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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 MOTION TO MODIFY, SUPPLEMENT AND/OR AMEND ORDERS SEALING SURREPTITIOUS AUDIO AND EVIDENCE DERIVED THEREFROM

Plaintiff Terry Bollea professionally known as Hulk Hogan ("Mr. Bollea") moves this Court for an Order modifying, supplementing and/or amended its prior rulings sealing filings in this proceeding which contain, reference and/or disclose the content of surreptitious audio recordings of Mr. Bollea and evidence derived therefrom. Specifically, to the extent these materials are not stricken and removed from the record (as Mr. Bollea requests in a concurrently filed Emergency Motion to Strike), Mr. Bollea requests in the alternative that the Court find that under Florida Rule of Judicial Administration 2.420(c)(9)(A)(vii), any court filings containing, referencing or disclosing any of the contents of surreptitiously recorded audio of Mr. Bollea and/or any evidence derived therefrom, including the FBI investigation file in its entirety, are "confidential" and exempt from public disclosure, and must remain sealed. The grounds upon which this motion is based and reasons it should be granted are as follows:

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Introduction

Over the course of this lawsuit, the Court has correctly determined that surreptitiously recorded videos of Mr. Bollea naked, engaged in consensual sexual activity and having private conversations in a private bedroom, as well as the FBI investigation files emanating from efforts to use those videos against Mr. Bollea, are "confidential" under Rule 2.420 and are required to be sealed. With the exception of the video and article posted on Gawker.com on October 4, 2012 which is at issue in this case, none of the other illegally recorded content and derivative evidence is generally inherent to the issues being litigated in this case.

On numerous occasions, based upon Mr. Bollea's privacy rights, the Court has ruled that discovery associated with the crimes committed against Mr. Bollea must remain "confidential," and that court filings containing these "confidential" materials must remain sealed. (*See* November 18, 2015 Amended Order; November 18, 2015 Order; October 27, 2015 Order) The Court based these rulings on the findings that sealing these materials is necessary to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in this case, as well as to comply with the established public policy set forth in the Florida and U.S. constitutions, statutes, rules and case law.

Now that the Gawker Defendants have obtained the federal government's investigation file, and the Court and counsel for the parties have reviewed the corrected and unredacted DVDs, the Court has the final predicate necessary to conclude that Mr. Bollea was secretly recorded in violation of Florida law. Consequently, to the extent such materials are not stricken from the record, Mr. Bollea requests that the Court supplement, modify or amend its prior orders[1] sealing

[1] Although these sealing orders are under review in the Second District Court of Appeal (Case No. 2D15-5044), they 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

records containing evidence of or derived from surreptitious audio of Mr. Bollea, by finding that sealing also is necessary under Florida's Security of Communications Act and Article 1, Section 12 of Florida's Constitution.

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

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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).

[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)

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):

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 does not allow its citizens to be secretly recorded, and will not tolerate people using or disclosing 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 also is 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 §934.06, Fla. Stat. 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. 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 §934.06, Fla. Stat. *Perdue v. State*, 78 So.3d 712 (Fla.

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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.

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*, 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 Sections 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 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 on October 4, 2012, 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; and should therefore be sealed.

Sealing Materials Disclosing the Content of and Evidence Derived from <u>Surreptitious Audio is Required by Florida Law</u>

Florida's Security of Communications Act's clear prohibition against the "disclosure" of the contents of an intercepted oral communication is based upon "established public policy" in Florida that the privacy of oral communications be protected, as well as to protect the victims of illegal interceptions. *State v. Walls*, 356 So.2d 294, 296 (Fla. 1978). Article I, Section 12 of the Florida Constitution further provides that the right of people against the unreasonable interception of private communications by any means "shall not be violated."

As this Court previously recognized, Rule 2.420(c)(9)(A)(vii) states that court records that are determined to be confidential in case decision or court rule on grounds that "comply with established public policy set forth in the Florida or United States Constitution or statutes of Florida rules or case law" shall be confidential, and therefore sealed. Florida's Security of Communications Act and Article I, Section 12 of the Florida Constitution provide additional grounds under Florida's well-established public policy to seal all of the content of Mr. Bollea's surreptitiously recorded conversations, as well as any evidence derived therefrom.

The Security of Communications Act protects a person from being unlawfully recorded, while also prohibiting the contents of those recordings from being disclosed. Sealing records which, contrary to the Act, disclose the contents of secretly recorded conversations and evidence derived therefrom, effectuates the intent of the Act: to prohibit further disclosure.

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 into evidence. Consequently, these materials have no bearing on the merits of this case, and are not generally inherent in this proceeding. These materials are not an integral part of the case and serve no legal purpose. *Sonderling v. Sonderling*, 600 So.2d 1285, 1287 (Fla. 3d DCA 1992). Rather, they only serve to gratify public spite or promote scandal, and therefore should not be allowed to remain in the public domain. *Id.*

WHEREFORE, Mr. Bollea respectfully requests that the Court enter an Order modifying, amending or supplementing its prior rulings sealing court records, by finding that, pursuant to Rule 2.420(c)(9)(A)(vii), any court filings containing any of the contents of any surreptitiously recorded audio of Mr. Bollea, and/or any evidence derived therefrom, including the FBI investigation file in its entirety, are "Confidential" and exempt from public disclosure, and must remain sealed.

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CERTIFICATE OF SERVICE

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

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