparent, then [the person asserting the privilege] must show the court the danger of incrimination that could result from the answer." *Id.*

A similar procedure was utilized by the trial court in *Faver v. State,* 393 So. 2d 49 (Fla. 4th DCA 1981). In that case, the Court held a hearing outside the presence of jury regarding the testimony of a witness who was going to invoke his Fifth Amendment rights. *Id.* At the hearing, defense counsel examined the witness who asserted his Fifth Amendment privilege. *Id.* At the conclusion of the proffer the court denied defense counsel's request to call the witness to the stand to force him to invoke before the jury. The appellate court affirmed the trial court's procedure. *Id.*

A similar procedure should be utilized in this matter if Mr. Clem continues to maintain his position that he will assert his Fifth Amendment privilege. A hearing should be conducted outside the presence of the jury, and a determination should be made by the Court as to whether Mr. Clem's invocation is proper. If the Court deems his invocation proper, the testimony should not be presented to the jury.

II. Gawker cannot call Mr. Clem to the stand for the sole purpose of forcing him to assert his Fifth Amendment rights before the jury

A witness may not be called to the stand for the sole purpose of asserting his Fifth Amendment right. In *Faver v. State,* 393 So. 2d 49 (Fla. 4th DCA 1981), the court affirmed the trial court's decision denying defense counsel's request to call a witness to the stand to force him to invoke before the jury. The court, quoting *United States v. Johnson,* 488 F.2d 1206, 1211 (1st Cir. 1973), outlined the rule against calling a witness to the stand solely for invoking his Fifth Amendment right:

> If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him. . . . Obviously, before excluding a witness, the court must first establish reliably that the witness will claim the privilege and the extent and validity of the claim.

Id. The rationale for the rule was explained in *Bowles v. United States,* 439 F.2d 536, 541-542 (D.C. Cir. 1970), and adopted by the *Faver* court:

> The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness "takes the Fifth." In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.

The rules and rationale from *Faver* were also applied in *Insurance Co. of State of Pa. v. Guzman's Estate.* In *Guzman,* the Court found it was error to call a non-party to the stand for the sole purpose of having him claim his Fifth Amendment privilege. The court explained "[n]either side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him." 421 So. 2d 597, 603-604 (Fla 4th DCA 1982) (quoting *United States v. Johnson,* 488 F.2d 1206, 1211 (1st Cir. 1973). One of the reasons for this prohibition is "[t]hat a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations." *Id.* (quoting *Bowles v. United States,* 439 F. 2d 536, 541 (D.C. Cir. 1970). "Another reason rests upon the conclusion that an inference from a witness's refusal to testify may add critical weight to a plaintiff's case in a form not subject to cross-examination." *Id.*

Here, Mr. Clem cannot be called to the stand for the sole purpose of having him invoke his Fifth Amendment privilege in front of the jury. As noted above, "neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him." *Faver,* 393 So. 2d at 50 (quoting *United States v. Johnson,* 488 F.2d 1206, 1211 (1st Cir. 1973)). Mr. Clem's testimony would have a disproportionate impact on the jury's deliberations, and serve no evidential purpose to this case. As such, Mr. Clem should not be forced to take the stand for the sole purpose of invoking his Fifth Amendment privilege.

III. If Mr. Clem invokes, his prior deposition testimony may be admissible

In the event Mr. Clem asserts his Fifth Amendment privilege, his prior deposition testimony from this case ***may*** be admissible. "A declarant is unavailable if the trial court sustains an assertion of a Fifth Amendment privilege." *Henyard v. State,* 992 So. 2d 120, n. 3 (Fla. 2008); *see also Roussonicolos v. State,* 59 So. 3d 238 (Fla. 4th DCA 2011) ("It is undisputed that by invoking his Fifth Amendment right against self-incrimination, Limarto was unavailable to testify."). Accordingly, Mr. Clem's previous deposition testimony could be admissible under section 90.804(2)(a).

IV. If Gawker seeks to introduce Mr. Clem's deposition testimony, it cannot do so merely to impeach that testimony

It is a well-established evidentiary principle that counsel may not "get in the through the back door that which it could not have gotten in through the front door." *Jackson v. State,* 498 So. 2d 906, 909 (Fla. 1986) (quoting *Perry v. State,* 356 So. 2d 342, 344 (Fla. 1st DCA 1978)). "Although a witness may be impeached in Florida by '[a]ny party, including the party calling the witness,' pursuant to section 90.608, Florida Statutes, it is still improper under Florida law for a party to call a witness merely as a device to place the impeaching testimony before the jury."

Curtis v. State, 876 So. 2d 13, 20 (Fla. 1st DCA 2004). "'Generally . . . if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded.'" *Hernandez v. State,* 31 So. 3d 873, 879 (Fla. 4th DCA 2010) (quoting *Morton v. State,* 689 So. 2d 259 (Fla. 1997), *receded from on other grounds, Rodriguez v. State,* 753 So. 2d 29 (Fla. 2000)).

"In determining whether a party calls a witness for the primary purpose of impeachment, courts may consider (1) whether the witness's testimony surprised the calling party, (2) whether the witness's testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of *de minimis* substantive value." *Hernandez v. State,* 31 So. 3d 873, 878-879 (Fla. 4th DCA 2010) (citations and quotations omitted). It has been further explained that the 'primary purpose' doctrine focuses on the content of the witness's testimony as a whole. "If the witness's testimony is useful to establish any fact of consequence significant in the contest of the litigation, the witness may be impeached by means of a prior inconsistent statement as to any other matter testified to. In the words of one commentator, **the pivotal question is whether the party is calling the witness with the reasonable expectation that the witness will testify to something helpful to the party's case aside from the prior inconsistent statement**." *State v. Richards,* 843 So. 2d 962, 965 (Fla. 3d DCA 2003) (emphasis added).

In this case, Plaintiff anticipates that the primary purpose for which Gawker would introduce Mr. Clem's deposition testimony is to impeach that testimony. Mr. Clem's deposition in this case is the only sworn testimony at issue, and at that deposition he testified that Mr. Bollea had no knowledge that he was being recorded. There are multiple prior and subsequent unsworn out-of-court statements on this same issue. One of those statements is inconsistent with

Mr. Clem's deposition testimony[1], while many of them corroborate the deposition testimony. Gawker has indicated that it wants to introduce Mr. Clem's inconsistent statement. In turn, Mr. Bollea would introduce Mr. Clem's statements consistent with his deposition testimony. While all of these statements may be admissible under Florida Statutes section 90.806, they are inadmissible in this instance because Gawker's only purpose for introducing Mr. Clem's deposition testimony would be to impeach him with the prior inconsistent statement. Florida law is clear that eliciting testimony for this purpose is not permitted. Moreover, given the number of inconsistent and consistent statements at issue, admitting them all would cause confusion and unfair prejudice, and therefore would not pass muster under Florida Statute section 90.403.

V. Even if Mr. Clem's prior inconsistent statements were admitted, they cannot be used as substantive evidence.

Even if Gawker were to introduce Mr. Clem's prior testimony, and then introduce prior inconsistent statements as impeachment, these statements cannot be used for substantive purposes. "A witness's prior inconsistent statement to a police officer cannot be used as substantive evidence." *Smith v. State,* 880 So. 2d 730 (Fla. 2d DCA 2004) (citations and quotations omitted). Accordingly, to the extent any prior inconsistent statements of Mr. Clem are admitted, they should be admitted for the sole purpose of impeachment and not for any substantive purpose. A limiting instruction should be given to the jury to make this distinction clear.

VI. Potential adverse inferences from Mr. Clem invoking his Fifth Amendment Rights

To the extent a party seeks an adverse inference based on Mr. Clem's invocation of his Fifth Amendment rights, the law regarding this issue is set forth in *Coquina Invs. v. TD Bank,*

[1] All but one of the inconsistent statements were available at the time of Mr. Clem's deposition, at which he explained or retracted them.

N.A., 760 F.3d 1300 (11th Cir. 2014). In *Coquina,* the 11th Circuit affirmed the District Court's decision to (1) allow the plaintiff to call the defendant's former regional vice president even though it knew he would invoke the Fifth Amendment; and (2) allow the jury to draw adverse inferences against the defendant from the former vice president's refusal to testify. The Court recognized the admissibility of a non-party's invocation of the Fifth Amendment privilege and concomitant drawing of adverse inferences should be considered on a "case-by-case" basis.

The overarching concern is whether the adverse inference is trustworthy under all of the circumstances and will advance the search of the truth. Courts should consider four *non-exclusive* factors: (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party; (3) the compatibility of the interests of the party and non-party in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. "[T]hese factors should be applied flexibly" and "an invocation is not barred even if not all of the factors are satisfied."

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