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.

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

Defendants.
_____/

GAWKER MEDIA, LLC'S MOTION TO COMPEL PLAINTIFF TO PRODUCE COMMUNICATIONS RELATED TO HIS SETTLEMENT WITH BUBBA THE LOVE SPONGE CLEM

Pursuant to Florida Rules of Civil Procedure 1.310, 1.351, and 1.380, Defendant Gawker Media, LLC ("Gawker") respectfully moves this Court for an order compelling plaintiff Terry Gene Bollea to produce unredacted versions of all communications relating to the settlement of his claims against former defendant Bubba the Love Sponge Clem. While plaintiff has produced documents purporting to be these communications to Gawker, in most cases he has redacted everything but the address block and salutation. Hogan's pre-settlement communications with Clem concern facts central to this case and are not protected by any privilege recognized under Florida law. Accordingly, this Court should direct plaintiff to produce unredacted versions to Gawker within five business days.

BACKGROUND

As this Court is aware, this case challenges a report and commentary (the "Gawker Story") published on Gawker.com by Gawker Media, LLC, concerning an extramarital affair that

plaintiff, the celebrity publicly known as Hulk Hogan ("Plaintiff" or "Hogan"), conducted with Heather Clem, the then-wife of Clem, a well known radio personality and at the time Hogan best friend, all with Clem's blessing. It also challenges the publication, along with the Gawker Story, of brief excerpts (the "Excerpts") of a longer video (the "Video") depicting the encounter. Based on the Gawker Story and the Excerpts, plaintiff asserts claims against Gawker for invasion of privacy, for violation of his publicity rights, for negligent and intentional infliction of emotional distress, and for violation of the publication prong of Florida's wiretap statute.

As this Court is also aware, Hogan initially filed this action against only Bubba Clem and Mrs. Clem. (Hogan sued Gawker separately in federal court, only to voluntarily dismiss that action and file his claims against Gawker here several months later.) Immediately after Hogan filed this lawsuit, Mr. Clem – a radio "shock jock" who is widely known for his raunchy and brash commentary and personality – made multiple public statements to the effect that Hogan himself played a part in the release of the video, *see, e.g.*, Exhibit A (news report reporting on Clem's statements to his radio audience that "Hulk was in on the sex tape's release from the get go," that plaintiff "was in on the stunt," that he is "the ultimate lying showman," and "You can't play the victim like that."), and, at the very least, certainly would have been aware that his sexual encounter with Mrs. Clem was being taped, as it was widely known that the Clems had cameras in every room in their house.[1] Soon after (and well before Gawker was added as a defendant to this action), Clem settled Hogan's claims against him and was dismissed from this lawsuit. As part of the settlement, Clem purported to assign to Hogan his copyright interest in the Video to

[1] In an interview on the Howard Stern radio program, Mr. Clem stated that Hogan would definitely have known about the taping, because it was well known that he and his wife had video surveillance cameras constantly recording throughout their home, and Hogan previously had lived with them for three months. *See* http://www.youtube.com/watch?v=IwPQRPIITMPA, at 4:35-5:14 (last accessed December 23, 2013). During the interview, Stern agreed that all of the Clems' friends knew that everything that happened in the house was recorded, joking that he was worried about staying in their house for just that reason. *Id.* at 19:00-19:10.

Hogan, implicitly admitting that he (Clem) had participated in the creation of the Video, whereupon Hogan asserted claims for copyright infringement in the now-dismissed federal court action against Gawker. Remarkably, upon settling with Hogan, Clem immediately issued a public apology to Hogan asserting the exact opposite of his previous public statements – namely, that Hogan was unaware he was being videotaped and played no role in the release of the Video. *See* Exhibit B.

In light of this background, Gawker requested that plaintiff produce "[a]ny and all documents concerning [his] purported acquisition of the copyright to the" full-length video from which the Gawker Excerpts were created, *see* Gawker Media LLC's Requests for the Production of Documents to Plaintiff ("Gawker RFP") No. 33, and "[a]ny and all documents concerning the settlement of [his] claims against Todd Alan Clem, including documents containing communications between [plaintiff] or [his] agents or attorneys and the agents or attorneys of Todd Alan Clem," *id.* No. 34. Plaintiff objected to both of these requests on several grounds, including that they "seek[] confidential settlement communications." Pl.'s Resps. to Gawker RFP Nos. 33 & 34 (relevant pages, including Gawker's requests and plaintiff's responses, attached hereto as Exhibit C). Although Plaintiff's counsel initially agreed to produce such communications during the parties' meet and confer in late August, he has since refused to do so. Plaintiff's counsel then represented to the Court at the October 25, 2013 hearing that plaintiff would prepare a privilege log of these documents.

Then, on November 27, 2013, plaintiff served Gawker with supplemental discovery responses. Hogan's production was comprised of 47 pages of communications between plaintiff and his agents on the one hand and Clem and his agents on the other, purportedly concerning the

settlement of plaintiff's claims against Clem.[2] With the exception of Hogan's 5-page initial demand letter to Clem (which is included twice in the production), each of these pages is both marked confidential and extremely heavily redacted. In some cases, the entire page has been redacted; in most cases, only the emails' address blocks are visible.[3] In all cases (except as noted above), the entire substance of the communication has been redacted. In effect, other than Hogan's opening letter to Clem, plaintiff has refused to produce *any* of the communications with Clem concerning their settlement, despite the fact that it apparently resulted in a complete reversal of Clem's version of key events underlying this action. In addition to his "production," plaintiff provided Gawker with a privilege log, asserting that each listed document has been withheld because it reflects "confidential settlement communications." *See* Pl.'s Privilege Log (attached hereto as Exhibit D).

ARGUMENT

Plaintiff objected to RFP Nos. 33 and 34 based on a purported privilege protecting settlement negotiations. Plaintiff implies that this asserted privilege shields documents pertaining to the settlement between two parties (here, Clem and Hogan) from discovery by a third party (here, Gawker). Florida law does not recognize any such privilege.[4] To the contrary, "while confidentiality agreements are necessary in some instances, to facilitate settlement, they

---

[2] Plaintiff produced (pursuant to the Agreed Confidentiality Order entered in this action) the executed settlement agreement between himself and Clem but has continued to assert the settlement privilege with regard to the communications concerning it.

[3] Because these documents have been designated confidential, Gawker is not filing them with this motion. Should the Court wish to review them, Gawker will produce them under seal pursuant to the Agreed Confidentiality Order. Plaintiff's designation of these pages as confidential in their current form is curious, given that the redacted communications reveal no substance at all. While Gawker is not seeking to do so at this juncture, Gawker reserves the right to challenge the designation of these pages as confidential, regardless of the outcome of this motion.

[4] Florida law includes a statutory privilege for court-ordered mediations, *see* Fla. Stat. Ann. § 44.102(3), but this privilege does not apply outside the context of these mandated mediations. *See, e.g.*, *DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So. 2d 971, 973-74 (Fla. 4th DCA 2002).

may not be subsequently employed by a litigant to . . . thwart" discovery. *Neiman v. Naseer*, 47 So. 3d 954, 955 (Fla. 4th DCA 2010) (enforcing subpoena seeking information about settlement because such information is not protected by the attorney-client privilege). Florida's refusal to recognize a privilege protecting settlement negotiations and agreements from discovery by third parties is in line with the vast majority of courts to have considered the issue. Thus, in *In re Subpoena Issued to Commodity Futures Trading Commission*, the United States District Court for the District of Columbia noted the absence of any consensus among the federal courts in favor of a so-called "settlement privilege," and emphasized that, in fact, several states (including California, Mississippi, Montana, and Texas) had "expressly declined to recognize" such a privilege. 370 F. Supp. 2d 201, 209-10 & n.16 (D.D.C. 2005), *aff'd*, 439 F.3d 740 (D.C. Cir. 2006). *See also Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 856 N.E.2d 213, 235 (Ohio 2006) (declining to recognize settlement privilege and noting that "[t]here is no broad consensus of support, in federal courts or in other states, for such a privilege").

To be sure, Section 90.408 of the Florida Statutes provides that an "offer to compromise a claim . . . is inadmissible to prove liability . . . *for the claim*." *Id.* (emphasis added). But this statute offers Hogan no protection here. By its terms, this rule (1) regulates admissibility at trial, not relevance for discovery purposes, and (2) applies only to offers to settle the same claim, between the same litigants, in the same litigation. *See, e.g.*, *Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 779-80 (Fla. 5th DCA 2007) (explaining that section 90.408 is limited and permits introduction at trial of settlement negotiations and agreements for any purpose other than those specified in the rule); *Harris v. Grunow*, 71 So. 3d 186, 189 (Fla. 3d DCA 2011) (noting that section 90.408's objective is to ensure *jurors'* fairness); *Wolowitz v. Thoroughbred Motors, Inc.*, 765 So. 2d 920, 925 (Fla. 2d DCA 2000) (evidence of settlement negotiations is permitted to

prove other relevant matters). *See also In re MSTG, Inc.*, 675 F.3d 1337, 1345-47 (Fed. Cir. 2012) (refusing to adopt settlement privilege and noting that Rule 408 does not protect settlement negotiations from discovery).[5]

Here, of course, the settlement negotiations are directly relevant to Hogan's *and* Clem's anticipated testimony about Hogan's involvement in and knowledge of the recording and dissemination of the Video; such evidence is therefore key to evaluating the reliability of both Hogan's and Clem's testimony, and, if necessary, impeaching their credibility. It is well established that settlement materials are discoverable when they bear upon issues of witness credibility. *See, e.g.*, *Tanner v. Johnston*, 2013 WL 121158, at *5-6 (D. Utah Jan. 8, 2013) (settlement materials discoverable where relevant to witness credibility); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 687 (D. Kan. 2004) (permitting discovery into "settlement-related documents and information primarily for their impeachment value"); *Tribune Co, v. Purcigliotti*, 1996 WL 337277, at *2-3 (S.D.N.Y. June 19, 1996) (permitting discovery of settlement materials where it could reveal bias of settling witness). Such materials would be admissible at trial for the purposes of impeaching Hogan's or Clem's credibility. *See, e.g.*, *Special v. Baux*, 79 So. 3d 755, 759 (Fla. 4th DCA. 2011) ("When, on cross-examination, a piece of evidence is offered to attack the credibility of a witness on a material issue, such evidence is 'relevant' . . . because credibility is central to the truth seeking function of a trial."), *review granted*, 90 So. 3d 273 (Fla. 2012); *see also* Fla. Stat. Ann. § 90.608 (permitting parties to "attack the credibility of a witness" by, among other things, "[i]ntroducing statements of the witness which are

[5] Section 90.408 operates in a manner substantially similar to its federal counterpart, Federal Rule of Evidence 408. *See, e.g.*, *Agan v. Katzman & Korr, P.A.*, 328 F. Supp. 2d 1363, 1371 (S.D. Fla. 2004) (stating that although section 90.408 is "more generalized" than Rule 408, "the scope of the privilege . . . is fundamentally the same").

inconsistent with the witness's present testimony," or "[s]howing that the witness is biased"); *id.* § 90.614 (governing impeachment by prior inconsistent statements).

As is pertinent here, both Hogan and Clem have told multiple, mutating stories about *the facts at the heart of this lawsuit.* Hogan pled in his complaint that the tryst with Mrs. Clem took place in 2006, but later stated that it was 2008. Hogan also has asserted that he had "no idea" of the identity of the woman in the video, though he plainly knew it was Heather Clem. Bubba Clem's stories, too, have shifted over time. In the first version, which Clem repeatedly offered before settling with plaintiff, he contended that Hogan was undeniably aware (or at a minimum should have known) that his tryst with Mrs. Clem was being video recorded and was complicit in the distribution of the Video. In the second version, which Clem began sharing only *after* he settled Hogan's claims against him, Hogan was an innocent victim, totally unaware that Clem, his then-best-friend, was video recording him having sex with Mrs. Clem, even though the encounter proceeded with Mr. Clem's blessing. How this eyebrow-raising about-face came to be, including any settlement negotiations pertaining to Clem's public statements, is highly germane to Gawker's defense against Hogan's claims, and is directly relevant to the reliability of both Hogan's and Clem's testimony. The communications preceding the settlement agreement therefore are discoverable.

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to Florida Rules of Civil Procedure 1.380 and 1.351, movants' counsel certifies that they have, in good faith, conferred with counsel for Hogan regarding the settlement communications in an effort to secure the discovery at issue without court action but have been unable to do so.

CONCLUSION

For the foregoing reasons, this Court should direct Hogan to produce unredacted versions of all communications relating to his claims against Bubba Clem and the settlement thereof, excepting only those communications between plaintiff and his own counsel that are properly subject to attorney-client privilege. The Court should also direct Hogan to testify fully concerning the same at his upcoming deposition.

Dated: December 27, 2013

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Rachel E. Fugate*
Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

and

Seth D. Berlin
Pro Hac Vice Number: 103440
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendant
Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December 2013, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Christina K. Ramirez, Esq.
cramirez@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines, Esq.
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ *Rachel E. Fugate*
Attorney