

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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

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**THE GAWKER DEFENDANTS' MOTION FOR ACCESS TO  
CORRECTED AND UNREDACTED DVDS PRODUCED BY THE FBI**

On December 1, 2015, Assistant United States Attorney Kenneth Stegeby advised that the Federal Bureau of Investigation was producing to Judge James R. Case five DVDs from the federal FOIA lawsuit. *See Gawker Media, LLC v. FBI*, Case No. 8:15-cv-01202-SCB-EAJ (M.D. Fla.). According to the FBI, those DVDs consist of (1) corrected and unredacted copies of the three sex tapes, and (2) video footage from the FBI's sting operation on December 14, 2012, involving plaintiff Terry Bollea, his lawyer David Houston, and Keith Davidson, the target of the FBI investigation. Counsel for defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, the "Gawker defendants"), on behalf of their clients, hereby move this Honorable Court for an order (1) directing the two DVDs of the FBI sting operation be produced to counsel for the parties, (2) permitting counsel for the parties to watch the three sex tape DVDs, or, in the alternative, (3) permitting counsel for the Gawker defendants to make a brief *ex parte* showing about the DVDs' relevance and their likelihood to lead to the discovery of admissible evidence.

As is explained below, the Stipulated Protocol does not contemplate that the DVDs of the sting operation be produced to Judge Case. Rather, like other materials produced in the FOIA litigation, they should have been provided directly to the parties' counsel, a view shared by both

the FBI and Judge Bucklew, who is presiding over the FOIA action. All five DVDs are directly relevant to issues bearing on plaintiff's claims for liability and damages, and to the credibility of key witnesses, including Bollea, Houston, Bubba Clem, and Heather Clem. Indeed, those DVDs provide unique contemporaneous evidence that is central to this case, such that the sting DVDs should be produced to counsel for the parties and the sex tape DVDs should be able to be viewed by counsel for the parties, as was the case with the previously produced DVDs.

**I. THE DVDS OF THE STING OPERATION ARE NOT GOVERNED BY THE FOIA PROTOCOL AND SHOULD BE PRODUCED TO COUNSEL.**

The DVDs of the sting operation should have been provided directly to counsel for the parties rather than to Judge Case. The FOIA protocol incorporated certain of the Court's prior orders, including one requiring that sex tapes involving Bollea and Heather Clem, still in his possession or that of Bubba The Love Sponge Clem, be turned over to Judge Case for his review, rather than producing them to counsel for the parties. The privacy concerns articulated by plaintiff in connection with sex tapes are simply not relevant to footage of the FBI's sting operation. While some portion of the video of the sting operation might show the three men reviewing parts of the sex tapes, we understand that the footage shows them (and possibly Davidson's client) in a meeting fully clothed and certainly not engaging in any sexual conduct. Even under the terms of the protocol, such footage is supposed to be turned over to us. *See* Stipulated Protocol ¶ 7 (requiring footage of video that does not contain nudity, sexual content, or "offensive" language to be provided to Gawker's counsel).<sup>1</sup>

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<sup>1</sup> To the extent that the video of the sting operation includes any audio of Bollea uttering offensive comments on the sex tapes, the concern reflected in the protocol no longer exists because he has publicly admitted that he made such comments. In any event, any privacy interest he claims in his offensive comments is adequately protected by deeming the DVDs "Confidential" or "Attorneys' Eyes Only" for discovery purposes.

In that regard, the FBI did not believe that the DVDs of the sting operation footage were sensitive or covered by the protocol, because it initially produced them directly to the Gawker defendants' counsel, Gregg Thomas. (In an abundance of caution, Mr. Thomas returned the DVDs, without watching the footage of the sting operation, to Mr. Stegeby). Similarly, at a hearing on December 8, the judge presiding over the federal FOIA litigation, the Honorable Susan Bucklew, expressed great surprise that footage of the sting operation had been produced to Judge Case, explaining that it was completely different than sex tape footage and she could not understand why it would need to be shielded from being produced directly to Gawker. *See, e.g.*, Ex. A (Dec. 8, 2015 Hrg. Tr.) at 18:19 – 19:24 (THE COURT: asking “Why is a video of the sting operation going to Judge Case?” and, when Gawker’s counsel advised that “when that protocol was agreed upon,” under which “video footage was supposed to go to Judge Case, it was our understanding . . . that the videos we were talking about were sex tapes,” the Court responded, “That was my understanding” as well).

Having Judge Case keep the DVDs of the sting operation is particularly troubling because, when the protocol was negotiated, Bollea did not disclose that the sting operation was videotaped, despite discovery requests seeking information about the FBI investigation. *See, e.g.*, Ex. B (Second Supplemental Resp. to Daulerio Interrog. No. 9). Had he done so, Gawker would have been able to clarify that the protocol’s general reference to video footage applied to sex tapes, not to footage of the sting operation. In that regard, we request that the Court clearly hold that now and direct Judge Case to produce the DVDs of the sting operation to counsel for both parties.

## **II. THE PARTIES' COUNSEL SHOULD BE PERMITTED TO WATCH THE DVDS.**

We believe the parties and the Court would be best-served by simply having Your Honor and counsel review the corrected and unredacted sex tapes, as occurred when the FBI produced the errant copies in June. Indeed, the Gawker defendants continue to object to further proceedings before a Special Discovery Magistrate and have previously expressed their objection to the duplication and additional expense associated with having matters addressed by Judge Case and then again by the Court. That is particularly the case here where (a) the Court is almost certainly going to be asked by one party or the other to review his recommendations regarding the discoverability of the footage and to review the DVDs itself in connection with the parties' exceptions; (b) trial is in less than three months and the content of the DVDs is likely to be the subject of challenges both to discoverability and, soon after, admissibility; (c) the Court is at this point far more familiar with the contours of the evidence each side is likely to ask to introduce at trial and how that footage relates to that other evidence; and (d) the Court also is far more familiar with the records produced by the federal government and how they bear on the relevance of the DVDs, as those records were all produced to the parties and then provided to the Court after Judge Case's participation in the case ended. Moreover, there is no compelling basis to prevent the parties' counsel from reviewing the DVDs themselves given that they have already reviewed the prior versions of the DVDs directly, which contained most of the same video footage at issue, with errors and redactions.

Allowing the Gawker defendants' counsel to view the DVDs is a matter of fundamental fairness. Plaintiff and his counsel already know what is on the DVDs. They have known that information for years: Bollea was obviously present when the sex tape DVDs were filmed. He and Houston were present during the filming of the sting operation. During the sting operation, Bollea and Houston watched the sex tape DVDs. *See, e.g.,* Ex. C (FBI Form FD-302,

memorializing interview with D. Houston). And, Bollea personally reviewed the audio of the sting operation to ensure its accuracy. *See also* Ex. D at GAWKER-800, 803. The parties should be on a level playing field. All counsel should know what is on the tapes. At this point, the question is not whether these DVDs are admissible, but only whether they and the information on them are *discoverable*. Counsel for the Gawker defendants should not be forced to guess about the details of the DVDs' contents or the relevance of that information. We should be permitted to see and hear the DVDs' contents so that we can know what is on them – just like plaintiff and his counsel.

**III. THE DVDS ARE RELEVANT AND REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE CONCERNING LIABILITY, DAMAGES, AND CREDIBILITY.**

The DVDs and their contents are relevant to both the merits of the case and the Gawker defendants' contention that plaintiff and his counsel have engaged in a fraud on this Court. The following two sections of this Motion explain, in part, the relevance of the DVDs and provide some of the evidence establishing their relevance. Indeed, as explained below, the documents produced by the FBI since the motion *in limine* hearing held on July 1, 2015, shed substantial light on the contents of the DVDs and underscore their relevance to this litigation (although, here, the question is simply discoverability not relevance). Moreover, based on the records produced by the FBI, and as explained below, it appears that plaintiff and his counsel have long known what is contained on these DVDs and engaged in a concerted effort to mislead the Court to block the Gawker defendants from obtaining plainly relevant evidence.

**A. The Relevance Of The DVDs To The Merits Of Plaintiffs' Claims**

The DVDs contain evidence that bears on core issues in this lawsuit, involving liability, credibility, and damages.

**1. Relevance to Invasion of Privacy Claims**

The sex tape DVDs, as well as the DVDs of the sting operation, will provide evidence bearing on the following matters relating directly to Bollea's core claim for invasion of privacy, the credibility of the key witnesses on that issue, and his other related theories of liability:

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- Similarly, Bubba Clem testified at his deposition that Bollea did not know about the cameras in his house and that Bollea did not know he was being filmed with Heather Clem. But, Mr. Clem told the FBI the opposite, stating to FBI agents that Bollea knew about his cameras *and* knew he was being filmed during his sexual encounter with Ms. Clem. Ex. G at GAWKER-1180 (FBI Form FD-302 memorializing interview with B. Clem). The sex tape DVDs likely include evidence about which of these former best friends' multiple and conflicting stories is accurate and could provide information about Bollea's knowledge of the cameras and whether he knew he was being filmed.

- Heather Clem testified in this case that she did not know that she was being filmed and only learned of the recording after the fact. *See, e.g.*, Ex. H (H. Clem Dep.) at 20:19 – 22:1. But, documents produced by the FBI suggest that she knew she was being filmed at the time. Indeed, it appears from those documents that she and Bubba Clem are shown *on one of the tapes* discussing the filming, with Mr. Clem stating that he wanted to watch the tape

and Ms. Clem responding, “[Y]ou’ll probably just see my face squirming – I just tried to get past the pain and enjoy it. . . .” *See, e.g.*, Ex. I at GAWKER 179. The sex tape DVDs likely will reveal the truth about Ms. Clem’s knowledge of the filming and directly address her credibility on this relevant fact.

- Bollea has testified that he succumbed to Heather Clem’s repeated advances at a particularly vulnerable moment during a low point in his life, after his first marriage was effectively over. Ex. E (T. Bollea Dep.) at 273:17 – 275:21, 277:11 – 279:15. Ms. Clem, in turn, has emphatically denied making any such advances. *See, e.g.*, Ex. H (H. Clem Dep.) at 76:4 – 78:3, 111:17 – 112:2. The sex tape DVDs likely contain evidence bearing on these conflicting versions of events and whether plaintiff reluctantly engaged in sexual relations with Heather Clem and whether he was victimized by the Clems at a low point in his life. They also likely contain statements and other evidence (such as songs playing in the background, which can be identified using a widely available application called Shazam, *see* [www.shazam.com](http://www.shazam.com)) that will establish when the tapes were filmed, and whether Bollea’s testimony about the timing and circumstances of the encounters is credible.

- Bubba Clem testified in this case that he only knew of one sexual encounter between Bollea and Heather Clem and that he was aware of only one sex tape. *See* Ex. J (B. Clem Dep.) at 322:5-8, 18-20. Likewise, Heather Clem testified that she only recalled one sexual encounter with Bollea at her home. *See* Ex. H (H. Clem Dep.) at 12:24 – 13:5. Yet, there appear to be three sex tape DVDs, all of which were recorded at the Clems’ house, and records obtained from the FBI indicate that Bubba Clem appeared in all three videos. *See*,

*e.g.*, Ex. I (Davidson transcript). The sex tape DVDs undoubtedly will provide definitive evidence about these issues.<sup>2</sup>

## **2. Relevance to Alleged Commercial Value of Excerpts**

The DVDs also provide key evidence concerning Bollea's claim that he is entitled to \$100 million in damages both for the alleged commercial value of the video excerpts posted by Gawker and for his alleged emotional distress, the latter of which is discussed in the next section.

With respect to economic damages, Bollea claims in this lawsuit that the value of the brief video excerpts posted by Gawker was tens of millions of dollars. He further claims that this astronomical value flowed from the grainy footage's depiction of approximately nine seconds of sexual content. [REDACTED]

<sup>2</sup> Although they reserve their rights based on how things proceed during the trial, based on the limited information that we have obtained about the sex tape DVDs to date, the Gawker defendants do not intend to display any footage containing nudity or sexual content in the courtroom (other than the Video Excerpts at issue).



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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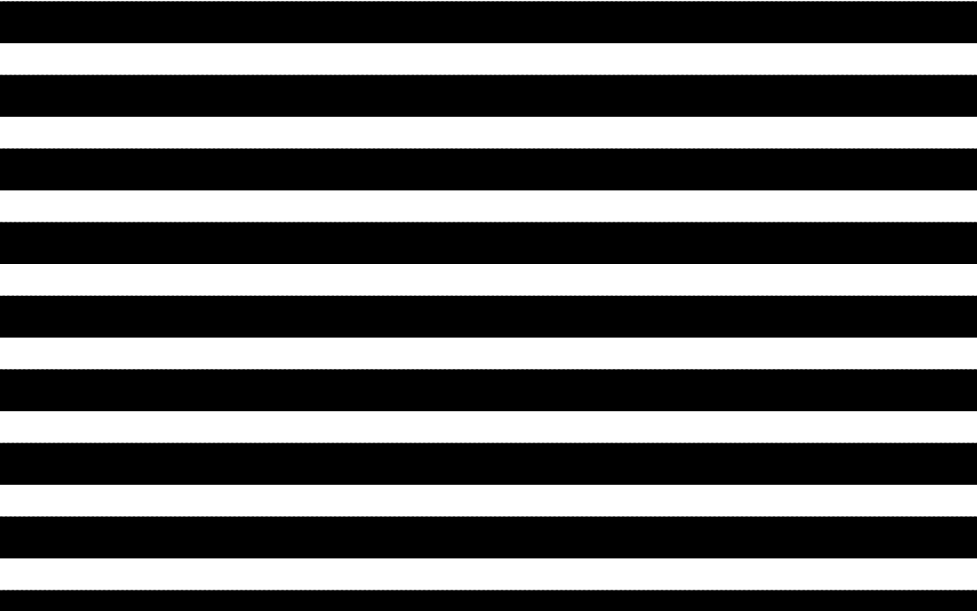
[REDACTED]

[REDACTED]

### **3. Relevance to Claims for Alleged Emotional Distress**

With respect to Bollea's claims for emotional distress, Bollea contends that he suffered distress from Gawker's posting of the video excerpts. The record, however, shows that, both before and after the Gawker posting, Bollea spoke at length about the sex tapes in the national media, often joking about it. Bollea's numerous interviews about the sex tapes was consistent with his long history of talking in the press about his love life, illicit affairs, and intimate details of his sex life.

The FBI documents reveal that Bollea only stopped talking about the sex tapes and filed this lawsuit *after* Keith Davidson contacted his lawyer, David Houston, and told him that one of the tapes showed Bollea making racist statements. [REDACTED]



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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In sum, the Gawker defendants should have access to key video evidence that bears directly on core issues of liability, credibility, and damages. Indeed, the video footage on the DVDs indisputably shows Bollea, his lawyer, and two key witnesses (Bubba and Heather Clem) addressing these core facts. Bollea undoubtedly will claim that he had no idea he was being filmed, that his real reason for filing this lawsuit was his supposed distress from the alleged invasion of his privacy resulting from the posting of the video excerpts, and that those excerpts were worth millions of dollars. Yet, whether his claims are credible or whether the Gawker defendants' view of this evidence is more plausible present classic questions of fact that should be decided by a jury. And before the Court decides those questions (what is relevant and what is a fact issue for the jury), it should allow the parties' counsel to see evidence that directly addresses those issues so that they have the necessary discoverable information. Contemporaneous video footage dealing with these central issues should not be suppressed.

**B. Relevance To Plaintiff's Fraud On The Court**

The existence of the three DVDs and the contents of the video of the sting operation also are critical evidence of plaintiff's fraud on the Court.<sup>3</sup> For example, throughout this litigation, Bollea and his counsel have repeatedly stated in court filings, in court hearings, in sworn

discovery responses, and in deposition testimony taken under oath that they do “not know if any other clandestine recordings exist other than the video depicting [Bollea] having relations with Heather Clem (which was excerpted and posted by Gawker Media on its website).” Ex. S at 8 (Resp. to Interrogatory No. 5); *see also* Ex. E (T. Bollea Dep.) at 291:12-14 (testimony from plaintiff stating that he has “no idea” whether more than one sexual encounter with Ms. Clem was filmed). Indeed, in arguing against a motion for sanctions on this very issue, plaintiff’s counsel – with Bollea and Houston sitting right beside him – told the Special Discovery Magistrate that “nobody on either side of this table . . . has ever seen any of these supposed tapes.” Ex. T (July 18, 2014 Hrg. Tr.) at 51:23 – 52:6. This assertion was followed months later by Bollea testifying at his deposition that he “refused to watch the tape.” Ex. E (T. Bollea Dep.) at 802:15-19. Houston likewise testified at his deposition that he watched only a few seconds of video with Davidson, did not know if there were three sex tapes, did not hear any audio on the tapes, and did not hear Bubba Clem’s voice on the tapes. Ex. U (D. Houston Dep.) at 212:1-6, 212:14-20, 214:22-23, 216:3-4, 223:9-12. And, at the hearing on motions *in limine*, Bollea convinced the Court to exclude evidence of the FBI investigation, additional DVDs, and his racist statements, without prejudice. That ruling was based on his counsel’s representations to the Court – again, with Bollea and Houston sitting at counsel table – that the transcripts of the racist statements were the result of “an extortionist manipulating the audio through an impersonator.” Ex. V (July 1, 2015 Hrg. Tr.) at 201:8-11.

Counsel for the Gawker defendants understand that the DVD of the sting operation, however, will show these and other statements made by Bollea and his counsel throughout the litigation were patently and knowingly false. [REDACTED]

[REDACTED]

[illegible][illegible]

[REDACTED]

[REDACTED]

**IV. IN THE ALTERNATIVE, COUNSEL FOR THE GAWKER DEFENDANTS SHOULD BE PERMITTED TO MAKE A BRIEF CONFIDENTIAL, *EX PARTE* PROFFER PROVIDING ADDITIONAL EVIDENCE AND THEORIES ESTABLISHING THE DVDS' RELEVANCE.**

To the extent that counsel are not permitted to obtain copies of the DVDs of the sting operation and/or are not permitted to view them or the sex tape DVDs, we respectfully request an opportunity to make a brief confidential, *ex parte* proffer to the Court providing additional facts supporting our theories on why the DVDs and content on the DVDs are relevant or reasonably calculated to lead to the discovery of admissible evidence. *See* Stipulated Protocol ¶ 8 (expressly authorizing defendants to request making such an *ex parte* submission).

This proffer should be made *ex parte* so that we are not required to divulge our work product to plaintiff or his counsel and thereby waive the protection afforded by the work-product doctrine. *Id.* All of the evidence discussed in the prior section has been disclosed to plaintiff. *See, e.g.,* Conf. Thomas Decl. ¶¶ 6-22. Counsel for the Gawker defendants have additional theories about why the DVDs produced by the FBI are relevant and contain information that is reasonably likely to lead to admissible evidence. Those theories – which have not been disclosed – rely on additional evidence that has been disclosed to the plaintiff previously, although not tied to this issue.

In addition, at prior hearings, we have been hamstrung in our ability to explain to the Court the contents of the FBI materials and other evidence produced in the case because plaintiff has designated so much discovery – and nearly all evidence that casts doubt on his theory of the case – as “Confidential” or “Attorney’s Eyes Only.” Thus, we have never had an opportunity in

any forum to discuss with Your Honor the specific evidence and the details for why that evidence is relevant and related to other evidence.

Accordingly, and so as to not waive the protection afforded by the work-product doctrine and in light of plaintiff's vast confidentiality designations, we respectfully request to present this evidence and our theories through a confidential, *ex parte* proffer. Given the timing of the upcoming trial, we respectfully request that the Court permit this proffer to be made on January 13, 2015, the day of the next scheduled case management conference and hearing.

### CONCLUSION

For each of the foregoing reasons, and consistent with fundamental principles of due process, counsel for the Gawker defendants respectfully request that the Court grant the motion, direct the DVDs of the sting operation be provided to counsel for the parties and allow counsel for both parties to view the sex tape DVDs. In the alternative, we respectfully request that the Court permit counsel for the Gawker defendants to make a brief, confidential, *ex parte* proffer about the DVDs' relevance and the likelihood that they will lead to the discovery of admissible evidence.

December 22, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of December, 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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