

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.

**THE GAWKER DEFENDANTS' MOTION TO COMPEL
PLAINTIFF TO PRODUCE IMPROPERLY WITHHELD DOCUMENTS**

Pursuant to Florida Rule of Civil Procedure 1.380, counsel for defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, "Gawker"), on behalf of their clients, respectfully move this Court for an Order compelling plaintiff Terry Bollea to produce documents that he wrongfully withheld during discovery. Records Gawker's counsel recently obtained from the FBI via their Freedom of Information Act ("FOIA") lawsuit have revealed that Bollea failed to produce a large number of materials that he was obligated to turn over in this litigation. On November 30 and December 2, 2015, the FBI produced hundreds of unredacted records to Gawker's counsel. Those records for the first time identified many people whose names, voices, and images had been withheld in the FBI's earlier productions, including Keith Davidson (the alleged extortionist who was the subject of the FBI's investigation), FBI Special Agent Jason Shearn (who was the agent principally responsible for the FBI's investigation), Bubba Clem, Steven Diaco (Bubba Clem's attorney), and other third parties, including Mike Walters of TMZ. Those recently produced records fully expose the scope of Bollea's failure to produce responsive records that Gawker requested long ago.

Specifically, the unredacted FOIA records show that (a) Bollea provided documents to the FBI that he failed to produce, or even disclose the existence of, to Gawker, despite those documents being responsive to discovery requests served on him; (b) Bollea and David Houston, one of his lawyers in this litigation, disclosed to the FBI and others his settlement communications with Bubba Clem and Heather Clem, thus waiving the “settlement privilege” Bollea asserted as the basis for withholding those communications in this proceeding; and (c) during the FBI investigation, Bollea and Houston waived their attorney-client privilege on an array of topics, including the sex tapes, their dealings with Keith Davidson and other third-party witnesses with knowledge of the sex tapes, the FBI’s investigation, and their lawsuits against the Clems and Gawker. In fact, when agreeing to become a cooperating witness in the FBI investigation, Houston explicitly told the FBI – in a meeting attended by Bollea – that he agreed to waive the privilege, even in Bollea’s “civil suits.” Ex. 1.

Accordingly, Gawker’s counsel respectfully request that the Court order Bollea to produce all wrongfully withheld documents. Those documents should be produced immediately, so that they can be reviewed and used at the upcoming trial, which is scheduled to begin on March 7, 2016.

I. BOLLEA WRONGFULLY WITHHELD MANY RESPONSIVE DOCUMENTS.

Materials that Gawker’s counsel have received in the FOIA lawsuit conclusively demonstrate that Bollea provided documents to the FBI that he deliberately withheld from Gawker. For example, included within the documents produced by the FBI were the following, none of which was produced in this case:

- Houston provided the FBI with an email exchange between himself and an individual whose name was redacted in the government’s production. *See* Ex. 2. The exchange

occurred on October 11, 2012, the day after Davidson first contacted Houston and two business days before Bollea filed this lawsuit. In the email, Houston thanked the person for being “kind enough to alert me you have been offered what I have termed to be illegal material in the form of tapes as it pertains to Hulk Hogan,” and expressed appreciation for that individual’s “willingness not to involve [yourself] in what amounts to a cheap extortion scheme.” *Id.* Significantly, he also wrote that the person had “*provide[d] us with the literal heads up as to what was coming.*” *Id.* (emphasis added).¹

- Houston gave the FBI another email exchange between the same unidentified individual and Houston’s business manager, which is dated October 16, 2012. *See* Ex. 5. In that email, the individual wrote to Houston: “I saw TMZ and also put a post on my website SAYING Hogan had nothing to do with the sex tape leak. If you guys need me to testify in court David has my #.” *Id.*

- The FBI records include an email from Houston to Special Agent Shearn dated October 19, 2012. *See* Ex. 6. In that email, Houston relayed to Shearn information he had

¹ Given the timing and circumstances of the email, as well as other documents produced by the FBI, it appears that recipient of Houston’s email was Nik Richie, the publisher of *The Dirty*, and that the “heads up” referred to the fact that one of the sex tapes showed Bollea making racist statements. In April 2012, *The Dirty* published two items that included still images from a Hogan sex tape. *See* Ex. 3 at 4 and Exs. 5-6 (Gawker’s Motion *in Limine* on Evidence Relating to Plaintiff’s Admission that He Believed the Sex Tape(s) Showed Him Making Statements that Have Been Marked as Confidential, with selected Exhibits) (hereinafter, “Mot. on Offensive Statements”). Along with the images, the second posting included the following caption: “Terry, do you remember what you said about black people in this sex tape?” *See id.* at Ex. 6. Recently, Richie publicly stated that he had seen the sex tape on which Bollea “100 percent said the N-word.” *See* Ex. 4 at 3 & Ex. 6 (Joint Opposition to Plaintiff’s Emergency Motion to Conduct Discovery Concerning Potential Violation of Protective Order, with selected Exhibits) (hereinafter, “Jt. Opp.”). And, one day after Houston sent his October 11 email, Bollea sent a text message to Bubba Clem acknowledging that one of the tapes “*has several racial slurs*” and, echoing Houston, expressing his concern that “*there is a lot more coming.*” *See* Mot. on Offensive Statements at 6 and Ex. 12.

learned directly from “Mike Walthers [sic] of TMZ” about the taping practices of Bubba and Heather Clem. *Id.*

- The FBI produced another email from Houston to Special Agent Shearn, dated March 5, 2014. *See* Ex. 7. In that email, Houston informed Shearn that Judge Case has recommended that Gawker’s motion compelling Bollea and his counsel to sign FOIA authorizations be granted. He then requested that Shearn “be so kind as to ***register our objection despite the execution of the Freedom of Information Act form.***” *Id.* (emphasis added).

- The federal government also gave Gawker’s counsel an email exchange between Houston and Assistant United States Attorney Sara Sweeney on which Shearn was copied. *See* Ex. 8. In this exchange, which is dated September 8, 2014, Houston informed Sweeney that “the Court has ordered us to have Mr. Bollea sign the FOIA Request.” *Id.* Houston further implored Sweeney to withhold information from Gawker: “I do not believe the FOIA request would require or in any way cause you to turn over the videos to anyone. If I am mistaken, please advise so we may receive the necessary Court Order to protect the videos themselves. ***As you are aware, it has been our goal to prevent the dissemination of the videos and or any language as it concerns the video whether it be audio or otherwise.***” *Id.* (emphasis added).

Each of these documents was plainly responsive to specific discovery requests served on Bollea,² and each was within his custody and control. *See, e.g., Saewitz v. Saewitz*, 79 So. 3d

² *See, e.g.,* Ex. 9 (excerpts from Bollea’s responses to Gawker’s first set of requests for production, which included requests for “[a]ny and all documents in any manner related to the Video” from which Gawker published excerpts, and “[a]ny and all documents concerning videotapes made of you engaged in Sexual Relations”); Ex. 10 (excerpts from Bollea’s responses to Gawker’s second set of requests for production, which included a request for “[a]ny and all documents in any manner referring or relating to communications between you or anyone acting on your behalf and any law enforcement person or agency concerning any recording of you having sexual relations with Heather Clem”); Ex. 11 (excerpts from Bollea’s responses to Gawker’s fifth set of requests for production, which included a request to “produce any

831, 834 (Fla. 3d DCA 2012) (“possession, custody, or control” includes “not only . . . possession, but . . . the legal right to obtain the documents requested upon demand”). Moreover, each document was also responsive to document requests served directly on Houston and his law firm, which responded to those requests largely by saying that their documents were produced by Bollea.³ See Exs. 12, 13.

These documents, which Gawker was only able to learn about as a result of its FOIA lawsuit, do not appear to be the only ones Bollea withheld. Other records recently produced by the FBI suggest more documents and information have been withheld. For instance:

- An FBI Form FD-302 summarizing an October 15, 2012 interview with Houston states that Houston told the FBI that, “[s]ince Gawker released the one minute of the BOLLEA sex tape, Houston has been contacted by a number of outlets to include Keith Davidson . . . ; [REDACTED] of the website thedirty.com; TMZ and others.” Ex. 16.
- Another FBI document that summarizes a different interview with Houston four days later states that Houston informed Special Agent Shearn that he “is receiving information

responsive documents within your possession, custody, and control that have not previously been produced” in response to “request[s] for production of documents previously propounded to you by Gawker or any of the other defendants in this action”).

³ See, e.g., Ex. 14 (document subpoena directed to Houston, dated December 4, 2014, seeking, *inter alia*, “[a]ll documents reflecting, referring, or relating to communications with law enforcement authorities and/or prosecutors . . . relating to the Sex Tapes, . . . Bubba Clem, or Heather Clem,” “[a]ll documents reflecting, referring, or relating to communications with people other than Terry Bollea, Jennifer Bollea, and any of Terry Bollea’s attorneys about the Sex Tapes prior to the filing of the Lawsuit,” “[a]ll documents reflecting, referring, or relating to communications with TMZ and any person employed by or working on behalf of TMZ, including . . . Mike Walters,” and “[a]ll documents reflecting, referring, or relating to communications with Nik Richie or anyone else connected with The Dirty about Terry Bollea, Hulk Hogan, Heather Clem, or the Sex Tapes”); Ex. 15 (document subpoena directed to Law Office of David Houston, dated December 4, 2012, seeking the same documents).

from Mike Walthers [sic] of TMZ, although he would like to keep Walthers' identity confidential because he is a good source of information." Ex. 17.

- The FBI produced an email that Houston's business manager sent to Special Agent Shearn explaining that Houston had spoken to Walters, who told Houston that "someone is showing snippets" of sex tapes to Walters. *See* Ex. 6.⁴

Neither Bollea nor Houston produced *any* communications with the individuals Houston referenced in his discussions with the FBI (other than Davidson), and they did not produce many documents reflecting communications with Special Agent Shearn. It appears that Bollea's failure to provide these and other records was designed to hide Bollea's racist statements and was part of his extensive fraud on this Court. *See, e.g., supra* notes 1 & 4; *see generally* Mot. for Fraud on the Court (detailing systematic fraud designed to cover up the existence of additional sex tapes and Bollea's statements). Houston made their intent plain when he attempted to go behind this Court's back in an effort to dissuade the federal government from releasing the tapes or evidence of Bollea's statements, writing that "*it has been our goal to prevent the dissemination of . . . any language* as it concerns the video whether it be audio or otherwise." Ex. 8 (emphasis added). Whatever the reason for Bollea's failure to disclose those records, however, his failure is a clear breach of his duties under the discovery rules.

⁴ Houston's statements to the FBI contradict what he said in his sworn deposition testimony, where he described his communication with Walters as "fairly brief" and testified that Walters did not provide any useful information. *See* Ex. 18 (Houston Dep. Tr.) at 127:11 – 130:18. The FBI records show otherwise. In fact, as Gawker suspected earlier in the case, at the time Houston was receiving information from Walters in October 2012, Walters had seen the tape and knew it contained footage of Bollea making racist statements. *See, e.g.,* Mot. on Offensive Language at 3-5 (documenting the fact that Bollea and Houston talked with Walters before filing this lawsuit). Indeed, in recent months, Walters publicly acknowledged those facts. *See* Jt. Opp. at 4-5 (Walters stated that he had watched tape and heard Bollea's racist statements).

He should be compelled to produce *all* previously withheld documents, including his and Houston's communications with third parties relating to, *inter alia*, (a) Gawker, (b) the sex tapes, (c) the Clems, and (d) the FBI investigation, including both unredacted copies of the documents the federal government produced in redacted form and any other wrongfully withheld documents of which Gawker remains unaware. In addition, to the extent that Bollea no longer has such documents within his custody and control, he should be required to explain why and under what circumstances he spoliated that evidence.

II. BOLLEA WAIVED ANY "SETTLEMENT PRIVILEGE" RELATING TO COMMUNICATIONS WITH BUBBA CLEM AND HEATHER CLEM.

The materials Gawker's counsel received in the FOIA lawsuit also demonstrate that Bollea wrongfully withheld his settlement communications with Bubba Clem, Heather Clem, and their counsel. During discovery in this case, Gawker brought a motion to compel Bollea to produce his settlement communications with Mr. Clem, which he had withheld based on an asserted "settlement privilege." *See* Ex. 19 (Gawker's motion). In support of its motion, Gawker argued that Florida does not recognize a privilege shielding settlement communications from discovery. In opposition, Bollea argued the opposite, telling this Court that such a privilege exists and that the settlement communications with Mr. Clem and his lawyers were privileged. *Id.*; Ex. 20 (Bollea's opposition). The Court sided with Bollea and denied Gawker's motion to compel. *See* Ex. 21 (order denying motion to compel).

Gawker does not seek to challenge, or revisit, this Court's legal ruling on the existence of a "settlement privilege." Rather, based on newly discovered evidence, it brings to the Court's attention the fact that any privilege that might attach to Bollea's settlement communications was unambiguously waived by Bollea, which he failed to disclose either to Gawker or this Court when Gawker's motion to compel was being adjudicated.

Specifically, the unredacted FBI documents produced in the past few weeks make plain that Bollea and Houston discussed the settlement negotiations with Bubba Clem and the eventual settlement at length with the FBI and with the supposed extortionist, Davidson. For example:

- During an interview that Special Agent Shearn conducted with Houston on October 22, 2012, Houston disclosed that Bollea’s legal team and Mr. Clem’s legal team were in the midst of settlement discussions and described to Shearn the terms of the proposed settlement. Ex. 22.

- During another interview with Special Agent Shearn a few days later, “Houston . . . advised that Terry Bollea and Bubba The Love Sponge Clem will be settling their civil suit as early as 10/26/2012. Houston discussed the terms of the settlement and offered to send a draft copy of the settlement to interviewing Agent.” Ex. 23.

- On October 25, 2012, following his interview with Special Agent Shearn, Houston sent Shearn a draft of the settlement agreement with Mr. Clem. Houston also sent the FBI agent an email exchange between counsel for Bollea and counsel for Mr. Clem, in which the terms of the proposed settlement – and, in particular, the rationale behind the most recent set of changes to the proposed settlement agreement – were discussed. Ex. 24. That email was never produced to Gawker. In fact, Bollea listed it on privilege logs as one of the communications he withheld on the basis of the “settlement privilege.” Ex. 25 (privilege log of Bollea, identifying only one settlement communication from October 25, 2012).⁵ This document provides additional support for Gawker’s argument that Bollea’s settlement with Bubba Clem was a sham. *See* Gawker Defendants’ Opposition to Plaintiff’s Motion in Limine No. 3 to Exclude Evidence

⁵ Remarkably, Houston provided this document to the FBI, but did not list it in his own privilege log, even though he asserted that other communications with Bubba Clem’s counsel were protected by the “settlement privilege.” *See* Ex. 26 (Houston’s privilege log).

or Argument Related to Settlement at 2-3. Indeed, the email that Houston forwarded to the FBI, which is partially redacted, says that Bollea would not “*seek to criminally prosecute Bubba,*” which “*was never an issue,*” even though the Agreement makes it appear that not being prosecuted is a significant part of the consideration extended to Clem. Ex. 24 at GAWKER-1109 (emphasis added).

- Both Bollea and Houston discussed with Davidson the terms of Bollea’s settlement with Mr. Clem when they met with Davidson on December 14, 2012. *See* Ex. 27 at GAWKER-1492, 1537 (excerpts from FBI transcript of recording of December 14, 2012 meeting between Houston, Bollea and Davidson).

Houston similarly disclosed to the FBI and to Davidson Bollea’s settlement communications and strategy with respect to Heather Clem. For instance:

- During an interview Special Agent Shearn conducted with Houston on December 3, 2012, Houston discussed settlement communications he had received from counsel for Heather Clem, specifically “a request to terminate letter.” Ex. 28.

- Eight days later, during another interview with Special Agent Shearn, “Houston explained that his law firm ha[d] been getting correspondences from attorney Barry Cohen related to the outstanding civil lawsuit against Heather Clem.” Ex. 29.

- Houston and Bollea also discussed with Davidson the ongoing settlement discussions with Ms. Clem, repeatedly complaining to Davidson that Ms. Clem had rejected an offer that “amounts to a walk-away.” *E.g.*, Ex. 27 at GAWKER-1574-75 (excerpts from FBI transcript of recording of December 14, 2012 meeting between Houston, Bollea and Davidson).

Bollea did not produce *any* of the communications with Ms. Clem’s legal team to Gawker. Indeed, neither he nor Houston even disclosed their existence.⁶

The disclosures by Bollea and Houston to the FBI and Davidson waived any privilege that might have otherwise attached to settlement communications with the Clems or their lawyers. The law is clear that the intentional disclosure of a privileged communication to someone outside the scope of the privilege effectuates a waiver. *See, e.g.*, Fla. Stat. Ann. § 90.507 (providing that a person waives a privilege when he “voluntarily discloses” otherwise privileged communications or “consents to disclosure of, any significant part of the matter or communication”); *AG Beaumont I v. Wells Fargo Bank, N.A.*, 160 So. 3d 510, 512 (Fla. 2d DCA 2015) (articulating general rule); *see also Hamilton v. Hamilton Steel Corp.*, 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982) (“It is black letter law that once the privilege is waived, and the horse is out of the barn, it cannot be reinvoked.”). While such waiver most frequently arises in the context of the attorney-client privilege, under Florida law, “***all personal privileges may be waived.***” *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 508 (Fla. 2d DCA 2006) (emphasis added). Moreover, Florida law holds that this waiver applies not just to the specific communications that Bollea and his counsel chose to disclose to the FBI and Davidson: The privilege is waived with respect to ***all communications on the subject-matter disclosed.*** *See,*

⁶ Those communications are plainly responsive to discovery requests served long ago by Gawker. *See, e.g.*, Ex. 9 (excerpts from Bollea’s responses to Gawker’s first set of requests for production, which included requests for “documents concerning any communications about Sexual Relations between you and Heather Clem,” and “documents concerning any sexual relations you had with Heather Clem”); Ex. 14 (document subpoena directed to Houston, seeking, *inter alia*, “[a]ll documents reflecting, referring, or relating to communications with Heather Clem or Heather Clem’s attorneys from January 1, 2012 to the present concerning . . . Terry Bollea, . . . the Sex Tapes, the Lawsuit, . . . or the Gawker Story”); Ex. 15 (document subpoena directed to Law Office of David Houston seeking same).

e.g., Coates, 940 So. 2d at 511 (articulating subject-matter waiver doctrine); *Courville v. Promedco of S.W. Fla., Inc.*, 743 So. 2d 41, 42 (Fla. 2d DCA 1999) (same).

The law simply does not permit Bollea to do what he did here – assert a global privilege with respect to his settlement communications with the Clems, while selectively disclosing them to third parties. Those disclosures waived any privilege concerning Bollea’s settlement communications. Accordingly, Bollea should be compelled to produce (a) all of his and his lawyers’ settlement communications with Mr. Clem and his lawyers, and (b) all of his and his lawyers’ settlement communications with Ms. Clem and her lawyers up to the date Bollea filed his amended complaint naming Gawker as a defendant in this case (December 28, 2012).

III. BOLLEA AND HOUSTON WAIVED THE ATTORNEY-CLIENT PRIVILEGE.

Finally, the FOIA materials demonstrate that, during the FBI investigation, Bollea and Houston waived the attorney-client privilege with respect to the sex tapes; the FBI’s investigation; their dealings with Bubba Clem, Keith Davidson and other third parties who had access to the sex tapes; and this civil litigation.

The FBI records reveal that Bollea and Houston waived the privilege implicitly through their voluntary disclosures and explicitly through an agreement with the FBI to relinquish the privilege. Specifically, on October 22, 2012, Bollea and Houston met with Special Agent Shearn and another FBI agent. During that meeting, Houston was told that, if he agreed to cooperate with the FBI as a witness, rather than acting solely as Bollea’s attorney, the privilege that would normally attach to his communications would be lost. *See* Ex. 22. As Special Agent Shearn’s memorandum of that meeting recounts: “Interviewing Agents asked HOUSTON if he was *willing to give up his attorney-client privilege* by being a witness in the ongoing investigation. HOUSTON *confirmed that he understood the privilege would be potentially lost, to include any civil suits* by being a witness in the ongoing criminal investigation and that *he intended to*

continue.” *Id.* (emphases added). Special Agent Shearn’s handwritten notes from that meeting are even more direct on this point: “**David confirms no privilege** – ok w/ being witness – **even in civil suit.**” Ex. 1 (emphases added).

In addition to making this explicit agreement, Houston and Bollea shared detailed information with the FBI about (a) what they knew about the sex tapes, (b) their dealings with Davidson, (c) their strategy in dealing with the Clems and their lawyers, (d) their strategy in dealing with other third party witnesses like Mike Walters of TMZ and Nik Richie of *The Dirty*, and (e) their strategy in litigating against Gawker. *See, e.g.*, Exs. 16, 17, 23, & 30-33. The FBI records reveal that Bollea and Houston shared information on many of these same topics with Davidson. *See, e.g.*, Ex. 27 at GAWKER-1484, 1486, 1492, 1511-13, 1521, 1537, 1574-75 (excerpts from December 14, 2012 meeting between Bollea, Houston, and Davidson).⁷ These disclosures – particularly in conjunction with Houston’s express confirmation in Bollea’s presence that he understood the privilege would be waived – vitiates any attorney-client privilege on these subjects. As the Second District Court of Appeal has held, these disclosures waive the privilege for all other “communications on the same matter.” *Courville*, 743 So. 2d at 42.

The law on this point is clear: A person who directly and/or through his attorney cooperates with federal investigators waives any attorney-client privilege with respect to the subject matter of the cooperation both for that proceeding and **any other proceeding**. *See, e.g.*, *In re Qwest Comm’ns Int’l Inc.*, 450 F.3d 1179, 1186-89 (10th Cir. 2006) (collecting cases). A

⁷ Additional examples of Bollea and Houston’s communications with the FBI and Davidson on these topics are contained in Gawker’s Motion to Dismiss on the Grounds of Fraud on the Court and its Motion for Access to the DVDs Produced by FBI, both of which are being filed simultaneously with this Motion. In addition, the Court has received all of the records produced in the FOIA litigation in connection with the *in camera* submission by Gawker’s counsel for the Court’s consideration of plaintiff’s designation of those records as “Highly Confidential – Attorneys’ Eyes Only.” Those records contain all of the communications to which Gawker’s counsel has been given access to date.

person simply is not permitted to waive the privilege in connection with a government investigation and then invoke it later to shield information about the same subjects in a separate proceeding. As one court has observed in explaining this hornbook principle, “[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a ‘friendly’ agency.” *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981). The privilege is “available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.” *Id.* at 1222; *accord, e.g., In re Subpoena Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (“A client cannot waive [attorney-client] privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial.”); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (same). Once the privilege is waived, “it cannot be reinvoked.” *Hamilton*, 409 So. 2d at 1114. This principle is exactly what the FBI explained to Bollea and Houston and expressly the agreement that Houston entered when he told the FBI that he understood the attorney-client privilege would be lost “even in [the] civil suit.” Ex. 1.

Here, the waiver is even broader than in the usual circumstance in which a person and his attorney cooperate with a federal investigation. Houston did not simply disclose his client’s confidences to the FBI. He agreed to personally act as a witness in that proceeding. It is well established that a party who consents to putting forth his attorney as a witness waives the privilege with respect to the subject-matter of the anticipated testimony. *See, e.g., Rutgard v. Haynes*, 185 F.R.D. 596, 601 (S.D. Cal. 1999); *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D.

288, 295-96 (D. Mont. 1998); *Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble Co.*, 1988 WL 74462, at *2 (N.D. Ill. July 8, 1988).

The broad scope of Bollea and Houston's waiver of their attorney-client privilege is highlighted by the extent to which Bollea has invoked the privilege to prevent Gawker from learning discoverable information on these same topics throughout this case. For example, during his deposition, Bollea asserted attorney-client privilege when asked about many key topics, claiming that the information reflected discussions of legal strategy held exclusively with counsel, including:

- Why he settled with Bubba Clem so quickly, Ex. 34 (T. Bollea Dep.) at 559:15-19;
- What actions had been taken to determine who was responsible for disseminating the sex tape, *id.* at 583:4-12; and
- Why he did not sue TMZ, *The Dirty*, or Nik Richie, *id.* at 585:23 – 586:9.

As discussed above, Bollea and Houston discussed all of those topics with the FBI.

More disturbingly, Bollea also asserted attorney-client privilege when asked about other significant issues, claiming that the information was privileged because it reflected facts he only knew because of private conversations with Houston, including:

- Offers he received to license the sex tapes, *id.* at 437:20-25;
- Which law enforcement agencies he and Houston contacted about the sex tapes, *id.* at 574:12-21;
- The subject matter of his complaints to law enforcement, *id.* at 576:3-11; and
- How he learned about Davidson's allegation that there were additional sex tapes, including one with racial slurs, *id.* at 764:20 – 766:16, 767:1-8, 768:22 – 769:2.

The Special Discovery Magistrate upheld Bollea's invocation of the privilege in every single one of these instances.

Leaving aside that facts Bollea learned from his attorney are not privileged, *see Carnival Corp. v. Romero*, 710 So. 2d 690, 694 (Fla. 5th DCA 1998), the FOIA materials demonstrate that Bollea lied when he testified that his only knowledge of certain facts came from private conversations with Houston, given his personal involvement in the FBI investigation and his personal dealings with the FBI and with Davidson. *See, e.g.*, Ex. 30 (FBI case-opening document describing in-person complaint made by Bollea and Houston); Ex. 35 (FBI Form FD-302 describing meeting with Bollea in which Bollea and FBI agent reviewed the sting audio). More significantly, however, when coupled with Bollea's invocation of the privilege with respect to communications on each of these topics, the FOIA materials underscore the breadth of his and Houston's waiver of that privilege.

In short, Bollea and Houston have waived their attorney-client privilege. Thus, neither Bollea nor Houston can invoke that privilege with respect to their communications with each other or with Bollea's other attorneys concerning (a) the sex tapes, (b) Bollea's and Houston's dealings with the Clems and their strategy with respect to litigating against and settling with the Clems, (c) Bollea's and Houston's dealings with Davidson, (d) Bollea's and Houston's dealings with Mike Walters of TMZ and Nik Richie of *The Dirty*, (e) the FBI investigation, and (f) this civil suit against Gawker. While that waiver might not extend for the duration of this lawsuit, it certainly extends for the entire period in which Bollea and Houston actively cooperated with the FBI investigation, an investigation that ended on July 19, 2013, when the federal government declined to prosecute anyone. *See* Ex. 36. Thus, Bollea should be compelled to produce all

communications between him and Houston and his other attorneys, and between Houston and his other attorneys, on these topics through July 19, 2013.⁸

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to Florida Rule of Civil Procedure 1.380, movants' counsel certifies that they have, in good faith, attempted to confer with counsel for plaintiff about the foregoing in an effort to secure the discovery at issue without court action, but have been unable to do so. Specifically, Gawker's counsel attempted to resolve this matter informally shortly after they first started receiving the relevant FOIA records. Gawker's counsel sent a letter to counsel for Bollea, bringing these issues to their attention and requesting that the withheld documents be produced. *See* Ex. 37 (Ltr. from M. Berry to Counsel for Bollea, dated August 14, 2015). Bollea's lead counsel, Charles Harder, quickly responded by (1) promising to look into the documents produced to the FBI but not given to Gawker, (2) standing on Bollea's previous assertions of the settlement and attorney-client privileges, and (3) threatening to seek sanctions if Gawker's counsel pursued these issues with the Court. Ex. 38 (email from C. Harder to M. Berry, dated August 14, 2015).

Since that time, Gawker has received no further response, and follow up communications from Gawker's counsel about this matter have gone unanswered. *See, e.g.*, Ex. 39 (email from M. Berry to C. Harder, dated August 15, 2015); Ex. 40 (email from M. Berry to C. Harder, dated

⁸ In addition, Bollea should be compelled to produce these communications under the "crime-fraud" exception to the attorney-client privilege as Bollea used the services of his lawyers to perpetrate a fraud, as explained in more detail in Gawker's contemporaneously filed Motion to Dismiss on the Grounds of Fraud on the Court. *See* Fla. Stat. Ann. § 90.502(4)(a) ("There is no lawyer-client privilege . . . when . . . [t]he services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud."); *see also Kneale v. Williams*, 30 So. 2d 284, 287 (Fla. 1947) ("[N]o privilege attaches to a communication and transaction between an attorney and client with respect to transactions constituting the making of a false claim or the perpetration of a fraud.").

September 18, 2015). In the meantime, the FBI produced additional records and removed redactions, providing conclusive evidence that Bollea failed to produce responsive records to Gawker and that he and Houston waived any settlement and attorney-client privileges during the FBI investigation.

Given the imminent trial date, Gawker can wait no longer and has no choice but to seek relief directly from this Court. It does so now because the FOIA litigation appears to be largely concluded, meaning that these issues can all be addressed in one motion, rather than piecemeal as additional government records trickle in. At bottom, plaintiff has declined to produce the materials sought or even to articulate reasons for his refusal to do so.

CONCLUSION

For the foregoing reasons, Gawker's counsel respectfully requests that Bollea be required to produce: (a) all documents he failed to produce or disclose to Gawker, including, but not limited to, those he provided to the FBI, but not Gawker; (b) all of his and his counsel's settlement communications with Mr. Clem and Mr. Clem's attorneys, as well as all of his and his counsel's settlement communications with Ms. Clem and Ms. Clem's counsel through the date that Bollea amended his complaint to add Gawker as a defendant in this action; and (c) all communications between Bollea and Houston and his other attorneys, and between Houston and Bollea's other attorneys, through July 19, 2013 on the same subject matter for which they waived their attorney-client privilege in dealing with the FBI and Davidson.

Dated: December 22, 2015

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By: /s/ Gregg D. Thomas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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