

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

GAWKER MEDIA, LLC and GREGG D.  
THOMAS,

Plaintiffs,

Case No.: 8:15-cv-01202-SCB-EAJ

vs.

THE FEDERAL BUREAU OF  
INVESTIGATION and THE EXECUTIVE  
OFFICE OF UNITED STATES ATTORNEYS

Defendants.

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**CONFIDENTIAL DECLARATION OF GREGG D. THOMAS  
IN SUPPORT OF PLAINTIFFS' OBJECTIONS**

I, Gregg D. Thomas, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the following is true and correct:

1. The statements made in this Declaration are based on my personal knowledge.
2. I am a partner at Thomas & LoCicero PL, counsel for plaintiffs in the above-captioned matter, along with the law firm of Levine Sullivan Koch & Schulz, LLP.
3. My firm, along with the Levine Sullivan firm, also serves as counsel for Gawker Media, LLC and other related parties in connection with the related case *Bollea v. Clem, et. al.*, No. 12012447-CI-011, currently pending in state court in Pinellas County, Florida (referred to herein as the "Florida Litigation"). The plaintiff in that case is Terry Gene Bollea, the celebrity widely known as "Hulk Hogan" ("Hogan"). The Florida Litigation arises out of an article published by Gawker in October 2012 reporting on a controversy involving video footage of Hogan having sexual relations with Heather Clem, the wife of his best friend, radio shock jock Bubba the Love Sponge Clem.

4. I submit this supplemental Confidential Declaration in further support of Plaintiffs' Objections to Defendant Agencies' FOIA Responses and *Vaughn* Indexes and Declarations. The primary purpose of this Confidential Declaration is to put before this Court certain information that Hogan has designated as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" under the protective order in the Florida Litigation.

**A. The FBI Investigation**

5. For Gawker's FOIA Requests and its Objections to make sense, some basic background about the FBI investigation is needed. Before turning to the specific issues raised by Gawker's Objections, I set forth that background here in the hope that it will aid the Court in addressing the issues presented.

6. As the Court knows, after Gawker published its report about the Hogan sex tape, Keith Davidson, a Los Angeles attorney, attempted – unbeknownst to Gawker at the time – to facilitate the sale of several sex tapes featuring Hogan and Heather Clem in exchange for payment from Hogan. Hogan complained to the FBI, which, in consultation with the United States Attorney's Office, investigated Davidson and his "client" for extortion, culminating in a sting operation and arrest at the Sand Pearl Hotel in December 2012.

7. At the time it published the report about the sex tape, Gawker did not know of Davidson's existence, let alone his subsequent conduct. Gawker only learned about Davidson during the course of discovery in the Florida Litigation, long after the sting operation and the Government's decision not to prosecute Davidson.

8. Even though they have been substantially redacted, the documents produced by the FBI and EOUSA (including audio and video footage) make plain that a primary concern of Hogan's in pursuing the FBI investigation was his desire to hide the fact that, on one of the

DVDs at issue, he made deeply racist comments. Since learning of these comments and Hogan's knowledge that the tapes included those comments, Gawker has come to believe that the Florida Litigation against it was filed for the same purpose, including to send a message to Gawker and anyone else that might receive that footage (it was not part of what Gawker received) not to publish it.<sup>1</sup> Although it is not necessary for this Court to weigh in on the correctness of Gawker's belief, which is an issue to be addressed in the Florida Litigation, I explain these facts here because they provide the context for understanding Gawker's position with respect to many of the missing, unaccounted-for and withheld documents, as well as for its request to obtain additional records in unredacted form – a topic about which the Court asked several times at the last hearing.

9. Attached hereto as Exhibit 36-C is a copy of a so-called "agreement" reached between Hogan, on the one hand, and Davidson and his client, on the other, and produced to Gawker in the Florida Litigation. Exhibit B to that agreement (pages BOLLEA 001210 – 001214) contains a summary transcript of the three DVDs. In that summary transcript, Hogan is referred to as "Bostick," the alias he used to sign the agreement (*see* pages BOLLEA 001215 – 001216, identifying "Bostick" as Hogan); Bubba Clem is referred to as "TAC," reflecting his prior name, "Todd Alan Clem"; and Heather Clem is referred to as "F" for "female."

10. Based on Hogan's contention in the Florida Litigation that the Davidson transcript found at "Exhibit B" to the agreement was unsubstantiated hearsay and that no party had ever

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<sup>1</sup> In that regard, Gawker always questioned Hogan's motivation for filing suit over the brief and almost indecipherable video excerpts it published when (a) the video footage at issue had been the subject of consistent news coverage and public discussion, including by Hogan himself, for almost seven months before Gawker's publication and (b) he had publicly discussed the graphic details of his sex life for years. Attached hereto as Exhibit 35-C is a true and correct copy of the Statement of Undisputed Material Facts submitted by Gawker in the Florida Litigation detailing that prior public discussion and media coverage (*see* Paragraphs 33-112).

seen the footage itself, the Florida state court ordered that the parties redact the racist language from the transcript. To comply with that order, the redacted version of Exhibit B removing the racist language is submitted herewith.

11. Attached hereto as Exhibit 37-C is a draft of Exhibit B produced by the FBI. It appears to be identical except that Bollea is referenced as “Doe” rather than “Bostick,” and the FBI has redacted other people’s names. (As addressed below, even though the FBI took custody of the full agreement, the final version of Exhibit B has been omitted from the FBI’s production.) Again, to comply with the state court’s order described above, we have redacted the racist language (in addition to the FBI’s own redaction of the identities of persons other than Hogan and Heather Clem). It is our understanding that an unredacted copy of the documents has been provided to the Court, and should the Court wish to review the full document, it is found in the FBI’s production at GAWKER 175-179. The FBI should also be able to make available, if it is has not done so already, a copy of the unredacted DVD itself from which the transcript is made.

12. According to the transcript, Hogan is heard on the tapes to say words to the effect of the following (with the racist language redacted pursuant to the state court’s order):

My daughter jumped sides on me [vis-à-vis my ex-wife]. I spent 2-3 M on her music. I’ve done everything like a jackass for her. . .

The one option Brooke had – Brooke’s career beside me is South Beach Records – [redacted] Billionaire guy – I don’t know if Brooke was fucking the [redacted] guy’s son . . . whatever . . . I mean I know what is going on – I mean I don’t have double standards – I mean I’m a [redacted] to a point. Fucking [redacted]. But then when it comes to nice people and shit whatever. I mean I’d rather if she was gonna fuck a [redacted] – I’d rather have her marry an 8 foot tall 100M basketball player.

Cecil – fucking [redacted] – he had Jamie Fox coming in on the 22nd track...I didn’t even tell Brooke about it. Fuck her.

Brooke and Cecil meet in Miami – Brooke fucks up a 10 M dollar deal I had with the Saudis – Brooke says Fuck You Dad. . . .

Exhibit 36-C (BOLLEA 001213); Exhibit 37-C (GAWKER 178). As also reflected therein, after Hogan leaves the room, Bubba Clem is depicted saying to Heather Clem, “If we ever did want to retire, all we have to do is use that footage of him talking about [redacted] people.” *Id.*

13. Attached hereto as Exhibit 38-C is a true and correct copy of the FBI’s case opening document. As reflected therein, Davidson first contacted David Houston, Hogan’s principal lawyer, on or about October 10, 2012, and the two men then spoke on October 12. When Hogan and Houston initiated the FBI investigation the following business day, they specifically recited that Davidson “stated that Bollea used racial epithets [sic] in one of the tapes and, if released, would damage Bollea’s career.” GAWKER-2.

14. Attached hereto as Exhibit 39-C is a true and correct copy of an FBI Form FD-302 memorializing a statement to the FBI by Houston on October 15, 2012. As reflected therein, Hogan was present with Houston for this statement. As further reflected therein, in a conversation on October 12, 2012, Davidson told Houston “that he had reviewed the tapes and said one of the tapes contained racial epithets [sic] which could hurt BOLLEA’s career if released” (GAWKER-6 – GAWKER-7).<sup>2</sup>

15. Attached hereto as Exhibit 40-C are true and correct copies of texts between Hogan and Bubba Clem supplied to the FBI. As reflected therein, on October 12, 2012, Hogan texted Bubba Clem that “We know there’s more than one tape out there and a one that has several racial slurs were told. I have a PPV [pay-per-view] and I am not waiting for anymore surprises because we know there is a lot more coming” (GAWKER-45).

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<sup>2</sup> Please note that, for certain confidential exhibits (specifically, Exhibits 39-C, 45-C, 49-C, 53-C, 59-C, 61-C, and 75-C), in addition to the FBI’s redactions, we have redacted telephone numbers and other similar information to comply with the administrative rules governing ECF filing. Where this has been done, the redaction is indicated with the word “redacted,” rather than the blank box the FBI used for its redactions.

16. The FBI recorded multiple telephone conversations between Houston and Davidson, and those conversations included significant discussion of the racial slurs Hogan used on one of the DVDs. Attached hereto as Exhibit 41-C is a true and correct copy of excerpts from the transcript of a telephone conversation, recorded by the FBI with Houston's consent, between Houston and Keith Davidson on October 22, 2012. As reflected therein, Houston asks Davidson, "What are we dealing with? Are these just straight up sex videos or are we dealing with something, I've heard there's one with racial epithets involved" (GAWKER 727). After Davidson described the racist language on one of the DVDs, Houston says, "that would not be a good thing," the "racial issue certainly could cost [Hogan] a great deal as far as sponsorships," and he's "a national guy and he's got a certain image to maintain," concluding by asking what he needs to do "to make sure that doesn't happen" (GAWKER 738).

17. Attached hereto as Exhibit 42-C is a true and correct copy of a transcript of a telephone conversation, again recorded by the FBI with Houston's consent, between Houston and Davidson on October 28, 2012. As reflected therein, Houston tells Davidson, in connection with the "video out there with what's been said to be racial epithets on it and I think everybody is well aware that he is a public figure in a public marketplace and that would be very damaging to him" (GAWKER-750).

18. Eventually, in coordination with the FBI, Houston and Hogan entered into a written agreement with Davidson and his client to acquire the DVDs. *See* Paragraph 9 *supra* and Exhibit 36-C. Thereafter, Houston and Hogan arranged to meet Davidson and his client at the Sand Pearl Hotel on December 14, 2012 to consummate their agreement and then for the FBI to effectuate its arrest and seizure.

19. During this meeting, Hogan and Houston watched significant portions of the DVDs. Attached hereto as Exhibit 43-C is a true and correct copy of excerpts from the transcript of the FBI's audio recording of the events and sting operation on December 14, 2012. As reflected therein, after watching one DVD, Houston asks "That's the one that was released to GAWKER, correct?" Houston then says "I'd like to be able to at least [go to] the more damaging part of the tape with the language . . . so I know that's actually on there" (GAWKER-701). They then watch the portion with the racist content and the portion that follows where Bubba Clem makes his "if we ever wanted to retire" comment to Heather Clem (GAWKER-702).

20. The FBI produced an audio file containing the FBI's recording of the events of December 14, 2012. As reflected therein, the audio reveals Hogan, Houston and Davidson watching the DVDs, including the portion with the racist language and Bubba Clem's "if we ever wanted to retire" comment. We have not filed a copy here because we would be required to redact the content at issue. It is my understanding that the FBI could provide a copy of this file to the Court if it has not done so already. The referenced portion appears at 3:04:45 to 3:08:50.

21. Attached hereto as Exhibit 45-C is a true and correct copy of an FBI Form FD-302 memorializing a telephone conversation between the FBI and Houston following the "sting operation" at the Sand Pearl. As reflected therein, "HOUSTON stated he, TERRY BOLLEA and [redacted] viewed the DVDs in [redacted]'s hotel room . . . . HOUSTON confirmed that the DVDs contained content that had previously been negotiated for within telephone calls and settlement agreements. . . . Further, [redacted] fast forwarded one of the DVDs to the section which contained racial epithets and played the section for BOLLEA and [redacted]" (GAWKER-345).

22. On February 4, 2013, Hogan reviewed the transcript of the December 14, 2012 audio file, making any corrections and affixing his signature to a copy of it. Attached hereto as Exhibit 46-C (GAWKER-800) is a true and correct copy of FBI Form FD-340c, indicating that Hogan reviewed and corrected the transcript, and signed and dated it. Attached hereto as Exhibit 47-C (GAWKER-803) is a true and correct copy of a covering page to that transcript, containing Hogan's signature and the date.

**B. Missing and Unaccounted-For Documents**

23. **Video Footage of the December 14, 2012 meeting and sting operation.** The FBI has not produced any video footage of the December 14, 2012 meeting and sting operation, nor is such footage reflected on any log of withheld documents.

24. Attached hereto as Exhibit 48-C is a true and correct copy of excerpts from Hogan's deposition in the Florida Litigation. As reflected therein, before Davidson arrived,

we had to get there really early because the FBI took us in the room and showed us – showed us where all the cameras were hidden, alarm clock or whatever. They had these secret cameras hidden all over the room. And then they showed us an adjoining room where there were ten or 12 or however many agents. There were a bunch of agents in an adjoining room with headphones and video equipment.

*Id.* at 796:5-14.<sup>3</sup>

25. Attached hereto as Exhibit 49-C is a true and correct copy of closed circuit television authorizations signed by Hogan and Houston for the sting operation (GAWKER 945-948).

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<sup>3</sup> This testimony is included here rather than in my non-confidential declaration because it has been designated as "CONFIDENTIAL – ATTORNEYS' EYES ONLY" by Hogan in the Florida Litigation.



26. **Audio recording of November 27, 2012 telephone call between David Houston and a person who appears to be Keith Davidson.** The documents produced to date reflect that a recording was made of this call, but no recording or other notes or transcripts of that call have been produced or reflected on any index of withheld documents.

27. Attached hereto as Exhibit 50-C is a true and correct copy of an FBI Form FD-302 memorializing a telephone call on November 27, 2012 between the FBI and David Houston in which Houston advises that “he had just made a consensually monitored telephone call to [redacted]. During the call, HOUSTON explained to [redacted] that it was necessary to simplify the settlement agreement and to make it more relevant to the specific facts. Further, both HOUSTON and [redacted] agreed on an approximate meeting date of December 14, 2012” (GAWKER-167).

28. Attached hereto as Exhibit 51-C is a true and correct copy of an FBI Form FD-1087 (GAWKER-209) listing as evidence “One original computer disk – 11/27/12” reflecting “consensual monitoring – Telephonic.” No recording or transcript of this telephone call was included in the FBI’s production.

29. **Audio recording of December 5, 2012 telephone call between David Houston and a person who appears to be Keith Davidson.** The documents produced to date reflect that a recording was made of this call, which the FBI then transcribed, but no audio recording of that call has been produced or reflected on any index of withheld documents.

30. Attached hereto as Exhibit 52-C is a true and correct copy of a transcript that appears to have been prepared by the FBI of a “consensual recording of a telephone call on December 5, 2012 between Dave Houston and [redacted].” The content of the call, as revealed

in the transcript, involves negotiation over the terms of the agreement, and therefore strongly indicates that the other party is Keith Davidson.

31. **Communications between the FBI and Hogan and/or Houston.** Attached hereto as Exhibit 53-C is a collection of true and correct copies of emails and other communications between the FBI and Hogan and/or Houston produced to Gawker in the Florida Litigation (they have been designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” by Hogan in the Florida Litigation). While Gawker obviously has these documents already from Hogan and Houston, their omission from the FBI’s production raises concerns about the completeness of that production.

32. **Declination Letter.** Attached hereto as Exhibit 54-C (GAWKER-456) is a true and correct copy of FBI Form FD-1057, which states that “on 7/19/13, AUSA [REDACTED] sent via e-mail a copy of the declination letter stating in part that ‘it has been determined that a prosecution is not appropriate in this matter.’ A hard copy letter will be placed in the case file once received.” This declination letter was not produced by either the FBI or the EOUSA, raising further questions about the completeness of the Government’s production and *Vaughn* indexes of withheld documents.

33. **Agreement between Hogan and Davidson, and Drafts Thereof.** Although the FBI took custody of the Agreement following the sting operation on December 14, 2012, the FBI’s production does not include the final version of “Exhibit B,” which is significant because it contains Davidson’s summary transcript of the three DVDs. *See* Paragraph 9 *supra*.

34. In addition, at least two drafts of the Agreement (version 4 and a redlined version 5) have been omitted from the FBI’s production. Specifically, attached hereto as Exhibit 55-C are documents reflecting that the FBI was provided with those drafts, and copies of

them were produced to Gawker in the Florida Litigation. Again, while Gawker obviously has these documents already from Hogan and Houston, their omission from the FBI's production raises concerns about the completeness of that production.

35. **An FBI Form FD-302 witness statement for Bubba the Love Sponge Clem.** Attached hereto as Exhibit 56-C are excerpts from Bubba the Love Sponge Clem's testimony in the Florida Litigation. As reflected therein (at pages 400-406), Clem testified that he met with the FBI in November 2012.<sup>4</sup>

36. Attached hereto as Exhibit 57-C are true and correct copies of handwritten notes of an interview conducted by the FBI and dated November 9, 2012 (GAWKER-933-939). The context, including references to "Being smartass on tape – about retirement," *see* GAWKER 934, and his various references to "Heather," strongly suggest that these are notes of an interview with Bubba Clem. They are significant because Hogan has maintained in the Florida Litigation that he did not know he was being recorded, and these notes suggest otherwise, including their references to "Knew being taped – all sides," "talked about w/3," "not concealed," "obvious camera in play – Hulk knew, Heather, etc."

37. **Overdubbing the Audio of Hogan's Racist Comments on the DVD Produced by the FBI.** As described at the July 2, 2015 hearing, the audio did not match the video (or the Davidson transcript which was otherwise accurate) for the portion of the tape where Hogan makes the racist comments. Although the FBI has now confirmed that the reprocessed DVDs match the Davidson transcripts, *see* Exhibit 58-C (July 23, 2015 email from K. Stegeby to S. Berlin), the significant omission from the earlier production caused us to question why the DVD

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<sup>4</sup> Although this testimony was not designated as "CONFIDENTIAL" by Bubba Clem in the Florida Litigation, it was designated as "CONFIDENTIAL" by Hogan. Accordingly, it is included here rather than in my non-confidential declaration.



























