

# EXHIBIT 37

to the

**GAWKER DEFENDANTS' MOTION TO COMPEL  
PLAINTIFF TO PRODUCE IMPROPERLY WITHHELD DOCUMENTS**

August 14, 2015

**VIA EMAIL**

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**Re: *Terry Gene Bollea v. Clem, Gawker Media, LLC, et al.***  
**Case No.: 12012447-CI-011**

Dear Counsel:

I write concerning several issues raised by the materials the federal government recently produced in connection with the ongoing FOIA litigation.

First, the government produced a number of documents that should have been produced in response to the discovery served on plaintiff and the subpoena served on Mr. Houston and his law firm, particularly given each of their respective obligations to preserve records in connection with this litigation. These documents include, among others, documents that the government produced with the bates-labels GAWKER-11, GAWKER-85, GAWKER-1109, GAWKER-470, and EOUSA 22-24. Please produce unredacted copies of these documents and any other documents plaintiff and/or Mr. Houston have not previously produced, including without limitation communications with law enforcement personnel or any other third-parties about the sex tapes or the subject matter of this action. Please also provide an explanation for why plaintiff

and Mr. Houston did not produce these clearly responsive documents during the course of discovery.

Second, the government's production of documents shows that, in October 2012, plaintiff provided the FBI with copies of text messages he had exchanged with Bubba the Love Sponge Clem between October 6 and October 16, 2012. *See* FBI Documents Bates Labeled GAWKER-19-20, GAWKER-24-71. But, in August 2013, in response to discovery requests in this litigation, the text messages plaintiff produced ended mid-day on October 12, 2012; they did not include text messages with Mr. Clem from later that day or on subsequent days. *See* BOLLEA 00645-63. When plaintiff belatedly produced additional text messages in October 2014, Mr. Harder represented to Judge Case and to us that plaintiff "was not able to see" the missing text messages "when he personally searched his phone for responsive documents" in connection with the original production, and that they had to be recovered by an "IT specialist." Ltr. from C. Harder to Hon. James Case and Counsel for Gawker Defendants, dated Oct. 15, 2014.<sup>1</sup> Plaintiff then represented to the Court that "those text messages were not located earlier because Mr. Bollea was unable to retrieve them from his phone, and they were later retrieved by an eDiscovery specialist," contending that the "messages were not discovered until after [Gawker's February 2014 discovery] motion was denied." Response to Gawker's Exceptions to Motion for Sanctions, filed Nov. 18, 2014 at 5. Nowhere did plaintiff or his counsel explain – or disclose – that plaintiff had produced these very same text messages to the FBI *two years earlier*. Please explain why plaintiff was able to produce a complete set of text messages to the FBI in October 2012, but did not produce them to us in August 2013.

Third, it appears from the government's document production that Mr. Houston and Mr. Bollea discussed with third parties their ongoing settlement negotiations with Bubba Clem, Heather Clem, and their respective counsel, which constitutes a waiver of any settlement privilege. *See, e.g.*, FBI Document Bates Labeled GAWKER-86-93, GAWKER-118, GAWKER-212, and GAWKER-297. This waiver was not previously disclosed to the Court or to us. As reflected in the FBI's document production, plaintiff and Mr. Houston's disclosures about the settlement negotiations also suggest that the settlement with Mr. Clem was a sham and/or designed to affect his testimony in this case and that the joinder of Ms. Clem to the case against Gawker was fraudulent. Accordingly, please produce any and all previously-withheld documents referring or relating to settlement negotiations and communications with Bubba Clem and/or Heather Clem, or their respective counsel.

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<sup>1</sup> Prior to this, plaintiff had been ordered on October 29, 2013 to produce all documents related to his sexual relationship with Heather Clem, including without limitation communications related thereto; had represented to Judge Case in connection with Gawker's February 2014 motion to compel that he had done so; and had repeated that representation again to Judge Case in connection with Gawker's motion for sanctions, both in his briefs and at the July 2014 hearing on that motion.

Finally, the government's document production reflects that Mr. Houston agreed both for himself and on behalf of Mr. Bollea to waive the attorney-client privilege in connection with both the criminal investigation and this civil case. *See, e.g.*, FBI Document Bates Labeled GAWKER-86. This waiver was not previously disclosed to the Court or to us. We expect that plaintiff and Mr. Houston have preserved all records of their communications with each other and with other counsel in this case, including each of your respective firms and the Wolf, Rifkin firm. We also expect that plaintiff and his counsel will be producing all such materials forthwith, as they are responsive to document requests previously served on plaintiff and the subpoenas served on Mr. Houston and his law firm.


Please respond to this correspondence by Tuesday, August 18, 2015, at 5:00 p.m., addressing each of these issues and confirming that plaintiff and Mr. Houston will produce all of the improperly-withheld documents referenced above by no later than September 1, 2015.

Should you have any questions or wish to discuss any aspect of this correspondence, please do not hesitate to give me a call. In the meantime, we reserve all rights.

Very truly yours,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: \_\_\_\_\_

  
Michael Berry

cc: All Counsel of Record