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.
_____/

THE PUBLISHER DEFENDANTS' OMNIBUS OPPOSITION TO PLAINTIFF'S PRETRIAL MOTIONS[1]

The United States Supreme Court has repeatedly and unambiguously warned lower courts about the constitutional risk of sending First Amendment cases to a jury, stressing that "such a risk is unacceptable." *Snyder v. Phelps*, 562 U.S. 443, 458-59 (2011) ("a jury is 'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]' expression'") (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (sending First Amendment cases to a jury poses grave constitutional dangers because doing so allows "a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression"); *see also, e.g.*, *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 671 (9th Cir. 1990) (noting that the Supreme Court has emphasized "the danger that First Amendment

[1] Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") oppose each of the 23 pretrial motions filed by plaintiff on June 12, 2015. They intend to file written oppositions to certain motions and will oppose the remaining motions at oral argument. Nevertheless, given the sweeping nature and staggering implications of the motions, the Publisher Defendants submit this Omnibus Opposition to address the fundamental injustice of the relief plaintiff seeks.

values will be subverted by a local jury biased in favor of a prominent local public figure against an alien speaker").

The Publisher Defendants maintain that this case should have been dismissed on First Amendment grounds prior to trial. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1201-03 (Fla. 2d DCA 2014) (holding repeatedly that the "video excerpts address matters of public concern" and their publication is protected by the First Amendment). Nevertheless, now that this First Amendment case is proceeding to a jury, this Court has a constitutional duty to ensure that any resulting verdict does "not constitute a forbidden intrusion on the field of free expression." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

The upcoming trial, like all trials, "is a quest for truth." *Fedd v. State*, 461 So. 2d 1384, 1385 (Fla. 1st DCA 1984). But, plaintiff Terry Bollea, better known as Hulk Hogan, is determined to hide the truth from the jury.

On June 12, 2015, Hogan filed 23 pretrial motions. Those motions make a series of sweeping requests that, if granted in whole or in part, would have staggering ramifications.

Hogan's motions essentially ask this Court to create an alternative reality in the courtroom. He believes that this Court should exclude every bit of evidence that might complicate or undermine the story he intends to tell the jury. In Hogan's view, the facts and testimony learned in discovery should be redacted, history should be rewritten, and the public record should be whitewashed. He wants this case to be decided in a fictional vacuum, where everyone pretends that critical evidence does not exist. Specifically, Hogan's motions seek to conceal the following undisputed facts:

- Bubba The Love Sponge Clem told his national radio audience that Hogan knew that he was being taped during his sexual encounter with Heather Clem, intimated that Hogan

was involved in releasing the tape, suggested the entire lawsuit was an attempt to avoid being held accountable for his own conduct, and backed up that accusation with numerous prior examples from Hogan's life, *see* Pl.'s Mot. in Limine No. 11;[2]

- Hogan and Clem (who is Hogan's best friend) entered into a transparently collusive settlement agreement within days of Clem telling a national radio audience of Hogan's knowledge of the taping – and only after Hogan's lawyers separately threatened Clem's livelihood with another lawsuit, *see* Pl.'s Mot. in Limine No. 3; Defs.' Opp. to Pl.'s Mot. in Limine No.3; Defs.' Trial Ex. Nos. 64, 65, 66, & 277-93;

- Hogan's motivation for filing this lawsuit appears to have had little, if anything, to do with the publication of a few seconds of indecipherable, grainy footage of sexual activity (which he joked about on national television in the days following their posting), as evidenced by his admitted belief that the sex tape(s) showed him making statements marked as confidential, *see* Pl.'s Mot. in Limine Nos. 4, 6; *see generally* Defs.' Motion in Limine on Evidence Relating to Plaintiff's Admission That He Believed the Sex Tape(s) Showed Him Making Statements That Have Been Marked as Confidential;

- The federal government conducted a criminal investigation, at the behest of Hogan's personal lawyer, which (1) has been discussed publicly by Hogan and his lawyer, (2) focused on "the source and distribution of the secretly-recorded sex tape that is the subject of this lawsuit," D. Houston Aff. ¶ 2 (filed in connection with Pl.'s Mot. for Stay on March 5, 2014), (3) included highly relevant communications involving Hogan's lawyer, and

[2] Hogan argues that Clem testified at his deposition that his on-air statements about Hogan "were not true." Pl.'s Mot. in Limine No. 11 at 2. But, that testimony was demonstrably false, as shown by Hogan's own public statements and other testimony and evidence adduced in discovery (which, not surprisingly, Hogan has marked "confidential" so that it remains hidden from public view). Thus, at a minimum, Clem's on-air statements about Hogan (which were true) are relevant to, among other things, the credibility of Clem's anticipated testimony at trial.

(4) resulted in the government obtaining highly relevant evidence, *see* Pl.'s Motion in Limine No. 17; *see generally* Defs.' Motion in Limine on Evidence Relating to Plaintiff's Admission That He Believed the Sex Tape(s) Showed Him Making Statements That Have Been Marked as Confidential;

- Hogan, his current wife, and his ex-wife have regularly and repeatedly discussed his sex life and his "private" anatomy in magazines, books, and tabloids and on national radio and television shows, often in terms just as graphic as the Gawker report and commentary about which Hogan no doubt intends to complain vociferously to the jury, *see* Pl.'s Mot. in Limine Nos. 7, 8, 9, 18;

- The media – ranging from mainstream newspapers to celebrity tabloids and from Hollywood websites to television talk shows – regularly reports and comments on Hogan's sex life and sexual relationships and did so in reporting on the sex-tape story, *see* Pl.'s Mot. in Limine Nos. 8, 9, 10, 12, 18;

- Hogan starred in two reality television shows in which he and his family opened their home and their private lives to anyone in America with cable television, *see* Pl.'s Mot. in Limine No. 10;

- Hogan has so little regard for his own privacy that he tweeted a video of himself defecating, Pl.'s Mot. in Limine No. 18;

- Within a year of claiming that he suffered $100 million worth of "emotional distress" from the publication of grainy black-and-white security footage that, except for a few seconds, shows him either fully clothed or just from the rear, Hogan appeared in a thong with his bare buttocks exposed in an advertisement parodying a highly-sexualized music video in which Miley Cyrus appeared naked on a wrecking ball, Pl.'s Mot. Nos. 9, 18, 19:

- Hogan has filed numerous lawsuits, including lawsuits where (unlike this case) his image actually was used for a commercial purpose to sell products, *see* Pl.'s Mot. in Limine No. 16;

- Hogan's designated "expert" on damages for his right of publicity claim wrote a chapter in a book titled "Right of Publicity," which was published ***after*** the discovery deadline, *see* Pl.'s Mot. in Limine No. 19;

- Despite Hogan's claim that people must pay at least $4.95 to watch celebrity sex tapes on the Internet (as one of his experts testified ***after*** the discovery deadline), the truth is that lengthy excerpts from celebrity sex tapes – excerpts that are far longer and far more explicit than the video excerpts at issue in this case – are made available for free, *see* Pl.'s Mot. in Limine No. 20; *see also, e.g.*, Defs.' Trial Ex. Nos. 272, 574;

- Hogan was married at the time he was taped having sex with Heather Clem (a fact that he admits in the published video excerpts), and thus the conduct depicted on the sex tape can accurately be described as "adultery," an "extramarital affair," "cheating," "infidelity," "unfaithfulness," and "disloyalty," *see* Pl.'s Mot. in Limine No. 13;

- In 2011, after Hogan had sexual relations with Mrs. Clem, but before any information about the sex tape became public, he engaged in an extended discussion on a national television and radio show about whether he would ever have sex with Mrs. Clem, a discussion in which he denied that he ever would sleep with her, citing the "man law" by which he abides, *see* Pl.'s Mot. in Limine No. 7;
- The Defendants, who all *publish* information on the Internet for a living and are being sued in this case for *publishing* content Hogan finds offensive, are "Publisher Defendants," *see* Pl.'s Mot. in Limine No. 2; and
- Two different courts issued three separate rulings that the video excerpts are protected by the First Amendment, *see* Pl.'s Mot. in Limine No. 1.[3]

All of this evidence should be excluded, according to Hogan, because he might be prejudiced. Of course, "[m]ost evidence that is admitted will be prejudicial or damaging to the party against whom it is offered. The question under the statute is not prejudice but instead, unfair prejudice . . . ." *State v. Williams*, 992 So. 2d 330, 334 (Fla. 3d DCA 2008) (citation omitted).

Here, while the evidence might stain Hogan's public image, it is the truth, and all of it is relevant. The evidence that Hogan seeks to hide from the jury bears on:

- whether he kept his sex life and anatomy private,
- whether the video excerpts addressed a matter of public concern,

[3] The farcical nature of Hogan's positions is underscored by his claim that ***he*** should be permitted to tell the jury that this Court ordered the Publisher Defendants to remove the post and they refused, but that the Publisher Defendants should ***not*** be permitted to tell the jury the whole truth: their refusal came after multiple rulings that the post was protected by the First Amendment and this Court's order then was held to be unconstitutional. *See* Pl.'s Mot. on Punitive Damages at 23-24; Pl.'s Trial Ex. No. 72.

- whether the posting of the video excerpts actually harmed Hogan (and, if so, to what extent), and
- whether Hogan's "woe is me" testimony and the expected "'cover my ass'" testimony of his best friend Bubba The Love Sponge Clem is credible. *E.g*, Ex. 14 to Aff. of Rachel E. Fugate filed in support of Mot. for Summ. J. (media interview about sex tape in which Hogan tells a "woe-is-me story"); Pl.'s Mot. in Limine No. 11 at 2 (quoting Clem, who claimed to be in "cover my ass mode" when talking about Hogan on the radio).

The Florida Supreme Court has "take[n] a strong stand against charades in trials." *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 996 (Fla. 1999). Yet, for this trial, a charade is precisely what Hogan hopes to concoct.

A trial is not a lightly scripted reality television show with a contrived *Father Knows Best* ending. The courtroom is not a professional wrestling ring with a predetermined "world wrestling champion."

A trial "is a quest for truth," pure and simple. *Fedd*, 461 So. 2d at 1385; *Gov't Emps. Ins. Co. v. Krawzak*, 675 So. 2d 115, 118 (Fla. 1996) (approving reversal of verdict based on evidentiary ruling that created "a pure fiction" at trial). And, "only when *all* relevant facts are before the judge and jury can the search for truth and justice be accomplished." *Allstate Ins. Co.*, 733 So. 2d at 996 (emphasis in original) (internal quotation marks omitted).

Hulk Hogan may well wish to hide the truth from a jury of his peers. But, the Publisher Defendants have a constitutional right to due process. They have a right to put on a defense, and

they have a right to introduce relevant evidence.[4] And, most importantly, they have a right for the jury to see the truth.

CONCLUSION

The Publisher Defendants respectfully request that this Court deny Hogan's motions and his across-the-board requests to hide the truth from the jury.

Dated: June 26, 2015

Respectfully submitted,

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[4] *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (internal quotation marks omitted); *Brinkley v. Cnty. of Flagler*, 769 So. 2d 468, 472 (Fla. 5th DCA 2000) (explaining that right to due process includes "the right to introduce evidence at a meaningful time and in a meaningful manner" and "the opportunity to cross-examine witnesses" (internal quotation marks omitted)).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th 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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