

CONFIDENTIAL

EXHIBIT 3-C

to the

**GAWKER DEFENDANTS' MOTION
TO DETERMINE CONFIDENTIALITY OF
TRANSCRIPTS OF CLOSED COURT PROCEEDINGS**

Confidential

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

TERRY GENE BOLLEA,
professionally known as HULK
HOGAN,

Plaintiff,

Case No.
12-012447-CI-011

vs.

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

Defendants.

_____ /

CONFIDENTIAL -- ATTORNEY'S EYES ONLY

HEARING BEFORE THE HONORABLE JAMES R. CASE

DATE: July 18, 2014

TIME: 9:10 a.m. to 12:50 p.m.

PLACE: Riesdorph Reporting Group
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REPORTED BY: Aaron T. Perkins, RPR
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P R O C E E D I N G S

(Hearing proceedings called to order at
9:10 a.m.)

JUDGE CASE: Well, welcome back.

MR. HARDER: Thank you. And thanks for
scheduling and fitting us all in.

JUDGE CASE: It worked out absolutely fine.

On the amended notice of the hearing, I have
got a motion for sanctions by the defendants, in
which I think you want to take first; is that
right?

MR. BERLIN: Yes.

JUDGE CASE: Okay.

MR. HARDER: They filed it first.

JUDGE CASE: And then subsequent to that is
the protective -- the motion for protective order?

MR. HARDER: Right.

JUDGE CASE: Okay.

MR. HARDER: There may be some overlap when
we talk about them, so --

JUDGE CASE: That's fine.

MR. BERLIN: And we thought --

MR. BERRY: And time permitting at the end --
Charles and I had talked last week about
developing a schedule, perhaps, for discovery and

1 moving forward with an eye towards the possibility
2 of a trial. And I don't know that we can hash
3 that all here, but it may be helpful to talk a
4 little bit about that and the possibility of
5 perhaps setting a case management conference.

6 JUDGE CASE: That's fine.

7 MR. HARDER: Sure. I think that's a great
8 idea.

9 Mr. Bollea may -- he needs to leave around
10 noon, so if we finish up with the motions, he may
11 just exit out just because he has a work
12 commitment, and then we'll proceed without him on
13 the housekeeping matters.

14 JUDGE CASE: Okay.

15 MR. HARDER: And just one other kind of
16 preliminary thing. We were hoping that David
17 Houston would be available to join us. David was
18 at the depositions.

19 JUDGE CASE: Right.

20 MR. HARDER: He's in trial today. He has a
21 very full trial schedule, and so trying to get
22 everybody here in Florida at one time, we weren't
23 able to do it and include him too because of his
24 schedule and our schedules, so I'm sorry he
25 couldn't be here, but --

1 JUDGE CASE: That's all right.

2 MR. HARDER: -- he's with us in spirit.

3 JUDGE CASE: We're good.

4 Well, you're in the front chair, so I assume
5 you're speaking first.

6 MR. BERLIN: I will handle the motion for
7 sanctions.

8 JUDGE CASE: Okay. On.

9 MR. BERLIN: And Mike will handle the motion
10 for protective order. And I will try -- and
11 although there is some overlap, I'll try to defer
12 on that subject to Mike.

13 On our motion for sanctions, Your Honor, when
14 this case began, Mr. Bollea and his counsel
15 advanced a version of events both in the lawsuit
16 and in many public statements that they made,
17 including on a media tour that we talked about at
18 Mr. Bollea's deposition.

19 In response to the case, Gawker has advanced
20 both legal arguments and factual arguments. As to
21 the former, Gawker believes that the publication
22 at issue is protected speech and can't be punished
23 consistent with the First Amendment. We're
24 continuing to litigate that issue at the moment in
25 the Second DCA.

1 As to the latter issue, the factual claims
2 that Mr. Bollea has made, we've sought to
3 understand the facts, including how this sex tape
4 was made, whether plaintiff knew about it, sought
5 to capitalize on its distribution, who else knew
6 about it, and even how the tape came to be sent to
7 Gawker, which is something in the last hearing we
8 had in front of Judge Campbell she thought was a
9 key to the case.

10 So a year ago, at this point, we served
11 written discovery. And to that end, that
12 discovery asks for information and documents about
13 the sexual relationship between Mr. Bollea and
14 Heather Clem. That discovery asks when that
15 relationship occurred. That discovery asked how
16 many times Mr. Bollea had been videotaped having
17 sex. That discovery asked for information and
18 documents referring or reflecting communications
19 about that sexual relationship. And that
20 discovery asks for information and documents
21 related to plaintiff's media appearances, basic
22 stuff.

23 In response, Mr. Bollea and his counsel
24 argued that discovery should be limited. In
25 particular, they contended that the only thing

1 relevant here was this one tape and this one
2 encounter depicted on that one tape. We argued in
3 response that plaintiff's view of what was
4 relevant was too narrow. And the parties
5 litigated that issue back in October of 2013 at
6 the first of many discovery hearings that we've
7 had in this case. And Mr. Bollea lost.

8 As Your Honor knows, Judge Campbell held that
9 the discovery in the case properly extended to the
10 entirety of the sexual relationship between
11 Mr. Bollea and Heather Clem. She emphasized that
12 point by making the time period applicable at that
13 point, now a little longer. But if you take what
14 the period was when that order was issued, it was
15 some 11 years, so it was clearly not limited to
16 just one encounter or one tape.

17 That order -- the order that Judge Campbell
18 issued made clear that Mr. Bollea needed to
19 supplement his discovery responses on that point
20 and expressly referenced -- and I'm quoting from
21 the order -- Terry Bollea's obligations to provide
22 supplemental responses to the interrogatories and
23 request for production for documents in a manner
24 consistent with the foregoing ruling, i.e., the
25 full relationship between Mr. Bollea and Ms. Clem.

1 That issue came up again a couple hearings
2 later on January 17th of this year. And the
3 question was what to do if there were other tapes
4 involving Mr. Bollea and Ms. Clem. And
5 Judge Campbell, again, found that those other
6 tapes were properly within the scope of discovery.
7 She directed that they be preserved and that they
8 be provided. If either the plaintiff had them or
9 if Mr. Clem had them, they would be provided to
10 Your Honor to be viewed and, as appropriate,
11 transcribed by an official court reporter.

12 Now, it seems clear now why Mr. Bollea and
13 his counsel were trying to limit discovery to just
14 this one tape and the one encounter, but they lost
15 that issue.

16 Now, in addition to litigating that issue,
17 first in October of last year and then in January,
18 the next thing that the plaintiff and his counsel
19 did -- I think here is where things get
20 interesting, Your Honor -- despite that ruling,
21 they engaged in a series of misrepresentations to
22 us and, more importantly, to you and to
23 Judge Campbell, Your Honor, that were designed to
24 conceal the existence of information and documents
25 that Judge Campbell had plainly found to be

1 relevant and properly within the scope of
2 discovery.

3 They don't really address that point in their
4 papers, but that's really the heart of the issue.
5 And they started, in some respects, back at the
6 October 29th hearing. So one of the things we
7 argued at that hearing was that we had received no
8 privilege log at all. And in response to that
9 argument, Mr. Harder represented to
10 Judge Campbell, quote, There are no privileged
11 communications that I'm aware of, and I have asked
12 for them, and I have done everything I can to find
13 them, end quote.

14 Later, of course, the plaintiff would assert
15 privilege as to the entire set of FBI documents,
16 even though those documents unquestionably related
17 to the sexual relationship between Mr. Bollea and
18 Ms. Clem and the video recordings of it.

19 Indeed, if you accepted even the plaintiff's
20 version of events, which is that this case -- that
21 the discovery in this case was limited to just
22 this one encounter and this one tape, that stuff
23 would have been discoverable because it pertains,
24 in part, to the tape that's at issue that was
25 published by Gawker and the excerpts described in

1 the Gawker publication.

2 The plaintiff would later assert privileges
3 to a number of communications with the -- with the
4 New York publicist. Again, those are directly
5 responsive to statements made to the public and
6 media appearances. And instead of listing them in
7 a privilege log or the asserting privilege, they
8 told the court, We don't have any documents, and
9 we don't keep those documents with respect to
10 media-appearance-related documents.

11 That was particularly troubling, because it
12 now appears that some of the communications were
13 directly with counsel, with Mr. Harder. And they
14 have never been put on in a privilege log in this
15 case. The only time they have been asserted as
16 being privileged is when we subpoenaed those
17 documents in New York, and the publicist, now
18 being represented by Mr. Harder's firm, asserted
19 that they were privileged.

20 So we have a situation where back in October
21 we had a hearing. We said, What about assertions
22 of privilege? And this is important, because we
23 could have if we had -- if the privilege had been
24 asserted, we could have litigated and we could
25 have been literally been months and months ahead

1 of where we are now in litigating the case.

2 And then if we go back to the January 17th
3 hearing, there is a question as to the other
4 footage, right? So we say, we have a whole
5 colloquy request with Judge Campbell about what to
6 do about with this other footage and how it should
7 be handled and whether it should be produced. And
8 is it relevant?

9 And all throughout this hearing, even though
10 what we now know -- and we found this out after
11 the fact -- that by that point they knew that the
12 FBI had three DVDs, and knew there was a sting
13 operation, and so forth.

14 Mr. Harder, on behalf of the plaintiff,
15 repeatedly suggested to the court that he was
16 unaware of any other footage. At one point, he
17 says, If there happens to be more video, if there
18 happens to be more footage. And this is perhaps
19 the best example. He says, quote, Now, I think
20 what Mr. Berlin is saying, if I understand him --
21 and I don't even -- I'm operating in the dark here
22 because he's talking about certain things that
23 happened on the video, and yet they've never
24 produced any evidence of that to me, and this is
25 the first time I have ever heard of it.

1 Following the hearing, and the earlier
2 hearing at which they were ordered to provide
3 supplemental discovery related to the sexual
4 relationship between the plaintiff and the
5 Ms. Clem, they didn't identify or disclose the FBI
6 documents even though they were plainly
7 responsive. They did not amend their sworn
8 interrogatory answers. And there is an answer in
9 which Mr. Bollea says he does not know of any
10 other recordings that exist. Even though he knew
11 from having personally signed the agreement
12 detailing three tapes, he says he doesn't know.

13 He didn't identify in response to an
14 interrogatory the date of the tapes, even though
15 they're dated on these documents, even if it's as
16 to say, I'm not sure of the right dates, but
17 here's some information about the date. He did
18 not disclose that two of the tapes were labeled
19 Hootie, Bubba Clem's nickname for Mr. Bollea, as
20 we later learned at Mr. Clem's deposition.

21 And then we have another hearing before Your
22 Honor on February 24th at which two motions were
23 heard. And with respect, Your Honor, the
24 misrepresentations continued even more
25 significantly at that point.

1 First, we brought a motion to compel, again,
2 information related to the sexual relationship
3 between Mr. Bollea and Ms. Clem. And Mr. Harder
4 represented repeatedly that they had nothing else
5 to provide.

6 Here is what he told Your Honor: Quote, I
7 don't know how we could provide more information
8 beyond what is -- what is in Mr. Bollea's brain or
9 beyond the documents we've already produced.

10 Another one: Quote, Our responses are pretty
11 much full and complete. I can't see how we can
12 give any more information than we've already
13 given. Quote: We've actually been forthcoming
14 with the information we have.

15 Lest there be no suggestion that perhaps that
16 was, you know, a series of careless, off-the-cuff
17 comments, the written response, which one
18 obviously prepares with a little more precision
19 and the exact wording, says, quote -- this is the
20 opposition to that position -- Mr. Bollea has
21 provided all of the information that Gawker has
22 asked for, including all of the documents within
23 his possession, custody, and control that fall
24 within Gawker's document demands and all of the
25 information requested in Gawker's interrogatories.

1 Now, as Your Honor knows, you denied that
2 motion to compel, and here is what you said, Your
3 Honor: Quote, Mr. Harder, I'm taking you at your
4 word the plaintiff does not have any of the
5 information. And he represented that he does not
6 and that he doesn't have access to it and that
7 he's incapable of furnishing any of the discovery
8 you've represented.

9 Your Honor then went on to add what is
10 described as a very strong caveat; namely, If it
11 is determined that he has been less than candid or
12 honest in these proceedings and with the Court,
13 sanctions would follow, including likely a
14 preclusion order.

15 Now, on that same day, on February 24th -- at
16 the February 24th hearing, Your Honor heard our
17 motion to compel discovery on three additional
18 sets of the requests. I think it totals about
19 five requests. And they sought three categories
20 of information of documents: one, law enforcement
21 communications; two, telephone records; and,
22 three, media appearances.

23 Now, it's our position that we had already
24 asked for requests that would have encompassed
25 this. But so that there is no misunderstanding,

1 we brought a second set of requests.

2 With respect to the law enforcement records,
3 Bollea and his counsel asserted that the
4 government was involved in an active
5 investigation, an active law enforcement
6 investigation, and that Gawker was attempting to
7 interfere with that investigation in which it was
8 likely a target or a subject.

9 Now, we've since unravelled that and learned
10 that Gawker was not a target or a subject. We
11 learned in the investigation that they had already
12 months before declined prosecution and that it was
13 not a problem with the government if either of
14 those documents were produced or if any of the
15 witnesses that were identified in the documents
16 could be consulted. But the upshot of it was by
17 telling Your Honor that they were trying to avoid
18 producing these documents and, in our view, making
19 up a story to do so.

20 We then have a series of, related to the FBI
21 investigation -- and this happened over several
22 hearings, but let me pause in this now. We have a
23 series of flip-flops on what this investigation is
24 about.

25 The first time comes up at a hearing a few

1 weeks earlier at the end of January where we were
2 talking about whether or not to compel the
3 plaintiff and his lawyers to provide
4 authorizations to get documents directly from the
5 FBI. And they said, It's, quote, pure speculation
6 that the FBI investigation is in any way related
7 to the civil lawsuit.

8 And they did that even though they knew it
9 included significant information about the sexual
10 relationship between Mr. Bollea and Ms. Clem, the
11 recordings of those encounters, and the
12 dissemination of those recordings, all topics that
13 Judge Campbell had already determined were, in
14 fact, relevant to this lawsuit.

15 In a later affidavit submitted to
16 Judge Campbell, they reversed course and said that
17 the FBI investigation focused on, quote, the
18 source and distribution of the secretly recorded
19 sex tape that is the subject of this lawsuit. So
20 they admit that it relates.

21 And then when we get to April -- and I'm
22 going to come back to April in a minute, but when
23 we get to the April hearing, they reverse course
24 again and told Judge Campbell that the FBI
25 documents were not relevant. She, of course,

1 disagreed and ordered them produced, affirming
2 your order on that subject. But I just wanted to
3 pause on this back and forth about these FBI
4 documents.

5 Turning back to the February 24th hearing,
6 the second topic we took up was plaintiff's media
7 appearances to discuss the video, the Gawker
8 story. And Mr. Harder represented that the
9 plaintiff had no such documents. He didn't
10 disclose at that time that he had documents in his
11 own files that were communications with
12 plaintiff's public relations consultant, including
13 the press conference that Mr. Bollea had with his
14 counsel announcing the filing of this action when
15 it was first filed in federal court. And,
16 instead, as I mentioned earlier, we learned about
17 that through a subpoena to the publicist herself.

18 And then the third topic at that February
19 hearing was the telephone records, and you ruled
20 that they needed to be produced. And in so doing,
21 we had an argument, again, about the scope of what
22 needed to be produced. And the plaintiff took the
23 position that they should only have to produce
24 telephone records and telephone information
25 related to calls with people that they deem to be

1 relevant witnesses to this case and, otherwise,
2 they shouldn't do so.

3 We, of course, took the position that that's
4 not how discovery works, and that we don't
5 typically do it based on the plaintiff
6 determining, you know, what witnesses they think
7 are relevant. And you agreed with us and directed
8 that they all be produced, as Your Honor knows.
9 That was then affirmed by Judge Campbell.

10 But that then brings us a couple weeks later
11 to the plaintiff's deposition, which we had here
12 in this room. And with respect, those
13 misrepresentations continued in his sworn
14 testimony. First, Mr. Bollea denied any knowledge
15 of any other recordings. Second, he denied any
16 knowledge of the dates of the recordings.

17 His testimony is, I'm not good with dates.

18 So we said, Are there documents that would
19 help you refresh or pin down what the dates of
20 these recordings were?

21 And he said there weren't any.

22 Then there were a series of questions about
23 the FBI investigation, which drew a bunch of
24 objections from Mr. Harder and instructions to
25 Mr. Bollea to say, If you learned this information

1 from your counsel, it's privileged.

2 Now, Your Honor, we've had some opportunity
3 to go back and look at that privilege question.
4 And with respect, we actually think that -- we had
5 to do it on the fly, but we actually think that
6 the information that you learn from your lawyer,
7 facts that you learn from your lawyer, are, in
8 fact, not privileged. But we're not here today to
9 debate that. The question is, Is it a factual
10 question? When Mr. Bollea testified that he
11 learned these facts solely from his lawyer, was
12 that truthful?

13 And we now know from the FBI documents and
14 from their supplemental sworn interrogatory
15 answers that he had a series of meetings
16 personally with the FBI in advance of the sting
17 operation, that he had a meeting the day before
18 the sting operation, that he personally
19 participated in the sting operation, and that he
20 personally signed an agreement that was, at the
21 heart of the sting operation, attempting to obtain
22 the tapes from Mr. Davidson and Mr. Davidson's
23 client.

24 And then despite Mr. Harder's repeated
25 representations a couple weeks earlier at the

1 hearing that they had exhaustively searched for
2 responsive records and didn't have anything else,
3 plaintiff testified at the deposition that he
4 hadn't searched his e-mail; that he hadn't
5 preserved his texts, including having sent them
6 and then destroyed them, so that when you hit the
7 "load more messages" button to see if there was
8 anything else, we couldn't do that anymore; and
9 that he had discarded his calendars. He also had
10 no explanation why the media itinerary that we got
11 literally the day before the deposition, which on
12 its face shows that it was e-mailed directly to
13 Mr. Bollea, just days before this lawsuit began,
14 wasn't preserved.

15 And, Your Honor, when the issue of the N word
16 came up -- and this was at Mr. Clem's deposition
17 first -- the plaintiff and his counsel, once
18 again, concealed knowledge of multiple tapes,
19 saying, you know, there was only one tape from
20 which the excerpts were made, and that that tape
21 doesn't have any of the language on it, so we
22 shouldn't be able to ask the questions, even
23 though at the time they would have known that
24 there were, you know, transcript -- there was a
25 transcript of two other tapes, which included this

1 language, and explains that Mr. Clem's pivotal, We
2 can get rich off of this comment, was on its face,
3 not about the fact that Mr. Bollea had had an
4 affair with Ms. Clem and sex depicted on this
5 tape, but was about his use of racist language on
6 the tape.

7 And that testimony -- I'm sorry, that
8 information, had we been able to get it and get at
9 it, would have substantially undercut Mr. Clem's
10 testimony and the plaintiff's testimony about what
11 a great role model he is and what a great father
12 he is, while he's depicted on this tape using
13 racist language to talk about his daughter and her
14 boyfriend.

15 And, you know, as I said, most of the
16 question on whether to produce that document,
17 we'll reserve on it until we get to the next
18 motion. But just in terms of being part of a
19 pattern of not being candid with Your Honor and
20 with Judge Campbell, I do feel that I wanted to
21 mention that.

22 Then we get to April 23rd. We have a hearing
23 in front of Judge Campbell, the primary purpose of
24 which is a dispositive motion, a motion to dismiss
25 by the Gawker defendants, but we also take up

1 discovery motions. And the court, Judge Campbell,
2 affirmed Your Honor's report and recommendation
3 directing the production of the FBI records,
4 producing media appearance information, producing
5 the phone records, which rejects the argument that
6 the phone records need to be limited to just
7 people they just deem to be witnesses.

8 And then the plaintiff, in our judgment, Your
9 Honor, continues to thumb its nose at those
10 orders. We're now three months past that date. I
11 think it's within a couple days shy of three
12 months past that date. And we still don't have
13 all of the documents. We're still waiting on some
14 phone records. And the phone records that we do
15 have have all been redacted except for two or
16 three callers. Now, they would tell you, Well, we
17 filed the motion for protective order, which we'll
18 get to next, but in the meantime, there is an
19 existing court order that has not been complied
20 with.

21 And the protective order motion raises an
22 issue, which is this involves the privacy of other
23 people who are relevant to this case. That's
24 already been adjudicated both by you and by
25 Judge Campbell.

1 The next thing we have, is we have a
2 supplementary interrogatory response about the FBI
3 investigation and communications about that
4 investigation. And we have a bunch of written
5 communications, which speak for themselves. But
6 we asked for the oral communications. And we have
7 an interrogatory response that says, Well, in this
8 month there were approximately two or three
9 motions, and in that month there were
10 approximately two or three conversations. And the
11 description of the conversations all use the same
12 basic, boilerplate language, that it relates to
13 the criminal investigation being conducted and
14 doesn't tell you anything about the substance of
15 the conversations.

16 And we pressed on that issue. We were told
17 that none of the three law firms involved,
18 Mr. Harder, Mr. Turkel, and Mr. Houston, had any
19 notes of any of these conversations to be able to
20 give us any information and that memories have
21 faded.

22 Well, some of these conversations go back to
23 October of 2012, but many of these conversations
24 go back to earlier this year and are not that old.
25 And we don't have any information about what they

1 are about.

2 Then we said, Well, look, can you pin down
3 how many conversations there were by looking at
4 your billing records to figure out, you know, on
5 such-and-such a date, I billed my client for -- or
6 I recorded time in some fashion for, you know,
7 three-tenths of an hour. I talked to Sarah
8 Sweeney at the U.S. Attorney's office. And we
9 don't have that information.

10 And then what happens is that we get these
11 FBI documents. And then those documents,
12 essentially, confirm that what we have been told
13 for many months and what, more importantly, what
14 you have been told and what Judge Campbell has
15 been told was, in fact, not candid.

16 And what we learned was that there were at
17 least three recordings depicting Mr. Bollea and
18 Ms. Clem having sexual relations on three separate
19 instances. We learned that two of those
20 recordings have precise dates on them of July of
21 2007. Two of the recordings were labeled Hootie,
22 a nickname bestowed on Mr. Bollea by Mr. Clem;
23 that on one of the recordings Mr. Clem tells his
24 wife that they could, quote, unquote, retire off
25 the tape, not because it depicts Mr. Bollea having

1 sex, but because it depicts him repeatedly using
2 racist language about black people, including
3 specific people; that Bollea had personally
4 participated in the FBI investigation, including a
5 meeting directly with Davidson, his client
6 representative; that the FBI declined prosecution;
7 and that the government had actually retained
8 possession of the three video recordings of Bollea
9 having sexual relations with Ms. Clem,
10 specifically in connection with this case.

11 And I would say, Your Honor, that the --
12 taken together, that series of facts that we learn
13 now -- I mean, I look back at all of the work that
14 our whole team has done trying to unravel
15 factually what happened here and think to myself,
16 If I had known this back in October or November
17 when Judge Campbell ordered it, we would have
18 saved -- I can't tell you how much -- energy and
19 effort trying to prepare this case and move it
20 forward.

21 And we don't think that -- you know, where
22 does that leave us? If a party has a disagreement
23 about the scope of discovery or whether documents
24 were privileged, the proper thing to do is to
25 raise the issue, have it adjudicated and, unless

1 you appeal, to abide by the ruling.

2 Here what we have instead is that we have the
3 plaintiff and his counsel that clearly wanted to
4 avoid producing these documents. And I'm not an
5 idiot. I understand why they wanted to avoid
6 producing them. But these documents were already
7 adjudicated to be relevant, and they had a couple
8 of pages that they thought were sensitive.

9 And they could have confronted that issue
10 head on a year ago. They could have addressed it
11 with an attorney's eyes proviso, which is what we
12 now have in place, or in some other way. But what
13 you don't get to do, Your Honor, is to litigate
14 the scope of the discovery, lose, then decide for
15 yourself that you're simply not going to comply,
16 not going to provide the information you have, not
17 going to produce documents you have, not going to
18 assert a privilege as to those documents, and,
19 more importantly, you don't get to make statement
20 after statement and representation after
21 representation to the judicial officer who is
22 presiding over the case in an effort to conceal
23 information and documents that you've already been
24 ordered to produce. That's, plain and simple, a
25 violation of the core principles of the

1 adversarial process and blatant contempt for the
2 Court's authority, plain and simple.

3 Now, that brings us, I think, to their -- the
4 plaintiff's opposition papers. And I'm mostly
5 going to focus on the second set. The first set
6 really -- you know, the first set focuses on, you
7 know, that the April 23rd order was entered, you
8 know, without an opportunity to review the thing
9 at the last minute. And that's just demonstrably
10 wrong. And it's a little bit of a sort, in my
11 judgment, like a "dog ate my homework" sort of
12 tale, that we did not know. There is an order in
13 place, but you have to comply with the order as
14 best you can. So I'm going to focus on the bigger
15 picture stuff, if I can.

16 And I think that the arguments that they have
17 made really break down into four arguments. And I
18 will sort of address them, and then I will stop
19 and reserve for rebuttal.

20 First, there is what I would like to call the
21 bob and weave. They say, Well, we didn't know
22 there were other tapes because we hadn't seen
23 them, right?

24 Well, they just decided not to disclose any
25 of the information that they did have. I would

1 respectfully suggest, Your Honor, that if you have
2 information, including documents from an FBI
3 investigation, that you've gone back and forth
4 over with for months, that the appropriate
5 response -- if you want to say I have not seen the
6 tapes, then you say -- instead of saying, I don't
7 know anything, you say -- or I'm not aware of any
8 other tapes, you say, I haven't seen any other
9 tapes other than the one Gawker supplied, but I
10 understand from documents I have seen that there
11 may be others. That's a truthful response.
12 That's a candid response. That's a response that
13 when Your Honor says, Have you told me -- have you
14 told them everything you can, that's what you
15 would say.

16 And, instead, the plaintiff and his counsel
17 concealed that information by selectively deciding
18 what they knew and what they didn't know. And I
19 would suspect -- I would submit, Your Honor, that
20 that's really quite troubling.

21 The second thing that we see in the response
22 is what I would like to call the scarecrow -- like
23 the scarecrow in the Wizard of Oz. The scarecrow
24 is pointing in all different directions, right?

25 So they say that they are excused from things

1 like changing the dates of the encounters three
2 times from 2006 to 2008 to 2007, first, because
3 they use the word in and about, but they -- but
4 the reality is, Your Honor, that they ignore that
5 they offered two detailed explanations to the
6 court, one to Judge Campbell about the first
7 change from 2006 to 2008, and then one to you,
8 Your Honor, from 2008 back to 2007, both of which
9 leave out the fact that they actually have
10 documents that pin this down and that they could
11 have consulted and should have consulted.

12 So that brings us to the documents. And so
13 they say, Well -- they have an affidavit that they
14 have submitted from Mr. Houston, who is,
15 unfortunately, not here. But the gist is
16 essentially to say, I, Mr. Houston, was dealing
17 with the FBI, and Mr. Harder and Mr. Turkel really
18 did not know anything about these until there was
19 a specific request of the FBI documents in
20 December of 2013.

21 And I would respectfully suggest that that's
22 a problem for basically three reasons.

23 First, Mr. Houston was counsel of record in
24 this case starting in April of 2013, so the notion
25 that we can -- that we can be excused from

1 providing key information by saying, Well, one set
2 of lawyers knew it but the other ones didn't, is
3 really not right, and it's not fair to us as the
4 defendants trying to defend the case.

5 The second is that Mr. Harder himself,
6 according to the interrogatory answer that we've
7 since gotten, personally spoke with the FBI about
8 the investigation in January of 2013, at a minimum
9 before he represented to Your Honor that he had
10 nothing else to provide in February.

11 And, lastly, Mr. Bollea, the actual party,
12 personally participated in meetings, signing
13 agreements in a sting operation all before Gawker
14 was even named a defendant in this case. And so
15 the notion that this is somehow excused because
16 Mr. Houston was theoretically the only person who
17 knew about it just doesn't seem right.

18 And then the third argument that they make is
19 that they -- and this is perhaps, to me, the one
20 that's the most remarkable. They say there should
21 be no sanctions, because all of this stuff is
22 collateral and it's not relevant to the issues in
23 the case. Well, Your Honor, with respect, that
24 ship has sailed. The court has already determined
25 that these things are not collateral and that they

1 are relevant.

2 We've litigated that issue repeatedly, and
3 the court has determined that the sexual
4 relationship between Mr. Bollea and Heather Clem,
5 all of it, not just this one encounter or this one
6 tape, are relevant, that other video recordings
7 are relevant, that the FBI investigation is
8 relevant, that plaintiff's media appearances are
9 relevant. In fact, the DCA relied on them in its
10 opinion. The plaintiff's telephone records, all
11 of them, not just the ones that they determine are
12 relevant, are relevant.

13 And you don't get to disregard a series of
14 court orders, conceal evidence, misrepresent
15 things to the court, and then when you get called
16 on it to say, Well, it turns out that the things
17 that they are complaining about aren't really
18 material to the case, that they're not really
19 relevant, that they're collateral, that they're
20 not admissible.

21 We're not here having a conversation at trial
22 about whether these things were admissible; we're
23 having a conversation about discovery and whether
24 when you're, you know, pursuing things that may be
25 likely to lead to the discovery of admissible

1 evidence, that these things are discoverable.

2 And then, finally, the plaintiff challenges
3 the sanctions that Gawker and Mr. Bollea were
4 seeking as being out of proportion to the conduct
5 that's at issue. So I would like to address
6 those.

7 Well, the first thing that happens is that
8 when you read the opposition papers, they break
9 them down into the individual pieces and say,
10 Well, this is a small violation. And, you know,
11 Your Honor, I think if any one of these things had
12 happened, we probably would have just tried to
13 work this out. But like when you -- when you
14 realize that everything you've done for a
15 nine-month period has basically, you know, been
16 artificially narrowed because your adversary
17 hasn't given you information, you take them all
18 altogether. The point that this is not that
19 significant, I think, is really not well taken.

20 And so let me talk about the sanctions
21 themselves. We've asked for the case to be
22 dismissed, and we realize -- you know, I have read
23 the cases, and I'm sure Your Honor is familiar
24 with the cases -- that that is, obviously, the
25 most extreme sanction that we could ask for. And

1 if you read the cases, the cases make clear and
2 they draw a line.

3 They say, Look, if it's foot dragging or if
4 it's sort of normal muss and fuss of discovery, of
5 course you shouldn't dismiss the case. And I
6 would respectfully submit, Your Honor, that that's
7 not what we have here. In the cases that they
8 have cited, most of the cases involve one order,
9 not a series of orders. Here we have a series of
10 orders.

11 Some of the cases involve things that are
12 imprecise, either because they're oral rulings --
13 and here we have a series of written rulings -- or
14 because there is a general order that says, I want
15 you to just comply with all of the discovery
16 requests. And that's not what we have here. Here
17 we have a series of orders that address specific
18 topics saying, Discovery on this topic is proper.

19 And if you look at those cases, those cases
20 including a couple of the cases where there is
21 actually an affirmance of the dismissal order of
22 conduct that's a lot less egregious than what we
23 have just described, it says, Look, where there is
24 a, quote, refusal to obey as opposed to just not
25 following the court's order through either some

1 inadvertence or routine delay that we don't like
2 to see but realize happens, that that is enough to
3 dismiss the case.

4 And, you know, in response to that,
5 Mr. Bollea and Mr. Harder, acting on his behalf,
6 says, Look, he has a legitimate invasion of
7 privacy claim here. He has a constitutional, due
8 process right to press that claim, and so forth
9 and so on.

10 And, look, whatever the factual and legal
11 merits of Mr. Bollea's claims, it's not the case
12 that he's absolved from playing by the rules just
13 because he thinks he has a valid claim and
14 suffered an injury. You still have to play by the
15 rules. And when you don't do it and you don't do
16 it to this extent, dismissal is proper.

17 And we really would strongly urge the Court
18 and Your Honor to do that here, because this --
19 and I will just say, look, I have been practicing
20 law the better part of 25 years, and in my
21 experience I have not -- I have been in a case
22 where there has been hard-fought issues like this
23 case, but I have never been in a case where key
24 facts have been concealed and misrepresented to
25 this extent. And I have to say, it's just very

1 troubling.

2 So that we're not going back and forth, back
3 and forth, let me try to address the alternative
4 sanctions that we've also asked for. And I do
5 that without intending to suggest to you that
6 dismissal is in any way improper, because we
7 really think that's the appropriate response.

8 If the case is not dismissed, here is what we
9 think should happen. First, this one is a
10 no-brainer, but Mr. Bollea should be required to
11 promptly provide full and complete responses. I
12 think in our papers we ask for five days. I'm not
13 wedded to the period, but the notion that we are
14 still not having complete responses is not right.

15 Second, Gawker should be able to recall
16 Mr. Bollea and Mr. Clem for additional deposition
17 testimony, because we were basically asking them
18 questions and unable to examine them properly
19 based on what we were not told.

20 And if Mr. Clem and his lawyer, Mr. Diaco,
21 object to being re-called because of the expense
22 involved, if there is an expense, Mr. Bollea
23 should be required to reimburse his reasonable
24 expenses. It's not our money, but we realize that
25 could be an issue.

1 Third, we think that the conduct that we've
2 described here displays an ongoing contempt for
3 the court and its orders. Just to use the most
4 recent example, after the Court -- well, after
5 Your Honor rejected the plaintiff's argument that
6 he could be able to cull his phone records, after
7 the Court then rejected that argument, he
8 basically has refused to comply, and we are still
9 getting records that are, in effect, meaningless
10 because they have not given the information that's
11 been directed.

12 That's a blatant disregard of a court order,
13 and we think that there should be a finding of
14 contempt. It doesn't necessarily mean anything.
15 We're not asking for a daily sanction or anything
16 like that; we're just asking for a finding that
17 the conduct, both past and current, is displaying
18 a contempt of court.

19 Fourth, we would request that the Court give
20 an adverse inference instruction to the jury with
21 respect to the categories of documents that Bollea
22 and his counsel failed to preserve. This includes
23 his texts, his e-mail, his calendars, and the
24 substance of his and his counselor's oral
25 communications with law enforcement officials.

1 MR. HARDER: Seth, will you mind repeating
2 what you just said? I missed the first few words
3 of it. I'm sorry to interrupt.

4 MR. BERLIN: We would -- I will just do the
5 whole thing.

6 We would request that the Court give an
7 adverse inference instruction with respect to each
8 category of documents that Mr. Bollea and his
9 counsel failed to preserve. This includes his
10 texts, his e-mail, his calendars, and the
11 substance of his and his counsel's oral
12 communications with the law enforcement officials.

13 These are documents and information that we
14 should have and we don't have. And the proper
15 remedy for that -- I think it's been well
16 established in the cases -- is that the party
17 fails to preserve that information, you're
18 entitled to draw an adverse inference from that.

19 Fifth, as a sanction for improperly
20 concealing documents and information, we would ask
21 for a preclusion order. Now, in a case a
22 preclusion order limits the scope of what the jury
23 hears. You're precluded from bringing up certain
24 things, right? And in so doing, it sort of
25 artificially truncates the truth. And this case

1 is a little bit odd, because what's really going
2 on here is that the plaintiff, through his
3 discovery conduct, has artificially tried to
4 truncate the truth. And the defendant is trying
5 to have the full truth come in.

6 So, for example, when the plaintiff says --
7 which is a tale that he's told publicly many
8 times -- that, you know, in a moment of weakness,
9 he gave in to Mr. Clem and Mrs. Clem and had sex
10 with Mrs. Clem. And, in fact, we now know that
11 that happened four times. It makes it a little
12 less believable that it was sort of in just one
13 moment of weakness.

14 So what we're asking for is sort of what I'd
15 like to describe as a reverse preclusion order,
16 which is to say instead of saying that the facts
17 would be artificially truncated, that, instead,
18 Mr. Bollea would be precluded from arguing that
19 the things that he concealed did not happen.

20 And, look, when we were here in February
21 before Your Honor, you had indicated that if it
22 turned out that the plaintiff had been, quote,
23 less than candid with the Court, which is clearly
24 the case, a preclusion order would issue. And we
25 thought a lot about what that should be. And we

1 think that the appropriate thing would be a
2 preclusion that, essentially, precludes him from
3 benefitting from concealing these things by then
4 being able to argue that they don't come in or
5 that they are -- they're not right.

6 So, you know, he alleges in his complaint
7 that he had a particular public persona. But then
8 he wants public statements that he's made to be
9 prohibited and to conceal his public relations
10 efforts, the thing I mentioned about succumbing to
11 Mr. Clem and Mrs. Clem in a moment of weakness.

12 So this is -- so the things that we're
13 talking about that we would be, you know, that
14 precluded from arguing against is that there were
15 four encounters, that the FBI has three tapes,
16 that there was an alleged extortion attempt and an
17 FBI sting operation, which is obviously about
18 whether this is newsworthy and who gave this tape
19 to Gawker and so forth. And that's because we
20 don't think that the plaintiff should be rewarded
21 for having concealed that information for a year
22 and then misrepresented it to you and to
23 Judge Campbell. And that seems like the proper
24 kind of preclusion order.

25 And for what it's worth, Your Honor, Gawker,

1 for whatever everyone thinks about it, is
2 really -- it's about -- it's about the truth. And
3 so, you know, part of this is consistent with what
4 Gawker is about, which is to say, Look, the truth
5 is sometimes embarrassing, sometimes it's
6 uncomfortable, sometimes it's unpleasant. But if
7 we're going to have a trial, we shouldn't have a
8 trial where the version of what's going on is some
9 artificially truncated story. And so that is, I
10 think, a key piece of this.

11 And then, last, I want to say that
12 unravelling this misconduct had prejudiced Gawker
13 and the other defendants in a very real -- in a
14 very additional real way. Gawker has incurred
15 substantial sums over the last year trying to
16 unravel all of this; litigating motion after
17 motion after motion; seeking to enforce court
18 orders, trying to learn the facts when the
19 plaintiff and his counsel had them all along but
20 concealed them, preparing for and taking
21 depositions of Mr. Clem and Mr. Bollea without
22 information that would have been directly relevant
23 to the questions we were asking and the testimony
24 we were getting; and then, you know, claiming
25 privileges as to information at the deposition

1 when Mr. Bollea knew it directly, even though they
2 said it was only through counsel.

3 Now, look, while there is certainly some
4 amount of abnormal discovery tussling in an
5 average case -- and I'm familiar with all of that;
6 that happens in many cases -- I don't think that
7 this is the normal case. And as a result, Gawker
8 requests that the Court award the reasonable fees
9 and costs attributed to plaintiff's and his
10 counsel's misconduct over the past year.

11 And even the plaintiff's supplemental
12 opposition, although they would say it should be
13 modest, appears to concede that that might be
14 justified at least in part. And if Your Honor
15 would find that we are entitled to such an award,
16 and perhaps we would then request that we submit a
17 statement of those fees and costs. And if there
18 are particular -- any particular guidance about
19 the kinds of things you think should and should
20 not be included in that, we would -- we would do
21 that.

22 At the end of the day, Your Honor, this is
23 not one or even two or even three isolated
24 incidents but, instead, we think reflects a
25 persistent pattern of concealing evidence,

1 fabricating reasons for doing so, and in making
2 repeated misrepresentations to you and to
3 Judge Campbell, and although less important, also
4 to us. And this conduct to us strikes at the
5 heart of the adversarial process, and we think it
6 should be dealt with accordingly.

7 Thank you.

8 JUDGE CASE: All right. Thank you.

9 MR. HARDER: Thank you, Judge Case, for
10 having this hearing.

11 There is so much that's not true about what
12 Mr. Berlin just said, I don't know where to begin.
13 There is so much half truth and misrepresentation
14 to you, sir, that it's tremendous. And I believe
15 that this whole proceeding is a waste of our
16 resources because so much of it is turning the
17 facts on their head.

18 What a lot of this boils down to is
19 communications with law enforcement. Mr. Berlin's
20 premise is that those communications were asked
21 for and concealed, that there was a court order,
22 and that we refused the court order. And none of
23 that is the case.

24 We were first asked for FBI communications
25 when they propounded discovery asking for FBI

1 communication. And we immediately provided them
2 with a privilege log as to those communications.
3 We had a hearing before Your Honor about those
4 communications, which was on -- I'm trying to
5 remember the date of the hearing. It was part of
6 their February 12 and February 13 motions. I
7 think it was maybe late February or early March.

8 And Your Honor ruled that your recommendation
9 was that we had to provide FBI communications. We
10 took the issue to Judge Campbell, and we agreed
11 with Your Honor, and we promptly produced the FBI
12 communications. We did not conceal them. We
13 produced them. We redacted out five words, and
14 they repeated a few times. They were located on
15 three pages, two pages from one source and one
16 page from another source.

17 We've produced over 2,000 pages of documents
18 in this case, so redacting out five words -- and
19 these are words, Your Honor, they are racial
20 words, and Your Honor had previously ruled that
21 they were off limits in the case.

22 But the point is that we did not conceal
23 that. They had never asked for those documents
24 before. One of the documents that they've
25 presented in there motion was, if I have it here,

1 it was a story from TMZ from October of 2012.
2 October 14th, 2012, Hulk Hogan contacts FBI over
3 leaked sex tape. This is from -- I think it's the
4 day before this lawsuit was filed, one day before.
5 It was public information that we were seeking FBI
6 assistance with this. They didn't ever propound
7 discovery about this FBI investigation until about
8 six months ago. I think maybe it was right before
9 Christmas, December 19th. I may have my dates
10 slightly off.

11 That's what prompted us to provide a
12 privilege log and to resist that discovery. Your
13 Honor heard it. You ruled with them. We took it
14 to Judge Campbell. She agreed with you. And we
15 promptly produced the FBI communications. Every
16 FBI and AUSA communication that we had, we
17 produced to them. There was no concealment, none.

18 The premise is they think that they asked for
19 these FBI communications a year ago, and they
20 didn't. And they haven't presented to you
21 anything about that to show that they asked for it
22 before they really asked for it.

23 They keep saying over and over again that
24 Judge Campbell made a ruling on October 29th
25 compelling us to produce FBI communications.

1 That's not true. Look at the February 29 --
2 actually, she put it into writing, I think, in
3 March, and it's been produced in the case as part
4 of the records here.

5 Take a look at Judge Campbell's ruling on
6 that. It doesn't say anywhere that we are
7 compelled to do anything except two things. We're
8 compelled to provide a further response to
9 interrogatory No. 12, which we did promptly after
10 she said on October 29th that we had to. And the
11 second thing was that we were required to produce
12 a privilege log as to communications preceding the
13 filing of this lawsuit with the implication that
14 the privilege log would apply to responsive
15 documents that have been asked of us.

16 The AUSA and FBI communications had never
17 been asked of us as of October 29. There was
18 nothing to put on a privilege log. And all of
19 those communications were after the filing of this
20 lawsuit, in any event. So I just wanted to
21 address that issue.

22 Mr. Berlin says that we have disregarded
23 court orders. There is not a single court order
24 that we have disregarded.

25 When he talks about how we were ordered to

1 produce phone records, we have produced all the
2 phone records except for the three digits of the
3 prefix, so they have -- as to nonparties and
4 nonwitnesses, because nonparties and nonwitnesses
5 have a privacy right in the state of Florida.
6 They have a privacy right that their phone
7 communications should not be disclosed.

8 Nevertheless, we disclosed it except for a
9 three-digit prefix, and we have brought a motion
10 for protective order with Your Honor as to that.
11 If you rule against us, we will provide you --
12 we'll provide them with all the prefixes. I
13 believe it's an invasion of the privacy of
14 nonparties and nonwitnesses. I also believe that
15 it is a reasonable middle ground so that they can
16 see all of the phone calls that were made to or
17 from Mr. Bollea using the area code and the last
18 four digits.

19 And if the area code and the last four digits
20 matches up with anyone who they determine to be a
21 witness, I will be happy to immediately unredact
22 the prefix so they will have that full
23 information. It's been about a month now. They
24 have not identified a single phone call of a
25 redacted prefix where they say this is a witness.

1 But I will get to that when we get to the motion
2 for protective order.

3 I do not believe that is disregarding a court
4 order. I believe that that is protecting the
5 privacy rights of people who are not parties and
6 not witnesses. And we brought a motion. If Your
7 Honor disagrees with us, we will be happy to
8 comply with the order. But I feel that I have to
9 do my job to uphold Florida's privacy laws as to
10 nonparties and nonwitnesses.

11 Mr. Bollea -- I'm sorry. Mr. Berlin said
12 over and over again, concealed evidence, concealed
13 evidence, concealed evidence. We have not
14 concealed anything. When they gave us a document
15 request or a request for information, we provided
16 it. And when Judge Campbell, the one time she
17 compelled, she compelled a further response to
18 interrogatory 12 and we provided it.

19 And when Your Honor said we had to provide
20 certain information and Judge Campbell entered the
21 order, we provided it. What's interesting is that
22 Mr. Berlin did not put up an order, point to an
23 order and say, Here is the order; it says we have
24 to do X, Y and Z and we never did it, because that
25 doesn't exist. That scenario doesn't exist.

1 There is a lot of half truth here. There is
2 lot of innuendo. There is a lot of things that
3 just aren't accurate. And I will go through it.
4 These are just some preliminary things here.

5 Here is just an example. Mr. Berlin said,
6 The sting operation all happened before Gawker was
7 a named defendant in this case. You heard him.
8 Gawker was named in a lawsuit that was a federal
9 court case, and we ended up dismissing the matter,
10 the federal court case, and that same day naming
11 them as a party to the state court case, because
12 there were two actions that were pending.

13 The sting operation happened after Gawker had
14 been a named defendant in the same exact causes of
15 action. So for him to say, All of this happened
16 before Gawker was ever named in the case, that's
17 just a half truth. And there is so many examples
18 of that.

19 All of the examples about how we supposedly
20 flaunted court orders, we've never flaunted a
21 court order. All of the discovery that he's
22 talking about was when they asked for it. And
23 when it was ordered, we gave it. And now I'm
24 going to go through some additional things here.

25 One of the things -- the first thing I want

1 to point out is the similarity of this motion with
2 their February 12th motion. They brought a motion
3 to compel compliance with the Court's October 29
4 order and for sanctions. Your Honor heard it and
5 Your Honor denied it. The things that are in
6 their motion now, it's a lot of the same stuff
7 that was in that prior motion that you denied. It
8 was things that, We never got the date right. We
9 initially said that the sexual encounters happened
10 in or about 2006 and then later we said in or
11 about 2008 and then later on we said mid 2007.

12 They already brought a motion for sanctions
13 on that. It was denied. There is no reason for
14 sanctions for something like that. If somebody
15 makes an estimate and then they revise their
16 estimate, you don't sanction them because they
17 revised their estimate. And it was certainly not
18 concealing anything. We did not have the dates
19 quite right. We did not have records about the
20 dates.

21 He talks about a letter from the AUSA which
22 identified communications that came from an
23 extortionist. He talks about how there exists
24 certain other tapes. I have never seen any of
25 those tapes. They have never seen any of those

1 tapes. Mr. Bollea has never seen any of those
2 tapes. Nobody on either side of this table or
3 Your Honor or Judge Campbell has ever seen any of
4 these supposed tapes. We don't know if they exist
5 or not. Nobody has seen them. Maybe they exist
6 and maybe they don't.

7 An extortionist said they exist, an
8 extortionist who wanted money and wanted to make
9 certain representations of what was in the
10 supposed tapes, that there is racial comments,
11 that there is all kinds of other comments in
12 there, nobody has seen any of these things.

13 But yet Mr. Berlin says these tape exist. He
14 told you that about ten times. These tapes exist,
15 and I concealed that. Nobody has seen them. I
16 haven't concealed anything. I don't know if they
17 exist. When he asked for communications with the
18 FBI, we produced it. Those communications had in
19 there communications from an extortionist saying,
20 These are the -- these tapes exist, and these are
21 what's on them. We produced them. They have it.

22 I think the only potential prejudice here is
23 that -- it's not even a prejudice. If they had
24 wanted the FBI communications sooner -- they knew
25 that we were talking to the FBI. They waited a

1 year and four months to ask for the FBI
2 communications. And then we had some proceedings
3 that lasted maybe two or three months.

4 Judge Campbell said, You have to turn it over, and
5 we turned it over. Nothing was concealed, though.

6 Again, back to my point, this motion has a
7 whole lot of stuff in it that is a mirror image of
8 the last of their February 12 motion to compel
9 compliance with the October 29 order and for
10 sanctions. And you denied that. And for the same
11 reasons, of all the same things that were in that
12 motion, you should deny this motion as well, just
13 outright, because it's just a rehash of a lot of
14 the same things.

15 The only thing it's not a rehash of is when
16 you had a hearing on that motion to compel
17 compliance with the Court's order and for
18 sanctions, that same day you had a hearing on
19 their motion to compel us to produce the FBI
20 documents. Ultimately, we fully complied with
21 that, with the exception of redacting out five
22 words that were irrelevant and inflammatory and
23 have already been ruled upon. Otherwise, we have
24 fully complied.

25 There has been no concealment. There has

1 been no misconduct. And I will go through some
2 other things. I'm happy to answer questions at
3 the end of my presentation as well, in case I may
4 have missed something that, Your Honor, that you
5 think is worthy of further discussion.

6 What Gawker does over and over again is they
7 like to wait until the last second to hit us with
8 stuff. So when they brought this motion, it did
9 not have any specifics in it at all. They filed
10 an opposition, and then they lowered the boom and
11 they had this tremendously gigantic reply that
12 went on and on and on and on, hoping that we would
13 be unable to respond to it, except here. And we
14 had to ask for more time and we got more time. I
15 think that Mr. Berlin even said, If you want more
16 take, take more time. That's just not the right
17 way of doing things. And the courts have said
18 that over and over again.

19 We cited to two cases, one that says it's a
20 due process violation to consider arguments raised
21 for the first time in a reply brief. Well, almost
22 everything that he talked about today was in the
23 reply brief. It was not in their motion.

24 And another case says, An argument raised for
25 the first time in reply is deemed abandoned.

1 Almost everything that they raised was in the
2 reply. I know that this is a procedural issue,
3 but, still, I think it's improper to file a
4 motion, get our opposition, and then lower the
5 boom in the reply, and then we have to file yet
6 another opposition on top of that.

7 It's part of an ongoing practice. They have
8 done it over and over to us. When they asked for
9 the phone records, they waited until their reply
10 to cite to the law. They cited to two cases that
11 were completely off point, and it was filed on the
12 same day as the hearing, and we couldn't respond
13 to it. And it turns out that there was a lot of
14 the law that was completely the opposite of what
15 they had said. But, again, it was -- it was
16 responding to things on reply.

17 And I think it's worth mentioning that when
18 Mr. Bollea was deposed, they held back on about 12
19 different documents that were responsive to
20 discovery. And you remember, we brought our own
21 motion for sanctions on this. They had held back
22 on 12 different -- 12 or maybe there were more --
23 documents that were 100 percent responsive, and we
24 had a dialogue before -- Alia Smith?

25 MR. BERRY: Alia.

1 MR. HARDER: Alia Smith. I keep
2 mispronouncing her name.

3 I had communications with her. I said -- she
4 said, Well, we don't want to produce documents
5 until after the deposition.

6 I said, That's fine, but if you're going to
7 give something at the deposition, you need to give
8 it to us now so that we can use it to prepare for
9 the deposition.

10 She said, We don't agree with that.

11 And so they proceeded to take his deposition,
12 show a whole bunch of stuff was 100 responsive to
13 our discovery. It was documents that pertained to
14 Hulk Hogan, documents that pertained to media
15 appearances. I mean, all these things were 100
16 percent responsive. They held back. They
17 surprised him. They sabotaged him at his
18 deposition. And it was embarrassing. It's things
19 like him going to the bathroom in the hospital. I
20 assume you remember some of these things.

21 JUDGE CASE: I do.

22 MR. HARDER: There was a lot of them, though,
23 a lot of these things from them. They sabotaged
24 us. So here they keep talking about how we
25 conceal evidence, that we disregard court orders,

1 that we engage in misconduct. I mean, that was an
2 outright sabotage of us. And it's just -- it's a
3 bit two-faced for them to be saying the things
4 they are saying, which are total
5 misrepresentations, and to be engaged in the
6 conduct that they were engaged in.

7 There were actually other examples, though.
8 We asked for documents about their internal
9 communications regarding the sex tape, the sex
10 tape that they posted. Notice that everything
11 they talked about had nothing to do with their sex
12 tape; it's other tapes that may or may not exist.
13 It's so far afield what they're talking about.
14 But we asked for the communications in discovery,
15 their internal communications and external
16 communications regarding the actual sex tape.
17 They withheld that from us for eight months. We
18 took their deposition.

19 Yes, 32 pages of the IMs between all of your
20 employees making fun of Hulk Hogan. They withheld
21 that from us for eight months. And it was not --
22 we didn't even -- and they concealed it from us,
23 if you want to use that term that Mr. Berlin loves
24 to use, because they never told us about those
25 things until we were taking depositions, and their

1 employees said that they had internal
2 communications. And they had a specific term for
3 it.

4 They eventually produced those
5 communications. It was a lot. And it was
6 embarrassing stuff. It was their employees making
7 fun of Hulk Hogan in this actual sex tape that
8 they posted up to the Internet. Did we file a
9 motion for sanctions over that? No, we did not.
10 Why? Well, we eventually got it. It was somewhat
11 prejudicial because we had asked their employees
12 about this, and we never were able to actually get
13 the documents to ask them about specific comments.
14 We eventually got it.

15 Everything that they are complaining about,
16 they have in their possession. They have got it
17 from us. We haven't withheld anything. If there
18 is anything that they are entitled to, let me know
19 what they're entitled to and we'll get it to them.
20 That's always been my policy.

21 But if they don't ask and they assume that
22 there is a court order that says that I have to
23 give them something -- and there is not -- and
24 then they finally ask for it and then they ask you
25 for it and then Judge Campbell says, Yes, give it

1 to them, and I give it to them, that's not
2 sanctionable. That's not wrong. I haven't -- we
3 haven't done anything wrong in that respect.

4 In order for there to be sanctions, there has
5 to be a court order that we violated. They
6 haven't identified a court order that we violated,
7 with the possible exception of redacting the
8 prefixes and redacting the five words that's on a
9 motion for protective order.

10 He mentioned the April 23rd -- okay. That's
11 the day, an April 23rd order. Just a little bit
12 of background on that. Every time Judge Campbell
13 has entered an order, she's always said, This is
14 my order, meet and confer on a final order, and
15 then I will sign it.

16 On April 23rd she didn't do that. She
17 said -- because we had five motions to dismiss
18 from all of the five or most of the five
19 defendants. As you can imagine, that occupied
20 about two and a half hours of oral argument, and
21 all of their motions were denied.

22 And then in the last few minutes of this
23 hearing that she had scheduled for, she said, Does
24 anyone have any further comments on what was our
25 exceptions to Your Honor's order regarding the FBI

1 documents and the phone orders? And she said, I
2 have already read the papers. I don't want to
3 hear anything more that's beyond the papers. Is
4 there anything more?

5 I think there was very, very little that was
6 beyond what the papers said, and she said, Okay,
7 I'm going to overrule the exceptions; I'm going to
8 sign the order. Mr. Berlin, do you have an order?

9 He said, Yes, Your Honor.

10 He handed it to her, she signed it, and I
11 don't even know if I got a copy of it for the
12 first five days. They say that they handed it to
13 me. I didn't have any materials in my file
14 showing it. The court didn't put it up on the
15 system, the E-discovery system.

16 They had not supplied me a copy until they
17 said, Are you guys going to comply? You have
18 three days to comply.

19 And I said, Can you supply me with a copy of
20 the order, please? Because I did not even know
21 what it said.

22 And they say, The dog ate my homework. It's
23 not that. It's that if there is going to be an
24 order, we're entitled to notice of what that order
25 is. So we got the order, and it said we had to

1 comply in three days. We immediately started
2 producing things to them. I think it took a
3 couple of extra days. And Mr. Berlin -- and that
4 kind of leads me to the meet and confer process,
5 the so-called meet-and-confer process before this
6 motion. Mr. Berlin sent me a letter saying, You
7 need to comply with that X, Y, Z. And I sent him
8 a letter right back, probably within 24 hours or
9 two days at the absolute most, but it's probably
10 one day, saying we are absolutely complying with
11 this, and it's going to take us a few days.

12 And I explained that the phone orders are not
13 in our -- the phone logs are not in our
14 possession. They're in the possession of the
15 telephone carrier, and we're in the process of
16 gathering up the different communications with law
17 enforcement. And part of the order was we had to
18 provide them with a summary of all the
19 communications with law enforcement that had
20 happened over the past year and a half or so, year
21 and couple of months.

22 So I had to contact -- my office had to
23 contact Mr. Turkel and David Houston to get the
24 summaries, and then I had to go back and -- they
25 had to probably go back into their records. I had

1 to go back into my records. I think I had one or
2 maybe two phone calls with the FBI a year before
3 that. So I had to go look to see -- I couldn't
4 remember what I had talked to the guy about. It
5 had been so long. I think maybe it was a five-,
6 ten-minute conversation about, What's the status
7 of this?

8 So I had to go back in my records, and I --
9 we put it together as fast as we could, and then
10 we provided them with a very lengthy interrogatory
11 response, very lengthy. He didn't provide that to
12 you, but it was very lengthy. He characterizes it
13 as being boilerplate, but that was what everybody
14 could remember, was there were communications.

15 Now, David Houston had a lot of
16 communications with the FBI, because it was part
17 of the sting operation, and the sting operation
18 was related to an extortionist.

19 JUDGE CASE: Yes.

20 MR. HARDER: It was not related to Gawker,
21 the sting operation.

22 JUDGE CASE: Uh-huh (Indicates
23 affirmatively).

24 MR. HARDER: Now, after the sting operation,
25 we don't know what the FBI -- where their

1 investigations went. We don't know if it led to
2 Gawker. It's possible. Maybe not. We did not
3 know. We didn't know if it led to other people.
4 Mike Cowhead Calta or Tony Burton and his agency,
5 Buchwald Agency. We didn't know where all that
6 went, but we provided a summary of the
7 communications from David Houston to the FBI that
8 led to the FBI sting.

9 And, again, they had never asked us for that
10 until they propounded their discovery regarding
11 FBI communications. They had known for over a
12 year that there were FBI communications, and when
13 they asked, we were giving it to them.

14 But as far as the so-called meet and confer
15 process, I told them that we were in the process
16 of complying with the order, and they immediately
17 filed their motion. As fast as they could, they
18 filed their motion. In fact, it was so fast it
19 appeared to me that they had already been
20 preparing their motion simultaneously with
21 preparing their meet and confer, because they were
22 pretty convinced that they were going to bring
23 this motion.

24 And it was -- the initial motion was anemic.
25 It had very little facts. It was simply, We have

1 failed to comply with court orders; we have
2 flaunted the judicial process; we engaged in
3 misconduct without giving any specifics; we
4 disregarded what the court has said; we've
5 concealed evidence, that key facts have been
6 concealed, all this kind of generic stuff, but no
7 facts. And then we had to file an opposition
8 saying, We're not quite sure what you're talking
9 about, but we haven't done that at all; we have
10 been forthcoming. And then I explained how the
11 reply came in, and that was very large.

12 I mean, I feel that -- I don't know, maybe
13 I'm old school. I feel that there should be a
14 meet-and-confer process before there is a motion
15 as opposed to a motion and a meet and confer all
16 happening at the same time and then race to the
17 court so that it's like a game of gotcha. Ah ha,
18 we brought a motion. Oh, and now you're complying
19 with the order, now that we filed the motion.

20 But within that ten-day period, we were
21 already complying with that order. And there were
22 a few more documents that we had to get. We had
23 to get some answers from David Houston, who is a
24 busy guy, and from Mr. Turkel, who is a busy guy.
25 We had to go back into our archives to remember

1 what our communications were and to whom, and then
2 we provided them.

3 Now, if they didn't like the extent of our
4 interrogatory responses, if they felt that they
5 were not specific enough, they could have brought
6 a motion to compel further response to this
7 interrogatory, or they could have presented it to
8 Your Honor and said, This isn't enough; there has
9 got to be more.

10 But they did not do that. They just -- they
11 just wanted to -- they want to end the case is
12 what they want. They don't -- it's not about
13 discovery; it's about ending the case, because
14 they lost their five motions to dismiss. And
15 this thing came right on the heels of that, right
16 after. They are hell-bent on eliminating this
17 case and making sure that Mr. Bollea cannot
18 proceed to court, will not have his day in court.

19 So that's what this is all about. And that's
20 why they keep bringing these motions for sanctions
21 and motions for sanctions. They are more
22 interested in litigating about the litigation than
23 they are litigating about their own conduct.

24 Notice that none of this has anything to do
25 with their actual conduct. This case -- let me

1 remind everybody what this case is about. They
2 received an anonymous DVD that was 30 minutes long
3 of Mr. Bollea having sex with somebody in a
4 private bedroom. And it was not something that
5 they had created, like a private sex tape. This
6 was something where -- and you heard Mr. Clem
7 testify. It was like that little motion detector
8 that's way up in the corner of the room that's
9 painted the same color as the wall. It was a
10 surreptitious tape. It was a hidden tape, a
11 hidden camera.

12 They received a copy of it. They didn't make
13 any inquiries with Mr. Bollea about whether he
14 approved this, whether this was something that he
15 wanted to be out there. They simply immediately
16 edited it down into, in the words of their own
17 editor-in-chief, a highlight reel. That's the
18 words of their editor-in-chief. They created a
19 highlight reel, a minute and 41 seconds of the
20 greatest sexual events that happened on that
21 30-minute tape. That's what they posted up to the
22 Internet.

23 David Houston, who unfortunately is not here
24 today, immediately sent them a cease and desist
25 letter and said, Take this down. It was illegally

1 recorded; it's illegally up on the Internet; you
2 have no rights to do this; it is an invasion of
3 our privacy. And then he didn't get a response in
4 24 hours or 48 hours, and he immediately sent an
5 e-mail directly to the CEO of their company, Nick
6 Denton, and said the same thing. You have to take
7 this down; it's illegal; it's unauthorized; take
8 it down immediately. He got a letter a couple
9 days later saying, We're not taking it down.

10 That's what this case is about. Notice in
11 the 45 minutes that Mr. Berlin spoke, you didn't
12 hear anything about what the case is actually
13 about. It's all about the extortionist and what
14 the extortionist was trying to do.

15 So this lawsuit filed -- was filed maybe a
16 week or so. Then I got a call to get involved,
17 and then we filed a lawsuit. And we've been off
18 and running ever since.

19 I alluded to it earlier, but in order for
20 there to be sanctions, you have to have a
21 violation of a court order. I still haven't seen
22 the court order that we supposedly have violated.
23 The only potential here -- and if you disagree,
24 Judge Case, I'm happy to discuss that with you.

25 Mr. Berlin talked about media appearances.

1 We have gone over and over and over with you about
2 media appearances. The first thing is -- and he
3 didn't mention this -- in October of 2012 at the
4 time that they posted this sex tape, Mr. Bollea
5 happened to be on a preplanned media tour for a
6 wrestling event, the TNA wrestling event. He
7 testified in his deposition -- maybe you recall,
8 because their position is he was trying to promote
9 this sex tape. Well, nothing is further from the
10 truth, nothing. And they put that in court
11 papers. Nothing is further from the truth.

12 But you heard Mr. Bollea testify. He said
13 the sex tape came out, and I wasn't going to hide
14 from it. I don't hide from things. I was there
15 in the media to promote my wrestling event and
16 that's what I was doing. There is not a single
17 shred of evidence. In fact, all the evidence is
18 against them on this.

19 We didn't have -- Mr. Bollea didn't have
20 anything about his media itinerary, because he
21 testified about this. He said usually they hand
22 something to me, and after the media tour is over,
23 I hand it back or I toss it out. I have no use
24 for this stuff.

25 The day before they -- when they started to

1 make an issue about this, we made an inquiry to
2 the TNA Wrestling to see if we could get -- to put
3 an end to this issue, because it was so silly to
4 us that he was supposedly promoting the sex tape.
5 I mean, just -- it was so far from the truth, we
6 just wanted to put an end to it. So we contacted
7 TNA Wrestling to say, Do you guys have a copy of
8 the itinerary as it existed before the sex tape so
9 that we can show them? All of the same
10 appearances that he made were all listed as
11 appearances that he was going to make anyway.

12 Then they started changing their outlook on
13 it, and they said, Well, he never could have
14 gotten onto Howard Stern if it wasn't for the sex
15 tape. He never could've gotten on the Today Show
16 without the sex tape.

17 Well, you know what, TNA, the person who was
18 the publicist at the time, had left TNA and so we
19 had to track her down. And she said, Oh, I happen
20 to have one of those old e-mails. And she sent it
21 over to us. It was dated before the date of the
22 sex tape, and it shows, Howard Stern appearance on
23 this date, Today Show on this date. Everything
24 had already been laid out for the wrestling
25 promotion. And so I sent it over to them just to

1 say, Here you go; we happened to track this down
2 for you, not that we were concealing anything. We
3 didn't have it.

4 This happened to be an -- and it showed that
5 this had been an e-mail that had been sent over to
6 an account of Mr. Bollea. Now, Mr. Bollea
7 testified he doesn't use the computer. He
8 doesn't. He texts. He doesn't use computers.

9 So they happened to send it over to an e-mail
10 account, and then perhaps somebody who monitors
11 that e-mail account printed it out for them. And
12 after the media tour, it wasn't -- it wasn't
13 around anymore. It wasn't like anyone was
14 spoliating evidence in the case regarding their
15 sex tape. This was just something that had
16 nothing to do with their sex tape. It was a
17 preplanned media tour. And as always happens
18 after a media tour, you get rid of the old stuff,
19 unless you want to track it down from the
20 publicist. So there is nothing that we haven't
21 given them about the media tour.

22 Let me -- there is nothing that they have
23 asked for that we haven't given them that we have
24 in our possession. And nobody destroyed anything.
25 Now, they have sent a subpoena to the publicist,

1 who we got that information from, because her name
2 is on the e-mail. And we sent it over to them.
3 They want two years' worth of all of her
4 communications of every kind that has to do with
5 Hulk Hogan. Okay. Well, we'll probably be
6 litigating over that.

7 But as far as the media tour, there is
8 nothing that we have to hide, zero. And there is
9 nothing that we have hidden, and there is nothing
10 that we have spoliated. They're trying to make it
11 sound like we have all this innuendo and cloak and
12 dagger and words like "concealed evidence" and
13 "destroyed" and all this stuff. I mean, it's
14 just -- it's just not true.

15 Let's talk about the contents of the
16 extortionist's communications, because there is a
17 lot of talk about that. And Mr. Berlin, I'm glad
18 you reminded me of this, because he said that at
19 one of the hearings -- and he reminded me. This
20 is true.

21 At one of the hearings -- and I don't
22 remember which one it was, but it was a while
23 ago -- there was a discussion about whether there
24 might exist other tapes. I did not know if any
25 other tapes existed. I never said they do not. I

1 never said they do. I didn't know. But there was
2 a discussion if other tapes existed -- and we were
3 going with the premise that there might exist
4 other tapes. And we discussed that if there are
5 other tapes in existence and if they have ever
6 come to any of our possession, Gawker was
7 concerned that they could become destroyed or
8 concealed or something like that.

9 And I did make the decision that I don't see
10 how other tapes are relevant to this case, because
11 this case is about the one tape that they got, not
12 any other tapes that might exist of other
13 incidents and encounters between Mr. Bollea and
14 Ms. Clem, because they did not publish those.
15 They didn't have them in their possession. They
16 don't have them in their possession now. We don't
17 have them. We have never seen them. Maybe they
18 exist. Maybe they don't exist.

19 But we had a conversation with Judge Campbell
20 about if there are tapes. And Judge Campbell
21 said, Well, if there are tapes, preserve them, and
22 they are going to go to Judge Case, and Judge Case
23 will review these tapes to determine if there is
24 relevant dialogue, such as Mr. Clem allegedly
25 saying, Now we can get rich. And, apparently, if

1 he ever said it, I believe that he testified that
2 he doesn't recall it or never said it. But there
3 is no actual competent evidence that he ever said
4 it, but who knows, maybe it exists on a tape
5 somewhere. I don't know.

6 But going with the premise that maybe he said
7 that, the premise is that he said that to Heather,
8 and Mr. Bollea certainly was not in the room.
9 Just so if there was any innuendo about anything
10 like that.

11 But the concept was Your Honor would get the
12 tape. Your Honor would review the tape, because
13 there would be a lot of the oohs and aahs on the
14 tape, right? I mean, there would be a lot of,
15 Oh, that feels so good, and stuff like that, which
16 is not -- and that was one of my concerns to
17 Judge Campbell.

18 I said, Well, Your Honor, they have already
19 posted a tape to the world that millions of people
20 have watched, and that's why we're all here in a
21 lawsuit. We're concerned that they, being a media
22 organization, could get ahold of one of these
23 tapes and then post that, that new tape to the
24 Internet. We want to -- we want to put a lid on
25 this, because the events never should have been

1 taped, right? I mean, if people -- two people are
2 in a bedroom having sex and they are not giving
3 their consent to be taped or at least one of them
4 is not giving their consent to be taped, there
5 shouldn't be any taping at all.

6 And if there is a taping and it falls into
7 the hands of a media organization, that media
8 organization certainly should not be posting that
9 up to the Internet with full frontal nudity and
10 erections and oral sex vividly being portrayed and
11 sexual intercourse vividly being portrayed. That
12 should not posted to the Internet.

13 And so our concern was, Your Honor, we don't
14 want Gawker -- if there is another tape, we don't
15 want Gawker getting it.

16 She said, Okay. If there is another, Gawker
17 doesn't get it. Judge Case gets it. Judge Case
18 will review it to determine if there is any
19 dialogue, any words that people are saying that is
20 relevant to this lawsuit, to the claims and
21 defenses in this lawsuit. And if there is, then
22 Judge Case would get a court reporter to
23 transcribe only those portions of the dialogue
24 that's relevant, not the oohs and aahs and the
25 "feels so good" and that sort of thing, just the

1 dialogue. If somebody says, We'll get rich, or
2 somebody says, I approve of this message, you
3 know, if there is a dialogue that's relevant.

4 So let's take a look. And this is not
5 something that I put into my opposition paper, but
6 it's something that came to me recently and,
7 certainly, when Mr. Berlin mentioned it. So if
8 you take a look at -- this is the redacted
9 version. Well, this is -- this is part of it,
10 anyway. I'm looking at the thing that the
11 extortionist sent. Somewhere, we have --

12 MR. BERLIN: If it's helpful, Your Honor,
13 it's attached to our confidential statement at
14 tab 3.

15 MR. HARDER: Tab 3, 4?

16 MR. BERLIN: Three, I believe.

17 MR. HARDER: Oh, okay. I was passing over
18 it, because it has this so-called settlement
19 agreement in it.

20 Okay. Just to give perspective, tab 3 is --
21 this was part of the sting operation. When
22 Mr. Houston was contacted by the extortionist,
23 Mr. Houston went immediately to the FBI and said,
24 We're being extorted. And stuff like this happens
25 to celebrities. If you read the news a few years

1 back, Dave Letterman was being shaken down by
2 somebody who was, I think, the spouse of somebody,
3 and said, I know that you had an extramarital
4 affair. I will sell you the literary rights that
5 I possess to the story of you having an
6 extramarital affair. The price is \$2,000,000.

7 David Letterman went to the FBI. That man is
8 sitting in jail now because that's extortion. You
9 can't do that.

10 Celine Dion's husband was part of an
11 extortion. The woman who was extorting him, her
12 husband, are sitting in jail right now, because
13 she alleged that he had raped her and he didn't,
14 and she wanted \$2,000,000 or something. And
15 so when something like this happened to Mr. Bollea
16 and Mr. Houston was fielding the calls, he
17 immediately sent this over to the FBI. And he was
18 following the FBI's instructions on how to deal
19 with this extortionist.

20 So what this is, it's a dummy settlement
21 agreement, the purpose of which is to get the
22 extortionist into a room and to make certain
23 statements that are being recorded by the FBI in
24 the next-door room. And that's exactly what
25 happened. And then there was a sting that

1 happened.

2 And so the -- and just to carry that out, at
3 a certain opportune time, about 10 or so federal
4 agents storm into a room with the extortionist's
5 lawyer and the extortionist's agent, but the
6 actual Mr. X, is what they call the person, never
7 actually showed up. So they had a sting without
8 Mr. X but with the other two people. And that's
9 when the FBI took over and the AUSA got involved
10 and all that.

11 Well, tab 3 is this dummy settlement
12 agreement between Mr. Bollea and the extortionist.
13 And it has certain communications from the
14 extortionist to Mr. Bollea's team. It's really
15 David Houston who is handling it. And it was
16 describing -- alleging that there were three
17 tapes, alleging that the first tape is dated July
18 3rd; the second one is dated July 13th; and the
19 third one is undated. But when you compare that
20 with what the assistant U.S. attorney has, the
21 first tape is July 13, and the second tape is July
22 13.

23 JUDGE CASE: I saw that.

24 MR. HARDER: So we've got an -- either the
25 extortionist is not telling -- is not giving

1 accurate information, or the AUSA made a typo. I
2 don't know. And then the third one has no date on
3 it.

4 And so it's possible that these were all from
5 July 13 and that maybe it's a first part, a second
6 part, and a third part. Maybe it's three copies
7 of the same thing. We don't know. We've never
8 seen it. But in the extortionist's effort to try
9 to get money and as much money as possible and to
10 scare Mr. Bollea into thinking that his life is
11 going to come to a screeching halt if he doesn't
12 pay them off, it makes all these allegations about
13 what are in these various tapes. And, again, we
14 redacted out a few words out of here based upon
15 the prior ruling.

16 This actually falls within Judge Campbell's
17 protocol that these things actually should be
18 going to you, to determine if any of these words
19 are relevant to the case, because -- I mean, there
20 is a lot of graphic words here. I'm about to read
21 it, but he's typing this in. Can we go off the
22 record one second so I can say some of these
23 words.

24 JUDGE CASE: I think the record can stand it.
25 Judge Campbell may not like it, though.

1 MR. HARDER: Okay.

2 JUDGE CASE: All right. We'll go over the
3 record.

4 (Discussion off the record.)

5 MR. HARDER: So according to Judge Campbell's
6 protocol, this document actually should be going
7 to you, because it relates to so-called other
8 tapes, for you to determine whether any of this is
9 relevant, if there is something that might be
10 relevant and discoverable. But, otherwise, the
11 things that I just read are things that shouldn't
12 be part of the record.

13 So when we redacted out five words, we
14 actually, according to Judge Campbell's protocol,
15 we probably should have submitted the whole thing
16 to Your Honor without sending it over to them, let
17 Your Honor decide what's relevant and what's not,
18 and then produce to all parties those things that
19 are relevant. We would submit that the five words
20 that we removed that pertain to race, that those
21 things are not relevant to the case and should be
22 redacted out and Gawker should not have that.

23 Just to follow that through, Your Honor, we
24 would request that Gawker not have possession of
25 what they have and, instead, have possession of

1 what you determine from that to be relevant to the
2 case.

3 And my staff has reviewed the 30-minute tape
4 that came from Gawker to us, which is what they
5 received from an anonymous source. And my staff
6 reports back to me that they believe that Tape
7 No. 2 is what is, in relative general terms,
8 appears to be described as Tape No. 2, not to say
9 that tape -- not to say that the extortionist's
10 representations are accurate of the tape that we
11 received from Gawker, but just to say that of the
12 so-called Tape 1, Tape 2, and Tape 3, what Gawker
13 provided to us, appears to be along the lines of
14 Tape 2, and not of Tape 1 and 3.

15 So, therefore, the description of Tape 1 and
16 the description of Tape 3 would fall within that
17 protocol that Your Honor should receive, should
18 redact out things that are not relevant to the
19 case, the oohs and aahs and the F words and all of
20 that and the racial terms, we would submit, and
21 then provide the parties with a redacted version
22 so that -- because our concern was that Gawker
23 could end up posting this and getting some mileage
24 out of it. And Judge Campbell was sensitive to
25 that issue and that's why that protocol came

1 about.

2 So I think I may have covered this, but just
3 to make sure that I have fully covered it,
4 Mr. Berlin wanted there to be certain
5 determinations made by a court as to certain of
6 what he calls facts. He wants there to be a
7 determination that there exists three tapes.
8 Well, I would submit, Your Honor, until we have
9 seen three tapes, there should not be a
10 determination that there are three tapes.

11 Mr. Berlin also asked for there to be a
12 determination that there were, in fact, four
13 encounters with Mr. Bollea and Ms. Clem and no
14 different than four encounters. Well, my
15 understanding of the evidence as it's been
16 presented so far is that there were between three
17 and four, but I don't see why there should be a
18 determination that there was four and not three to
19 four.

20 But I guess my main point is I don't see why
21 there should be a determination as to factual
22 issues when the actual evidence that's presented
23 at the trial, that will bear out the facts. I
24 don't think Your Honor should be deciding what the
25 facts are or are not based upon a preclusion order

1 or reverse preclusion order, however it was
2 described.

3 The whole concept of a trial is that you let
4 everyone present the competent evidence that is
5 relevant to the claims and defenses, and you let
6 the jury decide what the facts are, and then you
7 apply the law that the judge says, that this is
8 the law, and then the jury makes a decision. So I
9 don't see any reason why there should be any
10 change of the normal course of business for a
11 court. There certainly, in my view, has not been
12 any showing that would warrant anything like that.

13 I don't mean to beat a dead horse, but
14 Mr. Berlin was talking about this scarecrow way of
15 presenting the facts, where we point to one way
16 and then we point to another and we point to
17 another. And the example he gave -- or the
18 factual scenario that he connected that to was
19 that we made an estimate when we first filed the
20 case, which was just a few days after the sex tape
21 came out, that it was in or about 2006. And then
22 later on, the facts as best they could be
23 recollected was that it was in or about 2008. And
24 it turns out we were not fully accurate because it
25 turns out that it was in mid 2007.

1 And the letter from the AUSA that identified
2 the extortionist's label of the tape, which said
3 July of 2007, that came out much later on in the
4 case. Mr. Berlin is making it sound like we had
5 that evidence sitting there at the time we were
6 drafting the complaint, and we were intentionally
7 trying to mislead them as to the date of the
8 encounter.

9 It's wrong on both levels. First, we never
10 intentionally tried to mislead anybody. We were
11 not actually inaccurate when we said in or about,
12 because 2007 is pretty close to 2006 when you're
13 going back five or six years. I mean, it's not
14 far off. And we didn't have the AUSA's letter,
15 and we didn't have the evidence that the AUSA had
16 at the time of drafting the complaint.

17 One thing about the AUSA's letter is that it
18 went to David Houston, and David Houston -- David
19 Houston is Mr. Bollea's personal attorney, and he
20 handled the FBI issue, and that was kind of his
21 role in this.

22 Technically, he's counsel of record so that
23 he can receive E-filings and so that he can stay
24 up to speed on what's happening. But he is not --
25 he is not assisting me in the litigation. He is

1 not -- I mean, maybe except for maybe small
2 things. He was at the deposition. We did talk
3 before the deposition and during breaks in the
4 deposition, after the deposition. So he's not
5 completely out of the loop, and I don't mean to
6 imply that he is. But he is -- he is a criminal
7 defense attorney, and so he's not involved in the
8 civil aspects of it. And he's not involved in a
9 great deal of things.

10 But when there is information that we think
11 he may have that's responsive to discovery, then
12 we go to him. So if they ask, Provide us with FBI
13 communications, he's the guy that I go to. If
14 they don't ask for communications with law
15 enforcement, then I don't necessarily go to him
16 and say, Give me all your law enforcement
17 communications, because they're not in the
18 discovery. Once they were in the discovery, I
19 absolutely did that.

20 Prior to them asking for the law enforcement
21 communication, they just said, All documents
22 regarding the sex video. Well, from our
23 perspective, the sex video was the thing that they
24 posted up to the Internet and maybe also, if you
25 take it a step further, it's the 30-minute version

1 that they didn't post, but that's the source from
2 where they got the smaller version. But they did
3 not propound a request for FBI communications.
4 And that's why we didn't provide FBI
5 communications.

6 And although he quoted numerous things from
7 me and from others, I do not believe that any of
8 that shows that I was being not forthcoming with
9 the Court with regard to information that we had
10 in our possession, certainly not with regard to
11 information that they had asked for in discovery,
12 certainly not -- there is certainly not any court
13 order that we have violated, in my opinion, with
14 the only possible exception of the matters where
15 we have a motion for protective order set for this
16 hearing. And if Your Honor has any thought on
17 what I just said, I'm happy to address that.

18 One other thing. When the FBI got involved,
19 they told Mr. Bollea and Mr. Houston, Under no
20 circumstances can you talk about this to anyone.
21 And we had to follow that, because it could
22 jeopardize the investigation.

23 And the investigation was very important to
24 Mr. Bollea. He wanted the extortionist in jail
25 for what that extortionist was doing. And the

1 last thing that we wanted to do was go against
2 what the FBI had said. And that's why, in part,
3 we were resisting the discovery as to the FBI,
4 because we were trying to comply with the FBI's
5 instruction. And when we researched the law and
6 it showed that there was a law enforcement
7 privilege out there and that it directly applied
8 to this situation, we were trying to follow the
9 FBI's instructions to us.

10 It wasn't until after they propounded their
11 discovery regarding law enforcement communications
12 that some of the things that Mr. Berlin mentioned
13 became apparent. It was never apparent to us
14 before we propounded discovery regarding law
15 enforcement that Gawker was absolutely not being
16 investigated by the FBI. We didn't know that. We
17 didn't know if they were, we didn't know if they
18 weren't.

19 Apparently, Mr. Berlin received a
20 communication well after all of this discovery,
21 FBI discovery issue was out, from somebody -- it
22 might have been the AUSA -- saying, Gawker is not
23 part of our investigation.

24 Okay. At that point we learned it. When
25 Mr. Berlin was making his presentation and he was

1 giving all kind of quotes, he made it sound as if
2 we already knew that back at the October 29th
3 hearing. He was quoting heavily from me from the
4 October 29th hearing. Well, I didn't have any of
5 the information law enforcement from February or
6 March or April, whenever these things -- of this
7 year when these things were happening. So a lot
8 of it is just taking things completely out of
9 context, particularly when it comes to the years
10 of everything.

11 My next point is that there has been no
12 prejudice to Gawker here. They've received -- one
13 thing that they say is they spent a whole year
14 litigating and trying to uncover the facts and all
15 this stuff. When they asked us for all documents
16 relating to the sex tape that they posted, we
17 provided it. Among the things that we produced
18 were Mr. Bollea's texts. Everything that he had,
19 we produced.

20 They propounded interrogatories, and we
21 responded to all of it. They brought a motion to
22 compel on all kinds of things, everything that
23 they -- everything -- virtually everything that
24 they had propounded to us, they brought a motion
25 to compel, and it was heard on October 29th.

1 Judge Campbell, if you take a look at that
2 order -- and I think it's right here --
3 Judge Campbell ordered two things.

4 Well, she ordered a few things, but in terms
5 of the motion to compel, she ordered a further
6 response to Interrogatory No. 12. That's
7 number -- item No. 5. And she ordered a privilege
8 log of all document as to which he claims
9 privilege other than those documents created after
10 this litigation was filed.

11 And we didn't have anything. The law
12 enforcement thing came in. They were not
13 responsive to prior discovery. And, also, when we
14 sent them a privilege log as to law enforcement,
15 those communications, I believe they were either
16 all or almost all after the lawsuit was filed.
17 The lawsuit was filed October 15th. And I don't
18 have the privilege log in front of me. It would
19 really surprise me if there is anything that's on
20 there from prior -- I mean, it would maybe be one
21 thing or two things. But I'm pretty sure all of
22 the communications were after October 15th of
23 2012.

24 But, again, you give a privilege log as to
25 responsive categories. You don't give a privilege

1 log as to everything under the sun. If they ask
2 you for certain things, then you give a privilege
3 log as to what they are asking for. So we've
4 fully complied with this order, and with all other
5 orders.

6 But in terms of the prejudice, they talk
7 about how they have had to spend so much time and
8 so much energy and so much resources and all of
9 that. When they gave us requests as to the law
10 enforcement, we first resisted it based on the
11 privilege. Your Honor disagreed. They also asked
12 for sanctions, and you denied their request for
13 sanctions. That was as to their motion to compel
14 and for sanctions. They didn't get it.

15 It went to the judge. Judge Campbell agreed
16 with Your Honor. It was pretty much just to
17 submit everything to Judge Campbell that had
18 already been litigated. And then we produced it.
19 There was -- they didn't have to do anything other
20 than maybe send a meet-and-confer letter saying,
21 When are we going to get this stuff? We promptly
22 gave them the law enforcement communications. The
23 only exception is the five words and the prefixes,
24 and we have a motion for Your Honor as to that. I
25 believe it's a meritorious motion.

1 But otherwise, all of the money that they
2 have spent on the litigation, that's on their own
3 dime. It has nothing to do with concealment of
4 evidence or failure to follow court orders.
5 That's all drummed up. It's fictitious. There
6 is -- there is no basis, in my view, for monetary
7 sanctions.

8 I mentioned that these issues go to
9 collateral issues. And Mr. Berlin kind of scoffed
10 at that. But the issues that all of this motion
11 that's before Your Honor deals with are the number
12 of sex tapes. And we don't know the answer, but
13 we produced the information that we had, which is
14 the extortionist's claim that there is more than
15 one sex tape. Maybe it's true, maybe it's not.
16 We don't know. It's collateral to the issues of
17 what they did, though, because they only had one
18 sex tape, and they edited it, and they posted it
19 up to the Internet. They didn't edit Tape No. 1
20 and they did not edit Tape No. 3, if those tapes
21 exist. So, again, collateral.

22 The date of the encounters, we've given them
23 all information that we have regarding the date of
24 the encounters. Mr. Bollea testified for two days
25 where they drilled him with questions. Did it

1 happen before this or after this? Was there --
2 was it two weeks between the first and the second
3 or was it three weeks?

4 I don't recall; I don't recall. He did not
5 recall sexual encounters and the dates of them.
6 He even made a statement.

7 And they asked him, What about your
8 calendars, would your calendars reflect it?

9 He said, Well, I don't put a star on my
10 calendar every time I had an encounter with
11 Heather Clem. That's virtually what he said.

12 So when they're saying, He destroyed his
13 calendar; he's trying to spoliage evidence, that's
14 not the case. His calendar from 2007 doesn't have
15 anything about Heather, and he gets rid of his
16 calendars every year. So by 2008, he had gotten
17 rid of it. This case was filed October of 2012,
18 so he didn't have calendars from those prior
19 years. And they didn't propound a document
20 request in 2012 or early 2013 asking for his
21 calendars for 2012. They waited an entire year.

22 Even so, I don't think his calendar would
23 have anything that would be relevant to it. But
24 in any event, they already have the media tour. A
25 lot of these things are just repeats. I'm trying

1 to move through it here.

2 There is no trial date in this case, which
3 actually is an issue that I'm concerned with,
4 because we would like to get the case on for
5 trial. But if Gawker is saying that they are
6 somehow prejudiced because they're learning of the
7 FBI communications late in the game, well, part of
8 that is because they waited more than a year to
9 ask us for the FBI communications, and then it
10 took about two or three months to go through the
11 litigation process. And then we provided them to
12 them. But there is still no trial date. So the
13 fact that they have the FBI communications as of
14 May, which is when we produced them, as opposed to
15 as of a month or two or three or six months prior
16 to that, part of it is because they didn't ask for
17 them sooner. And there is no prejudice as to any
18 so-called delay in this, because there is no trial
19 date. They still can conduct discovery regarding
20 these things.

21 One of the things that they ask is for
22 Mr. Bollea to show up for another deposition. You
23 know what, Judge, if you think that's appropriate,
24 that's fine with me, just to answer questions
25 about the discovery issues that were pending at

1 the time of his deposition, not anything new. If
2 they propounded something after his deposition, I
3 don't think he should have to come and answer
4 questions about that stuff, because they waited
5 too long. They chose to take his deposition
6 before they were finished.

7 But as to the FBI communications, as to the
8 phone records, those were the two pending issues
9 which have now been resolved. I don't think it
10 should take more than two hours for them to ask
11 him about these things. But I'm not opposed to
12 that. We're not trying to hide anything. And if
13 they feel that they have to get to the bottom of
14 something and he comes back for a couple of hours
15 to answer questions, then okay.

16 A concern that I would have -- and maybe we
17 can have a dialogue about this. If you were
18 inclined to do that, what would be the scope? Do
19 they get to ask him anything about the extortion
20 attempt? Do they get to ask him anything about
21 their meetings with the FBI to try to get at the
22 extortionist? I would say that's kind of beyond
23 the scope of the case.

24 If they want to ask about, What do you know
25 about other sex tapes -- he may have already

1 answered that in his deposition, but if they want
2 to ask him again in light of what they have seen
3 in the extortionist's report about Tape 1 and Tape
4 3, if they exist, I don't have a problem with
5 that. I would imagine that he would say the
6 truth, of course, but that he's never seen them
7 and that he doesn't know anything about them and
8 he doesn't know if they exist and doesn't know if
9 they don't exist, and that he was -- everything
10 that he had testified before, I would expect him
11 to be consistent with that. But if they want a
12 couple more hours of asking about that, I'm not
13 going to oppose that.

14 There is a lot of cases -- and I'm sure Your
15 Honor is familiar with them. Discovery sanctions
16 have to be appropriately tailored and
17 proportionate. I don't believe that there is any
18 reason to order a sanction. I have done my utmost
19 and my co-counsel has done their utmost and
20 Mr. Bollea has done his utmost to answer their
21 questions when they ask their questions. Nobody
22 is concealing anything. But if it takes them a
23 year and three months to ask for FBI
24 communications, then they can't expect to have
25 received them before that time.

1 Dismissal. They're asking for dismissal.
2 And that's why I wanted to have an in-person
3 hearing, because when somebody is asking for the
4 dismissal of a case based upon a whole lot of what
5 I view is misrepresentations and taking things out
6 of context and trying to build a big thing out of
7 what is very little, if anything at all -- that's
8 why I wanted to have an in-person hearing, because
9 I think it warrants that.

10 And there is case law, and we cited to it.
11 For there to be an order of dismissal, you have to
12 show willfulness. You have to show personal
13 involvement by the client in the violations. You
14 have to show that lesser sanctions were tried and
15 did not work. You have to show prejudice to the
16 parties serving discovery. You have to show
17 prejudice to the judicial system, you have to show
18 that there is no reasonable explanation for the
19 parties' conduct.

20 I would submit to you, Your Honor, that they
21 don't win on any of those, and they have to win on
22 all of them. I believe that we have a reasonable
23 explanation for everything that we've done, and I
24 stand by it. And taking things out of context may
25 make things sound juicy, but if you really look at

1 the record, there has been no order that we have
2 failed to comply with.

3 There has been no concealment. There has
4 been no obfuscation.

5 Showing that lesser sanctions were tried and
6 did not work, there haven't been any.

7 Showing of a willfulness, I don't believe
8 that they have shown that. I certainly don't
9 believe that anything that happened ever was
10 willfully -- trying to keep information that's
11 relevant to this case and responsive to their
12 discovery, we never willfully or unwillfully tried
13 to keep information from them.

14 Personal involvement from the client, they
15 have absolutely not shown that.

16 Prejudice to them, there has been no
17 prejudice to them. If it takes a little longer
18 for them to get information because they wait a
19 year and three months to propound it, that's on
20 them. If they have to bring a motion to get FBI
21 communications that we legitimately opposed based
22 upon the case law and Your Honor heard that
23 motion, sided with them, but did not side on
24 sanctions, that issue has already been decided.

25 We've produced the FBI communications. They

1 can't say that we haven't produced it. We
2 redacted out five words.

3 As far as the phone records, I don't know if
4 you've seen the phone records, but it's pages and
5 pages and pages and pages of phone numbers with
6 the area code and the last four digits, because
7 these are people that were not parties to the case
8 and they are not witnesses of the case. And if --
9 and their whole basis for seeking the phone
10 records was because they said, We want to know
11 when he had communications with key witnesses in
12 this case such as Bubba Clem and Heather Clem.

13 Well, we went through every single name
14 that's ever been mentioned in this case, including
15 Tony Burton and the Buchwald Agency and Gawker
16 itself and everybody else we can think of, and we
17 put all those phone numbers together and we
18 unredacted -- we didn't redact those. We kept
19 those intact. And everybody else, from our best
20 determination, is a nonwitness and certainly a
21 nonparty. And if they want to say, No, there is a
22 phone number that matches up with a witness, I'm
23 happy to unredact that. Like that, I will do it.

24 But there is law in the state of Florida that
25 communications with nonwitnesses and nonparties is

1 private and it needs to be preserved and it's not
2 discoverable. And we have a lot of cases on that
3 where the court of appeals has sided with us.

4 And, Your Honor, if you ever made a phone
5 call to somebody and then their phone records were
6 requested and you had absolutely zero to do with
7 the case -- you were not a witness; you were not a
8 party; you had zero to do with the case -- I would
9 think that you would think, Gee, I don't see why
10 my phone records have to be produced in discovery.
11 And if it's a media organization that likes to
12 post juicy, lurid things about people, I would
13 think that you'd say, You know what, if I have a
14 privacy right, I'd prefer to have it preserved.
15 You're a nonparty; you're a nonwitness; there is
16 no reason for that.

17 So I think that -- and now I'm kind of
18 getting into my motion for protective order. But
19 an appropriate middle ground is what we did, which
20 was to give them all of the numbers except for
21 three digits. If they could match that up to a
22 witness, I'm happy to give it to them.

23 It's been over a month now. They haven't
24 matched anything up to anybody. Just look at the
25 last four digits. Look at the area code and last

1 four digits. You can match it up.

2 If Your Honor denies the motion for the
3 protective order and says, No, I want the whole
4 thing, fine, we'll do it. But I'm trying to be
5 reasonable here. I'm trying to do what's right.
6 That's what drives me. That's what gets me up in
7 the morning. And I believe that what we did was
8 right and bringing the matter to you for -- as a
9 motion for protective order was the right thing to
10 do. But we'll follow your order, just as we've
11 always followed your orders, as we've always
12 followed Judge Campbell's orders.

13 One of the sanctions that they asked for in
14 their papers, but Mr. Berlin did not mention --
15 and maybe he mentioned it kind of in a roundabout
16 way -- they want to be able to call Mr. Bollea a
17 racist to the jury. They want to be able to
18 parade around the "N" word to the jury. Just so
19 it's clear, there is no competent evidence that he
20 ever said the "N" word. All we have is an
21 extortionist who writes in a document summarizing
22 a tape that may or may not exist saying that in
23 that tape the "N" word is used in some other words
24 that are right around, you know, other racial
25 types of words that are within the same context.

1 It's inappropriate on so many levels for them
2 to be able to parade the "N" word and other types
3 of words in front of a jury. I mean, what they
4 want is to win the case in a roundabout way. They
5 want to be able to poison the jury of Mr. Bollea.
6 They want a finding. I believe that he said,
7 unless I wrote it down wrong, they want a finding,
8 that he used these words. Well, there is no
9 evidence that -- if I'm misstating --

10 MR. BERLIN: I'm sorry. Just because it may
11 save us some time. I'm sorry to interrupt. I
12 want to be clear, that although I have asked for a
13 reverse preclusion order on other things, that on
14 this subject --

15 MR. HARDER: Okay.

16 MR. BERLIN: -- what we're asking for today
17 is the discovery of the unredacted document in
18 opposition to the motion for the protective order,
19 and then reserving for a later date whether that
20 issue is to be before the jury or part of the
21 case.

22 MR. HARDER: I appreciate it.

23 MR. BERLIN: And I want to be clear that I'm
24 asking for a reverse preclusion on other stuff.
25 But on that, I understand that that's a sensitive

1 issue, and our requesting on that today is more
2 limited and to live for another day on whether
3 that becomes --

4 JUDGE CASE: Okay.

5 MR. HARDER: I appreciate it. I appreciate
6 it.

7 MR. BERLIN: Rather than have you -- rather
8 than having you go on about that, I thought I
9 would clarify our position.

10 MR. HARDER: Okay. I appreciate it.

11 I probably did not cover everything that
12 Mr. Berlin talked about today. I mean, he went on
13 for 45 minutes. I took notes. I was reviewing,
14 when I was talking, some other notes and just a
15 few items in here. I feel like I should go over
16 just to make sure that I covered everything.

17 But if I didn't cover something, Judge Case,
18 that you feel needs to be covered and I
19 inadvertently or accidentally did not cover it,
20 please flag me to that, and I'm happy to discuss
21 it.

22 I mean, the New York publicist, it's
23 interesting because they wanted documents of the
24 New York publicist. They chose to go to New York
25 to get those documents when they probably could

1 have gone to Your Honor to get those documents.

2 But whatever the case may be, the New York
3 publicist produced a privilege log as to -- I
4 think you said that my firm represents the
5 publicist. The publicist -- is that what you
6 said, because the publicist has an attorney? The
7 publicist has a separate attorney.

8 MR. BERLIN: My understanding is the
9 publicist has both a New York lawyer and that your
10 firm has also appeared in the proceedings.

11 MR. BERRY: Matthew Blackett filed papers.

12 MR. HARDER: Oh, he filed papers. Okay.

13 MR. BERRY: I may be mistaken, but he's --

14 MS. DIETRICK: Yeah, that's right.

15 MR. HARDER: Well, my understanding is that
16 the publicist has a separate counsel, and I don't
17 know if Matthew Blackett may have sent you some
18 documents, but --

19 MR. BERRY: He's on the pleadings.

20 MR. HARDER: He's on the pleadings on behalf
21 of the publicist?

22 MR. BERRY: (Nods affirmatively).

23 MR. BERLIN: That's correct. That's my
24 understanding.

25 MR. HARDER: That's news to me.

1 In any event, the publicist issues are being
2 litigated in New York. There was a ruling by the
3 lower court, and there is an appeal as to
4 privileged issues, because there is a lot of law
5 that shows that communications between myself and
6 the publicist -- and these are communications.
7 Just so we have an understanding of what these
8 communications are, these are communications
9 between myself and the publicist that happened the
10 day we filed the lawsuit. And there may be some
11 communications when a story came out about Hulk
12 Hogan that's relevant to this lawsuit, and she and
13 I had some communications that were pertinent to
14 the litigation.

15 And there is law in New York that says those
16 are privileged, and the lower court made a
17 decision that the publicist -- and we also believe
18 is not following the law and so that's on appeal
19 before the appellate division of the lower court.
20 And it's basically just communications between the
21 publicist and counsel about the litigation itself.

22 But it's not about media appearances from the
23 TNA Wrestling media tour, because that publicist
24 was not involved in the TNA wrestling tour. That
25 publicist is Mr. Bollea's personal publicist, but

1 she was not dealing with the TNA media tour. TNA
2 had its own publicist that was being used. So
3 there is a separate list there. And we've had a
4 lot of communications over that, so there is no
5 misunderstanding.

6 I mean, some of these things are minor. But
7 Mr. Berlin mentioned a few times that the AUSA's
8 letter refers to Hootie on a label on one of the
9 disks that the FBI and the AUSA obtained from the
10 extortionist. I don't see how that has anything
11 to do with anything.

12 I mean, first, he doesn't even know that he
13 was called Hootie until Bubba Clem testified in
14 the case and said, I call him Hootie. And, second
15 of all, the AUSA letter came well into the loss,
16 and we had our mini litigation over whether
17 communications with law enforcement are the proper
18 scope of discovery, and we fully complied with
19 what the ruling has been.

20 So it's just -- I don't even know why that
21 issue is being brought up. I felt like I had to
22 address it.

23 Mr. Berlin used the term the flip-flop, that
24 we flip-flop on our position. There hasn't been
25 any flip-flops with respect to whether Gawker is

1 or is not the subject of the FBI's investigation.
2 I have never known one way or the other until way
3 late in the game after Mr. Berlin talked to the
4 AUSA and obtained a letter from her saying Gawker
5 is not a target of the investigation. Then I
6 learned that Gawker was not a target. Before
7 then, I didn't know.

8 And so if I ever said Gawker might or might
9 not be a target, because they were going out -- I
10 was trying to understand, Why are they going after
11 the FBI documents? Because if Gawker was a
12 target, then that would be a potential
13 interference of investigation of them. So that
14 was kind of one of the issues that we flagged.

15 I don't know one way or the other. I don't
16 talk to the AUSA. Until all this came down, I had
17 never spoken to the AUSA about that and don't know
18 one way or the other if Gawker was or wasn't.

19 So if he's trying to say that I'm a
20 flip-flopper, that I said that they were and then
21 I said they weren't and then I said that they
22 were, that's not accurate as far as my
23 recollection. I believe that I have been accurate
24 that they potentially could be.

25 And then once -- once the AUSA made it clear,

1 then I said to Judge Campbell, in a recent
2 hearing, the AUSA or law enforcement said that
3 they are not a target to it. And that was one of
4 the reasons why I thought, well, why is it that
5 they need to get all this investigation stuff?
6 And that's when I disclosed to Judge Campbell that
7 this is an extortion situation, and that's why --
8 that's the nature of these documents.

9 I thought that she might say, Okay, well,
10 maybe it needs another look. She actually
11 followed Your Honor's ruling, and then we
12 immediately produced them. But we didn't do
13 anything wrong. We didn't obfuscate. We didn't
14 conceal. We didn't violate any court orders.
15 Once we received that order to produce, we
16 produced.

17 Mr. Berlin made it sound like I was heavily
18 involved in the FBI things and Mr. Turkel was
19 heavily involved. I mean, that was the kind of
20 innuendo that I got. It was really David Houston
21 who was involved. I think I had one or two very
22 short communications with the FBI a long time ago.
23 And I disclosed that to them in the
24 interrogatories. To be honest with you, I don't
25 remember what I talked to them about. It was just

1 the status. It was probably five minutes. What's
2 the status?

3 Ken Turkel had communications, and they were
4 extremely short. I don't know if it was with
5 the -- I think he talked to the FBI and the AUSA
6 for just a couple of minutes on what's their
7 position with regard to these documents. And it
8 was the same time that Mr. Berlin was getting what
9 their position was, which is -- and it was a
10 changed position. The FBI originally said, Do not
11 talk to anyone about this. And just so you know,
12 that's not why we didn't produce these documents.
13 We didn't produce these documents because they
14 never asked for them.

15 But we certainly weren't volunteering
16 information about the FBI just to volunteer,
17 because they had said, Keep a lid on this. Don't
18 talk to anyone about this, certainly not --
19 certainly not media. Well, they are media, so the
20 FBI didn't want some big media storm over this and
21 then cause their whole investigation to look
22 embarrassing to them. And so they were trying to
23 avoid a situation like that, I assume. And they
24 were trying to avoid anyone interfering with their
25 investigation while they were conducting it.

1 But towards the end of the process,
2 Mr. Berlin was able to get them to confirm that
3 they -- I think he said there was a closed
4 investigation. I don't think I have ever heard
5 that it was a closed investigation. We've always
6 been told that it was still open but that they had
7 decided that they, based on the present evidence,
8 they were not going to prosecute.

9 Now, if it closed at some point, then it
10 closed at some point, but I don't believe that I
11 or David or Ken ever made any misrepresentations
12 of any kind regarding the status of the FBI
13 investigation and the AUSA's desire or lack of
14 desire to prosecute.

15 Law enforcement changed its mind over the
16 course of time, and so if there was a flip-flop,
17 it was really by law enforcement, and it certainly
18 wasn't by us. And if we were ever reporting what
19 our understanding was, it was just based upon what
20 our present knowledge was, and it was not intended
21 to mislead anyone.

22 And even so, I mean, this whole extortion
23 thing, we always have thought of that as being
24 separate and apart from what Gawker did. Gawker
25 took a tape, edited it down, and posted that tape.

1 We sued over that. And the fact that there is an
2 extortion happening, I think that that is somewhat
3 far afield. But they have the documents to take a
4 look at it and make whatever determinations they
5 want.

6 But I think if they do -- it sounds like they
7 want to proceed with discovery on the extortion
8 attempt and what was going on with law enforcement
9 as the extortion. And if you are going to allow
10 them to engage in that discovery, I don't think
11 that it's going to end up yielding admissible
12 evidence.

13 They're complaining about how expensive this
14 is. They're the ones driving the boat on the
15 expense. They're the ones who are going after all
16 kinds of things that are beyond what they did and
17 beyond what their defenses are to what they did
18 and what our claims are. But if they want to
19 spend a lot of money on uncovering every stone and
20 turning over every stone and uncovering everything
21 that has anything to do with anything, then I
22 suppose that's their prerogative within the scope
23 of whatever the courts are going to order. But if
24 they are complaining that that's expensive, I
25 mean, that's on them. We're not -- we're not

1 causing that expense.

2 I hate to repeat myself, but one of the
3 statements that Mr. Berlin said was that we failed
4 to produce documents that were already adjudicated
5 to be relevant. And that's -- and he was citing
6 to the October 29 oral order, and then it was
7 reduced in writing on February 6th, 2014. If you
8 read it, what he said is absolutely not in there,
9 and we have not violated this order at all.

10 I think I have covered my issues, Your Honor.
11 If you have any questions, I'm happy to answer
12 them.

13 JUDGE CASE: I think I'm good.

14 Short reply?

15 MR. BERLIN: I can give you a short reply.

16 JUDGE CASE: Okay.

17 MR. BERLIN: Let me start by asking Your
18 Honor if you have any questions for me.

19 JUDGE CASE: No, sir.

20 MR. BERLIN: Let me start by saying that my
21 favorite quote of the case is that Mr. Harder
22 cited in his supplemental opposition from a judge
23 in one of these cases who said that litigation is
24 not a fact-free zone. And so I want to sort of
25 focus on the facts. I think there has been a

1 significant -- the argument that Mr. Harder just
2 gave reflects a significant misapprehension of
3 what it is that we're here about. We are not here
4 because there was a delay in producing FBI
5 documents by itself. We are here because, first,
6 we believe that the initial set of discovery
7 requests and the order to produce documents that
8 relate to the sexual relationship between the
9 plaintiff and Heather Clem encompassed documents
10 about a tape or multiple tapes involving a sexual
11 relationship between the plaintiff and
12 Heather Clem.

13 And we think that those document requests,
14 you know, any and all documents related to the
15 video, any and all documents related to the
16 communications you had about the video, any and
17 all documents relating to sexual relations you had
18 with Heather Clem, any and all documents
19 concerning any videotape made of you involving --
20 I'm sorry, engaged in sexual relations, these are
21 all documents that -- document requests that were
22 the initial batch of documents requested last June
23 that should have been answered and should have
24 been provided.

25 Now, even if you were to take the argument

1 that says that you didn't specifically ask us for
2 law enforcement records and, therefore, we do not
3 have to produce them, I don't think that makes a
4 lot of sense, because in the documents themselves
5 there is -- just in one of the documents itself,
6 there is a passage that says that in this
7 agreement with Mr. Davidson that his client agrees
8 that the party that possessed the videos -- sorry.
9 His client agrees that they are the party that
10 possessed the videos given or provided to Gawker,
11 TMZ and other media for publication.

12 Now, he may say that's not true. I wouldn't
13 trust the word of an extortionist, but it's
14 clearly a relevant document because it clearly
15 relates to Gawker and what was posted by Gawker.
16 And we didn't get those documents.

17 But even if you assumed that these documents
18 didn't have to be produced, that we didn't ask for
19 them, we didn't make the skill shot of actually
20 saying, Give us the law enforcement documents,
21 instead of more broad requests, and even if you
22 assume that you don't have to identify them as
23 privileged -- and there are documents that start
24 on the 9th of October which is about a week before
25 this lawsuit got filed.

1 And our position is that things that were
2 exempted from the privilege log were things that
3 related to attorney client and attorney work
4 product privileges because of the burden involved.
5 And for our part, we've asserted other privilege,
6 journalist privilege and the like for things that
7 postdate the filing of the first lawsuit in
8 federal court. So we've played by that rule.

9 But even if you assume -- so we don't -- even
10 if you assume they don't have to be produced and
11 even if you assume that the prelitigation
12 documents don't have to be logged, the information
13 that's in those documents is still relevant and
14 germane to the answers of the questions that we're
15 getting. So when the answer to the interrogatory
16 sworn under oath is, I have no information about
17 any other sex tapes involving me other than the
18 one that Gawker posted, that's just -- that's
19 wrong. And it's not a question of just there was
20 a delay in giving us the FBI documents; it's that
21 there is affirmative representations under oath
22 that are wrong.

23 And then we come to hearings and we say,
24 Look, we don't think we have all of the
25 information. And we assure you up and down we

1 have given you everything, right? We assure you
2 we have given you everything, all of the media
3 appearances. We're in New York litigating against
4 the publicist, because we were in a hearing in
5 front of Your Honor where Mr. Harder represented
6 that he didn't have any documents.

7 And then we litigate there, and we come to
8 find out that he has documents in his own file
9 back and forth with the publicist which he's now
10 described. And we find this out. So this is not
11 a motion about a delay in getting discovery or the
12 alleged prejudice that results from the delay in
13 getting discovery. If that's what this was about,
14 we would not be here.

15 What this is about is that we have litigated
16 since last June trying to get these facts, and
17 we're not getting these facts. We're getting
18 different facts. We're getting told, you know, I
19 don't know anything about any other tapes, right?

20 And on this question of tapes, again, it's, I
21 don't know if there are these tapes, right? Well,
22 first of all, we have another transcript from
23 another source that also describes two of three
24 tapes and largely matches.

25 Second, the one tape that we do have

1 Mr. Harder admits lines up pretty nicely with the
2 transcript there, so that suggests that maybe the
3 transcripts that are there are not complete
4 fabrications.

5 And, No. 3, for tapes they don't believe
6 exist, they have spent an awful lot of time trying
7 to get them back from the FBI. That's what our
8 submission shows, that they are up in arms. Don't
9 hold them; we want you to give them back to us,
10 presumably so they can destroy them, which is why
11 we asked for a preservation order.

12 So that's what this motion is about. The
13 second thing is they say, We haven't violated any
14 court order. Well, I think in addition to
15 violating the court orders, you have some basic
16 duty of candor to the tribunal, and so when
17 Mr. Harder comes and says, We don't have any of
18 these documents; I don't have any privilege
19 documents; I don't have any media appearance
20 documents; I don't have any other documents about
21 any other tapes, when those statements get made,
22 those are misrepresentations, and they lead to the
23 entry of the orders that are problematic.

24 Mr. Harder wants to now have us interpret
25 Judge Campbell's order from the January 17th

1 hearing about the provision of video to you, which
2 he made based on the argument that actually seeing
3 Mr. Bollea and Ms. Clem engaging in additional
4 acts of sexual intercourse and sexual relations
5 shouldn't be produced to Gawker even under
6 attorney's eyes only or a confidentiality order.

7 That was not about the text of those things.
8 And to the extent that we now want to interpret
9 that order to apply to the text of documents, we
10 weren't able to litigate that issue in front of
11 Judge Campbell properly because we didn't know
12 that there were these transcripts that existed
13 because they had been withheld with us. So to sit
14 there and say, We now need to interpret an order
15 that was issued based on neither Judge Campbell
16 nor the other side knowing what was what doesn't
17 seem right at all.

18 But there have been -- the first order from
19 October 29th said documents and information, both,
20 pertaining to the sexual relationship between
21 Mr. Bollea and Heather Clem need to be provided,
22 and the order itself specifically calls for
23 supplementing interrogatories and providing
24 documents. So that's a first violation.

25 Then we come to the second order, which is

1 your order from February, which was not challenged
2 and, therefore, is the order, in which you say,
3 I'm denying the motion for sanctions, but I'm
4 doing it based on a representation that you've
5 provided everything that you can and that you have
6 on this subject. And then if that turns out to be
7 wrong, then you can -- you know, basically you're
8 in trouble. So that's a second violation.

9 And then the third violation is a violation
10 that's been conceded, which is from the April 23rd
11 order which says, I was ordered to produce phone
12 records; I was ordered to produce FBI documents;
13 and I haven't done that. I haven't -- they're
14 still -- there are still records that -- the FBI
15 records have been produced. They were produced,
16 you know, in that sort of rolling fashion. But
17 they have been produced. But the phone records
18 and the media appearances, we haven't gotten those
19 documents, right? So when we have a series of
20 these orders, that's the problem.

21 And when you look at -- and so the response
22 to all this, again, is rather striking to me, is
23 that this stuff is collateral. It's not relevant.
24 It's not going to yield any admissible evidence.
25 We've heard that over and over again, right?

1 That's not relevant to this case. I mean,
2 Mr. Harder probably made -- this is a tape, you
3 know -- this is a case about this tape. He went
4 on at some length about, Let me remind you what
5 this case is about.

6 We have a different view about what the case
7 is about, and we're entitled to that. But we've
8 litigated that, and we have umpires, two of them
9 in this case, who have already called those balls
10 and strikes and made that ruling. And we don't --
11 it's like if you were on the baseball field and,
12 you know, umpire says, you know, that's three
13 strikes and you're out, and you turn to the ump
14 and you argue and say no, it's not; I'm going to
15 substitute my judgment about what's relevant and
16 what's not for you, you know, that's not how --
17 that's now how this game is played.

18 And then, you know, speaking just to the
19 dismissal point, I think that this showing that we
20 have made shows that over time that these
21 misrepresentations were willfully made. They
22 included the personal involvement of the client
23 who testified about them at some length during his
24 deposition, that you considered lesser sanctions
25 in the earlier sanction motion and you denied it

1 with the caveat that if they did it again, that
2 there would be a further sanction; that there has
3 been clear prejudice to us as a party.

4 I mean, there are a number of things that we
5 have -- we have had to chase down. So, for
6 example, just on the date, Mr. Harder says, That's
7 a silly thing; who cares whether it's 2006, 2007,
8 2008. Well, during that time period, Mr. Bollea
9 was married, then separated, then divorced, right?
10 During that time period, we don't -- you know,
11 there is video broadcasts which we played during
12 the deposition where Mr. Clem talks about having
13 cameras in his house, right? Did these encounters
14 happen before or after that?

15 There is radio broadcasts. There is a period
16 where Mr. Bollea lives with Mr. Clem. Was that
17 before or after these encounters? We're just
18 trying to square out what happened, and we
19 spent -- I mean, we've got documents here that
20 tell us the answer to this question, which they
21 had and they have had since any discovery, you
22 know, before any discovery was answered in this
23 case that answered these questions. And, look, if
24 they want to say, Look, here is a document; we're
25 not sure this is the right answer, they're free to

1 do that. But to say, We have this information but
2 we're not going to give it to you, that's just not
3 right.

4 It's obviously prejudiced the judicial system
5 in the sense that there have been
6 misrepresentations to you and to Judge Campbell
7 and that you have made rulings based on those
8 misrepresentations and that you have taken up your
9 time, which by the way Gawker is prejudiced in
10 because we pay half of that. And that is a direct
11 affront to the administration of the judicial
12 system.

13 And the last is that I would submit that the
14 explanation that Mr. Harder has given is basically
15 to reargue the point that these things are
16 relevant -- that these things are not relevant to
17 the case. And that's already been determined that
18 we don't get to do that. We don't get to litigate
19 a motion on phone records, litigated it in front
20 of Judge Campbell, and then turn around and say,
21 We are not going to comply with that order because
22 we think -- we want to again assert that there is
23 a privacy interest. That issue has already been
24 adjudicated. How many times are we going to do
25 this, Your Honor? And I don't view these things

1 having a reasonable explanation when taken in
2 toto.

3 And I think I will stop there. I think there
4 is a, you know, as I said earlier -- let me just
5 stop here, which is to say to the extent that
6 these FBI documents -- there is no evidence that
7 anybody went back to the FBI and said, You know,
8 we have a discovery request that calls for some of
9 this information. Even if we don't produce the
10 documents, we have a discovery request that calls
11 for some of this information. Do you now have
12 concerns about us doing that?

13 All right. They didn't come to you or to
14 Judge Campbell and say, Look, we're between a rock
15 and a hard place. What would you have us do?
16 They just arrogated it to themselves, the decision
17 to say we're not going to disclose this
18 information. And I would respectfully submit that
19 that's just wrong. And that if you get to do
20 that, this whole process completely falls apart.
21 And that's why we're here today, Your Honor. And
22 with that, I think I will stop.

23 JUDGE CASE: Anything else?

24 MR. HARDER: Do you have any questions?

25 JUDGE CASE: No.

1 MR. HARDER: You've heard a lot; you've read
2 a lot.

3 JUDGE CASE: I have.

4 MR. HARDER: I don't want to repeat myself.

5 JUDGE CASE: I have. All right. Let's take
6 five minutes.

7 (A recess was taken at 11:32 a.m.)

8 JUDGE CASE: All right. I have had the
9 opportunity to review all the materials that have
10 been furnished to me prior to the hearing here
11 today. I have also had the opportunity to listen
12 carefully to the arguments which have been
13 propounded to me, and on both sides you have
14 represented your clients very capably. And I have
15 thoroughly enjoyed hearing these arguments. I
16 know you get to make them, but I get to hear them.
17 And after all those years on the bench, I used to
18 dread these kinds of hearings, because most of the
19 time the lawyers are not as competent you are, and
20 you do a good job, so I appreciate that.

21 But in the final analysis, any analysis with
22 respect to sanctions in the Florida courts are
23 still governed by the case of Kozel versus
24 Ostendorf, which is an old Supreme Court decision
25 which is still good and still followed. And the

1 tenets of that and the analysis of that case still
2 control.

3 And applying that analysis, I come to the
4 conclusion that the defendants' motion is -- will
5 be denied in its entirety. I will take advantage
6 of Mr. Harder's offer to have Mr. Bollea submit
7 for limited issues on another deposition with
8 respect to the matters that may have been raised
9 by the release of the FBI records. But other than
10 that, I think that's about as far as it ought to
11 go.

12 MR. HARDER: Thank you.

13 JUDGE CASE: Next motion.

14 MR. BERLIN: Your Honor, if I can make a
15 point for the record.

16 JUDGE CASE: Yes, sir.

17 MR. BERLIN: It's my understanding that that
18 case applies to where there is a dismissal
19 sanction requested but that the factors that are
20 outlined there are not limiting for other sorts of
21 lesser sanctions. And I just want to make that on
22 the record.

23 JUDGE CASE: The case instructs the trial
24 court to apply the least offensive sanction to
25 accomplish the goal, and it goes through the whole

1 laundry list of the analysis. At this point in
2 time, I'm just not convinced that the issues that
3 have been raised here today rise to the level of
4 any sanctions.

5 Next motion.

6 MR. HARDER: Your Honor, thank you. Turning
7 to our motion for protective order, there are two
8 issues that we presented. One is regarding -- I
9 believe it's five words that were redacted out of
10 a document production, which was the summary of
11 the alleged sex tapes by the extortionist. And
12 when we subpoenaed the Don Buchwald Agency for
13 their documents, they happened to have the same
14 summary from the extortionist in their possession.
15 And so when they produced their documents, it had
16 that same -- it was virtually an identical
17 summary. And both sets -- and Mr. Bollea made
18 reference to that.

19 So we redacted out certain words that I
20 believe are consistent with your prior order when
21 we were at Bubba Clem's deposition where the
22 question was asked, Did Mr. Bollea ever use the
23 "N" word? And we had a relatively lengthy
24 discussion over that issue and whether it could
25 inquired into. And Your Honor's ruling was to

1 sustain our objection.

2 So when we came across the same type of
3 language that was in these summaries by the
4 extortionist and within the possession of the Don
5 Buchwald Agency, which was essentially the same
6 thing, we redacted out those words. And I believe
7 it's five words.

8 I have, if you're interested in seeing a
9 version that shows Your Honor these words that are
10 the exact words that we redacted out. I would
11 like them not to be on the record but just for
12 your perusal to help you understand exactly what
13 we redacted out and exactly where it was redacted
14 out of the document. So if you want to make a
15 determination as to all of them or some of them,
16 it's entirely in your possession and up to you as
17 to how to do it.

18 The racially offensive language has nothing
19 to do with this case. It's highly prejudicial.
20 It's all hearsay, because this is coming from an
21 extortionist who is reading an alleged tape,
22 that's, I guess, listening to an alleged tape and
23 then putting down an alleged summary of that
24 alleged tape, it's hearsay in any event, and I
25 don't see how it would ever make it into

1 admissible evidence.

2 It's peripheral to the case, because the tape
3 that Gawker received -- and they received the tape
4 from the Don Buchwald Agency. Well, let me back
5 up. Let me back up. I want to be accurate here.

6 The Don Buchwald Agency and Tony Burton, who
7 is the agent, apparently, as we've learned through
8 discovery -- and Gawker was not forthcoming with
9 information at first, and it took eight months to
10 get this information.

11 But Tony Burton, the agent from Buchwald,
12 contacted Gawker's editor-in-chief, A.J. Daulerio
13 and said to him, We have a client who has a very
14 significant DVD, and we want to or the client
15 wants to get this DVD to you. What's your
16 address?

17 And then a day or so later, Gawker has
18 possession of the DVD that came in through the
19 mail with no return address on it. And then there
20 were e-mail communications that they produced
21 eight months after we had asked for them between
22 A.J. Daulerio, the editor-in-chief, and Tony
23 Burton, the agent, talking about this tape.

24 And when we subpoenaed the Don Buchwald
25 Agency after they had supplied us with these

1 things eight months down the road, then we ended
2 up with this same summary. So it appears to us
3 the Don Buchwald Agency was part of what the
4 extortionist was trying to do. So that's just a
5 little bit of background.

6 But the tape that Gawker has and produced to
7 us -- that's how we got this tape. It doesn't
8 have any of these words that are at issue here.
9 They never had possession of any tapes that had
10 these words in them. They never -- when they
11 edited their video down to a shorter video, it
12 didn't include any of these racial words in them,
13 I assume, in part, because they never had
14 possession of the -- any video that had these
15 words.

16 And when Gawker wrote a narrative, a story,
17 if you will, about the sex video that they watched
18 and they wanted to provide a play by play of
19 what's on the full 30-minute video that
20 accompanies their video of the short version, they
21 never said anything about anything about race.

22 So our claims against them have to do with
23 the video that they used and do not pertain to
24 race. Their defenses to our claims pertain to
25 their First Amendment defenses, their claims that

1 it's newsworthy, their claims that the sex tape is
2 of public interest, that their claims that
3 Mr. Bollea supposedly waived his rights or had no
4 privacy to begin with or that it's not offensive
5 or it's extremely offensive, whatever the defense
6 is technically.

7 But these words that we redacted out,
8 consistent with your prior ruling, don't have to
9 do with our claims. They don't have to do with
10 their defenses. They don't have to do with the
11 video that was posted. And the substantial
12 concern that we have, for anyone who reads and
13 follows the press and sees what happened to Paula
14 Deen when she was asked about the question, Did
15 you ever use the "N" word -- it was actually a
16 racial discrimination case where that issue
17 actually was part of the case, and I believe she
18 said yes. And then the next thing you know her
19 entire empire comes crumbling down.

20 And a more recent example is Don Sterling,
21 where she tapes him saying something that's
22 racially insensitive and posts it to the Internet,
23 and then he loses his right to be in basketball
24 ever again and has to pay \$2,000,000 in sanctions
25 and has to divest himself of everything that has

1 to do with basketball.

2 As we presented at the Bubba Clem deposition,
3 the stakes are very high on an issue like this.
4 And just to clarify, we're not admitting that this
5 word or these few words were ever uttered by
6 Mr. Bollea. These things show up on an
7 extortionist's summary of alleged tapes that are
8 not even at issue.

9 But because the stakes are so high, we have
10 to protect our client from a situation like this
11 that we have seen happen to others. And
12 particularly given that these words are not
13 relevant to the case, not reasonably calculated to
14 lead to admissible evidence, we think it was
15 appropriate that we redacted out these words. And
16 we think it's appropriate that Your Honor made the
17 ruling that you did at Bubba Clem's deposition.
18 We don't think that if these words are disclosed
19 to Gawker that they are going to lead to anything
20 that's admissible in the case. We are not trying
21 to prevent Gawker from getting anything that's
22 relevant in the case.

23 It's my understanding that Gawker obtained
24 directly from the Buchwald Agency an unredacted
25 version of what we have brought a motion for

1 protective order over. So it's my understanding
2 they already have possession of what we're
3 fighting over.

4 But part of the protective order is that I
5 would like there to be a protective order that
6 they absolutely cannot use that. I think it would
7 be appropriate for them to possess a redacted
8 version rather than an unredacted version and to
9 exchange their unredacted with a redacted version
10 to prevent against the situation that we are
11 fearful of, that there could be abuses,
12 particularly when you have an organization -- I
13 don't mean to rake them over the hot coals, but I
14 just have to say what is the case, which is that
15 Gawker is a news organization that publishes
16 salacious details about people. It posted the
17 Hulk Hogan sex tape without any questions asked
18 and left it out there when demands were made that
19 it be removed.

20 It posted nude videos of Rebecca Gayheart and
21 her husband when they were in a hot tub and a
22 video of that naked with another person, and a
23 video of that came into their possession. They
24 immediately posted it, and they got sued over it.

25 There are other examples that we provided of

1 publishing photos of Brett -- the football player
2 Brett Favre's penis and posting other pictures of
3 people's penises and then mocking it, mocking
4 those. And we provided examples in our papers.

5 So it is a realistic concern that we have,
6 that a defendant that is so aggressive in their
7 defense of this case, where in our view they are
8 doing everything in their power to stop this case
9 from going to trial, to stop Mr. Bollea from
10 having his day in court, where their own record is
11 that they have very little regard, if not zero
12 regard, for people's privacy.

13 I think I put in other papers in the past
14 that the CEO, Nick Denton, was interviewed by
15 Playboy. And a question was asked of him, Is it
16 true that Gawker gives lesser regard of privacy to
17 people?

18 And his answer was, I don't think people give
19 a fuck about privacy.

20 And that's the attitude of this particular
21 defendant, and that is why that we feel it's such
22 an important thing that we have to do to protect
23 Mr. Bollea's privacy, because the reason we're all
24 here is because of their invasion of his privacy.
25 And it would be tremendously unfair if this

1 litigation over correcting the wrong that's been
2 done, allowing him to seek redress, and be made
3 whole is used as a vehicle for Gawker to obtain
4 more invasions of his privacy and mount some sort
5 of campaign against him, which maybe they are
6 holding back on until after the case is done or
7 maybe they're holding back on until the proper
8 time during the case, or maybe they are planning
9 to use it in some sort of a settlement negotiation
10 of some type.

11 It has been used in the past in settlement
12 negotiations where it was stated that they have a
13 lot more video on that 30 minutes, and if this
14 case isn't settled, then they have plans or
15 inklings to publish more of the sex tape.

16 When I hear things from Gawker along those
17 lines --

18 MR. BERRY: Are you talking about our case?

19 MR. BERLIN: Wait a minute.

20 MR. THOMAS: Your Honor, settlement
21 negotiations are never permissible to be
22 discussed.

23 MR. HARDER: Is that true?

24 MR. THOMAS: Yeah, that is true.

25 JUDGE CASE: In the presence of the jury.

1 MR. HARDER: In the presence of the jury.
2 Well, the jury is not here.

3 MR. TURKEL: Let's be clear. They're not
4 admissible for liability or defense of liability.
5 They can be admissible for other purposes.

6 JUDGE CASE: Right.

7 MR. TURKEL: I mean, that's not an absolute
8 --

9 MR. THOMAS: So we can get the Bubba
10 settlement hearing?

11 MR. TURKEL: I'm not going to argue with you.

12 JUDGE CASE: Let's let him finish his
13 argument.

14 MR. BERLIN: Can I just -- I just want to say
15 on the order -- and then we can let that go --
16 that that is a complete and utter fabrication,
17 since --

18 JUDGE CASE: I heard it raised as a
19 hypothetical, that Gawker could do this.

20 MR. BERLIN: I understood him to say Gawker
21 has threatened to do that --

22 JUDGE CASE: I heard it --

23 MR. BERLIN: -- and that is, in fact, not at
24 all true.

25 JUDGE CASE: I heard it addressed in the

1 hypothetical sense.

2 MR. BERLIN: If you're taking it that way,
3 then you have it correct, because we didn't raise
4 that.

5 (Discussion off the record.)

6 MR. HARDER: I'm happy to leave it at that.
7 But if we want to get into that issue, I will even
8 testify under oath. But I would rather just leave
9 it where you left it, Your Honor.

10 The fact of the matter is they do have
11 another 28 and a half minutes of sex video, and
12 there is no court order that is stopping them from
13 publishing that if they wanted to do that,
14 although they would certainly be hearing from us
15 if they did that.

16 But in the same context, they have come
17 across in the course of discovery this
18 extortionist who was saying certain things,
19 supposedly saying that there is a videotape out
20 there that they supposedly have in their
21 possession or gave over to law enforcement in
22 connection with a sting that has these words on
23 it.

24 These words not being relevant to the case,
25 not being reasonably calculated, being highly

1 prejudicial, I can't imagine any scenario where
2 these words end up in front of a jury. It's
3 hearsay upon hearsay, and the potential for Gawker
4 to misuse these words either in connection with
5 settlement or in connection with retribution or
6 seeking revenge against Mr. Bollea or seeking to
7 use them to put an end to the case in some fashion
8 or another, potentially -- and here is a
9 hypothetical -- leaking them to someone else so
10 that Gawker could say, Well, it's not us who
11 published it; it's somebody else who published it,
12 things like that can definitely happen in the
13 world of Internet and Internet gossip sites, some
14 of whom won't hesitate to publish harmful things
15 about folks.

16 And I'm sure that Mr. Bollea -- I'm sorry. I
17 have done it again. Mr. Berlin is going to say,
18 well, we haven't done that and we pledge not to do
19 that. But, still, I have a job to do. I have to
20 protect my client. I have to avoid any sort of a
21 Paula Deen situation or Donald Sterling situation
22 or anything like that based upon hearsay
23 statements from an extortionist that seems to have
24 come our way in our case.

25 So we have cited cases in our pleadings that

1 support that a protective order is warranted.
2 Your Honor has already ruled in our favor on this,
3 and we would request a protective order as to that
4 issue.

5 As for the phone records, I feel like I made
6 my position clear a few minutes ago, and I don't
7 want to repeat myself. But just to summarize that
8 issue, if Your Honor feels that the prefix of
9 phone numbers of people who have zero to do with
10 this case should be disclosed to Gawker, we will
11 follow your order.

12 I believe that Gawker has enough information.
13 It has the phone numbers, except for three digits.
14 And if it wants to determine that any of those
15 phone numbers is a relevant witness, it has the
16 information to do that. And I will happily
17 unredact as to those individuals or individual
18 phone calls that they identify.

19 I have not heard from them as to any
20 particular phone calls. It's an open invitation
21 for the rest of this case. If at any time you
22 determine there is an individual who has a phone
23 number that matches up with something that's on
24 his call logs, we will be happy to unredact and
25 produce that.

1 However, in the meantime, I think it is
2 following the court of appeal's determinations
3 that people who are not witnesses and not parties
4 should not have their full phone numbers disclosed
5 in discovery. And that's all that we have done so
6 far. But if Your Honor disagrees, we will produce
7 it all.

8 I don't know if Mr. Bollea is going to
9 mention this, but we have obtained records from
10 his cell phone carrier and redacted and produced
11 all of those records. We have still -- we have
12 made requests to get records from his land line
13 carrier. And I believe I have this right. We
14 produced cell phone and are still waiting for the
15 land line. If I got that switched around, I
16 apologize. But there is one carrier we have made
17 requests from to obtain the phone logs.

18 And a while back before, a phone call
19 conference hearing with Your Honor, Mr. Berlin
20 said that his carriers allow him to access online
21 his phone records. We tried that. Mr. Bollea's
22 carrier does not have that option. We can't just
23 go online and get -- we would have done it. We
24 would have done it a long time ago if that was the
25 case. We're not holding back on anything.

1 And once we get these documents, we will
2 either -- according to your determination today,
3 we will either redact out the prefixes as to
4 people who are not -- that we can as best
5 determine are not parties, not witnesses, but
6 leaving all the other rest of the phone number.
7 Or if Your Honor says to produce it all, we'll
8 produce it all. There's just that one issue as to
9 the second carrier that we've made repeated
10 requests, and for some reason they're the ones
11 dragging their feet, not us.

12 Those are our -- that's our position on the
13 motion.

14 JUDGE CASE: Okay.

15 MR. BERRY: Your Honor, I'm going to arguing
16 this one.

17 JUDGE CASE: Great.

18 MR. BERRY: I will try to be brief on both of
19 these points. And I will start where Mr. Harder
20 ended with respect to the phone records.

21 For both of these issues, the question of
22 whether something is discoverable, as you know, is
23 whether something is reasonably calculated to lead
24 to the discovery of admissible evidence.

25 With respect to these telephone records, as

1 Mr. Berlin and Mr. Harder already talked about in
2 the prior discussion, this has already been argued
3 to Your Honor. You ruled on it. It's already
4 been argued before Judge Campbell. She's ruled on
5 it. The arguments here are no different than what
6 were being argued to you previously. This has
7 already been decided. There is no reason to be
8 here to reargue it again. They haven't brought
9 forward any new arguments.

10 The only thing that Mr. Harder here has said
11 that is different is that they have redacted this
12 information and that if we happen to know of
13 anybody who might be relevant, could figure out
14 from those phone numbers, he would be happy to
15 provide the full information.

16 But discovery is not a game. It reminds me
17 of talking to my kid when we go to restaurants and
18 they get the little place mats with games on them
19 with connect the dots, only he's saying that some
20 of the dots are going to be taken out of this
21 equation. So if you happen to connect the dots
22 and maybe see what the picture is -- I'm giving
23 you all of the numbers -- then I might be able to
24 give you that person.

25 The fact of the matter is we're entitled to

1 the information at the beginning of discovery to
2 determine whether there is admissible evidence,
3 whether Mr. Bollea communicated with anybody about
4 the publicity about the sex tapes, about the sex
5 tapes themselves, or anything else that's relevant
6 to this litigation.

7 Part of the defense with respect to the
8 sanctions motion -- and as we heard Mr. Bollea
9 testify at his deposition -- is he's not good at
10 names; he's not good at dates; he doesn't remember
11 things; he doesn't remember who he talked to about
12 this. These phone records could well reveal that
13 information.

14 For us to be able to look at half a phone
15 number and try and say, Oh, yeah, we think that
16 might be this person's name who you haven't
17 disclosed to us in the past; it's possible that
18 you discussed this with this person, who we don't
19 even have their phone number at this point. Could
20 you let us know if their phone number is on here?
21 That's not the way discovery works. The way that
22 it works is that they provide information that is
23 reasonably calculated to lead to admissible
24 evidence. That's already been ruled on, and that
25 information should be provided to us in full.

1 With respect to the five words from the
2 various summaries that have been produced, I just
3 want to provide a little bit of background facts
4 on a couple of things that Mr. Harder said which
5 kind of set the table with this.

6 With respect to the documents regarding
7 Tony Burton and Tony Burton's involvement in this
8 case, Tony Burton was this agent who got in touch
9 with Gawker. I wasn't involved in the case in the
10 beginning. It's my understanding that in the
11 initial document -- that in the initial discovery
12 responses that we provided, we provided
13 Tony Burton's name as being the person who got in
14 touch with Mr. Daulerio. We provided the name of
15 Mr. Burton's client as the one who got in touch
16 with Mr. Burton. And then we produced the e-mails
17 back and forth between Mr. Burton and Mr. Daulerio
18 that Mr. Harder referred to. All of that was
19 produced at the outset of the litigation before
20 Mr. Daulerio's deposition. He was asked about all
21 that information, and it's gone back some time.

22 The second thing that Mr. Harder said is with
23 respect to these documents that were produced by
24 the alleged extortionist and the documents, the
25 summary that was provided to us by the

1 Don Buchwald Agency, is that they are virtually
2 identical. They are virtually identical to the
3 extent that they both seem to deal with two of the
4 three tapes. The tapes -- the summaries that come
5 from the FBI talk about three tapes. The Buchwald
6 documents refer to two tapes.

7 The summaries substantively are similar in
8 that they kind of give the same play-by-play,
9 minute-by-minute description, but the description,
10 the actual words used throughout are different.
11 There are two separate documents apparently
12 created by two separate individuals, two separate
13 times. We don't know where they originated
14 necessarily, but they're not virtually identical
15 except they recount the same kind of substance
16 that was on those tapes.

17 On the merit of what is being argued here --
18 again, Your Honor and Judge Campbell have already
19 ordered the production of full and complete
20 records relating to this FBI investigation.
21 Again, we've been back and forth already about the
22 nature of those rulings.

23 At no point during the initial discovery
24 responses and the litigation on those or in the
25 subsequent ones pertaining to law enforcement

1 records was any objection raised with respect to
2 privacy, embarrassment, or any of this. At no
3 point even in an ex parte -- or in an in camera
4 discussion with Judge Campbell during the hearing
5 on this was that raised. Only after the documents
6 were ordered to be produced did they raise this
7 issue.

8 Again, it's not the way it works. We've
9 already gone down this road. The principal
10 argument that Mr. Harder seems to make -- and I
11 guess there is two. The first is that we defend
12 Gawker, and Gawker publishes salacious stuff, and
13 that it purportedly invades people's privacy.
14 That may well be the case. To some degree, that
15 may well be their view of Gawker. But the single
16 issue here is whether they have an obligation to
17 produce to us on an attorney's-eyes-only basis
18 information that's already been ordered to be
19 produced, not to Gawker, not to our clients, not
20 to the public, to the lawyers on an
21 attorney's-eyes-only basis.

22 Mr. Harder asked for that to be given to --
23 that protection to be given to these records.
24 Judge Campbell instructed it.

25 Mr. Berlin at that hearing said, We would be

1 in hot water if we violate that.

2 She said, Yes, you would.

3 It's not a question of whether this
4 information goes to Gawker. It's clear. The line
5 stops with those people sitting at this table and
6 those people who have been admitted to represent
7 Gawker in this case as officers of the court.

8 The second reason that they have offered is
9 that the stuff is not -- that this stuff is not
10 relevant and ultimately is not going to be
11 admissible, that it's hearsay, that it's
12 prejudicial, that it's not relevant, and all of
13 these sorts of things. The issue now is not
14 whether at the end of the day that these
15 statements or that these documents are going to be
16 put before a jury. The question is, Are they
17 reasonably calculated to lead to admissible
18 evidence?

19 The key statement at issue here -- the key
20 statement at issue is Mr. Clem making this
21 statement that we have this stuff, and if we ever
22 want to retire, that includes the redacted
23 information that has been taken out of those
24 documents. That statement is the exact reason
25 that Judge Campbell ordered the tapes to be

1 preserved and said that this stuff was relevant.
2 Now, it turns out that he wasn't talking about
3 sex; he was talking about something different and
4 the reason that they had value.

5 But that statement was the reason why
6 Mr. Clem found himself on this side of the "V,"
7 initially. The reason that Mr. Hogan sued
8 Mr. Clem, as both of them testified in the
9 deposition, was because of that reported
10 statement.

11 Plaintiff only sued Gawker after that
12 statement had been reported in the media. It
13 establishes -- at least has the ability to lead to
14 admissible evidence, that the Clems filmed
15 Mr. Bollea, and it potentially shows that Mr. Clem
16 was lying at his deposition about how many tapes
17 there were. This information shows that there is
18 apparently three tapes. He testified quite
19 clearly that there was only one.

20 Mr. Harder pointed to Your Honor's rulings
21 with respect to the -- for the "N" word at the
22 deposition. The context of that question and the
23 context of the discussion of the deposition was
24 very different than what we now know it is. At
25 that point, we had a posting on a website. We

1 didn't know the context. And the basis of my
2 question was, Have you ever heard Mr. Hogan use
3 the "N" word? And that was what was objected to,
4 and that was what your ruling was sustained on.

5 At that point, we didn't know that there were
6 summaries of these tapes. We didn't know that
7 these words were used or potentially used on those
8 tapes. And the only reason that we didn't
9 understand the context and know how that thing
10 came up and why it showed up on a website, we
11 weren't aware of it. But at that point, at least
12 Mr. Houston was. Potentially Mr. Bollea was. And
13 certainly Mr. Clem, who did the filming and made
14 the comment, understood why that website had
15 posted that information. But we weren't aware of
16 it. That ruling does not dictate the outcome
17 of -- or give them the ability to redact that
18 information out of these documents.

19 Mr. Harder also suggested there is no
20 evidence that Mr. Bollea made these comments. And
21 that may well be the case. We don't know. But we
22 were never allowed to ask the question. We didn't
23 have the context within which to ask the
24 information. And that's the only reason that we
25 don't know.

1 Again, at the end of the day, the plaintiff
2 claims that this is not going to be admissible,
3 that these things are highly prejudicial, hearsay
4 and whatnot. But that question can only be
5 addressed after a full factual record is made,
6 after discovery is closed, and we can assess, Are
7 these things relevant? Are they admissible?
8 Under what circumstances will they be? At this
9 point we simply don't know. But that's not the
10 question that is before you. The question is
11 whether they should be produced to attorneys on an
12 attorney's-eyes-only basis.

13 We do have a theory of relevance of how they
14 may ultimately be relevant to this case. But it's
15 work product. If you would like for us to make an
16 ex parte showing on that, we would be happy to do
17 so. But if it would helpful for this argument --
18 but at this point, that's not really the question
19 before Your Honor --

20 JUDGE CASE: Uh-huh (Indicates
21 affirmatively).

22 MR. BERRY: -- whether they're ultimately
23 relevant or not.

24 JUDGE CASE: Anything else?

25 MR. HARDER: Just briefly, just to respond to

1 what Mr. Berry said.

2 I will take the phone records first just to
3 respond to him. He said this has already been
4 argued and already been decided, that it's like a
5 game of connect the dots that his kids play, and
6 they feel that we're making them connect the dots,
7 and that's not the proper way of doing discovery.

8 Let me take that first. If you have a phone
9 number, Your Honor, that's -- what's the area code
10 here?

11 MR. TURKEL: 727.

12 MR. HARDER: 727. And then let's just say
13 it's 987-6543. If you have a phone number like
14 this, that would be a Clearwater phone number.
15 And if you take out these three digits, you still
16 have a nearly complete phone number. And if you
17 determine that there is a witness who has a phone
18 number that matches to this, then you can -- I
19 mean, litigation is connecting the dots. That's
20 what litigation is.

21 If you find a witness who has -- let's say I
22 produce the entire thing, all of the phone
23 numbers. And let's say they have a witness and
24 they have to find out the number of the witness.
25 They would have to do that in order for this to be

1 of any relevance or use to them. So they find out
2 that Joe Smith is a witness, and they find out
3 what his phone number is. And they look at this
4 and they say, Ah-ha, Joe Smith called Mr. Bollea,
5 or Mr. Bollea called Joe Smith on X date. Great,
6 we've got it. If you take this out, they still
7 have his phone number, and they can match it up.

8 They can still match up the fact that this
9 could be Joe Smith. And then they could call me
10 and say, Mr. Harder, we think you've got a phone
11 number of a witness. And I will just give it to
12 them. Here you go. If you think it's your
13 witness, go ahead. Or I may say, Well, who do you
14 think it is, and what's that phone number? That's
15 just to clarify. Fine, here you go.

16 It's no different whether we do this or we
17 don't do this. It's no different with respect to
18 any witness in the case. They have to get the
19 phone number from the witness first. Otherwise,
20 what you have is a log that has phone number after
21 phone number after phone number. And to determine
22 that these people are witnesses, you get on the
23 phone and you start calling them all.

24 You call everybody that he ever received a
25 phone call from or made a phone call to during the

1 course of the year 2012, and say, Hi, who is this?

2 Oh, this is Joe Smith.

3 Oh, do you know Terry Bollea? How do you
4 know him? Do you know anything about the sex
5 tape? Do you know anything about Heather Clem?

6 I mean, that's the only way otherwise that
7 you would be able to determine a witness by having
8 a phone log.

9 What they have said -- the reason why they
10 wanted the phone logs is so they can determine if
11 he made phone calls to Bubba or Heather or other
12 relevant witnesses during the period of 2012. We
13 didn't redact Heather Clem, Bubba Clem, any other
14 witnesses in the case as to his phone records.
15 But as to the nonwitnesses, nonparties, we did
16 that to it. So that if they let us know if this
17 matches up with Joe Smith who was a witness, there
18 you go; you've got it. Now you can determine that
19 he made that phone call or if the phone call was
20 made to him.

21 So for purposes of providing them with what
22 they need, I feel that I have done that. For
23 purposes of protecting third parties, I feel like
24 I have done that. For purposes of preventing some
25 kind of an avalanche of phone calls to everybody

1 that he knows, including his business contacts,
2 his personal contacts, to the extent that they
3 were ever interested in doing that, I have
4 prevented that from happening. They say that they
5 are not interested in that, and that's fine. But
6 still, what we have done is, I believe, a proper
7 balance between nonparty privacy and their right
8 to find out what phone calls he made to relevance
9 witnesses.

10 And, again, Your Honor, I have said it three
11 or four times. If you disagree with me, we'll
12 give them the phone records, but I think that
13 we've struck the proper balance.

14 Mr. Berry made a comment about Daulerio's
15 e-mail. The true facts are that they provided
16 some information to us in an interrogatory
17 response, and that interrogatory response said --
18 and I will quote it because I have their
19 interrogatory response right here -- Although the
20 package, which had the DVD of the sex tape,
21 contained no return address, Gawker does not
22 believe the video was sent to Gawker by
23 Mr. Burton.

24 And then, Gawker also does not believe that
25 the video was sent by Mr. Calta, referring to Mike

1 Cowhead Calta.

2 Eight months after he asked for documents --
3 eight months, and it was after we took the
4 depositions of their witnesses -- they provided us
5 with e-mails for the first time, because we didn't
6 have them at A.J. Daulerio's deposition. A.J.
7 Daulerio to Tony Burton about three days before
8 they posted the sex tape: So we're going to slice
9 this up into a highlight reel -- this is A.J.
10 Daulerio, their editor-in-chief -- then do some
11 commentary on the stills. I'll just say this came
12 across our desk, right, question mark?

13 And the response is: However you want to say
14 you got it. All I know is that it was sent to you
15 anonymously.

16 We got that eight months down the road. So I
17 just want to correct that, because we didn't have
18 that at A.J. Daulerio's deposition. We would have
19 loved to have asked him about that.

20 And this whole thing about you stonewall us
21 or you don't provide things, I mean, look, if it's
22 an honest thing -- and I know we're not arguing
23 the sanctions motion thing, but I'm not asking for
24 sanctions. I didn't bring a motion for sanctions,
25 because we eventually got what we asked for. But

1 sometimes counsel ends up with things, and then
2 they end up producing it, and they realize, Oops,
3 I should have produced that a long time ago.

4 Also, when it came to an insurance policy,
5 they had a second insurance policy. It took them
6 six months to produce that after we had asked for
7 it. And they even told me the existence of the
8 second insurance policy, and it still took months
9 and months for me to finally get it.

10 So, look, sometimes things show up late. And
11 I realize that is a little bit far afield, but I
12 wanted to address this Daulerio issue, because I
13 think it's very important.

14 The issue of -- I guess we're now into the --
15 I guess we're now into the issue of the racial,
16 and he was talking about the Daulerio e-mails.
17 And I think it was basically the connection of
18 Tony Burton, agent of the Buchwald agency to all
19 this. He said there two separate individuals who
20 they believe created the summaries. We looked at
21 these summaries, and it looked like it was the
22 same person who created them, and they may have
23 tinkered with them.

24 But in any event, whether it's one person or
25 two people, it's irrelevant to the fact that

1 racial language was never in their possession of
2 their video. They never published it. They never
3 published a narrative about it. It's not part of
4 their story. It's not part of their claims. It's
5 not part of their defenses to us. They want to
6 find out all things related to the sex tape. Are
7 there more than one tape. Even though it's far
8 afield, they're conducting that discovery, and
9 that's fine. They have received these summaries
10 here.

11 Where did I put those, from the extortionist?

12 They have it. They have all the information
13 that they need in order to conduct their discovery
14 into the extortion issue.

15 The fact that we took out five words -- I'm
16 happy, again, Your Honor, if you feel it's
17 necessary, I'm happy to show you an unredacted
18 version with highlighting --

19 JUDGE CASE: That's okay.

20 MR. HARDER: -- the words that we're talking
21 about. They received all of this. There is just
22 a word here; there is a word here; there is a word
23 here, here, and here, and here. That was taken
24 out because these are the terms, the terminology,
25 that's explosive, that's irrelevant, and it's

1 explosive. The fact that there could be an
2 attorney's-eyes-only provision, we have stamped it
3 attorney's eyes only. But still, it should -- it
4 should never exist on video because it was done in
5 a private place. It should never exist on paper,
6 because it was done in a private place. It should
7 not be part of this litigation, the racial stuff,
8 because it's not in their video.

9 It's so far afield, and it's so highly
10 prejudicial, and it is never going to show up in
11 front of a jury's eyes. It would be so
12 tremendously prejudicial, and there is no
13 probative value.

14 It's not -- the racial terms are not
15 reasonably calculated to lead to admissible
16 evidence. They have all they need, Your Honor, to
17 explore the extortionist issue. They have
18 probably 99.9 percent of the words from the
19 extortionist. They don't need the racial words on
20 top of it.

21 Talking about Bubba Clem testified that there
22 is one tape, that's the only testimony that's
23 competent testimony that we have as to the number
24 of tapes. Bubba Clem -- I don't remember exactly
25 what he says, if he says, I don't recall there

1 being a second tape, or, I never created a second
2 tape. But whatever it may be, adding the racial
3 terms to this is not going to help them get to the
4 bottom line of how many tapes there are. Either
5 there are two or three or there aren't two or
6 three, or just one.

7 But adding the racial terms is not going to
8 get them any answers of the things that they claim
9 to be relevant and the things that they claim to
10 be legitimate discovery. And because of the
11 explosiveness of this issue, the potential for
12 damage, the type of defendant that we're dealing
13 with that publishes these types of things, in
14 addition to the fact that it's irrelevant, that
15 it's not reasonably calculated, there is just an
16 added element of -- it's just not something that
17 is legitimate discovery. And when Your Honor
18 sustained the objection to the question, did
19 Mr. Bollea ever use the "N" word, that was the
20 proper ruling, and we would request that that be
21 followed still.

22 Thank you.

23 JUDGE CASE: Okay.

24 MR. BERLIN: Mike wasn't in the case at the
25 time, but I'm happy to address Mr. Harder's

1 assertion that we've somehow misrepresented the
2 nature of Tony Burton. We identified him in our
3 initial interrogatory responses.

4 JUDGE CASE: Right.

5 MR. BERLIN: And we produced a bunch of
6 e-mails from Gawker's e-mail in response
7 to discovery requests to Gawker. One of the
8 things that those discovery requests identified
9 was that A.J. Daulerio, who is another defendant
10 in the case, no longer works for Gawker. And the
11 e-mails that he's reading from are from
12 Mr. Daulerio's personal e-mail account, which
13 Gawker doesn't control. And when he served
14 discovery requests on Mr. Daulerio, those were
15 produced. And he didn't do that until after
16 Mr. Daulerio's deposition, and that was his
17 choice. But we actually did exactly what we were
18 supposed to do. And, in fact, Gawker would not
19 have been able to have possession, custody, or
20 control of a former employee's e-mail, to
21 go rummaging through them.

22 JUDGE CASE: Right.

23 MR. BERLIN: And the information -- but we
24 weren't hiding that there was Tony Burton or that
25 this was where we got it. And, in fact, the

1 e-mails -- the e-mails speak for themselves. But,
2 you know, I think if you ask both Mr. Burton and
3 Mr. Daulerio, they believe that Mr. Burton didn't
4 provide this tape, or Mr. Calta didn't provide
5 this tape. And, you know, apropos of what I was
6 talking about earlier and how one answers
7 discovery, we could have said, We don't know that
8 for sure, so we're going to say nothing. Instead,
9 we answered the question as best we could, which
10 is, This is the information we have. We don't
11 believe it's where the tape came from, but, you
12 know, we want to give you that information.

13 JUDGE CASE: Okay.

14 MR. BERLIN: I just wanted to be clear about
15 that on the record. I don't think it bears much
16 on this motion, but since there has been assertion
17 that we were not correct in discovery, I want to
18 be clear on the fact that we were. If Mr. Berry
19 wants to talk to the merits, I'll be quiet.

20 MR. BERRY: The only thing I would say on the
21 merits with respect to the racial language is the
22 same thing that I ended up with, is that we don't
23 think that there is ultimate admissibility of this
24 evidence, whether it's prejudicial, hearsay,
25 whatnot, is the question. But to the extent that

1 Your Honor is interested in considering that, we
2 would be happy to make an ex parte showing at this
3 point of why we think that it might be.

4 With respect to the phone records and
5 Mr. Harder's presentation, those three missing
6 digits could end up being 9,999,999 different
7 phone numbers. And there is no possible way that
8 we could figure out who might have talked to
9 Mr. Bollea.

10 What should have happened and what should
11 happen is that they produce the records and that
12 we can go down -- go with Mr. Bollea and ask him,
13 Does this refresh your recollection whether you
14 talked to this person or you talked to this person
15 or you talked to that person? We can't even do
16 that at this point, because I trust that if you
17 show Mr. Bollea half of a phone number, he's not
18 going to remember whose phone number that is
19 either.

20 JUDGE CASE: Okay. All right. I'm going to
21 work backwards.

22 I'm going to ask you to produce all the
23 records, all --

24 MR. HARDER: Phone logs?

25 JUDGE CASE: -- all the phone logs

1 unredacted. And I trust counsel not to abuse the
2 situation, because, obviously, nonparties,
3 nonwitnesses that have no association with this
4 case shouldn't really be bothered by anonymous
5 phone calls just on a fishing expedition. So with
6 that clarification, I'm going to order that the
7 phone records be produced.

8 Okay. Back to the other argument on the five
9 redacted words. Counsel makes a very compelling
10 argument to me on why these words should be
11 redacted and why that issue should not come
12 anywhere near this case at this stage of the
13 proceedings. You have a document that you don't
14 know who drafted it. You don't know where it came
15 from. You don't know anything about it, other
16 than it has inflammatory language in it that has
17 no business in this case whatsoever that I can see
18 right now. So your motion is granted.

19 You asked me to consider requiring the
20 defendant to surrender the unredacted copy that
21 they had obtained in their possession. It would
22 be my recommendation to Judge Campbell that she do
23 so. I'm not going to -- I don't think I have the
24 authority to order that at this point in time.

25 But it would certainly be my recommendation

1 that, given the nature of the content as it is --
2 and I'm not suggesting that anybody, you or your
3 firm, you know, would violate the
4 attorney's-eyes-only provision. But as we all
5 know sitting around this table, stuff happens.
6 And I would certainly hate to see any accidental
7 publication of this either from yourself or any
8 other publicist where they got -- could get their
9 hands on it. So the motion is granted.

10 MR. BERRY: Your Honor, can that be without
11 prejudice? As I said, we have some thoughts about
12 how this may ultimately lead to admissible
13 evidence down the road.

14 JUDGE CASE: Absolutely. No, no. You can
15 always go back and revisit something like this.
16 Like I said, he made a very compelling argument,
17 but I'm certainly willing to listen to at a
18 subsequent time, under the proper circumstances
19 that you've described, you know, why it might at
20 some day or some time become relevant.

21 MR. BERLIN: In that regard, might we ask
22 that either they be ordered to preserve the
23 unredacted versions or they be provided to you to
24 hold on to?

25 MR. HARDER: We will absolutely preserve

1 them.

2 JUDGE CASE: Preserve them, yes.

3 MS. DIETRICK: Can we provide them to you to
4 hold on to?

5 JUDGE CASE: Me?

6 MS. DIETRICK: Yes.

7 JUDGE CASE: I don't want them. It's too hot
8 a potato.

9 MR. TURKEL: Are they Bates?

10 MR. HARDER: Yes.

11 MR. BERLIN: They were Bates by the
12 Don Buchwald people.

13 MR. TURKEL: Bates them and preserve them.

14 MR. HARDER: Yeah. I don't know about the
15 Buchwald --

16 MR. BERRY: The Buchwald documents aren't
17 Bates.

18 MR. THOMAS: Just so there is no confusion of
19 what's being preserved, whatever it is, let's make
20 sure it's Bates.

21 MR. HARDER: As far as the Bates, we received
22 documents from the Buchwald Agency. We produced
23 them in a redacted form. I believe that you guys
24 obtained them in an unredacted form. So whatever
25 you have, I don't know what it looks like, whether

1 it has a Bates or not a Bates, but we need those
2 to be brought back to us.

3 And I assume they're going to be identical to
4 the ones that we've already redacted and provided
5 to you. And if they are not, I will redact those
6 and provide you the redacted version, but I assume
7 it's the same thing.

8 MR. BERRY: Your Honor, with all due respect,
9 I mean, these are third-party documents. These
10 aren't their does.

11 JUDGE CASE: I know.

12 MR. BERRY: They were sent to us by a third
13 party.

14 JUDGE CASE: I understand, but I'm just
15 saying --

16 MR. BERLIN: We're --

17 JUDGE CASE: You'll have a chance to do this
18 again in front of Judge Campbell, I'm certain.

19 MR. BERLIN: Let me represent to the Court
20 that in the meantime, because we are going to have
21 an opportunity to do this in front of
22 Judge Campbell, that I would -- to address the
23 concern that you're raising about stuff happening,
24 we'll take the documents, and we'll put them in a
25 sealed envelope, and we'll put them in our law

1 firm's safe so that if they should come to light,
2 it wouldn't be from us.

3 JUDGE CASE: Okay. Pending Judge Campbell's
4 ruling.

5 MR. BERLIN: Of course. If Judge Campbell
6 tells us to do something else, we will do that.

7 JUDGE CASE: But in the meantime, I
8 appreciate your --

9 MR. BOLLEA: Where are the documents now, if
10 they're not in a safe, sealed?

11 MR. BERLIN: They're in a locked file
12 cabinet, but so that they should have extra added
13 protection --

14 MR. HARDER: Well, I assume you have
15 electronic copies that have been scanned that are
16 sitting on your computer, so you'll have to delete
17 all those files.

18 MR. BERRY: Right. And in our system,
19 they're marked for -- under a protective order.

20 MR. HARDER: I'd feel safer, Your Honor, if
21 they all came back to us. And if they were
22 determined to be relevant in some fashion and we
23 had to produce them, we will maintain them in
24 exactly the form that they are in.

25 JUDGE CASE: Until Judge Campbell has an

1 opportunity to rule on this, I will accept Seth's
2 suggestion that they seal them and put them in
3 their law firm safe.

4 MR. HARDER: Okay.

5 JUDGE CASE: Somehow, they've got to also do
6 the same thing with the electronic version that's
7 probably available to any lawyer in your firm, or
8 legal assistant.

9 MR. HARDER: I mean, you could put it onto a
10 thumb drive, put that in the safe, and delete them
11 off your system.

12 JUDGE CASE: Correct.

13 MR. BERLIN: I believe we can figure it out.
14 I don't exactly know the technology, but I'm sure
15 we can figure out a way.

16 MR. TURKEL: In the recommendations to put in
17 the interim, we need to reflect that so it's clear
18 that --

19 JUDGE CASE: It's in the interim until --

20 MR. TURKEL: -- until any appellate remedies
21 have --

22 JUDGE CASE: Right.

23 MR. HARDER: And then any copies that might
24 be at Gawker have to be either sent to Seth or
25 destroyed.

1 JUDGE CASE: I don't know --

2 MR. HARDER: Well, Ms. Dietrick is the
3 general counsel at Gawker. I don't know if she
4 has a copy or not.

5 JUDGE CASE: Does she have a copy?

6 MR. BERLIN: I don't know. But we can work
7 that out and get them back and --

8 MS. DIETRICK: I have a copy of whatever is
9 attached to the briefing.

10 MR. BERLIN: It was attached, actually.

11 MS. DIETRICK: It was attached to the
12 briefing that was in your compilation that you
13 have right now. I don't have a separate copy. I
14 have the same thing that was filed.

15 JUDGE CASE: Okay.

16 MR. BERLIN: Yeah. I mean, that's one of the
17 concerns about, you know, taking back from lawyers
18 things that they've already been put in court
19 filings.

20 JUDGE CASE: Sure.

21 MR. BERLIN: And we'll raise that with
22 Judge Campbell.

23 JUDGE CASE: Okay.

24 MR. BERLIN: But we can certainly take that
25 up.

1 MS. DIETRICK: And I have several -- more
2 than several layers of protection technologically
3 and physically.

4 JUDGE CASE: Okay. I hope so. All right.

5 MR. HARDER: Thank you, Your Honor.

6 JUDGE CASE: Let's talk about the next time
7 we get together.

8 MR. HARDER: Should we have a discussion
9 about bringing the case to trial and --

10 JUDGE CASE: Sure.

11 This doesn't need to be on the record.

12 MR. HARDER: I don't think we need it on the
13 record.

14 JUDGE CASE: Right.

15 (Hearing concluded at 12:50 p.m.)
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REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, Aaron T. Perkins, Registered Professional Reporter, certify that I was authorized to and did stenographically report the above hearing and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 22nd day of July, 2014.

Aaron T. Perkins, RPR