IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Case No. 12012447 CI-011

Plaintiff,

vs.

GAWKER MEDIA, LLC aka GAWKER MEDIA; NICK DENTON; A.J. DAULERIO,

Defendants.
_____/

TERRY BOLLEA'S OMNIBUS RESPONSE IN OPPOSITION TO GAWKER MEDIA, LLC, NICK DENTON AND A.J. DAULERIO'S DISGUISED MOTIONS FOR REHEARING

Plaintiff, Terry Bollea professionally known as Hulk Hogan ("Mr. Bollea"), responds to Defendants, Gawker Media, LLC's, Nick Denton's, and A.J. Daulerio's (collectively, "Gawker Defendants") December 22, 2015 filings: three thinly-veiled Motions for Rehearing, disguised as a Motion to Dismiss for Fraud Upon the Court (the "Fraud Motion"), Motion to Compel Plaintiff to Produce Improperly Withheld Documents (the "Motion to Compel") and Motion for Access to Corrected and Unredacted DVDs (the "DVD Motion") (collectively, the "Motions for Rehearing"), as follows:

Introduction

Desperate times have led Gawker Defendants to resort to desperate measures. Gawker Defendants know they are about to face a jury to answer for invading Mr. Bollea's privacy. They also know that Mr. Bollea was, indeed, secretly recorded without his knowledge or consent. Having neither the facts nor the law on their side, Gawker Defendants have chosen to pound on the table in one last "Hail Mary" to try to avoid their imminent day of judgment.

The Motions for Rehearing are yet another attempt by Gawker Defendants to distract attention from the merits of this case, waste important time heading into trial, and re-litigate this Court's prior rulings. Gawker Defendants' Fraud Motion is a complete rehash of arguments that have already been rejected by this Court. Gawker Defendants' Motion to Compel mewls about what amounts to improper discovery into privileged and protected issues, or completely irrelevant matters—while once again ignoring the import of the voluminous discovery they have already obtained. Their DVD Motion has likewise been fully litigated and rejected by this Court.

The original impetus for Gawker Defendants' supposed need for all of the discovery at issue in the Motions for Rehearing (information associated with an extortion attempt against Mr. Bollea and settlement communications with Bubba Clem) was Gawker Defendants' representation to this Court that they needed the discovery because it would show Mr. Bollea knew he was being recorded naked and having sex, and was involved in the dissemination of the footage. As set forth in detail below, the discovery Gawker Defendants have already obtained establishes that these propositions are not true. Mr. Bollea was not involved, and did not know he was being recorded. Rather, he was the victim of video voyeurism, extortion and invasion of privacy.

Knowing this (while inexplicably failing to advise this Court of such in any of their moving papers), Gawker Defendants are yet again abusing the privilege they were granted (over objection) to conduct discovery into extremely private matters. Gawker Defendants are ignoring the salient facts and misusing discovery to try to manufacture supposed "discovery abuses" to try to hide the ball and avoid a trial on the merits. The Motions for Rehearing, along with the multiple appellate proceedings Gawker Defendants recently filed, are needlessly distracting

Mr. Bollea and the Court, and dwindling Mr. Bollea's resources, heading into trial. Substantively, all the Motions for Rehearing fail on their merits.

First, Gawker Defendants' cobbled-together Fraud Motion is little more than a roadmap of impeachment evidence they intend to use at trial; impeachment evidence which can easily be countered by other facts and testimony that Mr. Bollea is not inclined (nor required) to explain to his opponents before trial. None of the alleged "fraud" concerns the central issues of the case. On its face, the Fraud Motion fails to establish by clear and convincing evidence that Mr. Bollea "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of [Gawker Defendants'] defense." *Laschke v. R.J. Reynolds Tobacco Co.*, 872 So.2d 344, 346 (Fla. 2d DCA 2004). Everything Gawker Defendants raise in the Fraud Motion concerns completely collateral issues that have no bearing on the merits of the issues that will be tried.

Second, Gawker Defendants' posturing in the Motion to Compel about five documents they already have, which involve third-party witnesses they have known about for years but never sought to depose, is a red herring. These documents have absolutely no bearing on the salient issues to be tried in this case. Likewise, Gawker Defendants' effort to re-litigate this Court's ruling that settlement negotiations between Mr. Bollea and Bubba Clem are not discoverable, and to invade Mr. Bollea's attorney-client privilege, are misplaced, irrelevant and factually unsupported.

Third, the DVD Motion is based on faulty logic and arguments this Court has already rejected. Judge Case will review all of the DVDs for relevancy, as required under Florida law.

Gawker Defendants apparently disagree with the Court's rulings on this issue, but the decision has already been made.

Ultimately, the Motions for Rehearing expose Gawker Defendants' continued abuse of the discovery process for improper purposes. Gawker Defendants originally sought the discovery at issue because they represented to the Court that it would show that Mr. Bollea was involved in and knew he was being recorded. The only thing that has changed since the Court's denial of Gawker's first motion for sanctions and first motion to compel based on the same arguments being re-litigated now is that Gawker Defendants have verification from multiple sources, in addition to the deposition testimony of Bubba Clem and Heather Clem, that Mr. Bollea did not know he was being recorded and was not involved in disseminating the tape.

I. Gawker Defendants Know That Mr. Bollea Was Secretly & Illegally Recorded

The gamesmanship on display in the Motions for Rehearing is troubling given the history of this case, the salient issues that will be tried, and the representations Gawker Defendants made to gain access to the privacy protected information that forms the basis of their arguments. Gawker Defendants convinced this Court to force Mr. Bollea to sign a limited waiver of his privacy rights under the Freedom of Information Act ("FOIA") so that they could obtain access to the federal government's files for an extortion attempt against Mr. Bollea. The stated basis for this invasive discovery was the representation to this Court that those files would provide evidence as to whether Mr. Bollea knew he was being recorded. Gawker Defendants made the same argument in support of their unsuccessful effort to compel the production of Mr. Bollea's settlement communications with Bubba Clem:

> Here, of course, the settlement negotiations are directly relevant to Hogan's and Clem's anticipated testimony about Hogan's involvement in and knowledge of the recording and dissemination of the Video; such evidence is therefore key to evaluating the

> reliability of both Hogan's and Clem's testimony and, if necessary, impeaching their credibility.

See Ex. 19 to Gawker's Motion to Dismiss (Gawker Media, LLC's 12/27/2013 Motion to Compel, p.6). Gawker Defendants argued that this discovery would explain why Bubba Clem initially claimed (shortly after being sued) that Mr. Bollea was involved in and knew he was being recorded, but later admitted that this was not true. See Ex. A. (1/17/2014 Hrg. Trans. p. 52: "Your Honor, and in those settlement negotiations they result in a radically different statement by Mr. Clem.")

After obtaining the actual settlement agreement between Mr. Clem and Mr. Bollea in discovery, Gawker Defendants deposed Mr. Clem on March 4, 2014, and inquired of him under oath extensively about the settlement and Mr. Bollea's knowledge and involvement in the recording:

> Q. Do you miss him?
>
> A. Yeah. I – I miss him. And more importantly, I would like to tell him and look at him as a man and tell him I am so sorry. This is all – you know, this is the most biggest nightmare I have ever gone though in my life because I look like a rat and I look like a complete horse's ass on something that was wrong from the beginning and – and totally victimized him. He doesn't deserve this. This was a bad situation on top of a bad situation on top of somebody stealing it and giving it to you guys, and it's – and it's horrible. It's – there is no way to slice this as good for anybody, specifically him. He's the biggest victim of all. I mean, I look like a horse's ass, but that guy didn't do anything wrong.
>
> Q. Why do you look like a horse's ass?
>
> A. Because I double-crossed my best friend in the whole entire world.
>
> Q. How did you double-cross him?
>
> **A. Because I taped him unbeknownst to him knowing.**

Q. And –

Q. Not that it was ever going to get out, but it's still a wrong in every shape of form. And then in – in connection with whomever you guys got it from that stole it from me, I mean, the person that's getting the avalanche of everything is him….

Ex. B. (Bubba Clem Depo. pp. 89:25-91:2)

…

Q. So he did live in your house?

A. For three or four months, yes. I testified to that earlier.

Q. Okay. But the other stuff, not true?

A. **He did not bug me to have sex with my wife. It was the opposite of that. We initiated it. It was not his idea; it was ours. And this is Bubba freaked out, lie at all expense to the detriment of Terry. And there is not – there is nothing – except for the time frame as to where he lived with me, there is not an ounce of truth on that broadcast.**

Ex. B. (Bubba Clem Depo. p. 259: 9-19)

…

Q. Did you talk to Tom Bean before you went on air that day?

A. I think I spoke to Tom as they – literally, a few minutes after they had the conference on the courthouse steps, **and I had to be, you know, honest with him and say, No, Terry didn't know about it not – had no inkling of this.** And, you know, Tom did not advise me on how to play it, you know. I would say that Tom being a little more worldly and calculated than me probably would not have given me the "puff your chest out and be a d*#?" type scenario I did.

Ex. B. (Bubba Clem Depo. p. 254: 4-14)

…

Q. Did Tom Bean talk to you after this October 16th [2012] broadcast about what – what you broadcast?

A. Well, you know, Tom Bean doesn't control what I say, but he certainly is my confidant and my agent. And he was concerned that I was not being honest.

Q. And so what did he say to you?

A. I don't recall the specific conversation, you know, but I – I quickly, you know, wanted to correct the issue. And I think Tom had some conversations with Terry's people. And – and I needed – needed to – I needed to man up and do the right thing. And I think that my being here today, telling the truth under sworn testimony, having raised my right hand and the disclaimer that I said on the air brings an ounce of credibility back to me somewhat. I still can never repair what I did to my best friend, ever.

Ex. B. (Bubba Clem Deposition p. 255: 3-20)

…

Q. Okay. And so your comments there were, again, not truthful?

A. **Let me just, I know we're going to listen to all the tapes. But everything I said the day after, everything for the most part, was to cover my ass and to make Terry look bad, because I knew that Terry was right and that I was a horse's ass. So bringing up old matters that have no relevancy, bringing up stupid sh*#? that I talked about was desperation on my behalf. So we can listen to it all, which I'm sure we will, but that's pretty much under the umbrella of all of it.**

Ex. B. (Bubba Depo. pp. 541: 23-542:8)

…

A. Again, I'm spewing venom at this point. Im the fake. I'm the fraud at this point; he's not. I'm projecting. I'm guilty. I'm busted. And I'm just spewing out anything that comes off the top of my mind to keep people's eyes off the truth and the ball.

Q. So you don't –

A. And I had the luxury of being on this bully pulpit and him not being able to respond back. It's – it's totally irresponsible and not fair.

Ex. B. (Bubba Clem Depo. p. 549:2-18)

...

Q. Okay, so you're giving up your right to speak freely about those things, right?

A. Listen, I had said a lot of bad stuff about Terry that wasn't true. If I need to do – First Amendment is out the window when I have wronged him in the manner that I did. I certainly don't have a problem being truthful and honest in this document.

Ex. B. (Bubba Clem Depo. p. 587: 15-22)

Mr. Clem reaffirmed his sworn testimony that Mr. Bollea was not involved in and did not know he was being recorded on February 3, 2015, when he spoke with the Tampa Police Department: "Clem was asked if Bollea knew he was being recorded in the sex tapes. Clem said 'no, he did not know he was being recorded.'" Ex. C. (Tampa Bay Police Dept. Report, p. 20—31).

Gawker Defendants have also obtained additional evidence (of which they failed to advise this Court) confirming Mr. Clem's testimony that Mr. Bollea did not know he was being recorded. In particular, the documents Gawker Defendants obtained through FOIA and via the Tampa Police Department investigation demonstrate the following:

A. During the sting operation involving the extortion attempt against Mr. Bollea, the woman who acted as the intermediary for Matt Loyd,[1] **Lori Ann Burbridge**, was given a polygraph examination. Prior to the examination, she acknowledged that the videos:

> **...recorded Mr. Bollea engaged in sexual activity with Heather Clem while being secretly audio and video recorded without his knowledge and consent.**

Ex. D (FBI produced document GAWKER-325)

B. On February 3, 2015, Ms. Burbridge gave a **sworn** statement to the Hillsborough County State attorney in which she stated:

[1] According to the TPD Report, Matt Loyd stole the tapes from Bubba Clem, leaked portions to the media, and then tried to use them to extort Mr. Bollea.

Q. Was there any conversation between you and Matt or you and Tasha about why not just sell the tapes outright to TMZ, to Gawker, to some Hollywood type of outlet rather than actually trying to sell the tapes, and I don't want to say back to Hogan because my understanding is they were never in his possession, but was there any discussion of why not to try to sell them to one of these outlets rather than selling them to Hogan?

A. There was discussion to that effect but not in the way you might be looking for. The discussion was he doesn't, Matt [Loyd] doesn't have anything against Hogan.

Q. Okay.

A. **And that it's not Hogan's fault that Bubba secretly recorded him having sex with Bubba's wife.**

Q. Okay.

A. And that he would rather sell it back to Hogan. He knows, he knew that the DVDs has value, obviously, because he could have sold it somewhere else, but that he would rather sell it back to Hogan or sell it to Hogan instead of putting it out there.

Ex. E. (Burbridge Sworn Statement 2/3/2015 p. 87)

C. The two **FBI special agents** who viewed the DVDs after seizing them in the sting operation concluded that:

> **It did not appear in any of the three DVDs that BOLLEA had any knowledge he was being filmed before, during or after the sex acts with HEATHER CLEM**

Ex. F. (FBI produced document GAWKER-447)

D. The Hillsborough County State Attorney also obtained a sworn statement from **Heather Clem** on April 1, 2015, during which she confirmed that Mr. Bollea did not know he was being recorded. Ex. C. (Tampa Bay Police Dept. Report, p.20—31)

E. Heather Clem's April 1, 2015 sworn statement confirms her deposition testimony in this case, attesting that Mr. Bollea did not know he was being recorded. Ex. G. (Heather Clem Depo. pp. 18-19).

Gawker Defendants have identified all of the witnesses they plan to call at trial, and have all of the documents they need to present their case. Unless Gawker Defendants believe that Bubba Clem is going to recant his sworn deposition testimony, and that Heather Clem is going to recant her sworn deposition testimony, as well as her April 1, 2015 statement under oath, then every witness who testifies at trial will state that Mr. Bollea did not know he was being recorded. Further, independent witnesses, including two FBI special agents and Lori Burbridge (under oath), have confirmed that Mr. Bollea did not know he was being recorded.

Facing these facts, Gawker Defendants are resorting to meritless fraud on the Court arguments and manufactured discovery disputes over irrelevant and immaterial issues to try to save the day. Gawker Defendants have all of the discovery to which they are entitled and which they actually need to try this case. However, because they don't like the facts established by this discovery, they want to make this case about the discovery process itself, rather than what the discovery has proven.

II. Gawker Defendants Fail to Establish a Fraud Upon the Court

The fundamental problems with Gawker Defendants' cobbled-together fraud on the court argument are simple –no fraud was committed, and even the "fraud" that has been alleged does not concern the central issues of the case. Fraud on the court must be proven by clear and convincing evidence and is limited only to misrepresentations concerning the central issues of the case. Florida law and basic principles of due process do not permit the dismissal of cases based on allegations of misrepresentations or concealment of collateral or secondary facts. Gawker Defendants have to prove by clear and convincing evidence that the central facts of the case were concealed by the scheme of misrepresentation that they allege. They cannot do so.

Gawker Defendants' alleged frauds all concern completely collateral issues—Mr. Bollea's use of offensive language (already repeatedly ruled inadmissible in this case), the extortion attempt by Keith Davidson against Mr. Bollea, and alleged additional sex tapes that were never received by or published by Gawker Defendants. In other words, even if Gawker Defendants' arguments are credited, none of the alleged misrepresentations have anything to do with the actual issues of the case. This case is not about offensive language, or Keith Davidson's extortion scheme, or recordings of other sexual encounters that were never received or published by Gawker Defendants. Rather, this case centers on the one sex video that Gawker Defendants did receive and publish, and whether that publication constituted an actionable invasion of privacy or was protected by the First Amendment. Gawker Defendants have not identified allegedly concealed evidence that is of central relevance to these central issues.

In addition, many of the events that Gawker Defendants' label as "fraud" were nothing of the sort, and indeed not even misrepresentations, and certainly did not constitute any sort of fraud proven by clear and convincing evidence (which is required to justify a dismissal of a pleading on this theory). The fact that witnesses may not have had perfect memory of events that happened years before, for instance, does not mean that there was a scheme to defraud Gawker Defendants or the Court.

There is no basis to dismiss this case over the sideshow Gawker Defendants have created. It's time to get to the main event—a trial on Mr. Bollea's invasion of privacy allegations and Gawker Defendants' First Amendment defenses.

A. GAWKER DEFENDANTS' FRAUD ON THE COURT ALLEGATIONS HAVE BEEN HEARD, AND REJECTED, BY THIS COURT AND JUDGE CASE.

Gawker Defendants attempt to make it sound like the alleged "fraud" was newly discovered, but in fact these are the same allegations that Gawker Defendants have repeatedly

made throughout the case. In 2014, Gawker Defendants made a detailed motion for terminating sanctions in this case (heard by Judge Case in in July 2014 and by this Court in December 2014), based on Mr. Bollea's alleged concealment of the very same facts in discovery. Judge Case and this Court denied the motion.

In the 2014 motion, Gawker Defendants filed a 33 page affidavit setting forth alleged violations of court orders. These allegations included the exact same allegations that Gawker Defendants now style as a "fraud on the court", including that (1) Mr. Bollea allegedly concealed evidence as to the number of sex videos that existed, (2) Mr. Bollea allegedly concealed evidence of the existence of racially offensive language on a sex video, and (3) Mr. Bollea allegedly concealed evidence relating to the FBI investigation of Keith Davidson's extortion attempt.

In other words, this has all been heard before. Judge Case reviewed the extensive record, held a three and one-half hour hearing, and determined no sanctions were appropriate, let alone the terminating sanctions Gawker Defendants asked for. This Court reviewed Gawker Defendants' exceptions to Judge Case's Report and Recommendation and affirmed his conclusion that no sanctions were appropriate.

The thrust of Gawker Defendants' motion is that the FBI documents "revealed" evidence of the alleged fraud, but this is not true. Gawker Defendants made the same arguments in 2014; the facts were known then—they just did not establish a sanctionable offense (much less one that merits the extreme sanction of dismissal).

B. GAWKER DEFENDANTS HAVE FAILED TO ESTABLISH A FRAUD ON THE COURT BY CLEAR AND CONVINCING EVIDENCE.

A "fraud on the court" occurs where it can be demonstrated clearly and convincingly, that a party has deliberately set in motion an unconscionable scheme calculated to interfere with the

judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense. *Laschke*, 872 So.2d at 346.

Moreover, this "unconscionable scheme" must be "directly related to the central issue in the case." *Ramey v. Haverty Furniture Cos.*, 993 So.2d 1014, 1019 (Fla. 2d DCA 2008); *accord Gilbert*, 34 So.2d at 775 ("The scheme must go to the very core issue at trial.").

"Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances." *Cox v. Burke*, 706 So.2d 43, 46 (Fla. 5th DCA 1998).

Gawker Defendants have not demonstrated, by clear and convincing evidence, any fraud related to the central issue of the case. The central issue of the case is whether Gawker Defendants invaded Mr. Bollea's privacy by publishing the Sex Video that they posted online, or whether that publication was protected by the First Amendment. None of the "frauds" that Gawker Defendants allege meet the clear and convincing evidence standard, and none of them go to the central issue of the case.

Gawker Defendants have tried over and over again to assassinate Mr. Bollea's character by introducing evidence of racially offensive language into the case. These arguments have been repeatedly rejected by this Court and by Judge Case, because Florida law is completely clear that those statements do not even meet the threshold of admissibility (and thus clearly fall far short of anything "central" to the case). *MCI Express, Inc. v. Ford Motor Co.*, 832 So.2d 795, 801-02 (Fla. 3d DCA 2002) (holding that the trial court committed reversible error when it did not exclude testimony that executive of plaintiff used derogatory language about Cubans); *Simmons v. Baptist Hospital*, 454 So.2d 681, 682 (Fla. 3d DCA 1984) (same, holding: "We think these unfair character assassinations could have done nothing but inflame the jury against these

witnesses, who were so essential to the plaintiff's case, and in so doing, denied the plaintiff the substance of a fair trial below.") (emphasis added); accord *State v. Gaiter*, 616 So.2d 1132, 1133 (Fla. 3d DCA 1993) (trial court redacted racial slurs even though probative).

Thus, there can be no dismissal for "fraud on the court" based on an allegation that completely inadmissible (or even collateral) evidence was concealed.

Similarly, the number of sex videos that exist, and Keith Davidson's extortion scheme, are simply not central to any issue in this case. Even if those subjects may be mentioned at trial, they are clearly collateral—neither of those issues are at the core of the central issues of this case, which are Gawker Defendants' invasion of Mr. Bollea's privacy and their First Amendment defenses.

Gawker Defendants argue incorrectly that Mr. Bollea concealed evidence associated with offensive language, based upon the absurd contention that this offensive language was the "real" cause of his damages. Again, as a matter of law, the offensive language is inadmissible in this case, including on the theory that it was the "real" cause of Mr. Bollea's damages.

Equally absurd is Gawker Defendants' argument that Mr. Bollea concealed the amount of his damages because the documents they obtained in discovery included evidence of the **fake** transaction that was negotiated in the sting operation, evidence that Bubba Clem stated that a sex video was really valuable because it contained offensive language (evidence further establishing that Mr. Bollea was not involved), and evidence that TMZ paid a nominal fee to view once (and **not** to publish) a sex video. However, none of this evidence comes close to being "central" to the case.

The fake transaction was just that: a fake transaction with an extortionist. Mr. Bollea did not negotiate or even attempt to place a reality-based value on the footage because he was trying

to entice an extortionist to complete a "sale" as part of a sting operation. It does not constitute competent evidence of the real value of the Sex Video.

Mr. Clem's statements about racial content on a sex video are inadmissible (as set forth above). Moreover, these statements have nothing to do with the footage Gawker Defendants posted online; the footage upon which Mr. Bollea's damages are specifically based.

Finally, TMZ did not publish the tape; they paid for one-time, limited access.[2] Mr. Bollea's damages, however, are based on the value of publishing the sex video (which, of course, brought well over 5 million people to Gawker Defendants' website); as well as the amount one could charge others to view such footage.

"Fraud on the court" is a narrow doctrine, consistent with the policy of trying cases on the merits and litigants' due process rights. *Cox*, 706 So.2d at 46 ("policy favoring adjudication on the merits" must be considered in determining fraud on the court argument). It does not permit dismissal simply because Gawker Defendants are feigning outrage over inadmissible and/or collateral evidence, the subject matter of which they have known about for years. Gawker Defendants have not proven, by clear and convincing evidence, that the case should be dismissed.

C. THE "MISREPRESENTATIONS" ALLEGED BY GAWKER DEFENDANTS ARE, AT THE MOST, ERRORS AND EXAMPLES OF FAULTY MEMORY, AND DO NOT CONSTITUTE A FRAUD ON THE COURT.

Even if the issues involved in the Fraud Motion were not completely collateral, Gawker Defendants have still not proven any "fraud" by clear and convincing evidence. Gawker Defendants' position is basically that any time a witness gives testimony that later turns out to be incorrect, that this constitutes a "fraud". However, many of the examples cited by Gawker

[2] According to the TPD Report, TMZ paid **$10,000** for this limited, one-time access. Ex. C (Tampa Bay Police Dept. Report, p.18)

Defendants are simply issues of poor memory and incorrect recollection. For instance, Gawker Defendants make much of the fact that Mr. Bollea did not remember the details of a FBI sting operation, including the content of the video played during the encounter. Gawker Defendants' ascribe the worst possible motives to this, but there is no reason to assume that Mr. Bollea would remember all the details of the video played during an FBI sting in which agents came blazing into a motel room to make arrests.

Similarly, Gawker Defendants assume that Mr. Bollea's litigation counsel, Charles Harder, must have been committing a fraud when he indicated that he and his client were only aware of one sex video, when that was what his client testified to at deposition.

Gawker Defendants also ascribe "fraud" to arguments about lack of proof. For instance, Gawker Defendants argue that there was something wrong with Mr. Bollea's counsel saying that, in the absence of the additional sex videos being produced in discovery, the unauthenticated transcripts produced by Mr. Davidson or his client were not competent evidence of the contents of the videos. This is not a fraud—this is an argument that is both legally correct and entirely proper. In the absence of production of the actual videos, the "transcripts" could have easily been inaccurate. (Indeed, as Gawker Defendants have pointed out in another context, the "transcripts" are not even consistent with each other.) Mr. Bollea's lawyers pointing out this fact was not "fraud"; it was a correct statement about the inadequacy of the evidence supporting Gawker Defendants' arguments. The fact that the transcripts **could** be accurate was never contested by Mr. Bollea or his lawyers; the transcripts were simply not competent evidence of what was contained on the other recordings.

Gawker Defendants also claim that Mr. Bollea and his counsel misrepresented the existence of ongoing law enforcement investigations. However, there were, in fact, multiple

investigations of the secret recording of Mr. Bollea, including the federal investigation of the extortion attempt, and the investigation by local law enforcement of Matt Loyd's alleged involvement in the distribution of the Sex Video. The Hillsborough County State Attorney's Office investigation was, indeed, active, until only recently. It was the province of the law enforcement agencies, not Mr. Bollea, to announce when those investigations were terminated, and Gawker Defendants obtained that information from those agencies. There was no "fraud" on the part of Mr. Bollea or his lawyers.

Finally, Gawker Defendants argue that Mr. Bollea concealed evidence that he "knew he was being filmed." This is an outrageous misrepresentation of the evidence (and indeed, is an attempt by Gawker Defendants to commit the very thing they accuse Mr. Bollea of, fraud on the court). In fact, the evidence Gawker Defendants are describing contains no such admission. Rather, it says the opposite—that Mr. Bollea asked Bubba Clem whether he was "filming this," and Mr. Clem **assured Mr. Bollea that no recording was being made**. In other words, the evidence is completely consistent on the central point, that Mr. Bollea did not know that he was filmed. Notably, Gawker Defendants already knew about this issue – and asked Mr. Bollea about it at his deposition. Ex. I. (Bollea Depo. pp.260—263)

Mr. Bollea did not later remember this conversation at his deposition. Mr. Bollea also testified that he did not know that there were cameras in Bubba's house until later. Once again, if anything, this an issue of inaccurate recollection, not fraud on the court. Regardless, the material issue in this case—whether Mr. Bollea knew he was filmed—is **corroborated**, not impeached, by Mr. Bollea's statements to the FBI.

Florida law clearly provides that "… inconsistency, nondisclosure, poor recollection, dissemblance and even lying, is insufficient to support dismissal for fraud, and, in many cases,

may be well-managed and best resolved by bringing the issue to the jury's attorney through cross-examination." *Perrine v. Henderson,* 85 So.3d 1210, 1212 (Fla. 5th DCA 2012); *Bologna v. Schlanger,* 995 So.2d 526, 528 (Fla. 5th DCA 2008); *E.I. Dupont De Nemours & Co., Inc. v. Sidran*, 140 So.3d 620 (Fla. 3d DCA 2014); *Granados v. Zehr*, 979 So.2d 1155 (Fla. 5th DCA 2008). "Generally, unless it appears that the process of trial has itself been subverted, factual inconsistencies or even false statements are well managed through the use of impeachment at trial or other traditional discovery sanctions, not through dismissal of a possibly meritorious claim." *Howard v. Risch*, 959 So.2d 308, 311 (Fla. 2d DCA 2007).

III. Documents Were Not Improperly Withheld from Gawker Defendants in Discovery

Next, Gawker Defendants feign outrage over five inconsequential emails which they now have in their possession; the content of which is irrelevant to the central issues in this case. Gawker Defendants also presume, incorrectly, that additional documents must exist.

First, Gawker Defendants raise two emails between David Houston and Nik Richie, a man associated with TheDirty.com, who Gawker Defendants have known to be a potential witness with knowledge of the video footage of Mr. Bollea long before this lawsuit began. Gawker Defendants never sought to depose Mr. Richie, and have not identified him on their December 10, 2015 Amended Witness List (filed after obtaining the subject emails). David Houston provided his copies of these emails to the FBI in October 2012.

One of the emails Gawker Defendants are complaining about **supports** Mr. Bollea's case, and confirms that he was not involved. (Ex. 5 to Motion to Compel) In this email, Mr. Houston thanks Mr. Richie for having the "human decency" to refrain from engaging in the same conduct in which Gawker Defendants engaged, and for refusing to participate in the extortion scheme

against Mr. Bollea. In response, Mr. Richie referred Mr. Houston to his website post stating that Mr. Bollea "had nothing to do with the sex tape leak."

It is unclear why Gawker Defendants are complaining about emails which, if anything, are harmful to their case. Regardless, they have the emails and can try to use them at trial if they so choose. However, if the only intended purpose of the emails is to support another theory trying to make offensive language relevant, that issue remains irrelevant and immaterial to this case.

Second, Gawker Defendants raise three (3) emails between David Houston and the FBI. In May 2014, Mr. Bollea produced hundreds of pages of documents, including all of Mr. Houston's emails with the FBI that he was able to locate. The emails at issue in the Motion have absolutely no bearing on or relevancy to this case.

In one email, Mr. Houston relays information to the FBI concerning information he was learning **at that time** (October 19-22, 2012) from Mike Walters at TMZ concerning the possibility of **other** sex tapes with Heather Clem and **other** individuals. This **new** information being obtained in October 2012 has absolutely **no** relevance to whether Mr. Bollea knew he was being recorded in **2007** (when the tapes of Mr. Bollea were illegally and secretly recorded).

Gawker Defendants go so far as to mischaracterize Mr. Houston's deposition testimony to falsely accuse him of perjury on this issue. (See Motion to Compel FN4) Mr. Houston was asked in his deposition about a conversation with Mike Walters of TMZ on **October 9, 2012**. Ex. H. (Houston Depo. pp. 126-127). This October 9, 2012 conversation immediately followed an interview on TMZ, and was indeed "fairly brief." However, ten days elapsed between this "fairly brief" conversation and October 19, 2012 – when Mr. Houston conveyed information he was learning on calls with Mike Walters **subsequent** to October 9, 2012 to the FBI.

The remaining two emails between Mr. Houston and the FBI are completely irrelevant. In these emails, Mr. Houston merely notes his objection to the FBI's production of illegally recorded footage of Mr. Bollea, and communicates his desire to try to protect his client's privacy interests by ensuring that the illegally recorded content is not produced. The only reason these emails are raised in the Motion to Compel is to try to paint Mr. Houston in a bad light.

Finally, Gawker Defendants speculate, based upon references in FBI records about Mr. Houston's "communications" with media outlets to try to get information about who was extorting Mr. Bollea, that there must be more written communications. There are not. Mr. Houston's "communications" with other media outlets during that time period were by phone; they were not made through text, email or other written manner.

IV. Mr. Bollea's Settlement Communications with Bubba Clem Are Not Discoverable

Mr. Bollea's settlement negotiations with Bubba Clem remain undiscoverable, as ordered by the Court on May 24, 2014 (see Ex. 21 to Motion to Compel). Gawker Defendants have the Settlement Agreement, and asked Mr. Clem and Mr. Bollea about it at their depositions. As set forth above, the reason Gawker Defendants claim they need the settlement communications is because they maintain they will show that Mr. Bollea knew he was being recorded, and why Mr. Clem originally stated (falsely) when the lawsuit was filed that Mr. Bollea was in on it. Mr. Clem testified about this issue ad nauseam at his deposition. The fact that Gawker Defendants don't like Mr. Clem's answers does not warrant improper discovery of the underlying settlement communications.

V. Mr. Bollea Did Not Waive His Attorney-Client Privilege

Finally, Gawker Defendants broadly claim that Mr. Bollea waived his attorney-client privilege about numerous subjects because Mr. Houston participated in the FBI extortion

investigation and sting operation. This misplaced argument ignores the language in the supporting documents, as well as the fact that the content and substance of attorney-client communications was **never** disclosed.

The lynchpin to Gawker Defendants' argument is a statement made by FBI Agent Shearn to Mr. Houston on October 22, 2012 – which is memorialized in an FD-302 dated October 24, 2012 (see Ex. 22 to Motion to Compel) which states:

> 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 ongoing criminal investigation and that he intended to continue. (Emphasis added.)

Gawker Defendants completely ignore that the loss of the privilege was merely "**potential**," and that this "**potential**" loss never actually happened. Gawker Defendants also fail to identify any attorney-client "communication" between Mr. Houston and Mr. Bollea in their Motion that was revealed to the FBI or Davidson. The privilege covers the content of "confidential communications between lawyer and client made in the rendition of legal services." *Haskell Co. v. Georgia Pacific Corp.*, 684 So.2d 297, 298 (Fla. 5th DCA 1996). "It is the communication with counsel which is privileged, not the facts." *Brookings v. State*, 495 So.2d 135, 139 (Fla. 1986). Moreover, sending an attorney in pursuit of a "deal" doesn't waive the privilege. *Id.*[3]

Mr. Bollea and Mr. Houston relayed **facts** to the FBI, and discussed **facts** with Davidson as part of the sting operation (a fake deal created to catch Davidson and his client). The

[3] Certainly, "the mere fact that two attorneys may be representing a single client on the same matter does not waive the privilege that the client has to prevent his or her confidential communications to one of his or her lawyers from being revealed to the other lawyer." *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So.2d 504, 510 (Fla. 2d DCA 2006).

statements Mr. Houston made to Davidson during the sting operation itself were not reality – they were lines stated while playing the role of a "buyer" in an extremely volatile and tense situation, the sole and exclusive purpose of which was to make Davidson and his client comfortable and continue to "close the deal."

Mr. Houston explained this during his deposition, as reflected in the following testimony which Gawker Defendants again fail to acknowledge nor disclose to this Court:

> You have to understand I wasn't looking at it to identify the people on the tapes. I was looking at it only in a play acting sense to pretend. I was (*sic*) concerned with what was on the tapes. I was really more concerned with Mr. Bollea and his reaction to what he had viewed the first time. I would suggest to you that my brief viewing, of course, did indicate to me that it appeared to be someone similar to Mr. Bollea.
>
> Ex. H. (Houston Depo. pp. 213:20-214:3)
>
> Our goal was not to sit and verify content. It was simply to authenticate the fact that Mr. Bollea was on there. But, again, remember, this was all part of a sting, and so, therefore, we're playing a role where we're attempting to have Mr. Davidson believe that were bona fide purchasers for this material, which requires us to do something, which at that point was "Okay. Well, Terry, does that look like you?" which leads Terry to walk away, signaling to me he's very upset, which leads me to want to just simply get through the process.
>
> Ex. H. (Houston Depo. p. 217:9-18)

Gawker Defendants' insistence on taking the events that transpired during the sting, including Mr. Houston's and Mr. Bollea's statements, at face value is absurd. It is akin to claiming that Mr. Bollea's emotional distress was actually caused by a loss in a scripted contest in the wrestling ring.

Gawker Defendants' argument based on the crime-fraud exception to the attorney-client privilege is meritless. As set forth above, no fraud has been demonstrated. Moreover, Gawker

Defendants failed to present *prima facie* evidence that Mr. Bollea sought the advice of counsel to procure a fraud. *First Union National Bank of Florida v. Whitener*, 715 So.2d 979, 982 (Fla. 5th DCA 1998). To the contrary, Mr. Bollea sought the advice of counsel to prevent being the victim of crimes.

VI. Gawker Defendants Are Not Entitled to Watch the DVDs

This Court has already ruled, very clearly, that all DVDs and audio files produced by the federal government under the Freedom of Information Act ("FOIA"), pursuant to the limited FOIA authorizations that Mr. Bollea was required to execute solely for discovery purposes in this case, must be turned over to Discovery Magistrate James Case for review for relevancy under the parties Stipulated Protocol. (See ¶ 5-6 of Order on Plaintiff's Emergency Motion for Clarification). Gawker Defendants have already appealed the Court's September 23, 2015 Order on Plaintiff's Emergency Motion for Clarification. (See 2nd DCA case 2D15-4565). Now, despite that pending appeal, Gawker Defendants are asking this Court to reconsider, again, its clear pronouncement that all DVDs and audio files produced by the federal government must be reviewed by Judge Case for relevancy within the context of the salient issues being tried in this lawsuit.

It is troubling that Gawker Defendants continue to attack the Court's decision to make the parties adhere to the Stipulated Protocol and to have Judge Case review materials for relevancy before disclosure, when it was Gawker Defendants themselves who first proposed the concept of having Judge Case review materials for relevancy before requiring production. In fact, at a hearing on January 17, 2014 (at a time when Gawker Defendants were apparently still pleased with rulings being made by Judge Case), they proposed for Judge Case to review materials such

as DVDs for relevancy, "so that he could tell us, hey, there's something here that's relevant, Your Honor." Ex. A. (1/17/2014 Trans. p. 44: 11-24)

This procedure adheres to Florida law. When a party challenges discovery by asserting a privacy right[4] (which Mr. Bollea has done as it relates to all FOIA records, including audio and DVDs), the trial court **must** conduct an *in camera* review to determine whether the materials are relevant[5] to the issues in the underlying action." *Muller v. Wal-Mart Stores, Inc.*, 164 So. 3d 748 (Fla. 2d DCA 2015) (emphasis added). This *in camera* review is necessary to segregate documents that should be designated from those that should not. *Walker*, 111 So. 3d at 296. Further, the Court must "determine whether there is **good cause for disclosure**, such that the **need for the information** [to be disclosed] **outweighs the possible harm**." *Bergmann v. Freda*, 829 So. 2d 966 (Fla. 4th DCA 2002) (emphasis added).

Gawker Defendants cannot override this Court's Clarification Order, the Stipulated Protocol nor Florida law, simply because they want to appoint themselves the arbiter of whether privacy protected recordings (none of which are at issue in this lawsuit) are "relevant." This Court already gave Gawker Defendants considerable leeway in discovery to obtain access to highly confidential materials, over the objections of Mr. Bollea, so that Gawker Defendants could determine whether there was any evidence that Mr. Bollea knew he was being recorded.

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[4] "In exercising its discretion to prevent injury through abuse of the action or the discovery process within the action, trial courts are guided by the principles of relevancy and practicality." *Id.* Moreover, "[t]he right of privacy set forth in article 1, section 23 of the Florida Constitution undoubtedly express a policy that compelled disclosure through discovery be limited to that which is necessary for a court to determine contested issues." *Ryan v. Landsource Holding Co., LLC,* 127 So.3d 764, 767 (Fla. 2d DCA 2013). When making this determination, the Court should, *in camera*, "balance (on an *ad hoc* bases) the right to privacy and the right to know." *Friedman*, 863 So.2d at 194.

[5] "It is axiomatic that discovery in civil cases must be relevant to the subject matter of the case." *Walker v. Ruot*, 111 So.3d 294, 296 (Fla. 5th DCA 2013)

This discovery proved that he did not. Consequently, and true to form, Gawker Defendants want to use discovery for an ulterior purposes: namely, to waste time leading up to trial, distract from the salient issues in the case, inject prejudicial issues into the case, and force Mr. Bollea to respond to spurious allegations of nonexistent "fraud upon the Court" so that they can flush out Mr. Bollea's trial strategies.

Given that Mr. Bollea's fears over irrelevant and immaterial portions of discovery becoming public actually materialized, resulting in significant harm to Mr. Bollea, there is considerable reason for this Court to limit access to private and highly confidential information that has no bearing on the merits of this case. Sealed discovery in this case was recently made public. Consequently, the balancing of need versus harm now weighs even more heavily in favor of Mr. Bollea—particularly as it relates to recordings that are not at issue.

In reality, Gawker Defendants have no actual need to review other illegal recordings of Mr. Bollea, nor the DVD of the sting operation launched to try to catch someone who was trying to extort Mr. Bollea with them. Gawker Defendants twisted logic as to why these illegal recordings are "relevant" is unavailing. Notably, Gawker Defendants have abandoned their argument that the relevancy of these materials is that they will demonstrate that Mr. Bollea knew he was being recorded. The obvious reason for this is because he did not know; and significant evidence Gawker Defendants have in their possession demonstrates this to be true.

Judge Case is eminently qualified and familiar with the facts of this case such that he can review the materials in question and determine whether any portion of them is relevant to the salient issues.

A. The Sting Was Not "Real"

Gawker Defendants willful blindness to the fact that a sting operation is a fictional event orchestrated to catch a criminal is puzzling. They ask the Court to allow them to watch the DVD of the sting as if the events that transpired were "real." They were not.

Mr. Bollea and Mr. Houston were playing roles at the sting; no different than an undercover police officer. They were acting and saying things they needed to say in order to make a deal with someone who was trying to extort Mr. Bollea. Mr. Houston made this concept very clear to Gawker Defendants during his deposition:

> You have to understand I wasn't looking at it to identify the people on the tapes. I was looking at it only in a play acting sense to pretend. I was (*sic*) concerned with what was on the tapes. I was really more concerned with Mr. Bollea and his reaction to what he had viewed the first time. I would suggest to you that my brief viewing, of course, did indicate to me that it appeared to be someone similar to Mr. Bollea.
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>
> Ex. H. (Houston Depo. p. 217:9-18)

Gawker Defendants insistence on taking the events that transpired at the sting operation, including the video footage of those events, at face value is simply absurd. The events that transpired at the sting operation were fake, and consequently have no bearing on or relevancy to this case. Thus, the DVD of the sting operation is not reasonably calculated to lead to the

discovery of admissible evidence, and is outside the scope of permissible discovery. Certainly, Gawker Defendants have not articulated any reason as to why they believe the events at the sting are relevant to the issues being tried.

B. Gawker Defendants Counsel Should Not Be Permitted to Watch Illegally Recorded Footage of Mr. Bollea That Is Not At Issue

As set forth above, this Court has already ruled (pursuant to Gawker Defendants' own suggestion, and the Stipulated Protocol), that Judge Case will review the DVDs for relevancy, if any. There is no legitimate reason for the Court to reconsider its ruling.

Gawker Defendants' suggestion that "fundamental fairness" justifies allowing counsel to view illegally recorded footage of Mr. Bollea because they contend that Mr. Bollea and his counsel have known the full content of the DVDs is simply untrue, and ignores the facts.

As set forth above, Mr. Houston testified that Mr. Bollea, upon seeing himself on the first DVD, backed away and could not watch anymore. The FBI and TPD records confirm this fact.

C. The DVDs Are Not Relevant

Taken as a whole, the DVD Motion appears to be nothing more than a thinly-veiled attempt to force Mr. Bollea to respond to certain evidence and testimony **before** trial—and thereby reveal his trial strategy and attorneys' work product. Given the Court's prior rulings, which Gawker Defendants have given no legitimate reason to overturn, Mr. Bollea is not inclined to indulge Gawker Defendants' ploy. Suffice it to say, if the DVDs have any relevant material, then Judge Case is eminently qualified to review Gawker Defendants' relevancy positions set forth in the DVD Motion, and determine whether any of the content of the DVDs is, in fact, relevant.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system and via separate e-mail this 12th day of January, 2016, to the following:

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