

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA; et al.,

Defendants.

PUBLISHER DEFENDANTS' MOTION FOR CONTINUANCE

Pursuant to Florida Rule of Civil Procedure 1.460, Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby move for a continuance of the July 6, 2015 trial date (without waiving its arguments that the trial was not properly set), until key evidence in the possession of the FBI and United States Attorney's Office has been produced, as ordered by The Honorable Susan C. Bucklew of the United States District Court for the Middle District of Florida, and addressed. In support of this motion, the Publisher Defendants state as follows:

1. As the Court knows, for the past eighteen months, the Publisher Defendants have been seeking documents related to the investigation by the FBI and U.S. Attorney's Office, initiated by Hogan and his counsel, into the "source and distribution" of the sex tape at issue, records which this Court has previously described as both relevant and critical to the case.

2. Hogan has strenuously resisted at every turn. Hogan refused to provided copies of his records related to the Government's investigation, until ordered to do so by Judge Case, and then by this Court. He refused to provide authorizations that would allow a records request

to the FBI and U.S. Attorney's Office, litigating that question for a full year. He and his lawyers were ultimately ordered by both Judge Case and this Court to provide signed authorizations, and his petition to the District Court of Appeal was rejected. (For her part, defendant Heather Clem provided an authorization without objection.). Violating both the letter and spirit of this Court's order, plaintiff's lawyer wrote to both agencies to urge that they not release the records.

Confidential Exs. A (plaintiff's counsel's Nov. 10, 2014 letters to government) & B (Nov. 24, 2014 letter from Publisher Defendants' counsel to plaintiff's counsel addressing same);¹ *see also* Ex. C (June 8, 2015 Decl. of D. Hardy of FBI disclosing letter from plaintiff's counsel).

3. Following a year of Hogan's throwing up roadblocks to providing authorizations, Gawker submitted requests under the federal Freedom of Information Act ("FOIA") to the FBI and the U.S. Attorney's Office almost eight months ago. Exs. D and E (Nov. 7, 2014 FOIA requests). As the Court knows, Gawker ultimately filed a FOIA lawsuit in U.S. District Court for the Middle District of Florida, Case No. 8:15-cv-01202-SCB-EAJ. Gawker sought production of the roughly 1,300 pages of documents, two audio CDs, and three DVDs that had been generally identified by the agencies. Gawker sought expedited consideration.

4. After hearing the matter on an expedited basis, the Honorable Susan C. Bucklew ordered the Government to produce certain records, including certain DVDs and CDs, by June 26, 2015; to produce an index and affidavit relating to any withheld records by June 30, 2015; and scheduled another hearing for July 2, 2015 to address whether those records were properly withheld. Ex. F (June 24, 2015 order).

¹ The Publisher Defendants do not believe that a letter sent to a Government agency about a FOIA request, particularly one that is at odds with an order of this Court, is properly designated as "Confidential" or "Highly Confidential-Attorney's Eyes Only" under the Protective Order entered in this case or under applicable law. Nevertheless, in compliance with that order, the Publisher Defendants have filed that letter, and their response, under seal, together with a Motion to Determine the Confidentiality of Court Records, asking that they be unsealed.

5. Despite Judge Bucklew's order, on June 26, 2015, the Government produced only 24 pages of records, 12 of which were documents reflecting communications between Gawker and the Government, and all but two of which had been previously produced. The final two pages are a communication from David Houston to the FBI. That communication was not been produced in response to Gawker's earlier subpoena to Mr. Houston, and it bears directly on this motion. *See* Conf. Ex. G. (Because plaintiff has insisted that any documents produced by the Government be treated as confidential for thirty days, we are not describing the document's contents here, and are filing it under seal. *See* note 1 *supra*.)

6. Notwithstanding Judge Bucklew's order, no other documents, DVDs or CDs were produced. Instead, the Government filed at approximately 7:00 p.m. on Friday evening what it styled as an emergency motion for reconsideration or, in the alternative, for an extension of time. Accompanying that motion was a Second Declaration of David Hardy, attached hereto as Ex. H, the Chief of the FBI's records section, in which he testified to the following:

a. **Key Video Evidence** – For the first time, the Government confirmed that there are three video recordings depicting Heather Clem and Terry Bollea engaged in sexual relations, and that in all three recordings a third person is present for at least part of the video (and in one case “throughout” the recording).² Despite Judge Bucklew's order to produce these recordings in full, the Government advised that it intends to redact them; the extent of the redactions is not known and obviously needs to be addressed with Judge Bucklew. The existence of this video footage contradicts sworn testimony given by the key players in this case and representations made to this Court. The complete

² Correspondence from the Government had previously indicated that there were multiple recordings, but plaintiff has contended repeatedly – and apparently falsely – that they may be multiple copies of the same recording/encounter.

footage is crucial to the Publisher Defendants' defense, because it speaks directly to whether testimony by the key participants is truthful, including without limitation about plaintiff's claims of injury allegedly arising from the Publisher Defendants' publication.

b. **Key Audio Evidence** – The Government has two audio recordings, one of which is of a person “speaking about the Terry Bollea case,” and the other a recording involving Hogan’s long-time counsel David Houston and others discussing the investigation. At his deposition, Houston professed to have little recall of the details of the investigation, and to have taken no notes. This documentary evidence is thus central to understanding Houston’s efforts, undertaken on behalf of the plaintiff, to address the sex tape. While this too will need to be addressed with Judge Bucklew, the FBI contends that it needs to redact the CDs and cannot produce them for thirty days.

c. **Key Documentary Evidence** – Judge Bucklew’s order limited the exemptions at issue to FOIA’s law enforcement exemption (“Exemption 7(A)”). *See* Ex. F at 2 n.1. The Government has nevertheless indicated that it intends to redact the overwhelming majority of its documents based on *other* newly-claimed exemptions, and that it will be delayed in doing so, producing some on July 1, logging others thereafter, and it being unclear when a complete production will be made.

7. The Publisher Defendants want a fair trial. Here, we have a situation in which the plaintiff and his counsel, knowing full well about this evidence from their direct participation in this investigation, have repeatedly sought to obstruct its release, making what appear to be various misrepresentations to the Court and in sworn testimony in the process. It is absolutely essential to having any semblance of a fair trial that the Publisher Defendants be permitted to obtain and use in their defense this key evidence, the nature of which was, in many instances,

first disclosed on Friday evening, along with the fact that it would not be produced on time as ordered by the federal court. Plaintiff has taken every available route to press ahead to trial (including a severance strategy that has been rebuffed by the District Court of Appeal), while delaying at every turn the release of these key records – which the Publisher Defendants have been seeking since the Fall of 2013. If the trial is not postponed to allow defendants to obtain this key evidence, they will suffer extreme prejudice and a clear violation of their right to due process under the Fourteenth Amendment and their right under the First Amendment not to be punished for constitutionally protected expression under such circumstances. *See, e.g., Outdoor Resorts at Orlando, Inc. v. Hotz Mgmt. Co.*, 483 So. 2d 2, 3-4 (Fla. 2d DCA 1985) (granting emergency writ of certiorari, and ordering continuance where key witness testimony could not be presented absent continuance, because of the “detriment to the petitioner” and the “injustice occurring by putting the petitioner to trial without the testimony”).

8. A continuance should be granted.

CONCLUSION

For the foregoing reasons, the Court should enter an Order continuing the trial.

Dated: June 29, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

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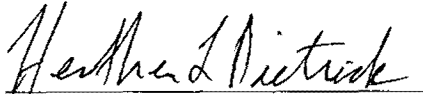
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pursuant to Fla. R. Civ. P. 1.460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June 2015, 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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