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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 24: TO EXCLUDE ARGUMENT OR EVIDENCE OF ILLEGALLY RECORDED AUDIO OF TERRY BOLLEA AND ANY EVIDENCE DERIVED THEREFROM

In his motion, Plaintiff Terry Gene Bollea, professionally know as Hulk Hogan, asks the Court to exclude all evidence "derived from" any sex tapes of him with Heather Clem – except for all such evidence that *he* wants to present to prove his liability and damages case. In other words, he asks this Court to suppress, not just the sex tapes themselves, but all evidence he claims is "derived from" those tapes, including statements he and other key witnesses voluntarily made to the FBI or to other third parties, or statements Bollea and his counsel voluntarily permitted to be recorded. At the same time, he asks, *with no legal support at all*, for this Court to do that while *also* admitting the sex-tape evidence he wants to use – specifically, the excerpts from the tape published by Gawker, along with all the evidence "derived from" that publication, such as evidence of his alleged damages.

This audacious gambit is fundamentally contrary to law. It should be summarily rejected by this Court for any or all of the following reasons:

(1) Bollea is not permitted, under either the Florida Wiretap Act or the "sword and shield" doctrine, to selectively invoke the exclusionary rule to keep out only the evidence that is harmful to him;

(2) Most, if not all, of the evidence Bollea seeks to preclude is not subject to exclusion under the Wiretap Act, including because (a) whether he had a reasonable expectation of privacy in the oral communications captured on the tapes is a jury question that cannot be decided by the Court, and (b) the "fruit of the poisonous tree" doctrine does not apply to evidence voluntarily disclosed by Bollea and his attorney or to evidence lawfully acquired by the FBI as a result of information the agency learned from Bollea; and

(3) Bollea's motion is untimely under the Wiretap Act's procedural provisions.

ARGUMENT

I. Bollea Is Not Permitted To Selectively Invoke The Wiretap Act's Exclusionary Rule.

As explained in detail below, the exclusionary rule Bollea invokes either does not apply *at all* to the circumstances presented here, or, if it does apply, only applies to a tiny fraction of the materials he seeks to exclude. It is, however, unnecessary for this Court even to reach that issue. That is because Bollea's motion fails for an even more basic reason. The exclusionary rule upon which it is based cannot be selectively invoked in the manner in which he seeks to do here.

A. The Plain Language of the Wiretap Act Precludes the Self-Serving, Selective Application of its Exclusionary Rule that Bollea Seeks.

Bollea moves for the Court to exclude "any evidence of any illegally recorded audio of Mr. Bollea, or evidence derived therefrom" – *except* for everything that he wants to introduce. Bollea seeks to arbitrarily limit the evidence at trial to "evidence of or derived from the article and video posted on Gawker.com on October 4, 2012." Mot. at 1. However, the very statute

Bollea invokes expressly precludes any such self-serving exception. The Wiretap Act provides that:

> Whenever any wire or oral communication has been intercepted, ***no part of the contents of such communication and no evidence derived therefrom may be received in evidence*** in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. ***The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.***

Fla. Stat. § 934.06 (emphases added).

Here, Bollea contends that all audio of him conversing with the Clems on the sex tapes was illegally recorded, including the excerpts published by Gawker. Indeed, that has been one of his central contentions in this lawsuit from the outset and an element of his claims. But the statute on its face unambiguously requires that, if that is so, *all* such evidence is excludable – period. The statute provides that "*no part of the contents*" of an illegally-recorded oral communication may be used as evidence, nor any "*evidence derived therefrom*." Furthermore, the only exception the statute contemplates is for criminal prosecutions under the statute – there is no exception for civil causes of action arising under the Act. And the case law is clear that any exceptions to the statute "must be strictly construed," so Bollea cannot ask this Court to read additional exceptions into the law to suit his purposes. *Jackson v. State*, 636 So. 2d 1372, 1374 (Fla. 2d DCA 1994), *approved*, 650 So. 2d 24 (Fla. 1995).[1]

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[1] *See also State v. Garcia*, 547 So. 2d 628, 630 (Fla. 1989) ("The exclusionary rule in this case, however, is statutorily mandated. Chapter 934, Florida Statutes, pertaining to security of communications, unequivocally expresses the Legislature's desire to suppress evidence obtained in violation of that chapter.") (emphasis added); *Atkins v. State*, 930 So. 2d 678, 682 (Fla. 4th DCA 2006) ("Because it is a statutory mandate, the court held that the good faith exception could not apply to permit introduction of illegally intercepted communications. The prohibition of the statute was absolute.") (citing *Garcia*); 22 Fla. Prac., Criminal Practice & Procedure

Instead of permitting parties to have their cake and eat it too, the statute sensibly offers a party in Bollea's situation a simple choice, one that comports with basic principles of adjudicatory fairness. The statute leaves it up to the allegedly "aggrieved person" as to whether he or she wishes to invoke its exclusionary rule. *See* Fla. Stat. § 934.09(10)(a). Thus, if a plaintiff wants to pursue a civil lawsuit and wants to introduce all or any part of an allegedly illegal recording of him to prove his or her case, the plaintiff is free to do so. Alternatively, the "aggrieved person" "may" invoke the statute's exclusionary rule and keep all of the allegedly illegal recording(s) out. *Id.* But the plaintiff cannot have it both ways, both bringing a lawsuit *and* invoking the exclusionary rule to exclude only the "part of" a recorded conversation that he or she does not like, as the statute is clear that "no parts of the contents . . . may be received into evidence."

Not surprisingly, Bollea does not cite a single Florida case that permits the self-serving, selective application of the statute that his motion demands. Indeed, he does not cite a single case in which the party who initiated the proceeding – either as a plaintiff or as the prosecution – successfully invoked the Wiretap Act's exclusionary rule for *any* purpose.

By contrast, in *Ferrara v. Detroit Free Press, Inc.,* 1998 WL 1788159 (E.D. Mich. May 6, 1998), the court construed the virtually identical provision of the federal wiretapping statute to offer a plaintiff the very choice Bollea tries to avoid making here. There, the plaintiff was a judge whose ex-husband had secretly recorded her making racist and anti-Semitic statements, and then leaked the statements to the media. The plaintiff then sued and moved to suppress the tapes. The court, however, noted that the plaintiff indicated she might want to use some of the

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§ 5:13 (2015 ed.) ("Two important limitations upon application of the exclusionary rule as a remedy for Fourth Amendment violations are the 'good faith' exception . . . and the 'impeachment evidence' exception . . . . Significantly, neither of these limitations applies in connection with the Chapter 934 exclusionary remedy.").

tapes to prove her case at trial. If so, the court deemed it obvious that she could not have it both ways. As a result, the court denied her motion to suppress. *Id.* at *8.

So, too, here. Bollea cannot invoke the Wiretap Act's exclusionary rule selectively, and he should be denied the relief he seeks on that basis alone.

B. Bollea Cannot Use The Exclusionary Rule As Both A Sword And A Shield.

This same conclusion follows from basic principles governing evidentiary exclusionary rules, including legal privileges. A plaintiff cannot bring a lawsuit and then invoke a privilege or exclusionary rule to suppress relevant evidence. As the Florida Supreme Court has explained:

> It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense.
>
> Plain justice dictates the view that, regardless of plaintiffs' intention, plaintiffs must be deemed to have waived their assumed privilege by bringing this action.
>
> Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield. Defendants ought not to be denied a possible defense because plaintiffs seek to invoke an alleged privilege.

Stockham v. Stockham, 168 So. 2d 320, 322 (Fla. 1964) (quoting *Indep. Prods. Corp v. Loew's, Inc.*, 22 F.R.D. 266, 276 (S.D.N.Y. 1958)) (alterations and internal quotation marks omitted); *see also Zabrani v. Riveron*, 495 So. 2d 1195, 1197 (Fla. 3d DCA 1986) (plaintiff may not claim proceeds of wife's life insurance policy while invoking Fifth Amendment to refuse to admit or deny role in her death); *City of St. Petersburg v. Houghton*, 362 So. 2d 681, 685 (Fla. 2d DCA 1978) (plaintiff who invoked Fifth Amendment and refused to answer questions at his deposition had to choose between answering the questions or facing dismissal of claims to which those questions related).

In bringing this lawsuit, Bollea alleges that Defendants caused him grave emotional harm by publishing video excerpts of a sex tape featuring himself and Mrs. Clem, in the context of an article commenting on those excerpts. Now, Bollea asks the Court to exclude essentially all of the evidence that would allow a jury to determine an array of material factual disputes, including, for example, the true cause of his alleged injuries and the value of the tape (if any) for the purposes of determining damages, or to assess the credibility of Plaintiff and key witnesses, whose statements made in their sworn depositions differ materially from statements in the FBI records. *See* Defs.' Mots. *in Limine* Nos. 1-3, Feb. 1, 2016 (describing the significance of the records obtained from the FBI).

In situations like this, courts consistently recognize that as a matter of fundamental fairness, plaintiffs cannot keep out such central evidence. By placing the material at issue in making their claims in the first place, they waive any right to selectively exclude it. *See, e.g.*, *QBE Ins. Corp. v. Jorda Enterprs., Inc.*, 286 F.R.D. 661, 664-65 (S.D. Fla. 2012) ("If a party could use the privilege as both a sword and a shield, then the party could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.").

Indeed, courts have rejected Bollea's self-serving gambit specifically in the wiretap context. For instance, in *McQuade v. Michael Gassner Mech. & Elec. Contractors, Inc.*, 587 F. Supp. 1183 (D. Conn. 1984), the plaintiffs sued for alleged violations of the federal wiretap act, 18 U.S.C. §§ 2510 *et seq*. Defendant sought access to sealed copies of the tapes so that he could respond to plaintiffs' claims that the recording was nonconsensual and that they were entitled to punitive damages, and plaintiffs opposed, citing the provision of the federal wiretap act that "prohibits any part of the tapes, or any information derived therefrom, from being received in

evidence." *Id.* at 1186. The court denied the effort to selectively exclude the tapes, explaining that exclusion would be improper because "[i]n these circumstances, the actual contents of the tapes are clearly relevant to the efforts of defendants to resist plaintiffs' claims – indeed, only the tapes themselves can shed light on the credibility of plaintiffs' allegations of threats, harassment, humiliation, and intimidation . . . ." *Id.* at 1190. The court further noted that "[t]o deny defendants' counsel any possibility of investigating or rebutting the allegations on which plaintiffs' claim . . . is based . . . ***would be to convert the allegations of the complaint into a judgment***. Any such construction of the statute would be absurd on its face and would be so incompatible with basic notions of fairness in adversary proceedings that it might well raise questions regarding the statute's constitutionality." *Id.* (emphasis added).

Having brought a lawsuit that necessarily places the recordings at issue, Bollea should not be permitted to invoke the Wiretap Act as a basis for excluding evidence that is harmful to him. Indeed, his effort would violate fundamental principles of due process.

II. The Wiretap Act's Exclusionary Rule Does Not Apply To The Evidence Bollea Seeks To Exclude.

Even if Bollea *could* selectively invoke the Wiretap Act's exclusionary provision in the manner in which he seeks to do, he would still not be entitled to the relief he seeks. That is because most, if not all, of the evidence he seeks to exclude is not subject to exclusion under the statute.

A. Bollea Has Not Established, and Cannot Establish, That, As A Matter of Law, He Had a Reasonable Expectation of Privacy In His Oral Communications.

To establish that the Wiretap Act applies, Bollea must first show that he had a reasonable expectation of privacy in his oral communications with the Clems. Under the Wiretap Act, an oral communication is protected only if "'the speaker [has] an actual subjective expectation of

privacy' in his oral communication, and society [is] prepared to recognize the expectation as reasonable under the circumstances." *Stevenson v. State*, 667 So. 2d 410, 412 (Fla. 1st DCA 1996) (quoting *State v. Smith*, 641 So.2d 849, 852 (Fla. 1994)); *see also* Mot. at 3 & 6 n.4 (same). Thus, to grant Bollea the relief he seeks, this Court would have to make a finding that he had just such an expectation of privacy in those communications. This Court cannot do that for two reasons.

First, that is a question that must go to the jury. In this case, unlike the usual case in which an exclusionary rule is invoked, the question of whether the rule applies is directly tied up with the underlying merits. As Bollea's own proposed jury instructions concede, one of the questions the jury is to decide is the precise question he is now asking the Court to rule on – namely, "[w]hether Terry Bollea had a reasonable expectation of privacy in his oral communications in the bedroom when they were recorded." Ex. 1 (Pl.'s Proposed Jury Instructions at No. 29). In fact, if this Court were to grant Bollea's motion, it would bind the jury on that question because the Wiretap Act expressly provides that, "[i]f the motion [to exclude] is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation" of the statute. Fla. Stat. § 934.09(10)(a). This Court, in denying Defendants' motion for summary judgment, already ruled that the Wiretap Act claim goes to the jury. Bollea should not be permitted to obtain what would be in effect a covert summary judgment ruling by way of a motion *in limine*.

Second, even if Bollea were somehow permitted to move for summary judgment on this issue now, there is undoubtedly a fact question as to whether Bollea had a reasonable expectation of privacy in his oral communications. While Bollea cites evidence supporting his position, there is considerable evidence to the contrary that his motion simply ignores. For instance, as

detailed in Defendants' recently filed Motion *in Limine* No. 1, both Bollea and Mr. Clem made statements to the FBI that go directly to whether Bollea had a subjective or objectively reasonable expectation of privacy with respect to the encounter with Mrs. Clem, evidence that, at the very least, renders any contrary testimony subject to impeachment. *See, e.g.*, Defs.' Mot. *in Limine* No. 1 at 3-4. Defendants are entitled to have a jury weigh that evidence in determining whether Bollea had a reasonable expectation of privacy at the time of the filming, rather than having that evidence excluded on the basis of this Court's preempting determination that he did not.

Moreover, the legal premise of Bollea's motion seems to be that the only fact that is relevant to his expectation of privacy is whether he did or did not know he was being taped. While it would be dispositive in Defendants' favor if he did know he was being taped, the converse is not true. Even if the jury were to conclude that he did not know he was being taped, it would not necessarily follow that Bollea had a reasonable expectation of privacy as a guest in someone else's home. That is especially so given the evidence indicating that Bollea *knew* the Clems had extensive security cameras. Strikingly, in one of the Florida Supreme Court cases Bollea's motion relies on, Justice Overton wrote a separate concurrence to emphasize that:

> I concur and write to emphasize that when an individual enters someone else's home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply. It is a different question, however, when the individual whose conversation is being recorded is in his own home or office.

State v. Inciaranno, 473 So.2d 1272, 1276 (Fla. 1985) (Overton, J., concurring). Here, the filming occurred in the Clems' house and it was well known to Bollea (and many other people) that the Clems had cameras throughout the inside of their house.

In short, there is a substantial argument that Defendants are entitled to judgment as a matter of law on the Wiretap Act claim, and Defendants reserve the right to present that

argument at the appropriate juncture in the trial proceedings. At a minimum, however, Bollea's effort to prematurely decide an issue that the Court has already ruled should, at least in the first instance, be decided by the jury must be rejected. Accordingly, the motion should be denied on this basis as well – it requires the Court to usurp the jury's role as fact finder.

B. The Wiretap Applies, At Most, To Only Portions Of The Tapes.

Even if Bollea could establish, as a matter of law, that he did have a reasonable expectation of privacy in the oral communications at the time they were recorded, that would not mean that the tapes are properly excluded under the Wiretap Act.

First, the Wiretap Act cannot be used to exclude oral communications where Bollea subsequently consented to the recording of those communications. As this Court is aware, Bollea and his counsel, David Houston, consented to the recording of their "sting" meeting with Keith Davidson, the alleged extortionist. *See, e.g.*, Ex. 2 (FBI consent forms). They did so knowing that one of the activities that was to take place at the meeting was the playing of all, or at least portions of, each of the three sex tapes, and with the understanding that the recording of that meeting could be played in court in a subsequent prosecution of Davidson. *See, e.g.*, Ex. 3 (GAWKER 763); Ex. 4 (GAWKER 1101). As a result, Bollea necessarily consented to the FBI's recording of all of the content contained on those sex tapes. Ultimately, Davidson only played portions of the tapes, and the content contained within those sections was indeed recorded by the FBI. *See, e.g.*, Ex. 5 (GAWKER 896-99). But, by agreeing to let the FBI record him viewing and listening to all three sex tapes, Bollea removed the disputed recordings from the scope of the Wiretap Act, because he knowingly consented to the recording of the complete contents of those communications. *See* Fla. Stat. § 934.03(3)(c).

Second, the Wiretap Act does not apply to any oral communications strictly between the Clems. There is an important exchange on the third sex tape (labeled as "Undated" in the FBI

production) that takes place between the Clems *after Bollea has left the room*. *See* Defs.' Mot. *in Limine* No. 3 at 2 (describing the exchange and its significance). This exchange establishes that both Bubba and Heather Clem were aware that they were being recorded at the time, which means that there was no violation of the statute as to them. Fla. Stat. § 934.02(2). In any event, Bollea does not have standing to seek the exclusion of any conversation between the Clems outside of his presence, because the Act provides that only an "aggrieved person" may "move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom." *See* Section 934.09(10)(a). Under the statute, an "aggrieved person" must be "a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." *See* § 934.02(9). Bollea cannot dispute that, after he left the room and, indeed, left the Clems' house, he was no longer a party to that conversation. Thus, conversations strictly between the Clems cannot be excluded under Section 934.06.

C. Bollea Cannot Exclude Evidence From the FBI Investigation He Initiated As Supposed "Fruit of the Poisonous Tree."

Finally, even if Bollea *could* establish that some or all of the tapes themselves should be excluded under the Wiretap Act, he certainly cannot establish that, therefore, *all* the records Defendants obtained from the FBI – including his own voluntary statements to the FBI and other third parties and the contents of recordings he and his lawyer consented to – should be excluded as the supposed "fruit of the poisonous tree." In arguing to the contrary, Bollea has twisted the familiar "fruit of the poisonous tree" doctrine beyond all recognition.

The "fruit of the poisonous tree" doctrine has two essential elements, neither of which applies here. First, the doctrine exists to prevent the same person who poisoned the tree from also trying to benefit from its fruit. In other words, "the rule's prime purpose is to deter" someone who acquired information illegally from also gaining the benefit of it. *United States v.*

Calandra, 414 U.S. 338, 347 (1974). In this case, neither the FBI that initially gathered this evidence, nor Defendants who now seek to use it, played any role in the illegal recording. Rather, Bollea's contention is that the *Clems* illegally recorded him. Mot. at 3-5. Thus, the doctrine has no application here.

Second, the "fruit of the poisonous tree" doctrine applies to evidence acquired as a result of information *learned from* an illegal search or recording. *See French v. State*, 198 So. 2d 668, 669 (Fla. 3d DCA 1967) ("Evidence which is located by the police as a result of information and leads obtained from illegally seized evidence, constitutes 'the fruit of the poisonous tree' and is . . . inadmissible in evidence."). For example, even where the government is the party that engaged in unlawful wiretapping and then tries to use evidence that it obtained later, the Wiretap Act's exclusionary rule does not apply where the information was obtained by "independent lawful investigation," or other means that are "attenuated from and independent of the first wiretap." *State v. Smith*, 438 So. 2d 10, 13 (Fla. 2d DCA 1983). In this case, the evidence in the FBI's investigative file was acquired as a result of information the FBI learned from Bollea and his counsel, not the alleged illegal recordings, which the FBI did not acquire until the sting operation at the conclusion of its investigation. That is a second reason why the doctrine does not apply.

Rejecting these well-established legal principles, Bollea instead proposes what is essentially a "but for" causation test for applying the "fruit of the poisonous tree" doctrine. *See* Mot. at 3 (arguing that the FBI records are all the fruit of the poisonous tree because "[b]ut for the illegal recording of Mr. Bollea, the FBI investigation never would have occurred"). But that is obviously not the test, because the same could be said for most evidence in the case – for example, "but for" the recording, all of Plaintiff's alleged damages would supposedly not have occurred, but that does not make his damages case the fruit of the poisonous tree. Indeed, under Bollea's logic, all

of the evidence the FBI gathered would have been subject to suppression under the analogous federal statute in an extortion prosecution of Davidson, *even though it was acquired at Bollea's behest.* After all, none of the evidence about Davidson's attempt to profit from the allegedly illegal recordings would have been acquired "but for" the illegal recording.

In fact, both the United States and Florida Supreme Courts have time and time again expressly rejected Bollea's "but for" logic. Thus, it is well-settled that evidence is not considered to be fruit of the poisonous tree "simply because it would not have come to light *but for* the illegal actions" of someone who engaged in illegal conduct. *Delap v. State*, 440 So.2d 1242, 1250 (Fla. 1983) (quoting *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (emphasis added); *State v. Cable*, 51 So.3d 434, 440 (Fla. 2010) ("we have 'never held that evidence is "fruit of the poisonous tree" simply because 'it would not have come to light *but for* the illegal actions of the police") (emphasis added) (citation omitted).

Indeed, all of the cases cited by Plaintiff actually show why the FBI records are *not* the fruit of the poisonous tree. In three of the cases he cites, the government was attempting to use or create evidence that was derived from recordings that the government had participated in unlawfully intercepting.[2] Here, the FBI is not trying to take advantage of its own unlawful wiretaps, and nor are the Defendants, since neither the FBI nor the Defendants were involved in recording Bollea.

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[2] Specifically, in *Horning-Keating v. State*, 777 So. 2d 438 (Fla. 5th DCA 2001), the court found that a prosecutor could not use unlawful recordings to ask questions at a deposition, where the recordings had been made by someone acting "in conjunction with" the police and the prosecutor. *Id.* at 448. In *Smith v. State*, 438 So. 2d at 13, the court actually affirmed the denial of a motion to suppress, but, in any event, there the State had used evidence that was obtained on the basis of wiretaps that it had authorized. And in *Bagley v. State*, 397 So. 2d 1036 (Fla. 5th DCA 1981), the court suppressed evidence found in a search of defendant's home because the affidavit in support of the search warrant "relied on *information* obtained from the wiretap" that had been unlawfully placed by law enforcement. *Id.* at 1038.

Moreover, *State v. Williamson*, 701 So. 2d 1243 (Fla. 5th DCA 1997) – the case that plaintiff cites as offering "[t]he clearest definition of 'evidence derived from,'" *see* Mot. at 7 – further undermines his argument. In *Williamson*, the defendants attempted to extort the manager of a health club, and the manager responded by recording a telephone conversation with the extortionists. *Id.* at 1243. The manager then notified the State's Attorney's Office, which opened an extortion investigation. *Id.* Law enforcement officers met the manager, listened to the recorded conversation, and authorized subsequent recordings. *Id.* at 1243-44. The defendants moved to suppress the authorized recordings under § 934.06, but the Court of Appeal held they should not be suppressed because "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 several factors that bolstered the complainant's credibility." *Id.* at 1244 (emphasis added). The court explained that "the authorization [of subsequent recordings] was not based on the contents of the improperly recorded conversation," but rather on the fact that the manager credibly complained that he was facing an extortion attempt, while the unauthorized recording merely "bolstered" that credibility. *Id.* at 1245. In this case, the FBI never listened to any tapes before proceeding to conduct its extortion investigation because no one had those tapes at the time. Rather, the FBI's decision to investigate and authorize additional recordings was based entirely, in the words of *Williamson*, on "the complainant's [Bollea and David Houston's] credibility." Thus, under *Williamson*, the records of the FBI investigation do not constitute "evidence derived from" any sex tapes.

In short, even if the sex tapes fall within the ambit of the Wiretap Act, the FBI records, including the many consensual recordings made as part of the FBI's investigation, cannot be excluded under Section 934.06.

III. Bollea's Motion is Untimely Because The Statute Required Him to Move to Suppress as Soon as He Became Aware of the Alleged Illegality of the Recordings.

Finally, in addition to failing on the merits, Bollea's motion is untimely. The Wiretap Act requires that a motion to suppress be made at the first practicable opportunity when the suppression issue arises. The Act explicitly provides that a suppression motion "shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." *See* Fla. Stat. § 934.06.

Bollea has alleged since long before this case began that he was unknowingly recorded. And, from the time Gawker posted the video excerpts, Bollea has claimed publicly and in countless court filings that he did not know he was being filmed by the Clems. None of the facts he cites in support of his motion is of recent vintage. *See* Mot. at 3-5 (citing deposition testimony from this case). Yet, Bollea is just bringing this motion now, on the eve of trial.

This is not a trivial consideration. The status of the other sex tapes and the FBI materials has been the subject of extensive motions practice and argument in this case since discovery began. Had Bollea brought this motion early in the case and prevailed, it would have radically reshaped the course of discovery and the preparations for trial. There have been numerous "opportunit[ies] to make such [a] motion," and Bollea has long been aware of the grounds of the motion. Fla. Stat. §934.09(10)(a). Having failed to move to suppress this material in a timely fashion, the Wiretap Act does not permit him to reverse course now and belatedly move to suppress the material at this late date.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Bollea's Motion *in Limine* No. 24.

February 12, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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