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 REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RE: CERTAIN CONTENT IN DOCUMENTS PRODUCED IN DISCOVERY

FILED UNDER SEAL

I. INTRODUCTION

Plaintiff Terry Bollea seeks a protective order permitting the redaction of: (1) offensive terminology, contained on only three pages of documents written by unknown persons and purporting to relate to an alleged video that is not even at issue in this litigation; and (2) the three-digit prefix of the telephone numbers of people who are neither parties nor witnesses to this case, whose telephone numbers happen to appear on Plaintiff's 2012 telephone records. Defendants Gawker Media, LLC and A.J. Daulerio (together, "Gawker") do not dispute that the determination of whether the protective order sought by Plaintiff is appropriate entails a "balanc[ing of] the competing interests that would be served by granting discovery or by denying it." *Rasmussen v. South Fla. Blood Service, Inc.*, 500 So. 2d 533, 535 (Fla. 1987). Gawker

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cannot (and does not) show that the competing interests weigh in its favor. The protective order should be entered for at least the following reasons:

First, the Special Discovery Magistrate has already ruled that the offensive terminology at issue is irrelevant and not discoverable. Thus, Plaintiff's redaction of these few words, from merely three documents, where the words have nothing whatsoever to do with the claims or defenses in this case, is **consistent** with the Magistrate's prior ruling.

Second, the aforementioned balancing test weighs in favor of allowing Plaintiff to redact the offensive terminology, which was written by an unknown non-party and which purportedly relates to an alleged video that might not even exist and, even if it does, is not at issue in this litigation because none of the parties to this case have ever seen it, nor possessed it, nor posted it to the Internet. Gawker's claimed interest in obtaining the exact words within the documents at issue, which lack foundation, are hearsay, and are irrelevant, is minimal to non-existent, while the potential harm to Plaintiff of the disclosure of such offensive terminology is enormous. The Magistrate need look no further than current events concerning Paula Deen and Donald Sterling to understand the significance of Plaintiff's request. For the record, there is no competent evidence whatsoever that Plaintiff ever said **any** of the terms that are attributed to him by unknown non-parties within the hearsay documents that purportedly summarize an alleged video that is irrelevant to this case.

Third, the balance weighs in favor of allowing Mr. Bollea to redact the prefix (the three numbers following the area code) of the telephone numbers of people who are neither parties, nor witnesses, to this lawsuit, that is, people who have **nothing whatsoever to do with this case**. Gawker offers no reason why it needs the telephone prefixes of people who have nothing to do with this litigation. The only possible reason that Gawker could want the prefix numbers is an

improper one: to ascertain the identity of these individuals and then investigate why Mr. Bollea was talking to them in 2012. Such a fishing expedition cannot justify any intrusion upon the highly important **privacy rights of non-parties/non-witnesses**, and should not be allowed. *Publix Supermarkets, Inc. v. Johnson*, 959 So. 2d 1274, 1276 (Fla. 4th DCA 2007) (holding that "the release of names and telephone numbers, where irrelevant, would be an invasion of privacy for the third parties").

Fourth, Mr. Bollea's motion is not, as Gawker argues, an attempt to "re-litigate" the issues already decided by the Court in its April 23, 2014 order. The Court ordered Mr. Bollea to produce law enforcement communications and his 2012 telephone records. Mr. Bollea has complied with that order and produced those documents.[1] Mr. Bollea brings this motion to allow him to redact certain offensive terminology and the three-digit prefix of certain telephone numbers within those documents. Mr. Bollea's request would have been premature if brought prior to this Court's April 23, 2014 order compelling production and, as such, Gawker's contention that the request should have been raised earlier is without merit.

II. ARGUMENT

A. Plaintiff Should Be Permitted To Redact Offensive Terminology Allegedly Attributed To Him By Unknown Persons In Documents Produced In This Case Relating To An Alleged Video That Is Irrelevant To The Lawsuit

Gawker does not dispute that, "[i]n 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." *Rasmussen*, 500 So. 2d at 535. As with any balancing test,

[1] Plaintiff has provided all of his 2012 cellular telephone records from AT&T. He has asked his landline carrier for his 2012 records, has not yet received them, and will produce them as soon as he receives them.

Florida's cases hold that the competing interests involved in a protective order request fall along a continuum. Here, the question is where on that continuum the offensive terminology allegedly attributed to Plaintiff, written by an unknown non-party, regarding an alleged video that might not even exist and, even if it does, is **not** at issue in this litigation, should fall. The answer, after balancing the competing interests, lies in allowing Mr. Bollea to redact offensive terminology: a mere twelve words contained on only three pages of documents produced in this case. The Special Discovery Magistrate **was correct** when he sustained Mr. Bollea's objections to similar questioning on this topic at Mr. Clem's deposition. That ruling continues to apply, and there is no basis to reverse course.

Gawker relies on *Hauser v. Volusia County Dept. of Corrections*, 872 So. 2d 987 (Fla. 1st DCA 2004), where the plaintiffs sought a protective order preventing defendants from inspecting the dust and mold conditions in their homes. The court held that it was "patently obvious" that such discovery was relevant to the plaintiffs' claims relating to the environmental condition of their workplace and that, to evaluate causation, "the environmental condition of claimants' homes would also be relevant." *Id.* at 989. In weighing the competing interests, the court found that plaintiffs had no "need for privacy and confidentiality as to the air and dust samples from their homes that would tend to outweigh the need for determination of the presence of toxic molds or other harmful substances in their home environment." *Id.* at 992.

For reasons that should be obvious, *Hauser* is distinguishable from the situation presented here, where there is **no relevance** to the offensive terminology that Plaintiff seeks to redact. Gawker's efforts to argue otherwise are unavailing. Gawker falsely claims that Plaintiff is withholding "a transcript of a sexual encounter between plaintiff and Ms. Clem." Opp. at 6. This is not true. The documents at issue are two purported summaries—prepared by an unknown

person (or persons)—of an alleged video that might not even exist and, if it does, no party to this litigation claims to have ever viewed it or possessed it, and it certainly is not at issue in this case because Gawker never posted any of it to the Internet.

Gawker also falsely contends that one of the redacted terms is included in a "pivotal comment" in the case. Opp. at 6, n.2. The "comment" Gawker refers to is where Bubba Clem **allegedly** says, "if we ever did want to retire, all we have to do is use that . . . footage of him . . . ." *Id.* First, it has not been established that Mr. Clem ever even made such a statement. Second, any such statement is **not found** in either the one minute and forty-one seconds of footage published by Gawker, nor the full-length 30 minute video produced by Gawker in this lawsuit—the footage from which Gawker prepared the one minute and forty-one second highlight reel that it published. The alleged quote lacks foundation, there is no competent evidence that Mr. Clem ever made the statement, and the alleged statement has nothing to do with the publication at issue here. To call the alleged quote "pivotal" is misleading and preposterous. Neither Mr. Bollea's privacy invasion claim, nor Gawker's "newsworthiness" and "public concern" defenses, rest in any way on Mr. Clem's alleged comment on an alleged video that Gawker never possessed or published.

The alleged summary of an alleged video containing the offensive terminology at issue is inadmissible based on a number of basic legal doctrines: it lacks foundation, lacks relevance, constitutes hearsay upon hearsay, and the alleged comments are extremely prejudicial and greatly outweigh any probative value. Such irrelevant, unfounded, highly prejudicial, hearsay statements are in no way analogous to the dust and mold samples at issue in *Hauser*.

In *Rasmussen*, the Florida Supreme Court considered whether the plaintiff should be allowed access to the contact information of non-party blood donors in a lawsuit involving the

plaintiff's alleged contraction of the AIDS virus from a blood transfusion. The Court prohibited the discovery. In making that determination, the Court did "not ignore [the plaintiff's] interest in obtaining the requested information in order to prove aggregation of his injuries and obtain full recovery," but found that the blood donors' contact information "would do little to advance that interest." *Rasmussen*, 500 So. 2d at 538. Moreover, the Court found that "[t]he 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.*

The offensive terminology that Plaintiff seeks to redact is analogous to the situation in *Rasmussen*. As in *Rasmussen*, Gawker's interest in obtaining the exact terms redacted is, at best, *de minimus*, while Mr. Bollea's interest in redacting the irrelevant, offensive terminology is enormous. This is particularly so because: (a) Gawker is a celebrity gossip site that publishes embarrassing and damaging information about celebrities, including Mr. Bollea; (b) Gawker's litigation tactics are to avoid at all costs a trial on the merits and instead seek to "win the case" through procedural and collateral proceedings; (c) there is no competent evidence that Plaintiff ever used the offensive terminology; (d) the words were written by an unknown person during the course of attempting to extort money from Plaintiff; and (e) the offensive terminology, the extortion attempt, and the alleged video that might not even exist and none of the parties has ever seen or possessed, are irrelevant to this lawsuit, and thus the minimal or non-existent probative value is overwhelmed by the extreme prejudice.

Gawker readily admits that its business is to publish private, salacious material. *See, e.g.*, **Exhibit A** (Deposition Exhibit 36; in which Nick Denton, CEO of Gawker, sent an email to his staff regarding "traffic" to Gawker.com, stating: "We scored with **royal breasts** [referring to its publication of Duchess Kate Middleton sunbathing topless at a private residence] and (this

month) **Hulk sex**."). Thus, the fact that Gawker's business is to make money by publishing embarrassing and damaging information about celebrities is hardly a "canard," as Gawker contends (Opp. at 3), but rather is a fact. Mr. Bollea's desire to avoid providing Gawker and its counsel with the exact offensive terminology attributed to him in an unauthenticated, hearsay document is both understandable and warranted. Other public figures' careers have been ruined by media outlets reporting on the use of the same kind of offensive terminology.

Under these circumstances, Gawker's argument that the restrictions on Gawker's use of the documents are sufficient to protect Mr. Bollea's concerns must fail. The very cases cited by Gawker confirm that "trial courts are guided by the principles of **relevancy and practicality**" in setting restrictions on discovery, and "the scope and limitation of discovery is within [the courts'] broad discretion." *Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189, 194 (Fla. 2003) (emphasis added).

Gawker's cases do **not** hold that a confidentiality order removes all privacy concerns.[2] In fact, this Court has entered an additional protective order limiting the scope of discovery in this case, even **with** a confidentiality order also in place. *See* **Exhibit B** (2/26/14 Protective Order). The Special Discovery Magistrate has broad discretion to recommend reasonable limitations on the discovery of offensive terminology contained within a document written by an unknown person seeking to extort Plaintiff, regarding an alleged video that might not even exist and which

[2] *Homeward Residential, Inc. v. Rico*, 110 So. 3d 470 (Fla. 4th DCA 2013), is a *per curiam* opinion with virtually no discussion of the petitioner's privacy objections. The court noted, in a footnote, that the lower court had entered a confidentiality order. That footnote, however, was not a holding that the fact of the confidentiality order was dispositive on a motion for protective order. Additionally, *Tootle v. Seaboard Coast Line R. Co.*, 468 So. 2d 237 (Fla. 5th DCA 1984), is not at all analogous to the situation here. In that case, "[f]or the second time, Tootle, the plaintiff in a personal injury case, has petitioned this court for a writ of certiorari to quash an order compelling the deposition of a psychologist who examined him." *Id.* at 238. The court's requirement that the plaintiff allow the discovery is not surprising under those circumstances.

is not even at issue in the case because none of the parties has ever seen it, or possessed it, and Gawker certainly did not publish it. The principles of **relevancy and practicality** require the exercise of that discretion—as the Special Discovery Magistrate has already exercised with respect to deposition questioning—and thus allowing Plaintiff to redact the few terms from only three pages of documents produced in this action is justified and appropriate.[3]

B. Plaintiff Should Be Permitted To Redact The Prefix Of Telephone Numbers For Persons Who Are Not Parties Or Witnesses To This Litigation

The determination of whether Plaintiff may redact the prefix digits of the telephone numbers of people who are neither parties nor witnesses to this litigation is subject to the same analysis as above: On balance, do the competing interests weigh in favor of granting the discovery or denying it? Again, the balance weighs in favor of allowing the redaction of the prefixes, because the people at issue are neither parties nor witnesses to this litigation, and they have important privacy rights that must be protected.

Florida courts have unambiguously adopted a general rule that "the release of names and telephone numbers, where irrelevant, would be an invasion of privacy for the third parties." *Publix Supermarkets*, 959 So. 2d at 1276. This rule is not limited to the contact information of medical patients or persons participating in a shoplifting program, as Gawker urges. Opp. at 9, n.4. Applying the general rule announced in *Publix Supermarkets* to the situation here, Mr. Bollea is justified in redacting the prefix of the phone numbers of the people that he called and who called him in 2012 who are neither parties nor witnesses in this lawsuit—to protect against an invasion of their personal privacy. Gawker makes **no argument** as to why it needs the prefix

[3] Plaintiff seeks a protective order permitting him to redact the offensive terms from the documents produced by Don Buchwald & Associates and its agent Tony Burton (collectively, "Buchwald"), **including** the copy of the ***un***redacted documents at issue that Gawker subsequently obtained directly from Buchwald.

numbers of the telephone numbers of individuals who are unrelated to this litigation. The truth is that Gawker does **not** need the prefixes, because the full phone numbers of these completely unrelated persons are irrelevant to this case and not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the resulting invasion of these individuals' privacy is not justified and should be protected against.

C. Plaintiff's Motion Is Not An Attempt To Re-Litigate The Issues Decided In The Court's April 23, 2014 Order

The Court's April 23, 2014 Order determined the discoverability of documents concerning law enforcement's investigations and Mr. Bollea's 2012 telephone records. Mr. Bollea has produced those documents and records. Mr. Bollea now seeks to redact certain discrete terms and digits from that production. Mr. Bollea did not make this request in his briefing on the discoverability of the full documents and records because Mr. Bollea did not believe that any portion of those documents and records should have been produced. Now that the documents have been ordered produced, Mr. Bollea appropriately seeks the narrow protective order requested here. Gawker's argument that Mr. Bollea is engaged in an "end run" around the Court's previous order is simply not true.

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 (twelve words contained on only three pages of documents produced by Plaintiff, including unredacted copies of such documents already obtained by Gawker directly from Don Buchwald & Associates and/or its agent Tony Burton),

and the prefix digits (the three numbers following the area code) of telephone numbers of persons and entities who are not parties or witnesses in this case.

DATED: June 16, 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 16th day of June, 2014 to the following:

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