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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447 CI-011

vs.

GAWKER MEDIA, LLC aka GAWKER MEDIA; NICK DENTON; A.J. DAULERIO,

Defendants.
_____________________________________/

PLAINTIFF'S EMERGENCY MOTION TO STRIKE AND REMOVE ALL MATERIALS FROM THE RECORD THAT DISCLOSE OR ARE DERIVED FROM ILLEGALLY RECORDED AUDIO

Plaintiff, Terry Bollea professionally known as Hulk Hogan ("Mr. Bollea"), pursuant to Rule 1.140, *Fla. R. Civ. P.*, and decisional law, moves this Court for an order immediately striking and removing all records from the court file which contain, disclose or are derived from any of the contents of illegally recorded conversations involving Mr. Bollea, made in violation of Article I, Section 12 of the Florida Constitution and Florida's Security of Communications Act (the "Act"), with the exception of evidence of or derived from the article and video posted on Gawker.com on October 4, 2012, which is the subject of this lawsuit. The grounds upon which this motion is based and reasons it should be granted are as follows:

Introduction

Over the past several years, the Gawker Defendants have repeatedly victimized Mr. Bollea by knowingly using and disclosing the content of illegally recorded videos to try to profit from, and publicly destroy Mr. Bollea with the fruits of the crimes committed against him. Mr. Bollea has fought tirelessly to try to stop people from violating his privacy rights and Florida

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law with surreptitiously obtained recordings of him naked, engaged in consensual sexual activity and private conversations in a private bedroom. He has endured years of extremely costly litigation to try to protect his fundamental privacy rights and in turn the privacy rights of others.

In retaliation, the Gawker Defendants persist in their efforts to use irrelevant, inadmissible and illegally recorded materials to gain a tactical advantage in this case and potentially taint the jury pool heading into trial. The Gawker Defendants have "chummed the waters" of the court file with the lure of impertinent and immaterial content from illegally recorded conversations involving Mr. Bollea because they know that media companies are circling and poised to devour any salacious materials the Gawker Defendants dump into the court file.

The time has come to put an end to the games that Gawker Defendants are playing with Mr. Bollea's life's work, career and legacy. The time has come to stop those who are using this Court as a vehicle to further destroy the privacy rights of the victim of a crime, in clear violation of Florida's Constitution, public policy and well-established laws. Mr. Bollea therefore moves the Court to strike and remove[1] from the court file the fruits of the crimes committed against him, because sealing those records within the court file is no longer a sufficient method to enforce Florida law and protect Mr. Bollea's undeniable Constitutional and statutory privacy rights.

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[1] Mr. Bollea notes that several of this Court's orders regarding the confidential nature of the subject materials, and the orders which sealed many of the materials at issue in this motion, are currently under review in the Second District Court of Appeal (Second DCA Case No. 2D15-5044, filed by Intervening Media Companies). However, the sealing orders have **not** been stayed, and are therefore subject to modification or amendment by this Court at any time. *See, e.g., Curry v. State*, 880 So.2d 751, 755-56 (Fla.2d DCA), *rev. den.*, 888 So.2d 17 (Fla. 2004) (certiorari is an original proceeding in the district court of appeal and "has no effect on the jurisdiction of the circuit court unless a stay of the proceedings is granted"); *In re J.T.,* 947 So. 2d 1212 (Fla. 2d DCA 2007) (certiorari petition had no effect on circuit court's jurisdiction).

The Evidence Establishes that Mr. Bollea Was Illegally Recorded

The Court's and counsel's recent viewing of the corrected and unredacted DVDs produced by the FBI established that Mr. Bollea was secretly recorded in a private bedroom in violation of Florida law. Consequently, with the exception of the material posted on Gawker.com on October 4, 2012, no part of the content of Mr. Bollea's illegally recorded conversations, nor any evidence derived therefrom, should be publicly available in the court file. Well-established Florida law mandates that all such materials not be disclosed.

Mr. Bollea has consistently maintained, and testified under oath, that he did not know he was being recorded in the Clems' bedroom. Bubba Clem and Heather Clem have both, under oath,[2] confirmed this to be the case. Other third-party witnesses have corroborated that Mr. Bollea did not know he was being recorded. (*See* Omnibus Opposition.) The illegally recorded video itself, recently viewed by the Court and counsel for the parties, also makes it abundantly clear that Mr. Bollea was secretly recorded—based upon the setting, the nature and substance of the conversations, Mr. Bollea's conduct, and the conduct of others.

The device that was used to secretly record images of Mr. Bollea naked and engaged in sexual activity, and to intercept Mr. Bollea's private conversations in a private bedroom, was concealed above cabinets, and behind a plant, in the Clems' Bedroom. (Rice Depo. p. 25:10–25:18) The device was disguised as a motion detector, and there was nothing on it that would indicate that it was recording. (Clem Depo. Exhibit 51, pp. 196:24-197:13) (Rice Depo. p. 27:1-27:11) The following photo illustrates an example of what the recording device in the Clems' bedroom looked like (although the location was different at the time of the recording):

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[2] Bubba Clem initially claimed that Mr. Bollea knew about the recording, but explained under oath at his deposition that he was lying at that time to "cover his a**." (*See,* Omnibus Opposition)

Mr. Bollea was intentionally recorded. The secret recording device concealed in the Clems' bedroom only recorded if a DVD was placed in the recorder, and a button was pushed to "record." (Rice Depo. pp. 27:22-28:6) ("It would not do anything automatically. It actually required a user to – a human being to go and push the record button. This could not be set for timer record; this could not be set to automate, in any way.")

Florida Law Prohibits the Use or Disclosure of Surreptitious Audio

Section 934.03(1)(c)-(d), Fla. Stat., prohibits the use or disclosure of the "contents" of oral communications when one knows or has reason to know that such information was obtained through surreptitious recording. "Contents" is defined as "any information concerning the substance, purport, or meaning of that communication." § 934.02(7), Fla. Stat. The Act's clear prohibition against the disclosure or use of secretly recorded audio is based upon Florida's public policy that the privacy of oral communications must be protected. *State v. Walls*, 356 So.2d 294, 296 (Fla. 1978). This policy is also embodied in Article 1, Section 12 of Florida's Constitution, which provides that the rights of people against the unreasonable interception of private

communications by any means "shall not be violated." Stated simply, Florida doesn't allow its citizens to be secretly recorded, and will not tolerate people using illegal recordings against them.

This policy is so strong that Courts are statutorily prohibited from receiving the contents of and any evidence derived from a secretly recorded conversation into evidence in any legal proceeding or trial, if doing so would also violate the Act. § 934.06, Fla. Stat. This statutory exclusion is "absolute." *Jackson v. State*, 636 So.2d 1372, 1374 (Fla. 2d DCA 1974).

The underlying intent of the Act is to protect the privacy of oral communications, and to protect the integrity of court proceedings. *State v. Walls*, 356 So.2d 294, 296 (Fla. 1978). "The Legislature chose to prohibit unauthorized interception and use of the contents of such interception in evidence in court and administrative proceedings." *Id.* The exclusionary rule embodied in Section 934.06, Fla. Stat., applies to civil and criminal cases. *Horn v. State*, 298 So.2d 194, 201 (Fla. 1st DCA 1974). The purpose of Chapter 934 is also to protect the victims of illegal intercepts.

McDade v. State, 154 So.3d 292 (Fla. 2014), demonstrates the broad scope of the Act. In *McDade*, Florida's Supreme Court concluded that even a recording of the solicitation and confirmation of child sexual abuse surreptitiously made by the child victim in the accused's bedroom was inadmissible under Section 934.06. 154 So.3d at 293. In *McDade*, a sixteen year-old girl who had been sexually assaulted since she was ten, secretly recorded her stepfather confirming the sexual abuse in his bedroom. The Second District Court of Appeal ruled that the recording should have been admitted in the stepfather's criminal trial, but the Florida Supreme Court reversed, recognizing its prior decision in *State v. Walls*, which held that a surreptitious

recording made by the alleged victim of extortionary threats in the victim's home was also inadmissible.

In *McDade*, the Supreme Court noted the importance of the location of the subject conversations, the visibility of the recording device and the content of the recordings, when deciding whether the victim had a reasonable expectation of privacy.[3] Here, the conversations between Mr. Bollea and the Clems occurred in a private bedroom,[4] as was the case in *McDade*. The recording device was concealed, as was the case in *McDade*. The content of the recordings (which this Court and counsel have now reviewed) confirms that Mr. Bollea did not know he was being recorded; while the subject matter of the conversations also makes it clear that Mr. Bollea believed his conversations were private.[5] Moreover, Bubba Clem and Heather Clem both testified that Mr. Bollea was surreptitiously recorded.

Under similar factual circumstances, numerous other courts have excluded evidence of intercepted oral communications under Section 934.06. *Perdue v. State*, 78 So.3d 712 (Fla. 1st DCA 2012); *Horn v. State*, 298 So.2d 194 (Fla. 1st DCA 1974); *State v. Tsavaris*, 382 So.2d 56 (Fla. 2d DCA 1980). In the cases in which courts concluded that intercepted communications were admissible, the recording device was obvious, the locations were such that an expectation of privacy was not reasonable, or the recording was made unintentionally. *State v. Inciarrano*,

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[3] The speaker must have an actual subjective expectation of privacy in his conversation, and society must be prepared to recognize the expectation as reasonable under the circumstances. *Stevenson v. State*, 667 So.2d 410, 412 (Fla. 1st DCA 1996) (citing *State v. Smith*, 641 So.2d 849, 852 (Fla. 1994)). "Where both elements are present, the statute has been violated whether the intercepted communication is private in nature or not." *Id.* (citing *LaPorte v. State*, 512 So.2d 984 (Fla. 2d DCA 1987), review denied, 519 So.2d 987 (Fla. 1988)).

[4] A significant factor used in deciding the reasonableness of the expectation of privacy is the location: "conversations occurring inside an enclosed area or in a secluded area are more likely to be protected under Section 934.02(2)." *Stevenson*, 667 So.2d at 412.

[5] This fact is cemented by Bubba Clem's "retirement" comment – which clearly establishes Mr. Bollea didn't know he was being recorded.

473 So.2d 1272 (Fla. 1985); *Stevenson v. State*, 667 So.2d 410 (Fla. 1st DCA 1996); *Belle v. State*, 177 So.3d 285 (Fla. 2d DCA 2015). None of those circumstances are present here.

Importantly, Section 934.06 provides that the "contents" of an intercepted conversation should not be received in evidence. As set forth above, section 934.02(7) defines "contents" to include "any information concerning the substance, purport, or meaning of that communication." *See also*, *Tsavaris*, 382 So.2d at 66. Applied here, this precedent means that the substance of Mr. Bollea's intercepted conversations, other than those specifically disclosed on Gawker.com which are at the center of this case, cannot be used or disclosed.

Section 934.06 also prohibits the admission of the "fruit of the poisonous tree." *Horning-Keating v. State*, 777 So.2d 438, 448 (Fla. 5th DCA 2001). The exclusionary law applies to other evidence emanating from the content and substance of Mr. Bollea's surreptitiously recorded conversations. *Id.*; *see also*, *Bagley v. State*, 397 So.2d 1036 (Fla. 5th DCA 1981); *Smith v. State,* 438 So.2d 10 (Fla. 2d DCA 1983). Practically, this means that the FBI investigation should also be excluded as fruit of the poisonous tree.

In *Horning-Keating*, the Court held that recordings made in violation of Article I, Sections 12 and 23 of the Florida Constitution and Section 934.03 and 934.06, Florida Statutes, could not be used to frame questions posed at deposition. Thus, it was held to be reversible error for the trial court to compel answers to deposition questions derived from an intercepted recording.

The clearest definition of "evidence derived from," as applied to the facts presented here, is found in *State v. Williamson*, 701 So.2d 1243 (Fla. 5th DCA 1997), which held that "suppression of the recordings of subsequent authorized conversations is required only if the contents of the improperly recorded conversation was the basis for authorizing such subsequent

recordings and not merely one of the several factors that bolstered the complainant's credibility." In *Williamson*, law enforcement wiretaps subsequent to a conversation that was illegally recorded were deemed admissible because they would have been authorized by law enforcement regardless of whether the illegal recording was made. Here, however, Mr. Bollea's surreptitiously recorded conversations were, in and of themselves, the basis for the FBI investigation and subsequent authorized recordings. Unlike *Williamson*, the illegal recordings of Mr. Bollea were used to commit the extortion; and absent the recordings, the resulting law enforcement investigation never would have occurred.

In the criminal context, law enforcement investigations based upon illegal recordings are routinely excluded as "fruit of the poisonous tree." Where the exploitation of illegally recorded conversations, and not independent lawful investigation or fortuitous discovery, leads to investigations and resulting evidence, the entire investigation and any evidence derived therefrom is tainted and must be excluded. *Smith v. State*, 438 So.2d 10, 13 (Fla. 2d DCA 1983)

Considering the protections afforded to criminal defendants under Section 934.06, Mr. Bollea, who is the **victim** of an illegal recording, and also the **victim** of an extortion attempt using the very same illegally recorded material, should not be afforded less protection because he sought the assistance of the FBI. The intent of the Act is to protect the privacy of the victims of interception. This should necessarily include prohibiting the disclosure and use of collateral evidence associated with a law enforcement investigation.

Accordingly, with the exception of Mr. Bollea's conversations actually disclosed on Gawker.com, the content of Mr. Bollea's intercepted conversations, and evidence derived therefrom, including the entire FBI investigation file, cannot be used, disclosed or received into evidence by the Court.

Materials Disclosing the Content of and Evidence Derived From Surreptitious Audio Should Be Stricken and Removed From the Court File

The inadmissible, immaterial and impertinent evidence of and derived from Mr. Bollea's illegally recorded conversations should not be maintained in the court file. When such information is placed in a court file, the rules of procedure allow a party to file a motion to strike the matter from the record. *Holt v. Sheehan*, 122 So.3d 970, 974 (Fla. 2d DCA 2013). A motion to strike should be granted when the material at issue can have no bearing on the equities, and no influence on the decision in a case. *Pentecostal Holiness Church, Inc. v. Mauney*, 270 So.2d 762, 769 (Fla.4th DCA 1972). Materials that cannot be disclosed or used for any purpose, and which Florida law bars from being admitted into evidence, have no bearing on the equities and no bearing on the outcome of this case.

When impertinent and immaterial information is placed in a court file, the only recourse to the party harmed by the information is to move to strike the matter from the record. *Holt,* 122 So.3d at 974 (striking order from the record, and permitting judge to "replace" it with another order). Materials filed in the court file which are "not an integral part of the case and serve no legal purpose" should be stricken. *Sonderling v. Sonderling*, 600 So.2d 1285, 1287 (Fla. 3d DCA 1992). Materials which "gratify public spite or promote public scandal" should not be allowed to remain in the "public domain." *Id.*

In a situation analogous to what has transpired here, the Circuit Court of the Seventh Judicial Circuit directed the Clerk to "remove [a] sealed transcript of testimony from the court file and place it in the clerk's evidence locker." *State v. Barber,* 2004 WL 3605656, *1 (July 30, 2004). In *Barber,* a copy of a transcript of grand jury testimony was filed in the court file, and subsequently released to members of the press. Here, much like grand jury testimony, Florida

law prohibits the contents of illegally recorded conversations from being disclosed. Therefore, all such materials should be stricken and removed from the Court file.

Conclusion

Mr. Bollea is the victim of a crime, who continues to be victimized with the content of surreptitious recordings made in violation of his constitutional rights and Florida law. Evidence of and derived from Mr. Bollea's illegally recorded conversations cannot be used, disclosed, or received in evidence. Consequently, these materials have no bearing on the merits of this case, and should be stricken, removed from the court file, and secured in the Clerk's safe or evidence locker.

WHEREFORE, Mr. Bollea respectfully requests that the Court enter an Order immediately striking and directing the Clerk of the Court to remove from the court file all of the filings in the Court file containing, referencing or disclosing any material in violation of the Act, as well as any evidence derived therefrom, with the exception of the article and video posted on Gawker.com on October 4, 2012 which is at issue in this lawsuit.

/s/ Kenneth G. Turkel

Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Shane B. Vogt
Florida Bar No. 0257620
BAJO | CUVA | COHEN | TURKEL
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: svogt@bajocuva.com

-and-

Charles J. Harder, Esq.
PHV No. 102333
Douglas E. Mirell, Esq.
PHV No. 109885
Jennifer J. McGrath, Esq.
PHV No. 114890
HARDER MIRELL & ABRAMS LLP
132 South Rodeo Drive, Suite 301
Beverly Hills, CA 90212-2406
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com
Email: dmirell@hmafirm.com
Email: jmcgrath@hmafirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 9th day of February, 2016 to the following:

Barry A. Cohen, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1950
Tampa, Florida 33602
bcohen@tampalawfirm.com
jhalle@tampalawfirm.com
mwalsh@tampalawfirm.com
Counsel for Heather Clem

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esquire
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com
abeene@tlolawfirm.com
Counsel for Gawker Defendants

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com
krosser@houstonatlaw.com

Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Alia L. Smith, Esquire
Michael D. Sullivan, Esquire
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW, Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
msullivan@lskslaw.com
Pro Hac Vice Counsel for
Gawker Defendants

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
Pro Hac Vice Counsel for
Gawker Defendants

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hklaw.com

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amnestee@aol.com
asteele@rahdertlaw.com
ncampbell@rahdertlaw.com
Attorneys for Intervenor Times Publishing Company

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hklaw.com

Attorneys for Intervenors, First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, Vox Media, Inc., WFLA-TV, Media General Operations, Inc., Cable News Network, Inc., Buzzfeed and The Associated Press.

/s/ Kenneth G. Turkel
Attorney