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.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA, et al.,

Defendants.
_____/

Case No. 12012447 CI-011

PLAINTIFF'S OMNIBUS OPPOSITION TO GAWKER DEFENDANTS' MOTIONS SEEKING TO UNSEAL AND UNDESIGNATE HIGHLY CONFIDENTIAL MATERIALS USING THE VIOLATION OF THE PROTECTIVE ORDER AS PRETEXT

Plaintiff, Terry Bollea professionally known as Hulk Hogan ("Mr. Bollea"), responds in opposition to Defendants, Gawker Media, LLC's, Nick Denton's and A.J. Daulerio's (collectively, "Gawker Defendants"), Motion to Determine Confidentiality of Transcripts of Closed Proceedings and Motion for Order Declaring that Plaintiff has Improperly Designated Certain Discovery as "Attorneys' Eyes Only" (collectively, the "Pretext Motions"), as follows:

Introduction

As the Court knows, its Protective Order governing discovery in this case was potentially violated when someone leaked material designated Highly Confidential – Attorneys' Eyes Only in this case to *The National Enquirer*; which then published multiple stories about information within a "sealed transcript" concerning issues that are entirely irrelevant to this case. This resulted in substantial injury to Mr. Bollea – the very injury the material was sealed to prevent. Strong evidence points to Gawker Defendants as being *The National Enquirer's* source. Now, before Mr. Bollea and the Court can verify whether Gawker Defendants were responsible for the leak, Gawker

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Defendants are using their Pretext Motions as an artifice to induce the Court to essentially pardon the disclosure of "Attorneys' Eyes Only" discovery to the press. Frankly, this tactic is brazen and disingenuous given the significant evidence pointing to Gawker Defendants as the culprit and Mr. Bollea's pending Emergency Motion to conduct discovery to confirm the source.

As a preliminary matter, the Pretext Motions should be heard, if at all, by Special Discovery Magistrate Judge James Case (Ret.). These motions involve discovery issues that the Court specifically appointed Judge Case to hear and decide. Gawker Defendants cannot unilaterally strip Judge Case of his authority and dictate to this Court what matters it should hear.

The Pretext Motions also fail on the merits. Gawker Defendants' Motion seeking to unseal closed proceedings is legally and factually unsupported, and based on the incorrect legal standard. Gawker Defendants' Motion seeking to strip away necessary confidentiality designations from Highly Confidential and irrelevant discovery materials is equally unfounded.

In line with their *modus operandi* throughout this case, Gawker Defendants' Pretext Motions are yet another thinly-veiled attempt to litigate this case in the press, deflect attention from the salient issues (namely, Gawker Defendants' violation of Mr. Bollea's privacy rights), and publicly destroy Mr. Bollea to try to force him to "throw in the towel".

This case is only about ***the one*** video Gawker Defendants posted on their website, and whether the publication of that **one** video was an invasion of privacy or protected by the First Amendment. Everything else Gawker Defendants incessantly seek to inject into this case, including the Pretext Motions, is irrelevant and unnecessary, and calculated to confuse, complicate, and obfuscate the issues in the case and assassinate Mr. Bollea's character.

There is a very disturbing pattern of perversion and abuse of the laws pertaining to court records occurring in this case that should not be condoned. Mr. Bollea's privacy rights are

repeatedly being violated using illegally recorded footage of him in a private bedroom: first, by Gawker; then, by an extortionist; followed by the leak to *The National Enquirer* (possibly orchestrated by Gawker Defendants). Every time Mr. Bollea tries to protect his rights, the public records laws are invoked to violate his privacy yet again; not for some greater public good or policing of the judicial proceedings, but to publish sensationalized headlines and the intimate details of Mr. Bollea's private life.

While the public undoubtedly has an interest in the openness of judicial proceedings, it likewise has a statutorily embodied interest in prohibiting the disclosure of illegally recorded communications. Fla. Stat. § 934.03. The public also has an interest in ensuring that public access to court records doesn't have a chilling effect on privacy rights as a whole. Mr. Bollea also has constitutionally protected privacy rights, which have been afforded necessary and reasonable protections by this Court.

Gawker Defendants should not be permitted to victimize Mr. Bollea again and again using the fruits of illegal activity concerning side-show issues under the guise of "openness". This case is about **one video** and whether it was a matter of legitimate public concern, and none of the proceedings relative to what this case is truly about have been closed.

I. The Motion to Unseal Closed Proceedings is Legally & Factually Unsupported

On its face, Gawker Defendants' Motion seeking to unseal closed proceedings because "Attorneys' Eyes Only" discovery was leaked (which has been filed before the source of that leak has been determined) is duplicitous at best. If awarded, the relief would render the Protective Order meaningless, and Gawker Defendants would tacitly gain this Court's forgiveness and approval of what may be Nick Denton's self-fulfilling prophecy that Mr. Bollea's "real secret" would be

revealed, before even determining whether Gawker Defendants were the one's responsible for revealing it.

Before the Court should even be asked to grant the relief Gawker Defendants are seeking, the source of the leak must be determined. Otherwise, the Court could be unknowingly condoning (even rewarding) the very people potentially responsible for violating the Protective Order. No one should be permitted to use the ends to justify the means, and thereby absolve themselves of potential liability.

Assuming *arguendo* that Gawker Defendants' request to unseal closed proceedings is not premature and within the province of Judge Case, it nevertheless fails on the merits for two independent reasons. First, the original closure rulings are presumptively correct, and were necessary and narrowly tailored to avoid substantial injury to Mr. Bollea by the disclosure of matters protected by his privacy rights in matters that are not in any way relevant or material to this case. Second, Gawker Defendants base their motion on an incorrect legal standard, and fail to establish the "good cause" necessary to unseal the closed proceedings. Accordingly, the motion should be denied.

A. The Closure Orders Were Properly Entered and Legally Supported

"Sealed court records are entitled to a presumption that the sealing was properly and correctly done." *Scott v. Nelson*, 697 So.2d 207, 209 (Fla. 1st DCA 1997) (*Citing Russell v. Miami Herald Publishing Co.*, 570 So.2d 979, 983 (Fla. 2d DCA 1990); *Sentinel Communications Co. v. Smith*, 493 So.2d 1048, 1049 (Fla. 5th DCA 1986), *review denied*, 503 So.2d 328 (Fla. 1987). Gawker Defendants do not overcome this presumption.

The proceedings at issue were sealed because closure was necessary to avoid substantial injury to Mr. Bollea (as well as non-parties) by the disclosure of matters protected by the right to

privacy in matters which are not generally inherent in the specific type of civil proceeding sought to be closed. *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 114 (Fla. 1988). Here, the matters which are protected by the closure of certain proceedings are not "generally inherent" in this case—regardless of how badly the Gawker Defendants want them to be. The closed proceedings involved the content of video **not at issue in this case**, and which has absolutely no relevance or materiality whatsoever. The video and, in particular, the audio contained therein, was illegally recorded in a private bedroom in violation of Florida's Wiretapping statute and Mr. Bollea's undeniable privacy rights. There was, and still is, a risk for substantial injury to Mr. Bollea if these collateral materials are publicly disclosed.

This Court was entirely within the bounds of the law to seal proceedings that involved the discussion of the contents of illegally recorded video and audio footage that is **not** the subject matter at issue in this case. Moreover, given the very nature of these materials, there was **no** alternative, let alone a more reasonable one, and **no** less restrictive means to protect Mr. Bollea's rights. All of the requirements of *Barron* necessary to close the proceedings **were met**.

B. Gawker Defendants Misused Discovery to Get the Information they Want to Unseal

An issue that has been somewhat lost, but cannot be overlooked, in considering the relief Gawker Defendants are seeking, is the misrepresentations Gawker Defendants made to this Court in their effort to initially obtain the discovery which was sealed. Gawker Defendants convinced this Court to order Mr. Bollea to sign *limited* FOIA authorizations permitting the Federal Government to provide the contents of its files **exclusively to** Gawker Defendants' counsel and Judge Case (for review and determination of relevance) based on their assertion that the files were necessary to determine whether Mr. Bollea knew he was being recorded in the video they published. Gawker Defendants seek to eviscerate the "Attorneys' Eyes Only" protections upon which the Court's

decision was based, while admitting that their justification for obtaining these files was a ruse all along. In fact, Gawker Defendants have stated that they wanted the records in order to write stories about them; and Denton publicly touted that Mr. Bollea's "real secret" was the real reason the records were important. (Mr. Denton was never even allowed access to these materials, which were designated "Attorney's Eyes Only".) Now, shortly after the Court granted Mr. Bollea's motion in limine to prohibit Gawker Defendants from injecting offensive language into this case, the language was disclosed outside the courtroom to Gawker's fellow tabloid, the *National Enquirer*.

This Court is well-within its power to seal and keep sealed proceedings during which Highly Confidential and private discovery was discussed, particularly when that discovery is totally irrelevant and Gawker Defendants never should have had (or even filed) that discovery in the first place. Gawker Defendants should not be permitted to play "fast and loose" with this Court: misrepresenting their reasons for seeking certain discovery, only to reverse field and attempt to use it for an improper purpose, and then cry "foul" when Mr. Bollea merely seeks to keep highly private matters confidential; matters which Gawker Defendants agreed would remain highly confidential all along.

D. There is No Good Cause to Unseal Closed Proceedings

Given that this Court's justifiable decision to seal very limited proceedings about irrelevant, highly private, and substantially injurious matters was proper and lawful, Gawker Defendants bear the burden of demonstrating good cause to unseal them. Not surprisingly, Gawker Defendants misstate their own burden and the standard applicable to unsealing a closed proceeding.

The *Barron* standard they seek to impose on Mr. Bollea no longer applies here. "[P]roperly sealed court records are no longer 'public records' within the meaning of the state statutes and constitution [but rather] are *former* public records, now sealed, subject to being reopened upon

'good cause shown.'" *Scott*, 697 So.2d at 209 (emphasis in original); *Times Publishing Co. v. Russell*, 615 So.2d 158, 158-59 (Fla. 1993).

Florida's Supreme Court was very clear about this distinction: "Seeking to close records that are presumably open is a substantially different task than seeking to open records that have already been closed by a court." *Russell*, 615 So.2d at 15859. In fact, the Florida Supreme Court specifically rejected the same argument Gawker Defendants are making here—that on a motion to unseal records, the trial court must place the burden on the party seeking to keep the records sealed and require that party to make the specific showings set forth in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 114 (Fla. 1988) (a case involving an initial request to seal records), in order to justify continued sealing of the records. The burden to show good cause is on the party seeking to reopen court records." *Nelson*, 697 So.2d at 209.

Good cause is defined as "such a substantial, material change in circumstances that under law it is error to keep the court records sealed." *Id.* (*citing Sentinel*, 493 So.2d at 1049). In *Resha v. Tucker*, 600 So.2d 16, 18 (Fla. 1st DCA 1992), *cert. denied*, 510 U.S. 943 (1993), the court "reiterated that the party seeking to reopen sealed court records must 'demonstrate a compelling necessity for these records and the unavailability of lack of other means of obtaining the information sought.'" *Id.*

Gawker Defendants do not even attempt to establish the "good cause" necessary to unseal the operative proceedings; and given the factual circumstances surrounding the reasons they do articulate for wanting the records unsealed, it is impossible for them to do so. One cannot fathom that when fashioning the "good cause" requirement, Florida's Supreme Court was envisioning the situation presented here: a litigant trying to use a leak of sealed information in violation of a Protective Order as justification for unsealing additional closed proceedings.

There is no good cause for unsealing these transcripts, and Gawker Defendants' real motivation for seeking this relief is the antithesis of "good" cause. They want the Court to retroactively rescind the Protective Order to pardon its violation, and to publicly disclose the fruits of illegally recorded footage of Mr. Bollea, which Gawker Defendants were only able to obtain by misrepresenting the reasons they wanted and "needed" it in the first place.

The mere fact that there has been some general public discussion of the FBI's investigation into the extortion of Mr. Bollea and press reports and other public comments about some of the contents of one item of sealed discovery does not justify[1] unsealing the entirety of the closed proceedings. This holds particularly true when one considers that Gawker Defendants are the ones who orchestrated the public discussion they are using as a pretext to further violate Mr. Bollea's privacy rights.

There has not been any substantial, material change in circumstances rendering it unlawful to keep the proceedings sealed. In fact, the only substantial and material change in circumstances has been the violation of the Court's Protective Order by leaking sealed discovery to the press—which weighs substantially in favor of keeping the sealed proceedings closed.

The information that has been leaked does not change the fact that the issues discussed in the sealed proceedings remain entirely irrelevant to this case. Those issues have nothing to do with the **one** video Gawker Defendants posted. They have nothing to do with Gawker Defendants' invasion of Mr. Bollea's privacy by publishing footage of him naked and having sex in a private bedroom, nor their asserted First Amendment defenses. There is **no** justification for unsealing material that concerns irrelevant, highly prejudicial and substantially injurious issues. Frankly, the Court should consider rescinding its prior orders permitting this discovery in the first place, and

[1] In *Scott*, the court held that patients had not shown good cause to unseal court records in cases accusing a doctor of sexually molesting his patients. In *Russell*, the trial court's denied a motion to unseal court records which would reveal the arrest record of the founder of a charity and the Florida Supreme Court affirmed the ruling.

striking any references to it in the record. Such an order would presumably end the ongoing litigation over maintaining these materials under seal.

Incredibly, Gawker Defendants conclude by suggesting that they are somehow the victim in all of this; supposedly being forced to "defend themselves under the continued veil of secrecy." They also invoke the public interest to try to justify their actions; claiming that this Court and Special Discovery Magistrate Case's rulings need to be "publicly scrutinized." They even go so far as to contend that their endless efforts to improperly inject irrelevant issues into this case by any means necessary should justify the additional invasions of Mr. Bollea's privacy rights they are asking the Court to inflict.

It is not difficult to pierce the veil under which Gawker Defendants' true motivations for this motion are hidden. They said it themselves, and base their entire existence upon it: they want to expose and capitalize on other people's secrets, including illegal recordings of their activities in private bedrooms. They are not motivated by the public's interest, and time and again have shown no regard for the interests of ordinary citizens. The public has no interest in what has been sealed. To the contrary, the public's interest, as embodied in Florida's Wiretapping statute, is that illegal recordings of people taken without their knowledge or consent should never be publicly disclosed. The public's interest is in ensuring that victims can protect themselves in legal proceedings without having their privacy rights in collateral matters eviscerated.

II. The Motion to Remove Attorneys' Eyes Only Designations Seeks Unnecessary Relief Unsupported by Facts or Law

Gawker Defendants' second Pretext Motion seeks to strip the "Attorney's Eyes Only" designation from a number of documents and materials that are extremely sensitive and confidential, in yet another bid to violate Mr. Bollea's and third parties' privacy based on a non-existent prejudice with respect to the defense of their claim. This motion is certainly premature

given the potential violation of the Protective Order. Moreover, it should be heard by Judge Case, the Special Discovery Magistrate empowered to hear all discovery disputes in this action.

Should this Court decide to hear the merits, Gawker Defendants are not entitled to an order stripping protection from the two major categories of highly confidential material: (1) material concerning Mr. Bollea's use of offensive language, which has been repeatedly ruled irrelevant to this case and subject to the strictest restrictions in discovery, and (2) material relating to the investigation of the extortion attempt against Mr. Bollea, which may result in a criminal prosecution and likewise has nothing to do with the central issues in this case. Gawker Defendants' executives and in-house counsel do not need access to any of these materials to defend this case. This case is only about the **one** video they posted, and whether it invaded Mr. Bollea's privacy or was protected by the First Amendment. The rest of the mud Gawker Defendants want to sling doesn't matter.

Although, Mr. Bollea opposes this motion in the main, he has examined the materials identified by Gawker Defendants in their motion (something that did not happen prior to filing because Gawker Defendants did not specifically disclose what they were seeking to "undesignate" during the meet and confer process), and there are a few instances where Gawker Defendants have identified materials which do not need to be designated as confidential (identified below). Accordingly, with respect to those materials, and those materials only, Mr. Bollea does not oppose Gawker Defendants' motion seeking to lift the confidentiality designation.

A. This Motion Must Be Heard by Judge Case

This is a discovery motion. It concerns whether or not the confidentiality designations of various materials produced in discovery should be changed. As such, it must be brought in the first instance before the Special Discovery Magistrate, Judge James Case.

Gawker Defendants have purported to "withdraw" their consent to Judge Case hearing matters in this case; however, as stated in Mr. Bollea's response to that withdrawal and his supplemental response, that "withdrawal" is ineffective because Judge Case was appointed to hear discovery issues until the termination of this case.

Gawker Defendants continue to act as if they alone have the authority to dictate how this proceeding shall be litigated. They do not.

This Court controls this case, and with the consent of the parties ordered that discovery matters must be heard by Judge Case through the conclusion of the lawsuit. Accordingly, this matter should be referred to Judge Case, who will then hear it and issue a report and recommendation.

B. Discovery Relating to Mr. Bollea's Use of Offensive Language is Irrelevant and Unnecessary, and Should Remain Highly Confidential

As set forth above, Gawker Defendants' argument that the *National Enquirer* report, and Mr. Bollea's consequent necessity to address that report, stripped away all confidentiality protections regarding the discovery at issue is misplaced and incorrect. The materials at issue emanated from an illegally recorded video of Mr. Bollea in a private bedroom. By definition, they are Highly Confidential and should not be disclosed. They also have no bearing upon or place in this case.

Importantly, the additional videos at issue were never sent to Gawker and never published by Gawker. **This case is not about those recordings.**

The only reason Gawker Defendants' attorneys were even granted permission by the Court to gain access to these materials was to determine whether Mr. Bollea knew he was being recorded. As set forth above, Gawker Defendants have perverted the original justification for this discovery

and manufactured countless, failed excuses to try to inject collateral, prejudicial issues into this case.

This discovery should remain Highly Confidential because it is highly sensitive, private material in which Mr. Bollea and third parties have undeniable privacy rights. It should also remain Highly Confidential because it is completely irrelevant to and inadmissible in this case. There is no need to change the Attorneys' Eyes Only status of discovery materials that have already been ruled inadmissible.

The Court already correctly ruled that offensive language has no bearing on whether Gawker Defendants invaded Mr. Bollea's privacy, and whether their actions were protected by the First Amendment. This decision is well-supported by Florida law. Case law governing the admission of offensive language holds that such evidence is so prejudicial that it can only be admitted where the relevance of the evidence is so manifest and central that there is no way to avoid presenting it to the trier of fact. *MCI Express, Inc. v. Ford Motor Co.*, 832 So.2d 795, 801-02 (Fla. 3d DCA 2002) (holding that the trial court committed reversible error when it did not exclude testimony that executive of plaintiff used derogatory language about an ethnic group); *Simmons v. Baptist Hosp. of Miami, Inc.,* 454 So.2d 681, 682 (Fla. 3d DCA 1984) (same); *State v. Gaiter,* 616 So.2d 1132, 1133 (Fla. 3d DCA 1993) (trial court redacted racially offensive language from evidence even where the evidence was probative).

There is no need for Gawker's executives and in-house counsel to see discovery they can never use. Consequently, there is no need to change the Attorneys' Eyes Only designation. There is not even a need to address it. The relief being requested is a waste of time and resources, and should be summarily denied as such.

Gawker Defendants' assertion that any protections were waived because Mr. Bollea "let the cat out of the bag" is offensive and outrageous. Mr. Bollea was forced to publicly address this issue after being fired by the WWE and washed from its records because Highly Confidential discovery from this case was leaked. That leak and its consequences cannot be used to justify unsealing *more* highly confidential materials – particularly at the request of a primary suspect in the leak.

C. Information Regarding the Criminal Investigation of the Extortion Attempt Against Mr. Bollea Remains Highly Confidential, and Disclosure Could Compromise any Future Prosecution.

As set forth above, Gawker Defendants convinced this Court to order Mr. Bollea, over his objections, to sign FOIA authorizations allowing **only** Gawker's counsel to obtain the extortion investigation files; a decision based upon their claimed necessity for this discovery to determine whether Mr. Bollea consented to being recorded. Absent convincing the Court to do this, the Federal Government's files would have remained exempt from disclosure to Gawker based on Mr. Bollea's privacy rights. Regardless, they are and remain exempt from FOIA as to everyone else.

Gawker Defendants abused this privilege they were afforded, and ignored the reason they requested this invasive discovery. As a result, and consistent with the rationale for the Court's prior decision, everything within the Federal Government's files produced to Gawker's counsel should remain Highly Confidential.

If there is any evidence within those files that confirms that Mr. Bollea was involved in and consented to being recorded, then Gawker Defendants should be permitted to file a proper motion before Judge Case seeking to use such evidence at trial. (Conversely, Mr. Bollea should be permitted to counter-designate any evidence to the contrary.) Otherwise, the materials should remain protected.

However, Gawker Defendants weren't granted permission to obtain these records to uncover and disclose offensive language, nor to nitpick and manipulate the events underlying the investigation to manufacture a supposed "fraud on the court" defense against Mr. Bollea. Moreover, they cannot inject an issue like this into the case as a pretext to circumvent his privacy rights.

The circumstances surrounding the continued victimization of Mr. Bollea must also be given considerable weight. At the very same time Mr. Bollea was confronting Gawker Defendants' decision to post video of him naked and engaged in sex on the Internet for the world to see, he was being extorted with threats to release additional footage, and sought the FBI's assistance. Now, because he pursued the **only** avenue available to stop an extortionist from further invading his privacy rights, Gawker Defendants are suggesting that Mr. Bollea lost the very rights he sought to protect. There is something fundamentally wrong with this logic.

The extortion attempt was a serious crime. Someone obtained videos of private sexual encounters involving Mr. Bollea, and threatened to disseminate the videos unless Mr. Bollea paid a substantial sum of money. There was a federal investigation of the crime, including a sting operation. Notably, the extortion attempt and sting operation occurred in November 2012, **after** Gawker's October 2012 publication of the **one** Sex Video at issue. In other words, the extortion attempt concerned the threat to disseminate **other** videos, **not** the video which was published by Gawker. The extortion attempt has nothing to do with Gawker's publication of the Sex Video nor this case.

While the federal government did not bring indictments after the sting operation was conducted, in the Gawker-FBI litigation, the federal government indicated to the U.S. District Court that state prosecutors have recently commenced an investigation of the matter as well. Thus,

Gawker Defendants are seeking to remove the confidentiality designation with respect to materials that document a very serious crime which may remain under investigation, even though such documents do not concern the central issues of the case, namely, whether the publication of the Sex Video was an invasion of privacy and whether it was protected by the First Amendment. Thus, if Gawker Defendants are granted the relief they seek, a criminal investigation may be compromised for no reason whatsoever, because there is no reason anyone other than Gawker Defendants' attorneys need to have access to these documents in order to defend the allegations in this case.

If there are certain items within the records at issue which are germane, Gawker Defendants should be required to (through a proper motion) specifically identify which documents within the extortion investigation files they intend to use at trial, state the reason(s) why they want to use them, and file a confidential motion seeking permission to use those specific materials. Everything else should remain Highly Confidential to protect Mr. Bollea's privacy rights, and because it is irrelevant and serves no purpose in this case.

D. The Attorneys' Eyes Only Designation Does Not Interfere With the Ability to Defend this Case

Gawker Defendants' assertion that they cannot defend themselves in this case without their executives having full access to Attorneys' Eyes Only materials is a red herring. As set forth above, the materials at issue are inadmissible and have no bearing on nor tendency to prove or disprove any material facts germane to this lawsuit. They are part of the sideshow Gawker Defendants have orchestrated to **avoid** dealing with the merits.

Gawker Defendants already fully and exhaustively developed their defense during discovery, and filed comprehensive summary judgment motions articulating their defenses. This case was forced to be removed from the docket on the eve of trial, and Gawker Defendants were fully prepared to try the case at that time without their executives' and in-house counsel's access to

the subject materials. They also have an army of attorneys specializing in First Amendment defense who are more than capable of analyzing and using the Attorneys' Eyes Only materials appropriately.

It is important to note that only a small percentage of documents in this case have been designated Attorney's Eyes Only, and these documents (with few exceptions) concern the collateral issues raised in the Pretext Motions. Mr. Bollea has **not** designated any materials "Attorney's Eyes Only" which relate to the central issues of the case, even where such evidence concerns private matters. For instance, the Sex Video itself is certainly something that Mr. Bollea considers private and confidential; nonetheless, it is a central piece of evidence in the litigation and accordingly will be shown to the jury in open court. Similarly, there has been extensive testimony by Mr. Bollea and Bubba and Heather Clem regarding sexual activity; while this testimony clearly concerns private matters, it is not designated Attorney's Eyes Only because the circumstances which led to Gawker's publication of a recording of Mr. Bollea and Ms. Clem naked and having sex are relevant to the case and will be introduced into evidence at trial.

In contrast, the closed proceedings at issue are completely **collateral** to the case, as the Court has already determined. As a result, Gawker Defendants cannot make a serious claim of prejudice as a result of the Court's limitations with respect to access to this material. It simply will not affect Gawker Defendants' ability to defend this case one iota that Nick Denton or Heather Dietrick are not allowed access.

Notably, Gawker Defendants base their legal arguments entirely upon federal case law. Even if federal law is persuasive, *Sony Computer Entertainment v. NASA Electronics Corp.*, 249 F.R.D. 378, 383 (S.D. Fla. 2008), cited by Gawker Defendants, supports Mr. Bollea's argument. In *Sony Computer*, the Court held that documents **could** be designated "outside counsel only" because

Sony's in-house counsel was involved in corporate decision making (as Heather Dietrick is at Gawker by serving as its president) and thus there was a danger that documents could be further disseminated if shown to her. "Thus, based upon the record in the case at bar, it appears that Ms. Liu has a significant role in enforcement decisions regarding the distribution of the allegedly infringing products, and it might well be difficult for her to 'compartmentalize' the information she receives in the case at bar. To protect against such inadvertent, as well as intentional, disclosures of highly confidential information, the undersigned has determined that it is appropriate to permit an 'attorneys' eyes only' designation, which is restricted to outside counsel." *Id.*

Gawker Defendants also cite a line of cases discussing the scope of "attorney's eyes only" designations in **trade secret** cases. *See Moving Papers* at 12. Mr. Bollea is not asserting trade secret protection, but rather is asserting that certain information produced in discovery is both so collateral and so prejudicial that the executives of Gawker, which publishes news and gossip (and routinely invades people's privacy) should not have access to the information. The limitations on designating trade secrets "attorney's eyes only" do not apply to this case.

E. Gawker Defendants Have Identified a Limited Number of Documents for Which the Confidentiality Designation May Be Removed, and Mr. Bollea Does Not Oppose Removing the Designation of Those Documents.

Finally, while Gawker Defendants' motion is almost completely meritless, there were a few documents identified by Gawker which do not have to be designated "attorney's eyes only". These include portions of the depositions of David Houston and Richard Peirce, an audio recording of Bubba Clem's public apology to Mr. Bollea, and an article published by Gawker. With respect to these documents, as set forth in **Exhibit A** to this opposition, Mr. Bollea does not oppose the removal of the confidentiality designation.

Had Gawker Defendants set forth the specific documents they sought to "undesignate" during the meet and confer process, Mr. Bollea could have agreed to a change in the designation of these documents and narrowed the issues in the motion. However, Gawker Defendants failed to do so.

III. CONCLUSION

For the foregoing reasons, Gawker Defendants' Pretext Motions should be denied in their entirety (except as to the specific documents listed in Exhibit A). If they are going to be considered at this time, all discovery-related matters should be referred to Judge Case.

Dated: September 28, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 28th day of September, 2015 to the following:

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