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.

PUBLISHER DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE LETTERS PURPORTING TO BE OFFERS TO COMMERCIALLY EXPLOIT THE SEX TAPE AT ISSUE

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants") hereby move the Court for the entry of an order excluding the introduction of two letters allegedly received by Plaintiff Terry Gene Bollea (herein "Hogan") purportedly offering to partner with Hogan to commercially exploit the sex tape at issue in this case because they are inadmissible hearsay. As grounds for this motion the Publisher Defendants state:

1. Hogan has produced in discovery what are purportedly letters directed to him from two separate adult entertainment companies that were interested in partnering with Hogan to commercially exploit the sex tape at issue in this litigation (collectively, the "Letters"). The Letters are designated as Plaintiff's Trial Exhibit Nos. 15 and 16 and are attached hereto for the convenience of the Court.

2. To the extent Hogan seeks to introduce the Letters to prove the truth of the matters asserted therein, that is, that he received offers from adult entertainment companies to commercially exploit the sex tape and/or any amounts they were purportedly offering to pay to

do so, the Letters constitute inadmissible hearsay, not subject to any exceptions. Specifically, Hogan cannot establish the Letters are excepted business records as defined in Section 90.803(6), Florida Statutes that fall outside the prohibitions against the admission of hearsay because he cannot lay the proper, predicate foundation. Moreover, as detailed below, the introduction of such evidence at trial would be unfair and prejudicial.

3. Section 90.803(6) of the Florida Statutes states that the following records are exceptions to the hearsay rule:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.901(11)....

Id. § 90.803(6)(a).

4. Therefore,

> [t]o secure admissibility under this exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008).

5. Laying the proper foundation to establish a record as an excepted business record under section 90.803(6) can be accomplished three ways: (1) by having a records custodian testify under oath to the statutory requirements; (2) by stipulation; or (3) via certification or declaration that complies with sections 90.803(6)(c) and 90.902(11) of the Florida Statutes. *See Yisrael*, 993 So. 2d at 956-57. Failure to lay the proper foundation necessitates exclusion of the evidence. "'If evidence is to be admitted under one of the exceptions to the hearsay rule, it must

be offered in *strict* compliance with the requirements of the particular exception.'" *Id.* at 957 (quoting *Johnson v. Dep't of Health and Rehabilitative Servs.*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989)).

6. Section 90.803(6)(c) mandates particular procedural requirements that must be met if a party seeks to lay a foundation by certification or declaration:

> [a] party intending to offer evidence [that a business record is admissible under 98.803(6)] by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence.

Fla. Stat. § 90.803(6)(c).[1]

7. For at least four reasons, Hogan cannot meet the statutory requirements of 98.803(6) that would permit the Letters to be admitted at trial for their truth.

8. First, both Letters are undated so it is facially impossible to know when they were created, thus failing the contemporaneous creation requirement of section 98.803(6)(a).

9. Second, the parties have not entered into any stipulation that would permit the introduction of the Letters for their truth.

10. Third, Hogan has not provided proper notice pursuant to section 98.803(6)(c) of an intent to offer the Letters into evidence by certification or declaration. Thus, he cannot now authenticate the Letters via those means.

11. Finally, discovery is closed and witness designations have occurred. Hogan has not designated any witnesses that will testify and lay the proper predicate foundations that would permit the introduction of the Letters for their truth. Were he at this stage to unexpectedly call

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[1] Section 90.902(11)(a)-(c) of the Florida Statutes lays out the procedure for authenticating a business record under section 90.803(6) by declaration or certification, tracking the evidentiary requirements of section 90.803(6)(a).

such witnesses at trial, the Publisher Defendants would be highly prejudiced as they were never able to depose or take any discovery otherwise related to those witnesses. Indeed, the Publisher Defendants' first encounter with the witnesses would be on cross-examination at trial. Florida law counsels against permitting such unfair surprise in failing to disclose all anticipated witnesses pre-trial. *See Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981) (noting that "[p]rejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony").

12. The inescapable conclusion is that Hogan is prevented from offering the Letters into evidence to prove their truth because he cannot satisfy the strict evidentiary burdens of section 90.803(6)(a) that must necessarily be overcome to refute the hearsay status of the Letters and the introduction of such evidence via the testimony of live witnesses would be highly prejudicial to the Publisher Defendants.

WHEREFORE, the Publisher Defendants respectfully request that this Court enter an order precluding the admission of the Letters because they are inadmissible hearsay.

Dated: June 12, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*
Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440

Michael D. Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th 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:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Sarah Luppen, Esq.
sluppen@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ Gregg D. Thomas
Attorney