

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.

**SUPPLEMENTAL BRIEF RE: PLAINTIFF'S MOTION *IN LIMINE* NO. 3
TO EXCLUDE EVIDENCE OR ARGUMENT RELATED TO SETTLEMENT**

At the July 1, 2015 hearing in this matter, the Court heard argument on Plaintiff Terry Gene Bollea's Motion *in Limine* No. 3 (filed on June 12, 2015), which sought to preclude Defendants from introducing, or referring to, Bollea's settlement with Bubba the Love Sponge Clem. *See* Ex. 1 (July 1, 2015 Hrg. Tr.) at 134:3 – 144:12. In opposing that motion, Defendants argued that the settlement is admissible because it is a sham, designed (among other things) to secure favorable testimony from Mr. Clem. *Id.*; *see also* Defs.' Opp. to Pl's Mot. in *Limine* No. 3 (filed June 26, 2015). The Court reserved ruling on the motion, with the understanding that Mr. Clem's counsel would be present when the motion is considered in full so that he could address the significance, if any, of the settlement agreement's confidentiality clause. Ex. 1 (July 1, 2015 Hrg. Tr.) at 138:13 – 140:25.

In anticipation of the Court's hearing additional argument on that motion and pursuant to Paragraph 22 of the Second Pretrial Order, Defendants file this supplemental memorandum in opposition to Bollea's Motion *in Limine* No. 3, which addresses developments that have occurred since the motion was initially briefed.

First, materials recently produced by the FBI provide substantial additional support for the theory that the settlement with Mr. Clem was a sham, principally designed to influence his testimony. Two documents in particular speak to that issue:

- On October 25, 2012 (shortly before the settlement was completed), Bollea’s lead counsel, Charles Harder, sent an email to Mr. Clem’s attorneys about the settlement, stating that one of the key terms of the settlement agreement – Bollea’s promise that he would not “seek to criminally prosecute Bubba” – was, in fact, “never an issue” for Bollea. Ex. 24 to Defs.’ Mot. to Compel (filed Dec. 22, 2015). This statement – made in the course of the two men’s settlement negotiations – underscores that the settlement was a ruse. On its face, Bollea’s “promise” to not seek Mr. Clem’s prosecution appears to have been a significant part of the consideration extended to Mr. Clem. Yet, it turns out that the parties knew this was an empty promise, as Bollea “never” intended to pursue his best friend’s prosecution. Since consummating the agreement, Mr. Clem has repeatedly sought to emphasize his sincerity in taking responsibility for filming Bollea by saying that he should be prosecuted – all the while knowing Bollea is contractually bound not to seek his prosecution and never intended to cooperate in any prosecution of Mr. Clem. *See, e.g.*, Ex. 2 (July 16, 2015 BTLS Radio Show at 2:15:55 – 2:16:10 (“And my illegal act – and if they need to press charges against me for – then I will – I will go own up to my – to the charges against me like a man.”)).

- In November 2012, after the settlement with Bollea was completed, Mr. Clem was interviewed by the FBI. During that interview, Mr. Clem stated that Bollea knew about his cameras *and* knew he was being filmed during the sexual encounter with Heather Clem. *See* Ex. G to Defs.’ Mot. for Access to Corrected and Unredacted DVDs. This statement to the FBI provides further evidence that the settlement influenced Mr. Clem’s testimony in this case. At

his deposition, in the presence of Bollea and his attorneys, Mr. Clem stuck to his story about Bollea's lack of knowledge about the cameras and the filming, consistent with the terms of the settlement agreement. But, when he was interviewed by the FBI, in private and without Bollea's knowledge, Mr. Clem told a completely different story.

Second, at the same July 1 hearing at which this Court reserved on Bollea's motion concerning the admissibility of the Clem settlement agreement, the Court denied a motion *in limine* brought by Defendants, also involving the admissibility of settlement materials. That motion sought to exclude settlement overtures that Bollea made to Nick Denton before this case was filed. Ex. 1 (July 1, 2015 Hrg. Tr.) at 271:21 –79:3. During the argument on that motion, counsel for Bollea argued that the settlement overtures were admissible because Bollea planned to offer them to “show things other than liability or absence of liability, such as intent, knowledge, notice, things like that.” *Id.* at 277:17-23. Although Defendants disagreed with Bollea's position on that issue, there is no basis for allowing those settlement overtures to be admitted, while excluding the settlement agreement with Mr. Clem. Defendants do not intend to use the settlement agreement to prove that they were not liable. Instead, like Bollea, they intend to use the agreement to “show things . . . such as intent, knowledge, notice.” Specifically, they plan to use the agreement to impeach Mr. Clem and to argue that the timing and substance of the settlement show that Bollea sought to influence Mr. Clem's testimony on key issues and buy Mr. Clem's silence with respect to plaintiff's racial slurs on one of the tapes.

Third, to the extent that Bollea suggested at the July 1 hearing that the confidentiality provision of his settlement agreement with Mr. Clem affects its admissibility, materials produced by the FBI have settled that question as well. Specifically, those materials make clear that Bollea provided a copy of the settlement agreement, as well as details of the settlement negotiations, to

the FBI and Keith Davidson. *See* Defs.' Mot. to Compel (filed Dec. 22, 2015) at 8-11 & Exs. cited therein. In light of these disclosures, Bollea should not be permitted to argue now that the confidentiality provision of the agreement in any way prohibits the settlement from being admitted in open court. Indeed, following the January 13, 2016 hearing on Defendants' motion to compel settlement communications, the Court unsealed the portions of the argument in which counsel discussed some of the agreement's previously confidential terms to explain that the settlement was a sham.

For these reasons, as well as those set forth in the Defendants' original opposition, Bollea's Motion *in Limine* No. 3 should be denied.

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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