

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.

**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.¹ 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

¹ 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).²

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).

² 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 796:5-14.³

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).

³ 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 2012.⁴

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

⁴ 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.

produced was defective and whether that there was any possibility that the audio had been removed deliberately.

38. Given the substantial irregularities in the FBI's production – including the FBI's failure to produce multiple telephone calls, a 302 for a key interview of Bubba Clem (which appears to include statements that dramatically undercut one of Hogan's core contentions), and the production of a DVD with the audio track altered at a key moment – we believe the Court should require an explanation from the FBI concerning its production, both generally and in particular with respect to the altered DVD.

C. Additional Information Confirming that Unredacted Production of Documents Will Not Constitute an Unwarranted Invasion of Personal Privacy.

39. In my non-confidential Declaration, I submit materials to demonstrate that the identities of various persons redacted by the FBI are known and therefore that producing unredacted versions of the documents would not constitute an unwarranted invasion of personal privacy. In providing examples of such improper redactions, I referred to the documents produced by the FBI, but Hogan has designated the FBI's and EOUSA's document productions "CONFIDENTIAL – ATTORNEYS' EYES ONLY" in their entirety. Accordingly, attached hereto as composite Exhibit 59-C are true and correct copies of pages from the FBI production that are referenced in my non-confidential declaration.

40. I also supply information about Mark O'Brien's representation of Bubba Clem, about which Bubba Clem testified at his deposition in the Florida Litigation. Bubba Clem did not designate his deposition or any portion of it as "CONFIDENTIAL," but Hogan designated as "CONFIDENTIAL" the portion of the Bubba Clem's testimony where he identified O'Brien as one of his lawyers in connection with the sex tape controversy. *See* note 4 *supra*. As reflected in Exhibit 56-C, he testified that he met with the FBI in November 2012, explaining that the

meeting was arranged through Mr. O'Brien, who was serving as his counsel. *Id.* at 400:19 – 401:16. Mr. Clem further testified that his meeting with the FBI, which took place “at Mark O'Brien’s office,” was also attended by “my agent, Tom Bean” and “a representative from Mr. Diaco’s office.” *Id.* Mr. Clem then clarified that both O'Brien and “Stephen Diaco” accompanied him to the meeting with the FBI. *See id.* at 402:15 – 403:1. Disclosing their identities in their capacity as counsel for Bubba Clem will not constitute an unwarranted invasion of personal privacy.

41. I also note that documents produced in discovery in the Florida Litigation reveal the identity of the other principal special agent working on the Davidson investigation to be Charlotte Braziel, but those documents have been marked CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” by Hogan under the Protective Order in the Florida Litigation and are therefore being submitted with this confidential declaration. As an example, attached hereto as Exhibit 60-C (Bollea 1160) is a true and correct copy of an email exchange between Jason Shearn and David Houston concerning the logistics of the “sting” operation that identifies Ms. Braziel as one of the agents who worked on the FBI’s investigation. Disclosing her role in performing official work for the United States Government on an investigation in which her role is known, she was not undercover and on which there is no realistic threat of violence or other repercussions does not constitute an unwarranted invasion of personal privacy.

42. The FBI has also redacted passing references by others to Hogan’s family members, even though they are otherwise identifiable from the description of their familial relationship to him. *See, e.g.*, Ex. 61-C (GAWKER-12, referring to when “Bollea’s wife – [redacted] filed for divorce”). Redacting the word “Linda” from a sentence that otherwise identifies her as “Bollea’s wife” who “filed for divorce” makes no sense, and cannot in any

meaningful way be said to protect against an unwarranted invasion of personal privacy. The FBI has similarly redacted Hogan's nickname "Hootie," even though he has signed a privacy waiver. In addition to the materials attached to my non-confidential declaration, the testimony of Bubba Clem makes clear that Hogan's nickname is "Hootie." *See* Ex. 56-C at 222:21-24. This testimony is submitted in my confidential declaration because it has been designated as "CONFIDENTIAL" by Hogan in the Florida Litigation.

43. The FBI has also redacted K.C. Rosser's name from every email she sent and received on David Houston's behalf, despite the fact that her connection to Mr. Houston's work was no secret, the emails were plainly sent and received on his behalf, and Hogan's counsel was required to waive their privacy for their work on his behalf in connection with the FBI's investigation. *See, e.g.*, Ex. 62-C (GAWKER-76-77, redacted email exchange involving Rosser, noting that emails were sent on behalf of Houston and "dictated but not read" by Houston); *see also* Ex. 63-C (BOLLEA 1079-80, unredacted version of same email produced in state court litigation). Attached hereto as Exhibit 64-C is a true and correct copy of excerpts from the transcript of Houston's deposition in the Florida Litigation. As reflected therein, Houston identified Rosser as "one of the girls that receives dictation." *Id.* at 87:9-15. This portion of Houston's deposition is included here because it was designated as "CONFIDENTIAL" by Hogan under the protective order in the Florida Litigation.

D. Additional Information Demonstrating that the FBI's Other Redactions Are Unjustified and Improper.

44. In Gawker's Objections, at 14, Gawker explains the reasons why the notations on the documents produced by the FBI are insufficient to qualify as a proper *Vaughn* index. To illustrate this point, I attach hereto, as Exhibit 65-C, true and correct copies of documents produced by the FBI, bates labeled GAWKER-315, 325, 363, 422, 462, 930, 1101, and 1130.

These are examples of documents in which the FBI has not specified which redaction “code” applies to which redacted information.

45. In Gawker’s Objections, at 21-22, Gawker explains why the FBI appears to have improperly asserted Exemption (b)(3), which covers grand jury materials. To illustrate this point, I attach hereto, as Exhibit 66-C, true and correct copies of documents produced by the FBI, bates labeled GAWKER-449 and GAWKER-451. These documents concern toll records, and there does not appear to be any reason that grand jury secrecy should apply to them.

46. In Gawker’s Objections, at 23-24, Gawker explains why the FBI appears to have improperly asserted Exemption (b)(7)(E), covering material which, if disclosed, would reveal secret law enforcement techniques. To support this point, I attach hereto, as Exhibit 67-C, true and correct copies of documents produced by the FBI bates labeled GAWKER 18, 120-21; GAWKER 118, 420; and GAWKER 209, 227, which are “evidence entry” forms, “electronic communication” forms, and “evidence log” forms, in which the FBI, without explanation, has redacted information pursuant to Exemption 7(E).

E. Gawker is Seeking Full and Unredacted Production Documents to Correct False Testimony and Representations in the Florida Litigation.

47. At the July 2, 2015 hearing, the Court asked my co-counsel, Seth Berlin, “an overall question” about why Gawker was seeking these documents and information when “a lot of it you already know, a lot of the redactions you’re fully aware of who it is.” July 2, 2015 Hrg. Tr. at 43:6-15; *see also id.* at 44:15-24 (THE COURT: asking why you need them “[i]f you can guess who it is”); *id.* at 44:24-25 (THE COURT: asking “why do you care? You know who it is.”). Mr. Berlin responded, but was limited in what he could say given the state court protective order:

Why do I want to know? Let me tell you about this, Your Honor. I have to pause a minute because I'm under, as Your Honor knows, I'm under an order in the state court and the state court order says that these documents are to be treated as confidential. . . . So I'm limited in what I can say in open court, so I'm going to proceed judiciously.

Turns out, without getting into the specifics . . . that we have essentially under oath testimony to the FBI and we have under oath testimony in our case directly at odds with one another. So we have a situation . . . where the key participant, the plaintiff, is telling us one thing under oath and telling the FBI something else.

So this is why we are asking – and you can't use that document to impeach a person if there is a bunch of blanks in it. . . .

Id. at 46:17 – 48:19; *see also id.* at 58:8-12 (“some of this requires some review of the records to be able to say more than I can say in court because the substance of this is [sealed]. I've got my hands tied so I am dancing a little bit here”).

48. Mr. Berlin was simply unable to provide a meaningful answer to the Court's repeated question in open court. Without intending to provide an exhaustive account (which would be more involved than is necessary to litigate this FOIA action), below I attempt to answer the Court's question so that it has the necessary context for adjudicating the FOIA requests. In short, the documents produced by the FBI demonstrate that Hogan and Houston have given false testimony in the Florida Litigation and Hogan's counsel made material representations to the court on his behalf. Gawker seeks documents with as few redactions as possible to be able to use them to establish the truth in the Florida Litigation.

49. **False Testimony and Misrepresentations Regarding the Existence of the DVD with the Racist Language.** Even though, as described above, Hogan and Houston had personally viewed three DVDs, Hogan repeatedly sought in the Florida Litigation to hide the existence of the other two DVDs, including the DVD with the racist language. For example, attached hereto as Exhibit 68-C is a true and correct copy of Hogan's sworn interrogatory

response in the Florida Litigation denying that there was more than one DVD, and stating under oath that he “does not know if any other clandestine recordings exist other than the video depicting [him] having relations with Heather Clem (which was excerpted and posted by Gawker Media on its website).” *See* Resp. to Int. No. 5.

50. Even though Hogan and Houston had viewed three DVDs, when Hogan was asked at his deposition: “Do you know whether the other encounters in the bedroom [*i.e.*, other than the one excerpted by Gawker] were filmed?” he testified under oath, “I have no idea.” *See* Ex. 69-C (Hogan deposition excerpts) at 291:12-14.

51. After both Judge Case (the Discovery Magistrate) and Judge Campbell ordered Hogan to produce copies of his documents related to the FBI investigation, Hogan produced a copy of the agreement with Davidson, including Exhibit B setting forth summary transcripts of three DVDs, and a letter from Sara Sweeney referencing three DVDs. Gawker then filed a motion seeking to address his prior misrepresentations of the evidence. But Hogan and his counsel denied any misrepresentations. Attached hereto as Exhibit 70-C is a true and correct copy of Hogan’s opposition to that motion, in which he asserted:

Only one video – the video produced by Gawker in discovery, and from which Gawker drew the one minute and forty-one seconds of “highlights” from the sexual encounter that it posted on its website, and which gave rise to this lawsuit – has actually been confirmed to exist. The documents created by an unknown extortionist purporting that there might possibly be as many as three different videos, are unauthenticated, lack foundation, are unreliable, and are hearsay. No party in this action is aware of any more than one video. . . . Moreover, the letter Gawker refers to from the Assistant U.S. Attorney makes reference to three discs, but they could be three copies of the same sex video Thus, there is no basis whatsoever for Gawker to “charge” Plaintiff or his counsel with “knowledge” of the purported existence of three videos.

Ex. 70-C at 7. Hogan attempted to explain past misrepresentations by his lead litigation counsel (Charles Harder):

Plaintiff's counsel did not know the true number of videos, and was discussing with the Court how the Court and the parties should treat any such new video or videos **if** they exist and were ever produced. None have been produced. . . . It may well be the case that none exist. *Plaintiff and his counsel do not know.*

Ex. 70-C at 9 (emphasis added).

52. Attached hereto as Exhibit 71-C is a true and correct copy of excerpts from the transcript from the hearing on that motion, in which Hogan's counsel – with Hogan present in person – argued that Gawker's counsel

[t]alks about how there exists certain other tapes. . . . Mr. Bollea has never seen any of those tapes. Nobody on either side of this table . . . has ever seen any of these supposed tapes. We don't know if they exist or not. Nobody has seen them. Maybe they exist and maybe they don't.

51:23 – 52:6. *See also id.* at 52:15 (“Nobody has seen them.”); *id.* at 72:9-18 (referencing “any other tapes that might exist” and asserting “We have never seen them. Maybe they exist. Maybe they don't exist.”); *id.* at 78:4-8 (referencing Sara Sweeney's letter referencing three DVDs, and stating, “Maybe it's three copies of the same thing. We don't know. We've never seen it.”).

53. Although the Court credited those misrepresentations and denied the motion, it required Hogan to appear for another deposition, at which he continued to assert that he had not seen the videos. As reflected in Exhibit 48-C, at 802:15-19, Hogan testified:

Q. Did you view the DVDs obtained from Mr. Davidson that day?

A. No, I didn't. I saw my image on a screen and I said, that's me. And that's – I refused to watch the tape.

54. As reflected in the transcript of Houston's deposition in the Florida Litigation, Ex. 64-C, also taken after the above-described hearing, Houston testified that Hogan viewed only “a very brief snippet before he understood . . . that he was present” in the DVD, *id.* at 202:20 – 203:6, and that Houston himself only viewed them each for a few seconds, *id.* at 212:1-6 (testifying that he viewed the first DVD the longest, for “maybe 10 or 15 seconds maximum”).

As a result of claiming to have watched each DVD for only a few seconds, Houston testified as to the three DVDs, “Whether they be independent videos, to this day . . . I don’t know. It could be the same video copied. I don’t know. . . . Whether they were representative of separate videotapes would be up to someone who’s actually seen them.” 212:14:20; *see also id.* at 216:3-4 (“Whether they were different DVDs or one DVD and two copies remains to be seen, I guess.”). Despite having discussed both the racist language and Bubba Clem’s “if we want to retire” comment with Davidson and Hogan, Houston also testified, “I don’t think the audio was turned up, now that you mention it. I don’t remember hearing the audio.” *Id.* at 214:22-23; *id.* at 223:9-12 (“Q: On any tape that you viewed, did you ever hear the voice of Bubba Clem or the voice of who you believed to be Bubba Clem? A: No, I didn’t hear any voices.”).

55. Attached hereto as Exhibit 72-C is a true and correct copy of excerpts from the transcript of a hearing in the Florida Litigation on April 22, 2015, in which Hogan’s counsel advocated for an order requiring the redaction of racist language from the transcripts described above and from various other documents and testimony. As reflected therein, Hogan’s counsel (Charles Harder) represented to the state court that the “allegation of . . . a racial statement” has “never been substantiated. Allegedly, according to the extortionist, there is a tape that contains this. No one in this room or any of the parties has ever seen this tape, has ever received this tape, knows anything about this tape or than [that] an extortionist said it occurred.” Ex. 72-C at 70:23 – 71:23.

56. Attached hereto as Exhibit 73-C is a true and correct copy of excerpts from the transcript of the July 1, 2015 hearing in the Florida Litigation, in which Hogan’s counsel (Charles Harder) argued, with Houston sitting at counsel table with him, “There has also been this ongoing offensive language issue that’s been festering for awhile, and we didn’t hear any

evidence of it.” Ex. 73-C at 200:13-15. Rather than acknowledging that the original contained the racist language, Hogan’s counsel argued that the FBI’s production “calls into question all of the audio on all of the DVDs, because originally these DVDs came to the FBI by way of an extortionist, or an alleged extortionist. And if an extortionist is manipulating the audio on the DVDs – and we didn’t hear anything that they have been saying is on them. But even if something were to be on them, the audio problems call into question all of that.” Ex. 73-C at 200:13 – 201:2; *see also id.* at 201:5-11 (“even if there is another third DVD which allegedly has the things that they have been speculating might be on there, it could be an extortionist manipulating the audio through an impersonator, or who knows what, and adding things.”).

57. Given that Hogan and his counsel now appear to be poised to argue that the DVDs are unreliable because of the FBI’s faulty original production, Gawker requests a sworn explanation from the FBI as to how the DVDs were produced with incorrect audio in order to rebut such an arguments by Hogan.

58. The false testimony and misrepresentations are not limited to that key issue, but extend to numerous other aspects of the case, and Gawker seeks unredacted documents for use in demonstrating the truth about them as well in the Florida Litigation.

59. **False Testimony Concerning Awareness of Cameras in Clem’s House.** In the Florida Litigation, Hogan testified under oath that he was unaware that Bubba the Love Sponge Clem had cameras in his house. Specifically, he testified as follows:

Q. Did you ever notice security cameras in Bubba’s house?

A. No.

Q. Did Bubba ever point his cameras out to you?

A. Never.

Q. Did Bubba – I assume, therefore, that Bubba never explained to you how his security cameras worked.

A. I never knew he had cameras.

Ex. 69-C at 258:5-12.

60. Attached hereto as Exhibit 74-C is a true and correct copy of Hogan's reply brief in Florida's Second District Court of Appeal attempting, unsuccessfully, to have that Court reverse the Circuit Court's order directing him and his counsel to provide privacy waivers to facilitate the FOIA requests at issue in this action. As reflected therein, he represented to the Court of Appeals that he "has consistently denied that he had any knowledge of the cameras in the Clems' house."

61. As reflected in Exhibit 75-C (GAWKER-15- GAWKER-16), however, he told the FBI the opposite, stating that, before Hogan had sex with Heather Clem, he had specifically asked whether Bubba Clem was filming the encounter:

When BOLLEA arrived at the CLEM residence, H. Clem made advances on BOLLEA that were again encouraged by [redacted]. BOLLEA then agreed to have sexual intercourse with H. CLEM. While in the master bedroom, BOLLEA stated he recalled asking [redacted] "you aren't filming this are you?" [Redacted] responded that he was not filming and that he would not do that to BOLLEA. BOLLEA was asked by interviewing Agents why he thought to ask about the filming. BOLLEA responded by stating [redacted] has surveillance cameras all over his residence and wanted to make sure he was not filming in the bedroom.

Id. Although it is clear from the context that the redactions refer to Bubba Clem, Gawker seeks an unredacted version of this document to be able to use it to challenge Hogan's directly contrary testimony in the Florida Litigation.

62. **False Testimony by Bubba the Love Sponge Clem.** Attached hereto as Exhibit 56-C are excerpts from the transcript of the deposition of Bubba the Love Sponge Clem in the Florida Litigation. As reflected therein, Bubba Clem testified emphatically in the Florida Litigation that he was only aware of one sexual encounter between Hogan and his wife, stating under oath that "the first and only time" the two had sexual relations "was the time that you guys

have the video tape of.” *Id.* at 322:5-8; *see also id.* at 322:18-20 (Q. And as far as you know, they only had sex one time? A. Yes.”). He further testified that the only time he ever burned a DVD of a his wife having sex involved the encounter depicted on the video ultimately received by Gawker. *See id.* at 214:20 – 215:25.

63. Two of the three DVDs produced by the FBI that I viewed on June 30, 2015 depicted Bubba Clem. A third, supplied to Gawker, also depicts Bubba Clem speaking. In addition, Mr. Stegeby, who was ordered to review the DVDs, advises that the re-processed DVDs recently produced to Judge Campbell match the transcripts prepared by Davidson, and those transcripts reflect that Bubba Clem is present in all three DVDs. *See Ex. 58-C.* Gawker seeks unredacted versions of the DVDs to use in the Florida Litigation to demonstrate that this testimony is false.

64. In addition, during his deposition, Mr. Clem repeatedly testified that Hogan did not know about the cameras in his house. *See, e.g., id.* at 238:15 – 239:1 (testifying that Hogan did not know about the cameras in the Clems’ house or bedroom and that Bubba Clem never discussed the cameras with Hogan). Mr. Clem also testified that Hogan did not know his sexual encounter with Heather Clem was being recorded. *Id.* at 327:14-24 (testifying that the “only person” involved “who didn’t know” the sexual encounter was being recorded was Hogan). In his interview with the FBI, Mr. Clem apparently told a very different story, stating that Hogan knew there were cameras in the Clems’ house and knew that his encounter was being recorded. *See Ex. 57-C (GAWKER 933-39)* (notes of Bubba Clem telling FBI agents that Hogan “Knew being taped – all sides,” “talked about w/3,” “not concealed,” “obvious camera in play – Hulk knew, Heather, etc.”).

65. **False Testimony by Heather Clem.** Attached hereto as Exhibit 76-C are excerpts from the transcript of the deposition of Heather Cole (f/k/a Heather Clem). As reflected therein, Ms. Clem emphatically denied any awareness that her husband was recording her sexual encounters with Hogan, testifying she learned about that after the fact. *See id.* at 18:14-20 (testifying that she was unaware the sexual encounter with Hogan was filmed until after the fact). The DVDs and transcripts, however, reveal that she was aware of the cameras, as she is depicted stating, in response to Bubba the Love Sponge Clem’s “if we ever wanted to retire” comment (which has been redacted by the FBI) that “I tried to get past the pain and enjoy it. You’ll probably see my face squirming” In addition, the handwritten notes of what appears to be the FBI’s interview with Bubba the Love Sponge Clem, *see* Paragraph 36 *supra* and Ex. 57-C, also addresses the truthfulness of Ms. Clem’s testimony that she was unaware and/or did not participate in the recording. Gawker seeks an unredacted version of the DVDs, including Bubba Clem’s immediately preceding comment about “this footage of him talking about [redacted] people,” as well as the Form 302 memorializing Bubba Clem’s interview and other similar documents, to use in the Florida Litigation to put Ms. Clem’s comments in context and to demonstrate that her testimony, that she was unaware that she was being recorded, was false.

66. There are numerous other examples where full production from the FBI, without redactions of publicly-known individuals, will enable Gawker to meaningfully expose false testimony and misrepresentations to the state court. I have tried to provide sufficient detail to answer the Court’s repeated questions to Mr. Berlin at the July 2 hearing without burdening the

Court with every such example. Should the Court request additional examples or find that they would be helpful in adjudicating this matter, I would be pleased to provide them.

I, GREGG THOMAS, declare under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct.

Date of Execution: July 24, 2015

Place of Execution: Tampa, Florida

s/ Gregg D. Thomas

Gregg D. Thomas