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' MOTION *IN LIMINE* NO. 2: EVIDENCE CONCERNING PLAINTIFF'S USE OF RACIAL SLURS ON A SEX TAPE

On July 1, 2015, this Court heard oral argument on competing motions *in limine* filed by plaintiff Terry Bollea and defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio concerning Plaintiff's alleged use of racial slurs on sex tapes filmed by the Clems. The Court ruled that defendants could not introduce evidence concerning the alleged racial slurs, but stressed the ruling was without prejudice. *See* Ex. 1 at 216:25 – 217:8 (July 1, 2015 Afternoon Hrg. Tr.). The Court explained that the ruling would be revisited "[i]f you learn something else from the FBI – and that's why I was saying this is based on what we know now." *Id.*

In the months since that ruling, the FBI has produced many documents, audio recordings, and videos demonstrating that Plaintiff made racist statements on one of the recordings filmed by the Clems, that he learned that one of the sex tapes depicted him making those statements shortly before deciding to file this lawsuit, and that he and his legal counsel, David Houston, were chiefly concerned with that fact. In light of this evidence – and in particular the video evidence produced by the FBI – the Court recently acknowledged that "we need to revisit" whether evidence relating to Bollea's racial slurs is admissible. Ex. 2 at 8:24-9:5 (Jan. 20, 2016 Hrg. Tr.). As explained below, the materials produced by the FBI demonstrate that evidence regarding

Plaintiff's knowledge and concerns about his use of racial slurs on one of the tapes, as well as about the value of that particular footage, is relevant and should be admitted at trial.

I. THE FACT THAT A PARTY MADE RACIST STATEMENTS IS ADMISSIBLE IF IT IS RELEVANT.

Florida law recognizes that although evidence of racial slurs might be "inflammatory," such evidence is admissible when relevant. *See Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982). As the Florida Supreme Court has explained, "there are limited circumstances where the use of such offensive terms may be directly material to the issues in the case or to the testimony being offered." *Jones v. State*, 748 So. 2d 1012, 1023 (Fla. 1999) (addressing trial testimony that defendant used racial slur). When evidence of a party's racial slurs is relevant, it is admissible, notwithstanding concerns about prejudice and/or reputational harm, so long as the testimony and argument is not an "impermissible appeal to the biases or prejudices of the jurors." *Id.*[1]

Applying this approach, the Florida Supreme Court has held that a trial court did not err by admitting testimony that a defendant "used a racial slur" to explain the "scratches on his face in an attempt to deny his involvement in [a] murder." *Jones*, 748 So. 2d at 1023. The Supreme Court likewise has held that a trial court did not err by admitting testimony that a defendant made racial slurs "regarding the victim as well as reference to the victim's grieving relatives" where those slurs were "relevant to discredit [defendant's] alibi and to explain the context of an incriminating admission." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985); *see also Robinson*

[1] Thus, racial slurs are inadmissible only if irrelevant. *See MCI Express, Inc. v. Ford Motor Co.*, 832 So. 2d 795, 800-12 (Fla. 3d DCA 2002) (noting that racial slurs are admissible if "the probative value outweighs any prejudice that may result from having the jury hear them," but holding that trial court erred in admitting tape with racial slur because the slur was "completely irrelevant"); *Simmons v. Baptist Hosp. of Miami, Inc.*, 454 So. 2d 681, 682 (Fla. 3d DCA 1984) (evidence that expert witness had blamed his failure to pass Florida medical exam on "brown skinned people" was legitimately excluded because it was of only "marginal[] relevan[ce]").

v. State, 574 So. 2d 108, 113 (Fla. 1991) ("we reject as meritless [defendant's] contentions that his own statement to the police officers should have been edited" "to avoid the risk of racial prejudice," where African American defendant stated to detectives that he shot the victim a second time because he was concerned about "tell[ing] someone I accidentally shot a white woman").

The District Courts of Appeal also have repeatedly upheld the admission of evidence that a party used racial slurs. For example, in *Clinton v. State*, the court held that racial slurs were admissible because they were "relevant to prove that [defendant] acted with a premeditated design." 970 So. 2d 412, 413-14 (Fla. 4th DCA 2007) (testimony that defendant said "die nigger die" while stabbing victim and then screamed "I'm going to kill you nigger"). Similarly, in *Lay v. Kremer*, the District Court of Appeal held that a trial court ***erred*** by barring the admission of testimony that a civil defendant called the plaintiff a "mother-f--king nigger" because that statement reflected defendant's "intent" in committing the alleged assault and battery. 411 So. 2d at 1348-49 (ordering that "witnesses should be allowed to repeat [defendant's] statements exactly as they recall them"); *see also, e.g.*, *Wimberly v. State*, 41 So. 3d 298, 303 (Fla. 4th DCA 2010) (holding that trial court did not err in allowing prosecutor to elicit testimony that defendant used racial slur where "the use of the racial slur was relevant to the [defendant]'s state of mind as an element of the crime charged").

Indeed, in *Bullard v. State*, 521 So. 2d 223, 226 (Fla. 5th DCA 1988), the Fifth District Court of Appeal ***reversed a verdict*** when the trial court improperly excluded evidence of racial slurs. As the appellate court noted in that criminal case, "[t]he jury has the right to hear and the duty to consider the accused's version of the facts." *Id.* at 224. As the court explained:

> Where the judge went wrong is in directing the accused not to use certain language, even though, according to the accused, that was exactly what was said

> at the scene. It is up to the witnesses, including the accused, to tell their versions of the facts and up to the jury to decide what is believable and what really occurred. It is not up to the judge to edit, censor or in any way change a witness's testimony. So what if the words allegedly said are inflammatory? So what if distasteful language, or gruesome pictures or horrid accounts are put in front of the triers of the facts? If those circumstances are what a witness says occurred then so be it. A courtroom is often not the place for the genteel. It is a place where raw human emotions, grisly and morbid accounts and disgusting, filthy language are often brought forth. If the facts include these distasteful elements then they do. It's the facts which count, not the sensibilities of the persons hearing them.

Id..

Here, as explained below, evidence concerning Bollea's use of racial slurs is plainly relevant.[2]

II. PLAINTIFF'S CONCERN THAT THE SEX TAPES CONTAINED RACIST STATEMENTS IS AN ALTERNATIVE CAUSE OF HIS ALLEGED EMOTIONAL DISTRESS.

At trial, Bollea will ask the jury to award him millions of dollars in damages based on his claim that the posting of the brief sex tape excerpts on the Gawker website caused him to suffer emotional distress. Consistent with hornbook evidentiary and tort principles, defendants should be permitted to argue that Plaintiff cannot meet his burden of proving causation and damages by

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[2] Bollea previously has argued that the admission of evidence of his use of racial slurs would be unfairly prejudicial. Defendants do not intend to make improper appeals to the jury based on race or otherwise "exploit" Plaintiff's racist statements. *MCI Express, Inc.*, 832 So. 2d at 811. Nevertheless, the Court has the ability to limit any potential prejudice in several ways. For instance, it could offer a limiting instruction explaining to the jury why the evidence of Bollea's racial slurs is being admitted. Defendants will propose such an instruction when they file their proposed instructions on February 17, 2016. In addition, although Defendants do not presently intend to seek to offer the video of him uttering the racial slurs or the portions of the Davidson summary or Timeline document containing Bollea's actual racial slurs, if necessary, the Court could order the redaction of any material containing Bollea's statements to remove the actual racist words he used. *See, e.g.*, *Rich v. State*, 18 So.3d 1227, 1231 (Fla. 4th DCA 2009) (holding that trial court did not err by admitting evidence of racial slur, but suggesting that to avoid potential prejudice in future cases that courts consider "redacting the express statement of the racial slur"); *State v. Gaiter*, 616 So. 2d 1132, 1132-33 (Fla. 3d DCA 1993) (affirming redaction of racial slurs where their probative value did not outweigh the potential for prejudice).

presenting evidence that shows his distress stemmed from an alternative cause: his concern about the possible release of sex tape footage showing him making racial slurs.

In all tort cases, a defendant is permitted to introduce evidence of possible alternative causes of a plaintiff's alleged injury. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Mack*, 92 So. 3d 244, 248 (Fla. 1st DCA 2012) (holding that trial court committed reversible error by excluding evidence of possible alternate causes of plaintiff's cancer); *Haas v. Zaccaria*, 659 So. 2d 1130, 1133 (Fla. 4th DCA 1995) (holding that trial court committed reversible error by preventing defendant from presenting evidence of alternative possible causes of plaintiff's injury and noting that "the probabilities may be deduced only from an analysis of all the possibilities"); *see also, e.g.*, *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 820-21 (6th Cir. 2007) (upholding jury verdict for defendant where trial court admitted evidence "suggest[ing] there might be some alternate source of [plaintiff's] distress"); *York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 957-98 (10th Cir. 1996) (approving the admission of evidence concerning alternate causes of plaintiff's emotional distress, and noting that "it would be inequitable to allow the plaintiff to introduce selected evidence on the matter but to disallow defendants to present evidence supporting their theories of causation"); *Louden v. City of Whittier*, 2005 WL 6000502, at *3 (C.D. Cal. Oct. 27, 2005) (permitting defendant to introduce evidence that "would tend to prove an alternate cause for any emotional distress [plaintiff] claims to have suffered since the events giving rise to this suit").

Indeed, in cases involving claims for emotional distress damages, courts permit defendants to introduce evidence of potential alternative causes of a plaintiff's distress even when that evidence is extremely prejudicial. *See, e.g.*, *Judd v. Rodman*, 105 F.3d 1339, 1343 (11th Cir. 1997) (holding that evidence of plaintiff's employment as a nude dancer, while

potentially prejudicial, was admissible "as to damages for emotional distress because it suggested an absence of change in her body image" following defendant's allegedly tortious conduct); *Berry v. Deloney*, 28 F.3d 604, 608 (7th Cir. 1994) (in suit by high school student against her truant officer based on claims of "psychological trauma" and "emotional injuries" from an alleged nonconsensual sexual relationship, holding that trial court did not err by admitting evidence of the student's sexual relationships with other men and abortions because that evidence "would be relevant to the jury's determination of the amount of damages"); *Delaney v. City of Hampton*, 999 F. Supp. 794, 796 (E.D. Va. 1997), *aff'd*, 135 F.3d 769 (4th Cir. 1998) (in sexual harassment suit admitting evidence of plaintiff's "history of sexual abuse and other incidents" to show they "may have contributed to [plaintiff's] current psychiatric problems"); *McCleland v. Montgomery Ward & Co.*, [redacted] WL 571324, at *2 (N.D. Ill. Sept. 25, 1995) (in sexual harassment suit admitting evidence of plaintiff's childhood abuse because "a defendant may prove that the plaintiff's emotional distress was caused by something other than defendant's actions").

Here, defendants should be permitted to introduce two categories of evidence to show that Bollea's distress was caused, in whole or in part, by his concern about the possible release of footage of his racial slurs:

First, defendants plan to introduce Bollea's own pre-suit statements to demonstrate that the racial slurs were his principal concern and the cause of his distress at the time. While publicly complaining that he was upset by Gawker's posting of grainy excerpts of a sex tape, Bollea privately stated that he was very worried about the possibility that the public would learn about his racial slurs. For example, one business day before filing this lawsuit, Bollea sent a text message to Bubba Clem stating that "we know there's more than one tape out there and a ***one***

that has several racial slurs were told [sic], I have a PPV [pay-per-view] and ***I am not waiting for anymore surprises because we know there is a lot more coming***." Ex. 3 (excerpts from Defs.' Trial Ex. 774). Then, hours before filing suit, Bollea and his attorney David Houston told the FBI that they were concerned because Keith Davidson had told Houston "that ***Bollea used racial epitaphs*** [sic] in one of the tapes." Ex. 4 (Defs.' Trial Ex. 755) at GAWKER-2 (FBI case-opening document indicating that Houston communicated with Davidson several times between October 10-12, 2012). They expressed their fear to the FBI that "if released," the footage of those slurs "would damage Bollea's career." *Id.* As in any other tort case, defendants should be permitted to offer evidence of these contemporaneous pre-suit statements to counter Bollea's claim that he was solely distressed by Gawker's posting. *See, e.g.*, *Symonette v. State*, 100 So. 3d 180, 183-84 (Fla. 4th DCA 2012) (holding that party's text messages are admissible because "they were admissions, or the [party's] own statements offered against him").

Second, defendants plan to offer evidence of Bollea's conduct preceding and following his filing of this lawsuit to show that he was not distressed by the news of the sex tapes, nor Gawker's publication of brief excerpts from one of the sex tapes. Rather, that direct and circumstantial evidence demonstrates that he was severely distressed by the potential release of his racial slurs. Defendants have outlined that evidence in a timeline, which is being filed in a separate appendix accompanying this motion. In summary, the timeline shows that:

- In the Spring of 2012, when TMZ first reported the existence of "Hulk Hogan" sex tapes, and *The Dirty* published images from those tapes, Bollea did not file suit. Instead, he joked with TMZ's hosts about the tapes.

- In October 2012, after Gawker posted brief excerpts from a sex tape, Houston sent a cease-and-desist letter, but Bollea did not file suit or seek an injunction, even after Gawker explicitly told Houston that it would not take down the excerpts.

- After Gawker posted the excerpts, Bollea discussed the sex tapes at length on numerous national media outlets, from Howard Stern's radio show to the Today Show to TMZ. In doing so, he ignored his publicist's explicit advice to not talk to the media about the sex tapes.

- Bollea only stopped talking to the press about the sex tapes ***after*** Davidson told Houston that one of the tapes showed Bollea making racial slurs.

- Bollea prepared to file suit only after learning of the racial slurs from Davidson on Friday, October 12. Indeed, he did not even have counsel in Florida on Saturday evening, October 13.

- Before filing suit on Monday, October 15, Bollea and Houston met with the FBI and explained that the reason for seeking an investigation was their concern about Davidson's alleged threat to release the footage of Bollea's racial slurs.

- Later that afternoon – almost two weeks after Gawker posted the excerpts – Bollea filed suit. His lawyers then held a press conference proclaiming that Bollea was seeking $100 million in damages. With the press cameras rolling, Houston explained that the suit was intended to "send[] [a] message to any other entities out there that might be considering posting all or part of this video ***or for that matter any other***" (emphasis added). Houston then sent Davidson an email emphasizing that Bollea had filed the lawsuit. At the time, it was Houston's understanding, based on his initial conversation with Davidson, that "Gawker was being used" by Davidson's client "to fire a warning shot across the bow," and

that the real damaging material was yet to come out. Ex. 5 (D. Houston Dep.) at 141:20-142:1.[3]

- Two days later, Bubba Clem confirmed on the Howard Stern show that Bollea said the "'N' word" on the tape. That afternoon, Bollea's attorneys initiated settlement discussions with Clem. The two men quickly agreed to a settlement. That settlement appears to be a sham designed to compel Clem to provide favorable testimony and to prevent him from talking about Bollea's racial slurs.

- Bollea and Houston continued to push the FBI to investigate Davidson's alleged threat to release the tape with the racial slurs. That investigation culminated in a sting operation in December 2012, during which Houston specifically asked Davidson to show him "the more damaging part of the tape with the language . . . so I know that's actually on there." Ex. 6 (excerpts from Defs.' Trial Ex. 753) at GAWKER -897 (transcript of Sting Audio). Bollea and Houston then watched the portion of the sex tape with Bollea's racial slurs and Bubba Clem's comment to his then-wife that "[i]f we ever did want to retire, all we have to do is use that… footage of him talking about [REDACTED] people." After watching that portion of the tape, Houston said to Bollea, "My God . . . That's bad," and Bollea responded, "it just totally blows my mind to see that." *Id.* at 898-99.

- As this litigation proceeded into discovery, Houston encapsulated Bollea's deep concern about the possible release of the racial slurs when he implored the federal government not to produce video of them: "As you are aware, it has been our goal to prevent

[3] In fact, it would turn out that Davidson's representations to Houston that his client had provided a copy of the tape to Gawker were false. *See, e.g.*, Ex. 8 (Defs.' Trial Ex. 768) (FBI Form FD-302 summarizing interview with female client of Davidson in which she explained that, while Davidson instructed her to say that she was involved in providing the tape to Gawker, in fact neither she, nor any of Davidson's clients, played any role in doing so).

the dissemination of the videos and or any language as it concerns the videos whether it be audio or otherwise." Ex. 7 (Defs.' Trial Ex. 787).

In sum, the timeline of events shows that both before and after the Gawker posting, Bollea spoke at length about the sex tape from which Gawker posted excerpts in the national media, often joking about it. These interviews were consistent with his long history of talking in the press about his love life, illicit affairs, and intimate details of his sex life. Bollea only stopped talking about the sex tapes, filed this lawsuit, and sought an injunction ordering the removal of the sex tape excerpts from Gawker's website ***after*** Davidson told Houston that one of the tapes showed Bollea making racist statements. Prior to that time, just as he had done nothing to pursue TMZ and *The Dirty*, Bollea took no action against Gawker, even though millions of people had watched the excerpts and Gawker had said that it would not them down.

Defendants believe that all of this evidence demonstrates that Bollea's real distress was caused by the threat that the footage of his racial slurs would be released. Bollea undoubtedly will claim that his real reason for filing this lawsuit was his supposed distress from the alleged invasion of his privacy resulting from the posting of the video excerpts. Yet, whether that claim is credible or whether defendants' view of this evidence is more plausible present classic questions of fact that should be decided by a jury. Consistent with fundamental principles about a plaintiff's burden of proving that a defendant caused his alleged damages, defendants should be permitted to offer the evidence concerning the series of events reflected in the accompanying timeline, as well as other related evidence, that is relevant to showing that Bollea was distressed by the existence of footage showing him making the racist comments and the threat that footage would be publicly released. That evidence goes to the heart of Bollea's case and his burden of

proving that defendants' conduct, and not some alternative or intervening event, caused his alleged emotional distress.

III. THE COMMERCIAL VALUE OF THE SEX TAPES DERIVED FROM THE FACT THAT ONE OF THEM CONTAINED RACIST STATEMENTS.

In Bollea's claim for commercial misappropriation, he contends that the brief video excerpts posted by Gawker were worth tens of millions of dollars. He further contends that this astronomical value flowed from the grainy footage's depiction of approximately nine seconds of sexual content. Defendants should be permitted to offer evidence that the excerpts actual commercial value was nominal and that to the extent that the sex tapes had any real monetary value that value derived from the fact that they contained footage of Bollea using racial slurs. Indeed, in commercial misappropriation suits and other cases involving valuation damages, courts routinely permit the parties to offer evidence of an asset's value in other contexts and factors bearing on the asset's valuation. *See, e.g.*, *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1309 (M.D. Fla. 2010) (awarding damages for unauthorized use of plaintiff's photograph based on the licensing fee she received for her photography in other contexts); *Jackson v. Grupo Indus. Hotelero, S.A.*, 2009 WL 8634834, at *12 (S.D. Fla. Apr. 29, 2009) (explaining that court weighed many factors in determining value of plaintiffs' misappropriated image, including its use in other contexts); *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1003 (Fla.4th DCA 2004) (noting that court heard testimony and reviewed evidence of the many considerations that affected the valuation of plaintiff's misappropriated image); *Kalb v. Int'l Resorts, Inc.*, 396 So. 2d 199, 202 (Fla. 2d DCA 1981) (holding that trial court erred in excluding evidence that showed a business's valuation "could have been due to many factors").

Here, the evidence shows that the most anyone actually paid for access to any of the sex tapes was TMZ, which paid was $10,000. *See* Ex. 8 (Defs.' Trial Ex. 768) at GAWKER-412. Gawker itself ***paid nothing*** for the complete 30 minute sex tape that it received. In contrast, Davidson – who sought to make a deal for the sex tapes – agreed to accept $300,000 for all three tapes. *See, e.g.*, Ex. 9 (excerpts from Defs.' Trial Ex. 749) at GAWKER-1615-16 (excerpts from FBI transcript of recording of telephone call between Houston and Davidson).

The evidence produced by the FBI shows that to the extent that the tapes were valuable at all, that value flowed from the fact that they depicted Bollea making racist statements. For example, Davidson repeatedly explained to Houston that "there's one [tape] that's more inflammatory than the others and then that carries the lion share of the value." *Id.* at GAWKER-1609 (excerpts from FBI transcript of recording of telephone call between Houston and Davidson). Houston expressed this same opinion, stressing that the "racial issue certainly could cost [Bollea] a great deal as far as sponsorships" and that they needed "to make sure that doesn't happen." Ex. 10 (excerpts from Defs.' Trial Ex. 747) at GAWKER-1641 (excerpts from FBI transcript of recording of telephone call between Houston and Davidson).

Likewise, Bubba Clem understood that the footage of Bollea was valuable because of Bollea's racist statements. Specifically, one of the sex tapes includes footage showing that as soon as Bollea left the Clems' house, Bubba Clem told his then-wife Heather Clem "if we ever did want to retire, all we have to do is use that . . . footage of him talking about [REDACTED] people." *See, e.g.*, Ex. 11 (Defs.' Trial Ex. 170) at BOLLEA 001214 (transcript prepared by Davidson); Ex. 12 at GAWKER-406 (handwritten notes reflecting similar comment by Mr. Clem, apparently prepared by Davidson's client). Indeed, prior to and immediately after

watching that video, Houston and Bollea acknowledged that the tapes were valuable because they showed Bollea using racial slurs.

Defendants should be permitted to counter Bollea's claim that the brief excerpts it posted were worth millions of dollars by showing that the value of the tapes did not derive from their depiction of Bollea engaged in sexual conduct, but rather that they included footage of him using racial slurs. While Bollea might argue that his and Houston's dealings with Davidson were "fake" or that Bollea would receive a larger royalty payment if he had consented to the excerpts' release, those arguments present factual disputes. The jury should decide which of the parties' two competing views to credit.

IV. DEFENDANTS WILL BE PREJUDICED IF THE JURY IS NOT TOLD THE FBI INVESTIGATION INVOLVED AN ALLEGED EXTORTION ATTEMPT CENTERED ON THE EXISTENCE OF FOOTAGE DEPICTING BOLLEA MAKING RACIST STATEMENTS.

As set forth in Defendants' Motion *in Limine* No. 1 seeking to admit evidence concerning the FBI investigation, there is evidence from that investigation unrelated to race that goes directly to Bollea's burdens of proving liability and damages, as well as the credibility of key witnesses. If that evidence is admitted (as it should be), but the jury is not told about the nature and targets of the FBI's investigation, Defendants will be severely prejudiced. For example, if all the jury is told is that the FBI conducted a criminal investigation that is somehow connected to sex tapes involving Bollea and the Clems, the jury likely would become confused and misled into assuming that Gawker's publication of the video excerpts was, or was suspected to be, a violation of criminal laws. In fact, the target of the investigation was Davidson and his clients, and the investigation centered on an alleged attempt to extort Bollea over racist statements that were captured on one of the sex tapes. And, contrary to what Davidson represented to Bollea and Houston, neither Davidson nor his clients supplied anything to Defendants. *See supra* note

3. Moreover, even if they had provided the tape to Gawker, the FBI did not investigate the dissemination of the tape to Gawker or whether its receipt or publication of the video excerpts was criminal. In fact, the United States Attorney's office has said that Gawker was not a suspect or target of its investigation. *See* Ex. 13 (March 18, 2014 correspondence from S. Sweeney, Assistant U.S. Attorney for the Middle District of Florida, to S. Berlin confirming that Gawker was not the target or subject of any criminal investigation conducted by her office). There can be no sound reason to permit Bollea, or to require Defendants, to present to the jury half-truths or misleading facts that by their very nature would necessarily prejudice Defendants.

V. EVIDENCE OF THE RACIST STATEMENTS IS ADMISSIBLE TO IMPEACH PLAINTIFF AND OTHER WITNESSES.

Evidence about Bollea's racist statements is also critical to Defendants' ability to impeach the testimony of two of Plaintiff's key witnesses: Bollea himself, as well as his attorney David Houston. Defendants intend to show that both have repeatedly testified falsely, under oath, to conceal their true knowledge about the tapes' racist content in order to enhance the credibility of Plaintiff's claim that it was the excerpt of the sex tape Gawker posted that caused $100 million in damages to him.

For example, Bollea testified that during the sting meeting, he did not hear "any dialogue at all" on the tapes, Ex. 14 (T. Bollea Dep.) at 811:17-21, and that he did not actually watch any of the DVDs. *Id.* at 802:15-19; *see also id.* at 803:24 – 804:1 ("once I saw my image, I walked to the front of the room and let David and Davidson do what they had to do"). Houston likewise swore that he had no knowledge of anything that was *said* on any of the DVDs, testifying that "I don't think the audio was turned up, now that you mention it. I don't remember hearing the audio," and flatly telling Gawker's counsel "No, I didn't hear any voices." Ex. 5 (D. Houston Dep.) at 214:22-23, 223:9-12.

The FBI materials make clear this testimony was false. During the sting meeting, Houston specifically asked Davidson, "I'd like to be able to at least [go to] the more damaging part of the tape with the language . . . so I know that's actually on there." Ex. 6 (excerpts from Defs.' Trial Ex. 753) at GAWKER -897. Houston and Bollea then watched about seven minutes of that tape including portions with some of the racist content, which can be heard on the audio. *Id.* at GAWKER-898; *see also* Ex. 15 (Defs.' Trial Ex. 745) at 3:01:20 – 3:09:15 (Part 1) (Sting Audio). After watching that portion, Houston said to Bollea, "My God . . . That's bad," and Bollea responded, "it just totally blows my mind to see that." Ex. 6 (excerpts from Defs.' Trial Ex. 753) at GAWKER-898-99; *accord* Ex. 15 (Defs.' Trial Ex. 745) at 3:08:16 – 3:09:43 (Sting Audio recording reflecting same) (Part 1). Houston then confirmed to the FBI that "he [Houston], TERRY BOLLEA and KEITH DAVIDSON viewed the DVDs" and that Davidson had "fast forwarded one of the DVDs to the section which contained racial epithets and played the section for BOLLEA and DAVIDSON." Ex. 16 (Defs.' Trial Ex. 766). Likewise, in early February 2013, Bollea reviewed the FBI's transcript of the Sting Audio, including the portion in which he watched the sex tapes and heard his racist comments, and confirmed that the audio recording was accurate in a signed statement. *See* Ex. 17 (Defs.' Trial Ex. 752) (FBI Form FD-340c indicating that Bollea reviewed transcript); Ex. 6 (excerpts from Defs.' Trial Ex. 753) at GAWKER-803 (cover sheet to FBI transcript, signed by Bollea).

Houston in his testimony also claimed that Davidson's extortion efforts were all about sex, to make it appear that the sexual portions of the tapes were the most damaging. Houston thus testified that Davidson told him that "it would be very damaging to my client's reputation to have himself portrayed sexually" and "being with another man's wife." Ex. 5 (D. Houston Dep.) at 173:22 – 174:20. He further testified that in his initial conversations with Davidson, Bollea's

racist statements "[n]ever even came up." *Id.* at 157:14-18 (emphasis added). He then testified – again falsely – that Davidson first mentioned the racist statements "toward the end" of their dealings. *Id.* at 180:4-25 (testifying that "I know it was toward the end" and that the issue arose in their "final conversations" or "the day everybody met . . . December 12th").

The FBI materials make clear that Houston's testimony was false. All along Davidson's extortion efforts were aimed at race, not sex, as Davidson considered Bollea's racist statements to be the only content that was really damaging. Indeed, in their very first meeting with the FBI, Houston and Bollea told the FBI that on October 12, 2012, Davidson told Houston about the racist statements and emphasized that those "racial epitaphs [sic] . . . would damage Bollea's career" if released. Ex. 4 (Defs.' Trial Ex. 755); *see also* Ex. 18 (Defs.' Trial Ex. 756) (same).

All of this evidence should be admitted for impeachment purposes. In fact, Bollea made this very point when asking this Court to deny Defendants' fraud on the court motion. At the hearing on that motion, counsel for Bollea argued that these and other statements in the FBI records are properly used for impeachment purposes. As Plaintiff's counsel argued emphatically, "Florida law clearly provides an inconsistency, nondisclosure, poor recollection, dissemblance and even a lie is insufficient to support dismissal and in many cases may be well managed and best resolved by bringing the issue to the jury's attention through cross-examination." Ex. 19 (Jan. 13, 2016 Hrg. Tr.) at 78:16-22; *see also id.* at 76:10-13 ("You have numerous statements at numerous times. It happens. You reconcile them at trial or you impeach the witness. That's what we do."). Bollea's opposition papers advanced this same argument, characterizing the fraud on the court motion as "little more than a roadmap of impeachment evidence they intend to use at trial," and representing that such "impeachment evidence which can easily be countered by other facts and testimony that Mr. Bollea is not inclined (nor

required) to explain to his opponents before trial." Pl.'s Omnibus Resp. in Opp. to Defs.' "Disguised Motions for Rehearing" (filed Jan. 12, 2016) at 3.

Having successfully parried the fraud on the court motion by contending that the many inconsistencies between the testimony provided in this case and what is demonstrated by the FBI materials are best addressed through cross examination, Bollea should not be heard to argue now that this is not valid impeachment evidence.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion *in Limine* No. 2, and permit them to admit evidence concerning Plaintiff's racist statements on a sex tape.

February 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st 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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