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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, *et al.*,

Defendants.
_____/

OPPOSITION TO PLAINTIFF'S CONFIDENTIAL MOTION FOR PROTECTIVE ORDER RE: CERTAIN CONTENT IN DOCUMENTS PRODUCED IN DISCOVERY

FILED UNDER SEAL

Defendants Gawker Media, LLC and A.J. Daulerio, by and through their undersigned counsel, respectfully submit this opposition to plaintiff's motion for protective order.

PRELIMINARY STATEMENT

On April 23, 2014, the Court ordered plaintiff Terry Bollea to produce "full and complete" responses to document requests seeking records relating to (a) the law enforcement investigation into the recording of his sexual encounter with Heather Clem, and (b) his phone records from 2012. Bollea has not fully complied with either aspect of that order. Instead, he produced (or, in the case of certain phone records, has promised to produce) redacted versions of various records. Now, he belatedly moves for a protective order asking the Court's permission to do what he already has done – redact the records. In reality, his motion is nothing more than an attempt to re-litigate the issues that Judge Case and Judge Campbell already adjudicated and that ultimately resulted in the entry of the April 23 Order. Indeed, each of the bases for the pending motion either were or could have been raised in response to defendants' Fifth Motion to

Compel. Bollea should not get another bite at the apple, while flouting the Court's order in the meantime. His motion should be denied.

I. BOLLEA SHOULD NOT BE PERMITTED TO REDACT THE LAW ENFORCEMENT RECORDS.

For many months, Bollea concealed the records related to the FBI's investigation into "the source and distribution of the secretly-recorded sex tape that is the subject of this lawsuit." Aff. of David Houston ¶ 2 (filed with Bollea's Motion to Stay Pending Writ of Certiorari Review). Then, for several more months, he objected to producing his FBI documents on the single ground that those documents were covered by a law-enforcement privilege, even though the Government advised that it was not asserting a law-enforcement privilege with respect to those documents. Both Judge Case and Judge Campbell rejected plaintiff's argument and ordered production of the "full and complete" records. Bollea has not complied and continues to withhold certain information in those records.

Specifically, Bollea has redacted time-coded summary transcripts of tapes depicting him having sexual relations with Heather Clem. Ex. 1 (redacted copies of documents). He now admits that those transcripts reveal that he repeatedly used "offensive racial terms" on one of the Bollea-Clem sex tapes. Conf. Harder Aff. ¶ 2 & Ex. 1 (noting objection to questions about Bollea's use of the "N word"); *id.* (acknowledging redaction of "same terms" in documents).

Bollea and his counsel have known about the existence of these transcripts and the fact that they show him using racist language since at least December 2012, and likely earlier. *See* Confidential Statement of Violations of Court Orders and Misrepresentations by Plaintiff and Plaintiff's Counsel ("Confidential Statement") at ¶¶ 6-18. Although they knew of the potential "embarrassment" stemming from the "redacted terms" for well more than a year, Mot. at 4, Bollea did not raise this ground for refusing to produce the records, or seek a protective order, in

his objections to defendants' initial discovery requests, in his objections to defendants' supplemental discovery requests, or in the briefs and argument before Judge Case and then Judge Campbell – including in the confidential session in which he obtained authorization to produce the FBI documents on an "attorneys' eyes only" basis. Bollea should not be permitted to raise this issue now, after the Court has ordered the production of the records. In effect, Bollea's motion seeks to undo the Court's April 23 order requiring "full and complete" production of these documents, and authorizing them to be produced on an "Attorneys' Eyes Only" basis. That request is improper and should be rejected.[1] *Cf.* Confidential Statement at ¶¶ 20-21, 36-37, 39-42 (noting instances in which Bollea did not provide complete information to defendants and the Court about his knowledge concerning the information contained in these records).

In any event, each of Bollea's three reasons for redacting the documents is baseless:

1. Bollea's principal argument is that "Gawker should not have access to information regarding the alleged private statements of Plaintiff" because it "operates a group of celebrity tabloid websites." Mot. at 1, 5. This argument for withholding discovery, which Bollea has made time-and-again, is a canard. *See, e.g.*, Ex. 3 (Bollea's Opp. to Fifth Mot. to Compel ("Bollea Opp.")) at 9 (accusing Gawker of seeking law enforcement records to "obtain further salacious information to post at its tabloid website"). Discovery in this case is governed by a protective order restricting the disclosure of confidential information. Bollea cannot point to a single instance when Gawker has violated that order. And, while Bollea's motion warns that

[1] Bollea also has redacted the same terms from documents produced by Don Buchwald Agency ("DBA") and Tony Burton. *See* Conf. Harder Aff. ¶ 3; Ex. 1 (redacted copy of those documents). Those documents were produced in response to a subpoena served by Bollea. He has cited no authority permitting a party to redact information produced by a third-party in response to a subpoena. He should not be permitted to use the Court's subpoena authority to grant himself access to a third-party's records, while seeking to deny other litigants that same access. In this instance, given the obvious hide-and-seek approach that plaintiff took when providing these records to defendants, they subsequently sought and received the records from the third-parties directly. Ex. 2.

the redacted information could be used as "ammunition to wage a media firestorm against Plaintiff," Mot. at 2, Gawker's counsel expressly represented to the Court that Gawker has no First Amendment right to publish information obtained through discovery. Ex. 4 (Apr. 23, 2014 Conf. Hrg. Tr.) at 7:2-7 (citing *Seattle Times v. Rhinehart*, 467 U.S 20 (1984)).

More importantly, the information at issue here is subject to even greater protection: Judge Campbell mandated, with no objection from Gawker's counsel, that it be produced for "attorney's eyes only." *Id.* at 6:14 – 7:23. Gawker itself will not have access to the information. In fact, at the hearing where Judge Campbell ordered the disclosure of these records, Gawker's counsel acknowledged that if the lawyers publicly disclose any of the information Bollea produced "we're going to be in hot water." *Id.* at 6:20-21; *see also id.* at 7:17 (court reminding Gawker's counsel that if information in documents designated as "attorney's eyes only" were to be shared with non-lawyers at Gawker "you're in trouble").

2. Bollea next argues that the disclosure of these records has "the potential to cause him harm." Mot. at 5. In support of this argument, Bollea contends that the Court should "'balance the competing interests that would be served by granting discovery or by denying it.'" Mot. 4-5 (quoting *Rasmussen v. South Florida Blood Service*, 500 So. 2d 533, 537 (Fla. 1987)). Yet, the "competing interests" in the case quoted by Bollea have no bearing here.

In *Rasmussen*, a plaintiff who claimed to have contracted AIDS from a tainted blood transfusion subpoenaed a blood bank seeking the names and addresses of 51 people who had donated blood. *See* 500 So. 2d at 534. Neither the blood bank nor the donors were parties to the suit. Significantly, as the Florida Supreme Court explained, the subpoena would give plaintiff access to information about "the blood donors with ***no restrictions on their use***." *Id.* at 535 (emphasis added). Thus, the Court worried that if the information were disclosed, the plaintiff

might "conduct[] an investigation without the knowledge" of the donors, "disclos[e]" the information "to nonparties," and ask other people about "the donor's sexual preferences, drug use, or general life-style." *Id.* The Court also was concerned about the societal impact of disclosing information about blood donors: Given that "the prospect of inquiry into one's private life and potential association with AIDS will deter blood donation," the Court concluded "it is clearly 'in the public interest to discourage any serious disincentive to volunteer blood donation.'" *Id.* at 538 (citation omitted).

The "competing interests" in *Rasmussen* "do not remotely resemble those involved" in this case. *Hauser v. Volusia Cnty. Dep't of Corr.*, 872 So. 2d 987, 991 (Fla. 1st DCA 2004) (*per curiam*) (distinguishing *Rasmussen* on ground that it "involved the primary interests of blood donors, a blood service, and society in maintaining a strong volunteer donor system which would have been threatened by the disclosure of the blood donors' names and addresses"). While *Rasmussen* was based on the "stigmatizing effect" on third parties "of being associated with the AIDS virus,", *id.* at 991-92, which could harm "'the public interest'" in blood donation, *Rasmussen*, 500 So. 2d at 538, maintaining the secrecy of racist comments made by a party, particularly when those comments appear to explain a pivotal comment in the case, *see* note 3 *infra*, involves no competing public interest.

And, most importantly, unlike in *Rasmussen*, if Bollea complies with the Court's April 23 Order and produces the information, there are very strict restrictions on its use. Indeed, the Court has instructed that it must be kept confidential for "attorney's eyes only." *See Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189, 195 (Fla. 2003) (discussing impact of *Rasmussen* and then noting that "'our discovery rules provide sufficient means to limit the use and dissemination of discoverable information via protective orders'") (quoting *Martin-Johnson,*

Inc. v. Savage, 509 So. 2d 1097, 1100 (Fla. 1987)); *Westchester Gen. Hosp., Inc. v. Ramos*, 754 So. 2d 838, 839-40 (Fla. 3d DCA 2000) (documents that are "'reasonably calculated to lead to the discovery of admissible evidence'" must be produced, and if they include sensitive information "there is a protective order preserving the confidentiality of that information"); *Homeward Residential, Inc. v. Rico*, 110 So. 3d 470, 471 n.1 (Fla. 4th DCA 2013) (*per curiam*) (rejecting privacy-based discovery objection and noting that "the court entered a confidentiality order as to the documents produced"); *see also Tootle v. Seaboard Coast Line R.R. Co.*, 468 So. 2d 237, 239 (Fla. 5th DCA 1984) (a "plaintiff in a civil suit must cooperate in the discovery process, even if it means that he must authorize the disclosure of potentially prejudicial information") (requiring authorization to permit psychologist's deposition). There simply is no reason that a transcript of a sexual encounter between plaintiff and Ms. Clem should be withheld from Gawker's *counsel*, particularly in light of the extra protection imposed by the Court.[2]

3. Finally, Bollea argues that the information should not be disclosed because it might not be admissible at trial for various reasons. *See* Mot. at 5 (arguing information is "inadmissible hearsay"); *id.* at 6 (arguing information is "not relevant"); *id.* (arguing information "would be excluded because [its] prejudicial effect would far outweigh any probative value"). Whether information is ultimately admissible at trial is irrelevant to whether it is discoverable. *See* Fla. R. Civ. P. 1.280(b)(1) ("It is not ground for objection that the information sought will be

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[2] Bollea contends that "the Special Discovery Magistrate has already made the determination" that any information about Bollea's use of racist language is not discoverable "during the deposition of Mr. Clem." Mot. at 5; *see also id.* at 4 (arguing that redactions were justified because "the Special Discovery Magistrate. . . sustained Plaintiff's objection to questions about whether Plaintiff used such offensive language"). But, that deposition ruling was based on incomplete and inaccurate information provided by plaintiff and his counsel both before and at the deposition. *See* Confidential Statement at ¶¶ 58-59. Indeed, neither Gawker's counsel nor Judge Case were aware that transcripts of the tapes actually showed Bollea using racist language or that Mr. Clem's pivotal comment about "retiring" off of the recording actually referred to that language and not to the sex depicted. That information, however, was known by Bollea and Bollea's counsel.

inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."); *Bd. of Trustees of Internal Improvement Trust Fund v. Am. Educ. Enter., LLC*, 99 So. 3d 450, 458 (Fla. 2012) ("The concept of relevancy has a much wider application in the discovery context than in the context of admissible evidence at trial."); *Behm v. Cape Lumber Co.*, 834, So. 2d 285, 287 (Fla. 2d DCA 2002) ("Even information that is inadmissible at trial is subject to discovery if it appears to be reasonably calculated to lead to the discovery of admissible evidence.").

Judge Campbell has already ruled that requests for Bollea's records regarding the criminal investigation, the sexual relationship between plaintiff and Heather Clem, and the contents of sex tapes involving them are reasonably calculated to lead to the discovery of admissible evidence.[3] At this stage of the litigation, assessing whether that evidence is ultimately admissible would be premature. That question should be addressed only after the close of discovery and only on a complete factual record. The question now is limited to whether information should be produced in discovery to opposing counsel on an "attorneys' eyes only" basis, as already ordered by the Court; questions about the admissibility of that information are properly reserved for a later date.

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[3] With respect to the contents of the tapes, at a hearing on January 17, 2014, the Court ordered Bollea and Bubba Clem to turn over for inspection any recordings depicting Bollea and Heather Clem having sexual relations, finding them relevant not only generally but specifically concerning the Clems' discussion "that they were going to get rich from this video" – including because "Mrs. Clem is still a defendant in this case" and that "certainly would be something even [plaintiff] would want to know." Ex. 5 (Jan. 17, 2014 Hrg. Tr.) at 32:1 – 34:25. The "getting rich" language addressed by the Court is precisely what is at issue here. The transcript confirms that the Clems were not talking about getting rich from a sex tape involving Bollea, as his counsel implied at that hearing. *Id.* Rather, Mr. Clem told Mrs. Clem that "if we ever did want to retire, all we have to do is use that . . . footage of him talking about [redacted] people." *See* Ex. 1 at BOLLEA001214; Ex. 2 (unredacted DBA document).

II. BOLLEA SHOULD NOT BE PERMITTED TO REDACT HIS PHONE RECORDS.

Bollea's effort to redact information from his telephone records is nothing more than a rehashing of the same arguments he raised in opposition to Gawker's motion to compel those records and in his exceptions. Indeed, his motion for a protective order recycles the precise arguments that both the Special Discovery Magistrate and the Court already rejected:

- Bollea seeks to limit his production of telephone information to calls with "key witnesses," Mot. at 8, just as he proposed in earlier proceedings. *See, e.g.*, Ex. 6 (Feb. 24, 2014 Hrg. Tr.) at 68:16 – 71:7 (counsel proposing that Bollea's response be limited to identifying "any phone calls that happened to be on his phone records with Bubba or Heather Clem"); Ex. 7 (Reply on Exceptions on Fifth Mot. to Compel ("Bollea Reply")) at 3 (complaining that request "is not limited to exchanges between the 'key witnesses'"); Ex. 8 (Apr. 23, 2014 Hrg. Tr.) at 91:9 – 92:1 (plaintiff's counsel proposing that disclosure should be limited to phone calls and texts between "Hulk Hogan and Bubba Clem and Heather Clem").

- Bollea contends that "discovery of non-parties' phone numbers implicates those individuals' privacy rights," Mot. at 7, just as he argued previously. *See, e.g.*, Ex. 9 (Bollea's Exceptions on Fifth Mot. to Compel ("Bollea's Exceptions")) at 5 (arguing that disclosure would "invade the privacy of the many hundreds (if not thousands) of people with whom [Bollea] communicated"); Ex. 7 (Bollea Reply) at 4-5 (arguing that request for phone records "fails to account for the privacy interests of non-parties to this case").

- Bollea argues that "the release of the full telephone numbers for upwards of 99.9 percent of Plaintiff's calls would be irrelevant," Mot. at 8, just as he argued before. *See, e.g.*, Ex. 3 (Bollea Opp.) at 7 ("99.9% of which has nothing whatsoever to do with this case"); Ex.

6 (Feb. 24, 2014 Hrg. Tr.) at 68:16 – 71:7 ("we're talking about 99-percent-plus phone calls that have nothing at all to do with this case"); Ex. 9 (Bollea Exceptions) at 9 ("At least 99% of those communications have nothing whatsoever to do with this case."); Ex. 7(Bollea Reply) at 3 ("99.99% (if not 100%) of whom are not 'key witnesses' in this case").

- He even cites some of the same case law. *Compare* Mot. at 7 (*Colonial Med. Specialties of S. Fla. Inc. v. United Diagnostic Labs, Inc.*, 674 So. 2d 923 (Fla. 4th DCA 1996)), *with* Ex. 9 (Bollea Exceptions) at 6 (citing same case).[4]

Bollea should not be allowed to end-run the Court's order requiring him to produce "full and complete" copies of his phone records. He has made these arguments before, and they have been rejected. Asking the Special Discovery Magistrate not only to reverse his prior recommendation, but to effectively overrule Judge Campbell's April 23 Order, is improper. His back-door effort to undo the Court's order – while failing to comply with it – should be denied.

[4] Plaintiff's motion inexplicably includes the same citation and quotation from *Colonial Medical* twice, one right after another. Mot. at 7. While the Court should not even entertain an attempt to re-litigate this question, the two other authorities plaintiff relies on, not previously cited, are entirely inapposite. *See Publix Supermarkets, Inc. v. Johnson*, 959 So. 2d 1274, 1275-76 (Fla. 4th DCA 2007) (quashing order requiring supermarket to provide "correspondences between [its] attorneys and suspected shoplifters who had agreed to participate in the civil theft recovery program"); *Haywood v. Samai*, 624 So. 2d 1154 (Fla. 4th DCA 1993) (seeking doctor's appointment book disclosing patients). Bollea's attempt to analogize disclosing that a person may have spoken or texted with him to the privacy interests of persons participating in a shoplifting program to avoid prosecution, or of patients in a medical practice, fails.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Motion be denied and that Bollea once again be ordered to produce full and complete responses to its discovery requests within five (5) days.

Dated: June 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June 2014, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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