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.
_____/

MOTION FOR AN ORDER DECLARING THAT PLAINTIFF HAS IMPROPERLY DESIGNATED CERTAIN DISCOVERY MATERIALS AS "ATTORNEYS' EYES ONLY"

Undersigned counsel for Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (collectively, the "Gawker Defendants") hereby move on their behalf for an order reclassifying many of the discovery materials that plaintiff Terry Bollea has designated as "Attorneys' Eyes Only." Specifically, counsel for the Gawker Defendants challenge Bollea's extensive use of the "Attorneys' Eyes Only" designation to limit the Gawker Defendants' access to documents and information relating to the federal government's criminal investigation of an alleged extortion attempt involving the sex tapes (the "FBI investigation"), and Bollea's use of offensive language on one of those tapes.

Bollea's original justification for giving those materials "Attorneys' Eyes Only" status no longer applies. As set forth in detail below, recent developments in this case have rendered the information Bollea wants to protect a matter of public record. Thus, it is no longer appropriate to maintain the materials as "Confidential" at all. At the very least, those materials should be stripped of their "Attorneys' Eyes Only" status, so that all three Gawker Defendants can now, at long last, participate meaningfully in their defense of this action.

For those reasons, and the others discussed below, counsel for the Gawker Defendants respectfully request that this Court issue an order granting this motion, finding that the documents are not properly designated as "Attorneys' Eyes Only," and either removing confidentiality protection from them entirely, or, at a minimum, reclassifying those materials as "Confidential" so that the Gawker Defendants may have access to them.

BACKGROUND

A. The Protective Order

The Agreed Protective Order Governing Confidentiality, July 25, 2013 ("Protective Order"), gives each party limited rights to control the way certain information disseminated in discovery is used. Specifically, the Protective Order gives each party the right to insist that any genuinely "Confidential Information" be "used solely for the purpose of preparation and trial of this litigation," and that such information only be disclosed to "Qualified Persons," which includes the parties, as well as both their outside and in-house counsel. Protective Order (Ex. 1) at ¶¶ 1, 3, 4, 7. In an effort to prevent the discovery process from getting bogged down in disputes over what information qualifies as "confidential," the Protective Order permits each party to unilaterally designate discovery materials as "Confidential" on a provisional basis. *Id.* at ¶¶ 3, 10. If one party believes that any materials have been improperly designated, that party may – after the appropriate "meet and confer" process[1] – seek an adjudication of that issue from

[1] Prior to filing this motion, counsel for the Gawker Defendants sought to resolve this dispute informally. Specifically, on August 17, 2015, counsel for the Gawker Defendants sent a letter to Bollea's counsel asking their client to remove the "Attorneys' Eyes Only" designation from the materials addressed in this motion. *See* Ex. 2 (Ltr. from M. Berry to C. Harder, K. Turkel, and D. Houston, dated Aug. 17, 2015). No response was received. Nevertheless, it is clear from the positions Bollea has taken over the past month in correspondence to counsel for the Gawker Defendants and in court filings and arguments, and, in particular, in his efforts to restrict the access of the Gawker Defendants and Gawker's General Counsel to materials produced by the federal government, that Bollea will not agree to reclassify this material.

this Court. *Id.* at ¶ 10. If presented to the Court, "the burden of proving that discovery material has been properly designated as Confidential Information" lies exclusively "with the designating party." *Id.*

On April 23, 2014, this Court issued an oral ruling modifying the Protective Order slightly, in effect adding for certain materials an additional category of protected information: "Highly Confidential Information." Specifically, the Court, in ordering Bollea to produce documents in his possession, custody or control related to the FBI's investigation, gave him the option of designating such documents "Attorneys' Eyes Only." Apr. 23, 2014 Conf. Hrg. Tr. (Conf. Ex. 3-C) at 3:10 – 7:25. At that time, the Court did not make a determination as to whether those documents (which the Court did not review) actually merited such treatment. *Id.* Instead, the Court simply ruled that the documents could be subject to a different provisional designation than provided for under the Protective Order. *Id.* In addition, the Court ruled that Gawker's General Counsel, Heather Dietrick, would be included within the group of attorneys permitted access to materials designated as "Attorneys' Eyes Only." *Id.* at 7:8-24.

When Bollea subsequently produced his documents related to the FBI investigation, he sought an even further layer of protection. Among the documents he produced and designated "Attorneys' Eyes Only," was a summary transcript of three sex tapes that was sent to his attorney by Keith Davidson, whom Bollea alleged was an "extortionist." *See* Joint Opposition to Pl.'s Emergency Mot. to Conduct Discovery Concerning Potential Violation of Protective Order ("Joint Opposition"), Aug. 11, 2015, at 4, 6; *id.* Conf. Ex. 11-C (Davidson Transcript). Bollea produced that document in redacted form. *Id.* Conf. Ex. 11-C. He then moved for a protective order to permit him to redact certain "offensive words" from that document and other materials exchanged in discovery, including materials produced by third parties. *See* Ex. 4 (Special

Discovery Magistrate's "Report and Recommendation, dated Oct. 20, 2014). The Special Discovery Magistrate recommended that the motion be granted, *id.*, based, in part, on misrepresentations by Bollea's counsel about the legitimacy of the summary transcript. *See* Conf. Ex. 5-C (July 18, 2014 Hrg. Tr.) at 125:18 – 126:1. The Special Discovery Magistrate's Report and Recommendation was later adopted, with some modification, by this Court. Ex. 6 (April 22, 2015 Order).[2]

In October 2014, the parties agreed by stipulation to include in the category of materials that could be provisionally designated as "Attorneys' Eyes Only" anything produced by the federal government in connection with the FOIA litigation, subject to the procedures outlined in the Protective Order as modified by this Court on April 23, 2014. Ex. 7 ("Stipulated Report & Recommendation"). That stipulation was subsequently adopted in a Report and Recommendation issued by the Special Discovery Magistrate. *Id.* Bollea has repeatedly used the various Protective Orders (a) to stymie the Gawker Defendants' attempts to obtain appropriate discovery about the nature and contents of the Davidson transcript and the sex tape timeline that had been circulating long before Gawker received a Hulk Hogan sex tape; (b) to prevent questioning about the FBI investigation, the number of DVDs, and plaintiff's racist statements to the Clems; and (c) to obtain directions from the Special Discovery Magistrate that court reporters were required to redact testimony about plaintiff's racist statements from witnesses' deposition transcripts. *See, e.g.*, Joint Opposition at 6; *id.* Conf. Exs. 3-C, 20-C, 21-C, & 22-C.

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[2] As a result of these rulings, all references to certain offensive words have been redacted from documents produced in discovery and transcripts of witnesses' sworn deposition testimony, and, based on plaintiff's misrepresentations about the legitimacy of the Davidson transcript and a second summary timeline produced by a third party, questioning of witnesses about that subject has been severely limited.

On July 30, 2015, this Court made an oral ruling that, going forward, Ms. Dietrick would be excluded from the group of attorneys with access to materials designated as "Attorneys' Eyes Only." Joint Opposition Ex. 32 (July 30 Hrg. Tr.) at 72:23 – 73:7. In making that ruling, the Court made no determination as to whether any specific materials had been properly designated as "Attorneys' Eyes Only." *Id.* at 73:6 – 74:22 ("Some of these rulings are in a vacuum. I haven't seen the 1,000 pages. I haven't seen the audio. I'm handed five inches of paper this morning to review and I've not reviewed it."). Instead, the Court directed that the records be reviewed before conclusive determinations were made, holding that, in the meantime, any materials produced by the federal government and designated as "Attorneys' Eyes Only" materials could be disclosed only to outside counsel from that point forward.

B. Materials Bollea Has Designated "Attorneys' Eyes Only"

Even though Bollea has been authorized only to designate very limited categories of materials as "Attorneys' Eyes Only," he has used that designation broadly throughout the course of this litigation.[3] As relevant to this motion, the materials Bollea has designated as "Attorneys' Eyes Only" include the following:

- ***All*** of the documents he produced related to the FBI investigation;
- ***All*** of the documents produced by Bollea's attorney David Houston in response to a subpoena served by Gawker, including, as relevant here, documents related to the FBI investigation;

[3] Bollea has designated as "Attorneys' Eyes Only" many records that have nothing to do with the FBI's investigation, including, for example, his phone records (BOLLEA 001355 – 001387, 001392 – 002653, BHN 001-019), documents produced by his publicist in response to a subpoena served by Gawker (TRAUB 0093 – 0171), text messages exchanged with persons other than Bubba Clem (BOLLEA 02668-2669), and various other documents (BOLLEA 002670 – 02672). None of these designations was authorized by the Protective Order or by the Court's extension of it at the April 23, 2014 hearing.

- ***All*** of the materials produced by the federal government in connection with the FOIA lawsuit, including audio files containing recordings of the "sting operation";

- ***All*** text messages exchanged between Bollea and Bubba The Love Sponge Clem that have been produced in this litigation;

- ***All*** documents produced by a third party on which Bollea served a subpoena, including, as relevant here, multiple copies of a document that provides a timeline of two of the sex tapes depicting Bollea having sexual relations with Heather Clem, *see* Joint Opposition at 5; *id.* Conf. Ex. 4-C (timeline);

- ***All*** of the deposition testimony of Houston;

- Those portions of the deposition testimony of Bollea bearing on the FBI investigation and his alleged use of offensive language on one of the tapes;

- Those portions of the deposition testimony of two third-party witnesses bearing on the sex tape "timeline" and other related documents; and

- Various interrogatory responses concerning communications with law enforcement.

A complete index of all the materials designated as "Attorneys' Eyes Only" and challenged in this motion is attached hereto as Confidential Exhibit 8-C.[4] Copies of these materials will be delivered to the Court for *in camera* inspection.

ARGUMENT

Under the Protective Order, Bollea bears the burden of proving that the materials he has designated as "Confidential" and "Attorneys' Eyes Only" have been properly designated as such. Protective Order (Ex. 1) at ¶ 10. That burden is consistent with Florida law, which requires him to show that there is "good cause" for subjecting those materials to that level of protection. *SCI*

[4] On Monday, August 17, 2015, the federal government produced additional materials in the FOIA litigation. Consistent with the Stipulated Report and Recommendation and the Court's July 30 ruling, the recently produced materials are being treated as "ATTORNEYS' EYES ONLY," and their contents are not being shared with the Gawker Defendants or Ms. Dietrick, while Bollea has an opportunity to review them. If he subsequently designates any of those materials as "ATTORNEYS' EYES ONLY," counsel for the Gawker Defendants will ask that the designations be removed entirely or that they be marked only as "CONFIDENTIAL," and will provide the Court with an index of those records and copies of them.

Funeral Servs. of Fla., Inc. v. Light, 811 So. 2d 796, 798 (Fla. 4th DCA 2002) (citing Fla. R. Civ. P. 1.280(c)). As this Court recognized at the July 30, 2015 hearing, this showing must be made on a document-by-document basis. *See* Joint Opposition Ex. 32 (July 30 Hrg. Tr.) at 72:22 – 74:22 (ruling provisionally that documents properly designated as "Attorneys' Eyes Only" could not be reviewed by in-house counsel, but reserving judgment, pending review of each of the documents, as to whether any particular document had been properly designated in that fashion). Bollea cannot show that "Attorneys' Eyes Only" treatment is warranted here, let alone that these documents should continue to be designated as "Confidential."

A. The Information Bollea Seeks To Protect Is No Longer Confidential.

There is no basis, at present, for treating the information contained in the materials at issue here as "confidential," much less confidential to the degree necessary to justify "Attorneys' Eyes Only" status. During the course of this litigation, Bollea has indicated that he considers the following matters particularly sensitive: (a) that he alleged that he was the subject of an extortion attempt involving the sex tapes, (b) that the alleged extortionist claimed that there are three distinct sex tapes, and (c) that one of those tapes shows him using racially offensive language. All of that is now a matter of public record.

For instance, in the California proceeding relating to the subpoenas Gawker served on Keith Davidson and his law firm, Bollea publicly filed papers in which he stated that "Davidson was involved in an FBI investigation relating to an attempt to extort money from Mr. Bollea by threatening to release recordings depicting Mr. Bollea if Mr. Bollea did not pay money." Ex. 9 at 2. That filing further stated that: "During Fall 2012, Mr. Bollea participated in an FBI sting operation relating to persons who claimed to have recordings of Mr. Bollea engaged in sexual relations, and who were attempting to extort money from Mr. Bollea in exchange for the delivery

of those recordings. Attorney Davidson . . . represented certain parties involved in that FBI sting." *Id.* at 4.

In the FOIA litigation, the Government publicly filed documents that disclosed details of the FBI investigation. *See* Ex. 10 (Decl. of D. Hardy, with Exhibit 4). Specifically, the Government publicly filed a document that included as an exhibit a letter from Assistant U.S. Attorney Sarah Sweeney to Houston with the subject-line "Keith M. Davidson, USAO No. 2012R02418." *Id.* at 78. That letter indicated that the FBI was presently holding as evidence "from the above-stated investigation" (a) settlement documents, (b) a check "in the amount of $150,000 made out to Keith Davidson from David R. Houston," and (c) three DVDs. *Id.*; *see also id.* at 77 (Government's public filing of emails from Ms. Sweeney and FBI agent Jason Shearn with subject line "Davidson investigation").

In addition, the FBI's investigation into an alleged extortion attempt and its seizure of three sex tapes from the alleged extortionist has been repeatedly discussed in open court both in this proceeding and in the federal FOIA proceeding. *See, e.g.*, Joint Opposition Ex. 24 (July 1, 2015 Hrg. Tr.) at 199:15 – 206:1, 246:21 – 247:3; *id.* Ex. 32 (July 30, 2015 Hrg. Tr.) at 9:15-23, 11:21 – 12:6, 13:6-12, 42:20-22,73:21-24; *id.* Ex. 33 (July 2, 2015 FOIA Hrg. Tr.) at 46:1 – 55:8, 87:16 – 88:3, 90:23. Those facts have also been the subject of substantial public reporting. For instance, on July 15, 2015, *Capital New York* published a story about the FOIA proceedings, which reported the following:

> Charles Harder, the attorney representing Hogan at the hearing, told the court that the F.B.I. had enlisted Hogan and his lawyer David Houston in a sting operation. The target was an alleged extortionist, who had allegedly obtained three sex tapes that depicted Hogan having sex with Heather Clem, who was then the wife of Hogan's good friend Bubba the Love Sponge Clem.
>
> "The FBI had Mr. Houston communicate with the extortionist and set up a sting and that's what these audio CDs are and that's where these DVDs come from and that's where these alleged transcripts come from," Harder said.

> Other court documents disclose the target's identity: Keith Davidson, a Los Angeles-based lawyer who was suspended by the California bar for 90 days for four counts of misconduct in 2010 and has previously been involved in lawsuits over sex tapes featuring celebrities such as model Tila Tequila and actor Verne Troyer.

Ex. 11 at 2. Other publications have reported similar details. *See, e.g.*, Joint Opposition Exs. 34-37.

As for the allegation that one of the tapes features Bollea using racially offensive language, Bollea has now publicly admitted that is true. *See id.* Ex. 26 (July 24, 2015 *National Enquirer* story reporting on Bollea's use of racially offensive language on one of the sex tapes); *id.* Ex. 28 (article published the same day by *People Magazine* in which Bollea admitted the accuracy of the *National Enquirer*'s report).

More significantly for these purposes, in publicly and ***falsely*** accusing the Gawker Defendants and their attorneys of having disclosed "Attorneys' Eyes Only" material to the *National Enquirer*, Bollea himself has disclosed that those materials contain references to his use of racially offensive language. *See, e.g.*, Pl.'s Emergency Mot. to Conduct Discovery Concerning Potential Violations of Protective Order, filed July 29, 2015, at 16 (asserting that the *National Enquirer* published "verbatim statements" from sealed discovery); Joint Opposition Ex. 32 (July 30, 2015 Hrg. Tr.) at 30:5-8 (counsel for Bollea contending that "[t]he Enquirer article appears to match up very closely with the transcripts"); *id.* at 32:6-10 (counsel for Bollea stating that "there is an audio file that was produced by the FBI that was a surveillance tape that had audio footage from the bedroom sex incident which had offensive language on it"); *id.* at 59:14-15 (counsel for Bollea asserting that "there [are] two transcripts. They match up.").

While Bollea's repeated contentions that there is a "match" between the statements published by the *National Enquirer* and materials marked "Attorneys' Eyes Only" in this case is patently false, *see* Joint Opposition at 9-10, 15-16, his public statements and the public

statements of his counsel have nonetheless made clear to all that the FBI's investigation, and the materials that he and the federal government produced, pertain to his use of racially offensive language on a sex tape. Given Bollea's admission that he did in fact use the racially offensive language during one of the recorded sexual encounters, there is no interest left to protect.

In short, as a consequence of these recent public disclosures, there is no reason to continue to insist that information concerning the FBI's investigation or Bollea's use of offensive language be accorded specially protected status. *See, e.g.*, *Sciele Pharma, Inc. v. Brookstone Pharm., LLC*, 2010 WL 9098290, at *9 (N.D. Ga. June 23, 2010) (prior confidentiality designation was rendered "moot" and lifted when previously protected information became public).[5]

B. There Is No Justification For Depriving The Gawker Defendants Of Access To Materials Crucial To Their Defense.

Even if these materials still should be accorded *some* protected status, there is no justification for according them "Attorneys' Eyes Only" status and denying the Gawker Defendants, including Gawker's General Counsel Ms. Dietrick, access to them, particularly as the parties prepare for a court-ordered mediation and for trial.

The materials relating to the FBI investigation are central to this case. They are key evidence to the Gawker Defendants' contention that Bollea's alleged emotional distress in connection with the sex tapes had nothing to do with the public disclosure of the video excerpts from the sex tape Gawker posted (which Bollea freely discussed in the press before and after the

[5] To be clear, this motion is not seeking to remove the "confidential" designation of any documents or testimony provided by third-party witnesses for which the witnesses have asked for that designation (except for the testimony and documents produced by plaintiff's counsel, David Houston). The motion, however, is seeking to remove *plaintiff's* "Attorneys' Eyes Only" designation for those documents and that testimony. To the extent that a witness has asked for the information to be marked "confidential," this motion does not challenge that designation.

Gawker posting, just as he had freely discussed his sex life publicly for years), but had everything to do with his offensive language on those tapes (which Bollea has aggressively sought to hide from the public for years). *See* Joint Opposition at 22-23 & n.8. Those materials are also at the core of the Gawker Defendants' affirmative defense that Bollea committed a fraud on the Court. They are also at the heart of the Gawker Defendants' defense against the very serious and very public accusation that they leaked these materials to the *National Enquirer*. And, the materials relating to the FBI's investigation are significant to Gawker's continued litigation of the FOIA action, which revolves around those materials.

The Gawker Defendants cannot meaningfully receive and evaluate the advice of their outside counsel if they are denied access to materials that form the basis of that advice, and their counsel is prohibited from describing or referring to the substance of those materials in rendering that advice or sharing court filings that refer to it. Such a state of affairs would be intolerable in any litigation. It is especially so in a context where the plaintiff is asking for $100 million and now, with respect to the leak accusation, seeking to have judgment in this case entered in Bollea's favor and have the Gawker Defendants held in contempt and incarcerated. *See* Joint Opposition at 12 (describing the relief Bollea seeks); Ex. 12 (July 29, 2015 *TMZ* article, "Hogan: Gawker Leaked N-Word Story . . . They Should Be Jailed").

Indeed, it is precisely because of the "burden" this kind of arrangement "places on outside counsel in terms of effective communication [with] and representation of" their client that courts have limited the use of "Attorneys' Eyes Only" designations to very specialized circumstances. *Sony Computer Entm't. Am., Inc. v. NASA Elecs. Corp.*, 249 F.R.D. 378, 383 (S.D. Fla. 2008). Specifically, courts have reserved that level of protection for cases in which the litigation is between business competitors and the materials sought to be protected contain

sensitive business information that would confer an irrevocable competitive advantage. And, even against this backdrop, only in extraordinarily sensitive situations will a court prevent discovery from being shared with a client's in-house counsel. *See, e.g.*, *Lockheed Martin Corp. v. The Boeing Co.*, 2005 WL 5278461, at *4 (M.D. Fla. Jan 26, 2005) (limiting "Attorneys' Eyes Only" designation to outside counsel where (a) the litigation is between business competitors, (b) the discovery materials at issue contain competitively sensitive information," and (c) the in-house counsel being denied access to the materials has a direct involvement in his/her company's "competitive decisionmaking").[6]

This case is not like that. Bollea's stated concern is with preventing the Gawker Defendants from *publishing* the information contained in these materials. *See* Apr. 23, 2014 Conf. Hrg. Tr. (Conf. Ex. 3-C) at 6:14-17 (expressing concern about Gawker "posting" confidential discovery materials). Leaving aside that the substance of the information Bollea seeks to protect has already been disclosed and the subject of widespread public reports by other media organizations, that is a concern adequately addressed merely by designating the materials as "Confidential."

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In sum, there are serious questions whether the materials addressed in this motion should even be considered "Confidential" at this point, given both what has been publicly disclosed about their contents and the right of the Gawker Defendants to publicly defend themselves

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[6] *See also U.S. Steel Corp. v. U.S.*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (applying same test in international trade dispute); *F.T.C. v. Sysco Corp.*, --- F. Supp. 3d ---, 2015 WL 1120013, at *1 (D.D.C. Mar. 12, 2015) (applying same test in antitrust dispute); *Pinterest, Inc. v. Pintrips, Inc.*, 2014 WL 5364263, at *2 (N.D. Cal. Oct. 21, 2014) (applying same test in trade secret context);; *Sony*, 249 F.R.D. at 382-83 (applying same test in trademark dispute). Plaintiff has not cited a single authority, and we are not aware of any, where such a limitation has been applied in a case involving true and public facts that a plaintiff finds embarrassing.

against Bollea's very public leak accusations. *See, e.g.*, Exs. 12 -13 (media reports detailing and repeating Bollea's accusations). At a minimum, counsel for the Gawker Defendants ask on their clients' behalf that those materials be reclassified as "Confidential" so that the Gawker Defendants can be given access to them.

CONCLUSION

For the foregoing reasons, counsel for the Gawker Defendants respectfully request on their clients' behalf that this Court issue an order lifting the restrictions placed on the materials addressed in this motion, or, in the alternative, reclassifying them as "Confidential."

August 20, 2015

Respectfully submitted,

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I HEREBY CERTIFY that on this 20th day of August, 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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