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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY GENE BOLLEA'S CONFIDENTIAL MOTION FOR PROTECTIVE ORDER RE: CERTAIN CONTENT IN DOCUMENTS PRODUCED IN DISCOVERY

FILED UNDER SEAL

I. INTRODUCTION

Plaintiff Terry Bollea hereby applies under seal for a protective order permitting him to redact from documents produced in this litigation: (1) certain offensive terminology that the Special Discovery Magistrate has already ruled to be irrelevant to this case and non-discoverable; and (2) the prefix (the three numbers after the area code) of the telephone numbers of non-parties who had nothing at all to do with this case, while the phone numbers of witnesses in this case, including Bubba Clem's, would be produced in full.

Gawker Media, LLC ("Gawker") operates a group of celebrity tabloid websites that publish, among other things, salacious content that invades the privacy of celebrities. *See, e.g.*, *Fred Durst: Touch My Balls and My Ass and Then Sue Gawker*, Gawker.com (*printed* Oct. 2,

2013) (after Fred Durst sues Gawker for invasion of privacy, Gawker writes: "Someone sent us a link to a video of your penis, we went into shock, and we shared it with the world for about 2 hours."); Max Read, *Three Topless Photos of Kate Middleton Put Us at Two for Three on Royal Nudie Pic Scandals [NSFW] (Updated)*, Gawker.com (Sept. 14, 2012) (publishing the topless photos and stating, "isn't this the classy way to have your privacy invaded?"); A.J. Daulerio, *Brett Favre's Cellphone Seduction of Jenn Sterger (Update)*, Deadspin.com (Oct. 7, 2010) (posting video obtained from "third party," which includes, in Daulerio's own words: "penis photos at the 2:08 mark").

Here, in October 2012, Gawker published a surreptitiously recorded sex video depicting Plaintiff fully naked and engaged in private, consensual sex in a private bedroom, which gave rise to this lawsuit. This case turns on whether Gawker's publication of the sex video invaded Plaintiff's privacy, and whether Gawker had a First Amendment right to publish it anyway. Despite the straightforwardness of the case, Gawker has tried to use the discovery process as a tool to go far beyond what is relevant, to invade Plaintiff's privacy again and again in the process, and to punish and embarrass him as retaliation for filing this suit. The Court has already granted motions for protective orders to ensure that Plaintiff's privacy is not invaded by Gawker a second time, including precluding Gawker from engaging in discovery into his sex life, except as it pertains to Heather Clem, precluding Gawker from engaging in discovery of Plaintiff's medical history and business dealings, and requiring special procedures for the protection and handling of his videotaped deposition and other sensitive, confidential information. Plaintiff seeks this protective order to prevent Gawker from improperly obtaining, through this lawsuit, ammunition to wage a media firestorm against Plaintiff so as to gain improper leverage over him

in this litigation and/or further invade his privacy or seek to cause harm to his reputation and career.

Certain documents produced in discovery purport to summarize other videos (**not** the one from which Gawker created its "highlight reel" and published on the internet) in which Plaintiff is described by non-parties as allegedly using offensive language while he was in a private bedroom. There is no actual evidence that Plaintiff used this language, and the documents are hearsay upon hearsay, and lack any foundation. Moreover, the documents do **not** concern the video at issue in this litigation.

The Special Discovery Magistrate has already ruled on this issue, during Bubba Clem's deposition, and sustained Plaintiff's objection to questions about whether Plaintiff used such offensive language. On this basis, Plaintiff redacted the same terms from the document productions. The redactions also are consistent with Florida law—there is no circumstance in which this evidence would be admissible, because it is multiple hearsay, lacks foundation, lacks relevance, and is severely prejudicial. As such, the redacted terms are not reasonably likely to lead to the discovery of any admissible evidence.

Plaintiff also has been ordered to produce his telephone records. Gawker's basis for seeking these records was to establish if and when Plaintiff spoke with certain key witnesses for the purpose of obtaining information about those telephone calls in discovery. Gawker has expressly disclaimed any interest in Plaintiff's calls to anyone **other** than these key witnesses. For this reason, Plaintiff seeks to redact the prefix (three numbers that follow the area code) of telephone calls to and from people who are **not** witnesses in this case. The area code and the last four digits of these numbers remain to allow Gawker to identify if any of the telephone numbers match those of any of the witnesses herein.

Accordingly, the Special Discovery Magistrate should recommend that a protective order be entered permitting the redactions.

II. ARGUMENT

Pursuant to Florida's discovery rules, "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: . . . (4) that certain matters not be inquired into." Fla. R. Civ. P. 1.280(c). In this case, there is good cause for the Special Discovery Magistrate to recommend an order protecting Plaintiff from the embarrassment and oppression that would result from production of the redacted terms.

This case is about Plaintiff's right to privacy—a strong, free standing right in the State of Florida. As the Supreme Court of Florida held, in *Rasmussen v. South Fla. Blood Service, Inc.*, 500 So. 2d 533, 536 (Fla. 1987):

> [I]n Florida, **a citizen's right to privacy is independently protected by our state constitution**. In 1980, the voters of Florida amended our state constitution to include an express right of privacy. Art. V, § 23, Fla. Const. In approving the amendment, Florida became the fourth state to adopt a **strong, freestanding right of privacy** as a separate section of its state constitution, thus providing an explicit textual foundation for those **privacy interests inherent in the concept of liberty** which may not otherwise be protected by specific constitutional provisions.
>
> Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, **there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others**.

(Emphasis added.) In *Rasmussen*, the Court considered whether it was appropriate to enter a protective order precluding a plaintiff from discovering the private information of donors to a blood bank. The Court held: "In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting

discovery or by denying it." *Id.* at 535. The Court found that the competing interests in that case strongly weighed in favor of a protective order:

> In balancing the competing interests involved, we do not ignore [the plaintiff's] interest in obtaining the requested information in order to prove aggregation of his injuries and obtain full recovery. We recognize that [the plaintiff's] interest parallels the state's interest in ensuring full compensation for victims of negligence. However, we find that the discovery order requested here would do little to advance that interest. The probative value of the discovery sought by [the plaintiff] is dubious at best. The potential of significant harm to most, if not all, of the fifty-one unsuspecting donors in permitting such a fishing expedition is great and far outweighs the plaintiff's need under these circumstances.

Id. at 538.

Similarly, here, a protective order allowing Plaintiff to redact certain offensive terms from discovery should be entered. The probative value of the discovery is "dubious" (in fact, it is non-existent), and the potential for harm is great. (The Special Discovery Magistrate has already made this determination—during the deposition of Mr. Clem.) The competing interests strongly weigh in favor of entry of a protective order, for at least the following reasons:

First, Gawker is in the business of publishing gossip that invades the privacy of celebrities. *See, supra*, at 1–2 (listing examples of Gawker's "reporting" on the private and salacious details of celebrities). Thus, Gawker should not have access to information regarding the alleged private statements of Plaintiff that have nothing to do with the issues of this case, and have the potential to cause him harm.

Second, the redacted terms at issue are inadmissible hearsay—statements that allegedly appear in a video that neither Gawker nor Plaintiff has a copy of, and which has never been

produced in discovery in this case.[1] As such, there is no evidentiary foundation for the alleged statements.

Third, whether or not Plaintiff used offensive language in a video that Gawker did not post and thus has nothing to do with the claims in this action is simply not relevant to any of the claims or defenses in this case. Plaintiff is not suing Gawker for any reporting on purportedly offensive language—he is suing Gawker for publishing a voyeuristic video depicting him fully naked and engaged in explicit sexual activity and distributed without his knowledge or consent. The case has nothing to do with offensive language allegedly appearing in videos that are not at issue. Thus, discovery of such comments will not lead to evidence that will actually be admitted at trial.

Fourth, even if any relevance were established, the statements would be excluded because their prejudicial effect would far outweigh any probative value. Fla. Stat. § 90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."). Thus, the Special Discovery Magistrate's ruling at Bubba Clem's deposition sustaining Plaintiff's objection to questioning regarding the offensive language was correct. Gawker never took exception to that ruling, and it should be applied here and for the remainder of the case.

In sum, in this case about privacy, Plaintiff's right to privacy far exceeds any purported need for the discovery of the redacted terms. Accordingly, the protective order should be entered.

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[1] The Court has already found that, if additional sex videos are discovered, they are to be reviewed and transcribed *in camera*, rather than turned over to Gawker. The relevant excerpts of the January 17, 2014, transcript that includes this ruling are attached hereto as **Exhibit 1**.

Additionally, Plaintiff seeks to redact the prefix of the telephone numbers of non-parties who have nothing to do with this case. It is well-established in Florida that discovery of non-parties' phone numbers implicates those individuals' privacy rights, and such identifying information should not be produced unless the requesting party establishes a countervailing need for the information:

> Article I, section 23, Florida Constitution, affords Floridians the right of privacy and ensures that each person has the right to determine for themselves when, how and to what extent information about them is communicated to others. Names, addresses, and **telephone numbers are forms of identity information that can be considered private and confidential information**. When a party seeks private or confidential information, courts must require the party seeking the information to make a showing of **necessity** which outweighs the countervailing interest in maintaining the confidentiality of such information. This court has noted **the release of names and telephone numbers, where irrelevant, would be an invasion of privacy for the third parties.**

Publix Supermarkets, Inc. v. Johnson 959 So.2d 1274, 1276 (Fla. 4th DCA 2007) (emphasis added) (internal citations and quotations omitted). *See also Haywood v. Samai*, 624 So. 2d 1154 (Fla. 4th DCA 1993) (granting writ of certiorari and holding that "nonparty patients names and telephone numbers are irrelevant and that revealing their names and telephone numbers would be an invasion of privacy"); *Colonial Medical Specialties of South Florida, Inc. v. United Diagnostic Laboratories, Inc.*, 674 So. 2d 923 (Fla. 4th DCA 1996) (granting writ of certiorari and holding that party "failed to meet its burden to show any need for [the non-parties' telephone numbers] which would override the privacy rights of these non-party patients"); and *Colonial Medical Specialties of South Florida, Inc. v. United Diagnostic Laboratories, Inc.*, 674 So. 2d 923 (Fla. 4th DCA 1996) (granting writ of certiorari and holding that party "failed to meet its burden to show any need for [the non-parties' telephone numbers] which would override the privacy rights of these non-party patients").

Similarly, here, the release of the full telephone numbers for upwards of 99.9 percent of Plaintiff's calls would be irrelevant, and thus an invasion of the non-parties' privacy. As Gawker stated in its Response to Plaintiff's Exceptions Regarding Defendants' Fifth Motion to Compel, its purpose in seeking the telephone records is "to clarify the extent to which plaintiff spoke and texted with **key witnesses**, including Bubba and Heather Clem, during the relevant time period." **Exhibit 2** (emphasis added.) Gawker admits that its purpose is not to find out every call, no matter how personal, Plaintiff ever made.

Thus, there is no basis for allowing Gawker to see the entire private phone numbers of persons and entities that Plaintiff may have called or taken a call from, who have nothing to do with this case. Plaintiff therefore seeks to redact the prefix (only) of the listing of telephone calls to and from non-witnesses, while leaving enough digits visible (the area code and the last four digits) to allow Gawker to determine if any of the telephone numbers match those of any potential witnesses in this action—such as Bubba Clem, Heather Clem, Gawker's employees, or others.

III. CONCLUSION

For the foregoing reasons, the Special Discovery Magistrate should recommend that Plaintiff be allowed to redact from documents produced in this case any references to offensive language that are attributed to Plaintiff, and telephone numbers of persons and entities who are not witnesses in this case.

DATED: May 27, 2014

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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 this 27th day of May, 2014 to the following:

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