

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. 12012447-CI-011

HEATHER CLEM, *et al.*,

Defendants.

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**THE PUBLISHER DEFENDANTS' MOTION *IN LIMINE* ON EVIDENCE RELATING  
TO PLAINTIFF'S ADMISSION THAT HE BELIEVED THE SEX TAPE(S) SHOWED  
HIM MAKING STATEMENTS THAT HAVE BEEN MARKED AS CONFIDENTIAL**

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby move *in limine* on evidence relating to plaintiff's admission that he believed the sex tape(s) filmed in the Clems' bedroom showed him making "several racial slurs."

In public and in this Court, plaintiff Terry Bollea, professionally known as Hulk Hogan, has alleged that this case is about the harm caused by a tape depicting him having sex. In private, however, Hogan admitted a very different motivation for filing suit: He wanted to protect his public image after being told that the sex tape(s) included footage of him making "several racial slurs."

In the Spring of 2012, a timeline of Hulk Hogan sex tapes circulated in the Tampa radio community. The timeline showed that during his filmed encounters with the Clems, Hogan used several racial slurs. A website then published still photos from a sex tape filmed in the Clems' bedroom and suggested that the tape showed Hogan making statements "about black people."

After Gawker later posted the Video Excerpts, Hogan was told that a sex tape showed him

making “several racial slurs.” As the timetable of events makes clear, that knowledge is what prompted this lawsuit.

Indeed, shortly before he filed suit, Hogan sent a text message to his best friend, Bubba the Love Sponge Clem, making clear his motivation. As Hogan explained to Clem, “I have a PPV [pay-per-view] and I am not waiting for any more surprises because we know there is a lot more coming.” Specifically, Hogan expressed to Clem his real concern: “[w]e know there’s more than one tape out there” and “were told” that one “has several racial slurs.”

At trial, the Publisher Defendants plan to argue that Hogan filed this lawsuit, and has sought an injunction and the destruction of the sex tape(s), not based on any harm from the brief snippets of grainy footage showing him engaged in sexual activity, a subject which he has regularly publicized, but because he was concerned that if additional footage were released it would show him making “several racial slurs.” This argument will be based on evidence adduced in discovery and is premised on hornbook legal principles: a party’s admissions are admissible evidence; out-of-court statements are admissible for non-hearsay purposes and impeachment; a litigant can ask questions at trial to build a foundation for the admission of evidence, including to establish that evidence is subject to hearsay exceptions; and documents can be used to refresh witnesses’ recollections. These fundamental rules of evidence apply even when the evidence in question relates to offensive and embarrassing evidence, such as racial slurs.

Consistent with well-established Florida law, and in anticipation of plaintiff’s likely objections at trial, the Publisher Defendants respectfully request that the Court enter an order permitting them to:

(1) introduce the pre-lawsuit text message in which Hogan admitted to Bubba Clem that “we know there’s more than one tape out there and a [*sic*] one that has several racial slurs were [*sic*] told”;

(2) introduce, for non-hearsay purposes, documents that are a timeline and transcript of tapes of sexual encounters between Hogan and Heather Clem in which Hogan made “racial slurs” and Bubba Clem stated that if he “ever want[ed] to retire” he could “use this footage of [Hogan] talking about [REDACTED] people”<sup>1</sup>;

(3) elicit the testimony, and introduce evidence, necessary to establish the foundation for admitting those documents; and

(4) use documents that appear to transcribe Hogan’s racial slurs and Bubba Clem’s statement about the footage to refresh witnesses’ recollections about those slurs and that statement.

### **BACKGROUND**

1. On March 7, 2012, TMZ broke the news about the existence of a Hulk Hogan sex tape. TMZ’s television show featured that news as its lead story and included a live interview with Hogan and his personal lawyer, David Houston. *See, e.g.*, Ex. 1 (Houston Dep. 22:14 – 25:22); *see also* Fugate Aff. Ex. 57.<sup>2</sup> The night before TMZ broke the news, Hogan and TMZ producer Mike Walters exchanged text messages and talked twice by phone. *See* Ex. 2 (Hogan

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<sup>1</sup> During discovery, the Special Discovery Magistrate ordered that each racial slur and reference to African Americans in the documents produced by plaintiff and third-party witnesses, as well as all deposition testimony referring to racial slurs and African Americans, be redacted. For this reason, the Publisher Defendants have included the term “[REDACTED]” in this motion and the accompanying exhibits wherever the actual text of the exhibits or testimony includes redacted racial slurs or references to African Americans. If requested, the unredacted documents and videotaped deposition testimony will be provided to the Court for *in camera* review.

<sup>2</sup> Citations to “Fugate Aff.” are the Affidavit of Rachel E. Fugate filed in support of the Publisher Defendants’ motion for summary judgment.

phone records and discovery response). Hogan and Walters have a personal relationship, as Walters' father and Hogan's son worked together on a business venture in the past. *See id.* (Hogan deposition testimony).

2. In the following days, as the news of a Hogan sex tape spread, a timeline of two Hogan sex tapes circulated through the Tampa radio community. *See* Exs. 3, 4 (Peirce Dep. 95:12-15, 97:4 – 100:20; Dep. Ex. 112). The timeline showed that Hogan made two racial slurs while talking with Bubba and Heather Clem, as well as a “real [REDACTED] comment.” *See* Ex. 4 (Dep. Ex. 112). It also showed that at the end of one tape, Bubba Clem allegedly said to Heather that “[i]f we ever did want to retire all we have to do is use that footage of [Hogan] talking about [REDACTED] people.” *Id.*

3. Within weeks, a website called The Dirty posted two items that included still images from a Hogan sex tape. *See* Exs. 5, 6 (Dep. Exs. 60, 63). Along with the images, the second posting included the following caption: “Terry, do you remember what you said about black people in this sex tape?” *See* Ex. 6 (Dep. Ex. 63).

4. On October 4, 2012, Gawker posted the Video Excerpts. Those excerpts contained only 101 seconds of footage from a tape that runs more than a half hour. *See* Ex. 7 (Dep. Ex. 92).

5. In the wake of Gawker's posting, Hogan went on a media tour to promote an upcoming wrestling pay-per-view event. During the tour, he talked about the sex tape and his sexual encounter with Heather Clem extensively to various national media. Although Hogan and his lawyer told reporters that they were going to initiate legal action, they did not.

6. On October 9, in the midst of the pay-per-view media tour, Hogan and Houston appeared on TMZ's television show for a previously unscheduled interview about “the leaked

tape.” *See* Ex. 8 (TMZ Web Report and transcript of TMZ television interview); *see also* Fugate Aff. Ex. 98. During the interview, Walters told Hogan and Houston that he “saw the tape.” *Id.* According to Walters, “the tape” showed Bubba Clem telling Heather Clem that “if we ever did want to retire, all we’d have to do is use this footage of him.” Walters read this line from a “transcript of the end of this tape.” *Id.* In reporting Bubba Clem’s statement, TMZ implied that it proved the tape was valuable because it depicted Hogan having sex, but two separate documents obtained in discovery suggest that Bubba Clem’s actual statement expressed his view that the tape was valuable because it was “footage of [Hogan] talking about [REDACTED] people.” *See supra* ¶ 2 and *infra* ¶ 17. During the TMZ interview, Walters omitted that part of the quote.

7. After hearing Bubba Clem’s statement, Hogan asked whether TMZ could show the tape to Houston. In response, Walters suggested that they “talk about it off the air.” *See* Ex. 8 (transcript of TMZ television interview). Following the interview, Houston talked to Walters. *See* Ex. 1 (Houston Dep. 127:12-16). That same evening, Hogan and Walters had a lengthy telephone conversation. *See* Ex. 9 (Hogan telephone records).

8. The next day, October 10, an attorney from Los Angeles named Keith Davidson emailed Houston about the “Hulk Hogan Tape.” *See* Ex. 10 (Dep. Ex. 249). Davidson identified himself as a lawyer representing the “rights holder of the [sex tape] footage,” and someone considering representing “the possessor of the tapes.” He said that he wanted to talk to Houston about the tapes.

9. On October 11, Houston and Davidson spoke by telephone. *See* Ex. 1 (Houston Dep. 138:0 – 140:15). During that conversation, Davidson said that the first sex tape was sent to Gawker “to send a warning shot” to Hogan. *See id.* (Houston Dep. 140:9-11). Davidson told

Houston that Hogan should “pay him because otherwise there would be increasing problems for Mr. Hogan.” *See id.* (Houston Dep. 139:14-15).

10. On Friday, October 12, Davidson emailed Houston, stating that he had “viewed all materials” and could discuss their contents “more substantively.” *See Ex. 11* (Dep. Ex. 251). After receiving that email, Houston spoke to Davidson. *See Ex. 1* (Houston Dep. 148:11 – 150:15). Davidson again asked Houston whether Hogan “would pay him,” telling him there was “more than one” tape. *See id.* (Houston Dep. 152:2 – 156:6). (The following month, Davidson provided Houston with transcripts of the tapes, including one showing Hogan making racial slurs and Bubba Clem’s statement that “if we ever did want to retire, all we have to do is use that f--king footage of him talking about [REDACTED] people.” *See infra* ¶ 17.)

11. On the afternoon of Friday, October 12 – after Hogan spoke with Walters and Davidson contacted Houston – Hogan sent a text message to Bubba Clem. *See Ex. 12* (BOLLEA 002658 ). In the text message, Hogan told Clem that “things are moving really fast” and expressed the reason for his concern:

We know there’s more than one tape out there and a [*sic*] ***one that has several racial slurs*** were [*sic*] told. I have a PPV [pay-per-view] and I am not waiting for anymore surprises because we know there is a lot more coming . . . .

12. On the next business day, Monday, October 15, Hogan filed two complaints, one in federal court against Gawker and one in state court against Bubba Clem and Heather Clem. Both complaints sought injunctions against any future publication of footage from the sex tape(s) *and* orders requiring defendants to deliver all copies of, or excerpts from, the sex tape(s) to Hogan. *See, e.g., Ex. 13* (excerpts of federal complaint).

13. That afternoon, Hogan’s lawyers staged a press conference. They told reporters that Hogan was demanding the delivery of all copies of the sex tape(s) to ensure their

destruction. *See* Ex. 14; *see also* Defs.’ Trial Exhibit 269 (video of press conference featured in television news report). Hogan’s lawyers also stated that the lawsuit was intended to send a warning to anyone else who might have copies of the tape(s) and be inclined to publish footage. As Houston explained to the assembled press on the federal courthouse steps: “I’m hopeful today [the lawsuit] sends [a] message to any other entities out there that might be considering posting all or part of this video.” *See* Ex. 14.

14. Two days later, on October 17, Howard Stern interviewed Bubba Clem about the sex tape and Hogan’s lawsuit. During the interview, the two men had the following exchange:

HOWARD STERN: Let’s say he really is embarrassed by this. Let’s say everything that they are reporting, these rumors that the “N” word is being said –

MR. CLEM: But he said it.

*See* Ex. 15 (transcript of Howard Stern show ); *see also* Defs.’ Ex. 303 (*Howard Stern Show*, October 17, 2012). Other news reports around this time also mentioned that the tapes of Hogan showed him making racial slurs. For example, Philly.com, the website for *The Philadelphia Inquirer* and *Philadelphia Daily News*, reported that “[a] source says he saw footage on one of the surreptitious recordings of Hogan, all of which seem to have been taped in the Florida home of the Clems, using the N-word and making other derogatory remarks about black people.” *See* Ex. 16.

15. The afternoon of the Howard Stern–Bubba the Love Sponge Clem broadcast, Hogan’s attorneys initiated settlement discussions with Mr. Clem’s attorneys. *See* Ex. 17 (BOLLEA 000741-44).

16. Hogan and Bubba the Love Sponge Clem quickly reached a settlement. *See* Ex. 18. The settlement provided that Mr. Clem would only make “positive” statements about Hogan in the future and would “not disparage” him. Mr. Clem also agreed to “maintain total

confidentiality of all information regarding” Hogan and assigned to Hogan all of his rights, including intellectual property rights, to the sex tape(s). The settlement agreement required Clem to pay just \$5,000.

17. During the course of Houston’s discussions with Davidson, Davidson provided Houston with copies of a transcript of the Hogan sex tapes. That transcript showed Hogan (identified by the pseudonym “Bostick”) making several racial slurs. *See* Ex. 19 (BOLLEA 1213, 1214). Like the timeline that previously circulated in the Tampa radio community, the transcripts showed that Bubba Clem commented to Heather Clem that “if we ever did want to retire, all we have to do is use that f--king footage of him talking about [REDACTED] people.” *Id.* (BOLLEA 1214).<sup>3</sup>

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<sup>3</sup> After Houston’s second conversation with Davidson – which took place on October 12 – Houston told TMZ that he contacted the FBI to ask for an investigation involving the sex tape(s). *See* Ex. 20 (GAWKER 24003-04). That investigation centered on Houston’s claim that Davidson had engaged in extortion. Ultimately, the federal government declined to prosecute him or anyone else. *See* Ex. 21 (email from FBI agent). Following the investigation, the United States Attorney’s Office provided Houston with copies of Davidson’s transcripts and also informed him that it possessed “3 DVD recordings” that it was retaining during the pendency of this litigation. *See* Ex. 19 (correspondence from prosecutor in U.S. Attorney’s office). This Court previously held that tapes of any sexual encounters involving Hogan and Heather Clem are relevant and separately held that the federal government’s records relating to its investigation of the sex tapes were relevant and ordered Hogan and his lawyers to sign authorizations allowing the federal government to release those records. *See* Ex. 22 (February 26, 2014 Order; May 14, 2014 Order; and Jan. 17, 2014 Hearing Tr. 31:1 – 33:23). Hogan challenged that order by seeking a writ from the District Court of Appeal. After the DCA dismissed the writ petition, Hogan and his lawyers signed authorizations, and the Publisher Defendants’ counsel submitted requests for the records to the federal government. That request is now being considered by a federal court. *See Gawker Media, LLC v. FBI*, Case No. 8:15-cv-01202-SCB-EAJ (M.D. Fla.).



## ARGUMENT

### **I. PLAINTIFF’S TEXT MESSAGE TO BUBBA CLEM ABOUT HIS “RACIAL SLURS” IS ADMISSIBLE.**

18. Hogan’s text message to Bubba Clem is admissible. It is an admission of a party opponent. *See* Fla. Stat. § 90.803(18); *see also* *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”). At trial, the Publisher Defendants are permitted to introduce Hogan’s own statements in their defense against his claims.<sup>4</sup>

19. Hogan’s text message is relevant to show his motivation for filing this lawsuit and to undercut his claim that he was harmed by the excerpts Gawker posted. It is undisputed that Hogan did not file suit or seek an injunction until *after* he learned that sex tape(s) depicted him making “several racial slurs.” Indeed, the evidence shows that Hogan’s concern was not being depicted engaged in sexual activity – after all, he routinely talked about his sex life and body parts on national television and radio, and even discussed these supposedly “private” matters after Gawker’s posting, even joking about them. *See, e.g.*, SUMF ¶¶ 56-68, 75 and exhibits cited therein. Rather, as he wrote to Bubba Clem, he was concerned about his public image and the possibility of “more surprises.” As the text message to Clem reveals, that concern was based on his belief that “there’s more than one tape out there” and that unpublished footage showed Hogan making “several racial slurs.”

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<sup>4</sup> Even if the text message was not a party admission, it still would be admissible under several hearsay exceptions, most notably the exception allowing hearsay to establish the “declarant’s then-existing state of mind.” Fla. Stat. § 90.803(3). Here, among other things, the text message “prove[s] or explain[s] acts of subsequent conduct of the declarant.” *Id.* § 90.803(3)(a).

## **II. THE TIMELINE AND TRANSCRIPT DOCUMENTS REFLECTING HOGAN’S RACIAL SLURS ARE ADMISSIBLE**

20. Depending on the testimony and evidence adduced at trial, the Publisher Defendants should be permitted to use the timeline and transcript documents showing that Hogan made racial slurs and that Bubba Clem kept the recording because it depicted Hogan making statements “about [REDACTED] people.” *See* Exs. 4, 19 (Dep. Ex. 112, BOLLEA 1213-14).

21. To the extent that those documents reflect Hogan’s statements, they are admissions of a party and are relevant to establish that his concern about the “racial slurs” was justified.<sup>5</sup> Fla. Stat. § 90.803(18). And, to the extent that they reflect statements by Clem, those statements are relevant to the reason Clem kept the footage and to undercut Hogan’s damages theory on his commercial misappropriation claim. Although Hogan claims that the Gawker posting had value because it showed footage of sexual activity, that footage had little value. Rather, as Clem expressed at the time, the only value of the grainy footage filmed in the Clems’ bedroom was the fact that it showed Hogan “talking about [REDACTED] people.” Clem’s statements are admissible as “spontaneous statement[s] describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” *Id.* § 90.803(1). They also show his state of mind, including his “intent, plan, motive, [and] design.” *Id.* § 90.803(3).

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<sup>5</sup> At various stages of this litigation, Hogan’s attorneys have argued that evidence suggesting Hogan made racial slurs is highly prejudicial. But, Hogan has never testified about whether he used racial slurs while talking to the Clems after one of his sexual encounters with Heather. As a result, the record is devoid of any actual testimony from Hogan about the accuracy of the transcripts, whether he used the “racial slurs” mentioned in his text to Bubba, or whether he has made those “racial slurs.” Consistent with fundamental evidentiary principles, the Publisher Defendants should be permitted to make these inquiries at trial.

22. The timeline and transcript documents also are admissible for non-hearsay purposes. For example, the Publisher Defendants should be permitted to offer evidence that at least one of the timelines with Hogan’s racial slurs was circulating before Gawker posted the video. The fact that this information was being distributed locally prior to Gawker’s posting could be used as circumstantial evidence establishing how Hogan became aware that the tapes showed him making “racial slurs” – particularly in light of Hogan and Houston’s testimony that they did not recall how they learned that fact.<sup>6</sup> The timeline document therefore would not be offered as proof that Hogan actually made the racial slurs, but to establish merely that a document showing that he made those statements was circulating in the community and providing grounds to show a possible basis for his concern that tapes including “several racial slurs” might be released. The timeline document also shows that people in the local press were discussing the Hogan sex tapes for many months, establishing their newsworthiness.

23. Similarly, the transcript document that Houston received from Davidson is relevant to establish why Hogan was concerned about “several racial slurs” following Houston’s communications with Davidson. Although Houston claims Davidson did not mention the racial slurs during their October 11 and 12 conversations, the Publisher Defendants should be permitted to use the transcript document to impeach that claim. *See* Ex. 1 (Houston Dep. 180:1-25). For example, the Publisher Defendants should be permitted to argue to the jury that Houston’s testimony about Davidson is undermined by the timing of Hogan’s text message, his invocation

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<sup>6</sup> *See* Ex. 23 (Bollea Dep. 703:17 – 706:19, 765:09 – 766:18) (Hogan testifying that he does not recall conversation with Walters on October 9 and invoking attorney-client privilege when asked how he learned that the tapes included “several racial slurs”); *See* Ex. 1 (Houston Dep. 131:22 – 132:2, 180:1-25) (Houston testifying that he could not recall if the topic of “racial slurs” came up in his discussion with Walters and that he could not recall when Davidson mentioned the slurs).

of the attorney-client privilege when asked how he learned about the racial slurs, Davidson's statement that he had reviewed the "materials," and the fact that Davidson later sent a transcript showing Hogan making racial slurs. It is simply implausible that Davidson would tell Houston that "there would be increasing problems for Mr. Hogan" and not tell him that those problems included footage of him making racial slurs, which is what Davidson's transcripts showed. Houston's testimony is particularly implausible in light of Hogan's text message expressing his concern that "a lot more [was] coming," the possibility of "surprises," and his understanding that the unpublished footage included "several racial slurs."

24. At a minimum, the Publisher Defendants should be permitted to elicit testimony and offer evidence to establish a foundation for admitting the timeline and transcript documents, whether to establish that Hogan made "racial slurs" while being filmed in the Clems' bedroom, or to show the basis for why he thought that there might be footage of him making "racial slurs."

25. Even if the Publisher Defendants do not offer the timeline and transcript documents as substantive or impeachment evidence, they should be permitted to use those documents to refresh witnesses' recollections. *See Wilcox v. State*, 143 So. 3d 359, 378-79 (Fla. 2014) ("writings or objects used to refresh the memory of a witness need not be admissible evidence"); *Garrett v. Morris Kirschman & Co.*, 336 So. 2d 566, 569 (Fla. 1976) (recognizing "wide latitude in the choice of writings as mnemonic aids," even though "writings used to prompt recollection are not necessarily admissible in evidence themselves"). For example, if a witness testifies that he or she does not recall whether Hogan or Bubba Clem made the statements attributed to them, the Publisher Defendants should be permitted to show the timeline and transcript to the witnesses to see if the documents refresh their recollections.

**IV. EVIDENCE THAT A PARTY MADE RACIAL SLURS IS ADMISSIBLE EVEN THOUGH IT MIGHT BE PREJUDICIAL.**

26. Throughout discovery, Hogan has argued that all evidence suggesting that he made racial slurs and that a sex tape filmed in the Clems' bedroom depicts him making such slurs should be off limits. His argument has been premised on the potential prejudice of evidence concerning the slurs and the hearsay nature of certain of that evidence. As explained above, however, Hogan's text message referring to "several racial slurs" is not hearsay (it is a party admission), and the timeline and transcript documents are admissible on various grounds, including for non-hearsay reasons. Here, any prejudice caused by the admission of this evidence is outweighed by its probative value.

27. 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, 1347 (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 so long as the testimony and argument is not an "impermissible appeal to the biases or prejudices of the jurors." *Id.*

28. 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." *Id.* 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 v. State*, 574 So. 2d 108, 113 (Fla. 1991) (“we reject as meritless [defendant’s] contention 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”).

29. The District Courts of Appeal also have 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 (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. *See* 411 So. 2d at 1349 (ordering that “witnesses should be allowed to repeat [defendant’s] statements exactly as they recall them”).<sup>7</sup>

30. Here, the evidence of Hogan’s racial slurs is plainly relevant. His text message to Bubba Clem about the tapes showing him using “several racial slurs” establishes his motivation

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<sup>7</sup> The Publisher Defendants acknowledge that some Florida appellate decisions have held that the actual racial epithets made by a party are inadmissible under the facts presented in those cases. But, even those cases recognize that racial epithets are admissible if they are relevant. *See, e.g., 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” and was “exploit[ed]” in questioning and argument to “exacerbate[] the prejudicial impact of the comment”). Here, as explained in the text, the documents concerning Hogan’s “several racial slurs” is directly relevant to issues raised by his claims.

for filing suit and undercuts his claim that he was harmed by the Gawker excerpts. Likewise, the timeline and transcript documents provide evidence that Hogan was aware that he actually used those slurs. Those documents also provide grounds to show how Hogan knew on October 12 that the tapes included “several racial slurs.” And, Bubba Clem’s “retirement” statement demonstrates his motivation in keeping the tapes and shows that the value of the tapes is not based on sex, as Hogan claims, but instead based on the fact that he was “talking about [REDACTED people.]”

31. The Publisher Defendants have a good faith basis for seeking to admit this evidence. The fact that a Hogan sex tape included racial slurs was:

- Reported in the press before and after Gawker’s posting,
- Included in a timeline of two tapes that was produced by a third-party witness and that was discussed among people in the Tampa radio community,
- Included in a transcript of a tape provided to Hogan’s lawyer by a person seeking to establish the authenticity of the tapes and to show that they could cause “increasing problems for Mr. Hogan,” and
- Is the subject of a text message sent by Hogan himself.

32. The Publisher Defendants are not seeking to impermissibly appeal to the jury’s prejudices. Rather, they simply seek to admit this evidence, which is directly relevant to Hogan’s lawsuit and to defeat his claims that he filed this suit to seek compensation for the emotional harms caused by the brief sexual activity depicted in the challenged publication.

### **CONCLUSION**

For the foregoing reasons, the Publisher Defendants respectfully request that this Court enter an order permitting them to:

(1) introduce the pre-lawsuit text message in which Hogan admitted to Bubba Clem that “we know there’s more than one tape out there and a [*sic*] one that has several racial slurs were [*sic*] told”;

(2) introduce, for non-hearsay purposes, the timeline and transcript documents showing that Hogan made racist statements following one of his sexual encounters with Heather Clem and that Bubba Clem stated, on the recording, that if he “ever want[ed] to retire” he could “use this footage of [Hogan] talking about [REDACTED] people”;

(3) elicit the testimony, and introduce evidence, necessary to establish the foundation for admitting those documents; and

(4) use documents that appear to transcribe Hogan’s racial slurs and Clem’s statement about the footage to refresh witnesses’ recollections about whether Hogan used racial slurs and whether Bubba Clem made the statement that the tape had value because it showed Hogan “talking about [REDACTED] people.”

June 12, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of June 2015, 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:

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