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

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY GENE BOLLEA'S RESPONSE TO DEFENDANTS' EXCEPTIONS TO THE SPECIAL DISCOVERY MAGISTRATE'S REPORT AND RECOMMENDATION DENYING DEFENDANTS' MOTION FOR SANCTIONS

I. INTRODUCTION

On October 20, 2014, Special Discovery Magistrate Judge Case entered a Report and Recommendation denying Defendants Gawker Media, LLC's ("Gawker") and A.J. Daulerio's motion for discovery sanctions. Judge Case issued the Report and Recommendation after reviewing at least 94 pages of briefing and hundreds of pages of affidavits and exhibits, and after a three hour and thirty minute in-person hearing on July 18, 2014, where five counsel for Gawker, two counsel for Mr. Bollea, and Mr. Bollea himself, appeared. If the Court, for whatever reason, is inclined to **decline** to adopt the Report and Recommendation, then Mr. Bollea hereby requests a hearing on this matter during the already-scheduled Case Management

Conference set for December 17, 2014 at 1:30 p.m. If the Court is inclined to **adopt** the Report and Recommendation, then Mr. Bollea has no objection to the Court doing so without oral argument.

Given the extensiveness with which the matters were already briefed and considered by Judge Case, the parties have agreed to principally rely on their previous papers in bringing these issues before the Court. On or about October 30, 2014, Gawker's counsel supplied the Court with all the parties' briefing, supporting affidavits and exhibits, as well as the July 18, 2014 hearing transcript. For the reasons stated in Mr. Bollea's oppositions to Gawker's motion, and stated during the July 18, 2014 oral argument before Judge Case, Mr. Bollea respectfully submits that this Court should adopt Judge Case's carefully considered Report and Recommendation denying Gawker's motion for sanctions. Gawker's exceptions to that Report and Recommendation should be rejected for the following **additional** reasons:

First, the Special Discovery Magistrate carefully considered Gawker's arguments, examined the entire record, and determined that no sanctions were appropriate. That ruling is consistent with the facts and applicable law and Gawker has offered no reasonable ground to rule otherwise:

a. Mr. Bollea was, and is, in substantial compliance with all of his discovery obligations.

b. Any alleged delays in producing material did not prejudice Gawker, which will have plenty of time to prepare for a mid-2015 trial.

c. Mr. Bollea has offered to appear at a third day of deposition, further alleviating any potential prejudice that could have resulted from any alleged delay in producing documents.

d. The discovery requests that formed the basis of Gawker's sanctions motion concerned completely **collateral** issues. This case, as the Court knows, involves Gawker's invasion of Mr. Bollea's privacy through the publication of a clandestinely-recorded explicit Sex Video, as well as Gawker's claimed First Amendment defense and Mr. Bollea's damages. None of the discovery at issue had anything to do with those issues, and instead concerned collateral matters such as when the sexual encounter with Heather Clem occurred.

e. To the extent that there were discovery violations at all by Mr. Bollea (which he denies), the sanctions sought by Gawker were grossly disproportionate to the alleged violation and could not be imposed consistent with due process. **Gawker sought outright dismissal of the case**; and orders that would permit Gawker to introduce irrelevant, inflammatory, unauthenticated, inadmissible hearsay evidence to the jury. These sanctions were improper remedies for alleged discovery violations, including alleged delays in producing documents regarding collateral issues and inaccurate estimates of the date of an event, which later was corrected well before the filing of the sanctions motion and which caused no harm or prejudice whatsoever to Gawker.

Second, Gawker's arguments for asking the Court to decline to adopt Judge Case's recommendation are without merit:

a. Gawker improperly relies on recently-produced text messages that were not the subject of the sanctions motion that was before Judge Case. In any event, as Mr. Bollea's counsel explained in an October 15, 2014 letter to all counsel and Judge Case, 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, and promptly produced

thereafter. Mr. Bollea has agreed to be questioned about those text messages during a third day of deposition. Thus, there is no prejudice suffered by Gawker, and no basis for any sanction.

b. Gawker attacks Judge Case's reliance on *Kozel v. Osendorf*, 629 So.2d 817 (Fla. 1993), on the ground that *Kozel* involved only dismissal sanctions. Gawker omits, however, that they **sought a dismissal sanction** against Mr. Bollea, and thus *Kozel* is a controlling case. Judge Case's recommendation is consistent with the legal precedents governing lesser sanctions, as well as those governing dismissal sanctions.

Accordingly, Mr. Bollea respectfully requests that the Court reject Gawker's exceptions and enter an order denying Gawker's motion for sanctions.

II. RELEVANT BACKGROUND SUMMARY

In its motion to the Special Discovery Magistrate, Gawker contended that there were two categories of documents and information for which Mr. Bollea supposedly had not satisfied his discovery obligations: (1) information regarding his sexual relationship with Heather Clem pursuant to the Court's February 26, 2014 order; and (2) Mr. Bollea's communications and public statements concerning the sex video and Gawker's publication of the video pursuant to the Court's April 23, 2014 order. Contrary to Gawker's arguments, both categories of documents were produced. In addition, Mr. Bollea spent two days at his deposition answering detailed questions on this and all possible related topics, and he has produced all of the non-privileged documents relating to same. Gawker's motion also left out key factual details concerning the status of Mr. Bollea's compliance with the Court's April 23, 2014 order.

Mr. Bollea fully complied with the Court's February 26, 2014 discovery order. On February 21, 2014, Mr. Bollea served supplemental responses to Gawker's Interrogatory Nos. 9 and 10, stating what he remembered regarding the occasions he had sexual relations with

Heather Clem. The only documents he could locate that arguably reflected communications on this topic were text messages between Mr. Bollea and Bubba Clem, which Mr. Bollea produced in August 2013.

On March 6–7, 2014, Gawker took Mr. Bollea's deposition. *Id.* at ¶9. Gawker was permitted to fully probe all of Mr. Bollea's recollections regarding the sex video, and Gawker also received a full description of all of Mr. Bollea's communications with the Clems regarding his sexual relationship with Heather Clem, as well as full information regarding all sexual relations that occurred between Mr. Bollea and Heather Clem. Mr. Bollea has agreed to appear for an additional session of deposition as well.

In preparing responses to more recent and targeted discovery requests from Gawker-defendant, Nick Denton, Mr. Bollea, with the assistance of an information technology specialist, located additional text messages with Bubba Clem that Mr. Bollea had been unable to locate previously. These messages were not discovered until after Gawker's motion was denied and thus were not the subject of Gawker's motion. In any event, these messages were immediately turned over to Gawker, who will have the right to ask Mr. Bollea about these messages during his third day of deposition and well in advance of trial.

Mr. Bollea has fully complied with the Court's April 23, 2014 discovery order.

First, Mr. Bollea produced **all** documents in his possession, custody and control relating to his October 2012 media tour for promotion of a TNA Wrestling event. Mr. Bollea and his counsel, in response to Gawker's requests, searched diligently for documents responsive to the requests. None were located in Mr. Bollea's files. Regardless, Mr. Bollea's counsel was able to locate from TNA Wrestling, the New York media itinerary from October 2012, and provided it to

Gawker on March 5, 2014, before Mr. Bollea's deposition, as a **courtesy**. Mr. Bollea also responded to extensive questioning on this topic at his deposition.

Second, on May 8, 2014, Mr. Bollea produced **all** documents in his possession, custody and control relating to his phone records. Mr. Bollea also contacted his telephone carriers to obtain further records to produce to Gawker. Those records were not in his possession, custody or control until they were **received**. As such, at the time Gawker filed its motion, Mr. Bollea was in full compliance with the order. (Mr. Bollea has since that time received, and immediately produced, additional phone records to Gawker, and has agreed to a third day of Mr. Bollea's deposition to allow Gawker's counsel to question him about those records, phone calls and texts.)

Third, on April 30, 2014, Mr. Bollea produced communications with law enforcement in his possession, custody and control. On May 8, 2014, Mr. Bollea made a further production of responsive documents in response to Gawker's meet-and-confer correspondence regarding certain attachments to emails. As of May 8, 2014, Mr. Bollea had produced **all** documents reflecting his communications with law enforcement that were in his possession, custody and control. Mr. Bollea has agreed to be questioned at his third day of deposition regarding all such documents.

Mr. Bollea redacted one portion of the April 30 production. Judge Case ruled during depositions that certain evidence was not discoverable on grounds of privacy and relevance. Gawker never took exception to this ruling. The same material that the Special Discovery Magistrate ruled was not discoverable at the deposition appears in certain pages of the documents sent by non-parties to David Houston, Mr. Bollea's attorney (which material also appears in law enforcement communications), as well as in documents provided by a non-party

pursuant to a subpoena. Consistent with Judge Case's ruling, Mr. Bollea redacted a few words from that material. Such redacted words have nothing to do with this case or Mr. Bollea's sexual relationship with Ms. Clem. Judge Case confirmed this in a ruling, and found that the limited redactions were proper.

Fourth, on May 9, 2014, Mr. Bollea served supplemental responses to A. J. Daulerio's Interrogatories 9 and 10, which concerned Mr. Bollea's communications with law enforcement and his telephone numbers and service providers, respectively. Mr. Bollea served a second supplemental response to Interrogatory 9 on May 16, 2014. Mr. Bollea produced the related documents on April 30 and May 8, 2014.

Judge Case received extensive briefing, including a notebook sized confidential reply brief from Gawker. (Gawker's moving papers were short, and Gawker waited until its reply to actually argue its motion, an improper tactic that Gawker has routinely engaged in.) Judge Case conducted a lengthy hearing with extensive oral argument from both sides. Judge Case, after considering all the evidence and argument from both sides, denied Gawker's motion in its entirety.

III. THE NEW ARGUMENTS MADE BY GAWKER IN ITS EXCEPTIONS SHOULD BE REJECTED

Gawker makes **two new arguments** not made to Judge Case in its exceptions filed with the Court. Neither has merit.

A. Judge Case's Reliance on *Kozel v. Osendorf* Was Appropriate and Was Not Exclusive.

Gawker argues that Judge Case erred in relying on *Kozel v. Osendorf*, 629 So.2d 817 (Fla. 1993), a dismissal sanctions case, on grounds that its motion sought both dismissal sanctions and lesser sanctions. Gawker omits, however, that its motion **did** seek dismissal as a sanction (and presumably Gawker continues to seek dismissal as a sanction in asking this Court

to take exception to the Report and Recommendation). Thus, *Kozel* **is** an appropriate authority on which to rely.

Further, the Special Discovery Magistrate never said that he **solely** relied on *Kozel* in making his recommendation. Rather, Judge Case said that *Kozel* was an important case for him to consider. A reviewing court (such as this Court is when it reviews Judge Case's recommendations) reviews the **result**, not the reasoning of the lower court. *Johnson v. Allstate Ins. Co.*, 961 So.2d 1113, 1115 (Fla. 2d DCA 2007). So long as Judge Case's decision is justified on any ground (it was), it should be entered as an order by this Court. Additional grounds supporting Judge Case's recommendation include:

The Florida Fourth District Court of Appeal has held: "[T]he right of access to our courts is constitutionally protected and should be denied only under extreme circumstances. . . . To strike pleadings for failure to comply with a discovery order is the most severe of all sanctions and should be resorted to only in extreme circumstances. . . . Only a deliberate and contumacious disregard of the court's authority, bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness will justify a dismissal of pleadings for a violation of discovery procedures. . . . An outright noncompliance with discovery orders may justify the dismissal of pleadings, mere foot dragging usually does not." *U.S.B. Acquisition Co. v. U.S. Block Corp.*, 564 So.2d 221, 222 (Fla. 4th DCA 1990); *accord Kozel v. Osendorf*, 629 So.2d 817 (Fla. 1993).

Gawker's motion and exceptions **do not even come close** to meeting this standard. The case law is clear that this sort of sanction is reserved for the most egregious conduct, and Judge Case correctly concluded that Gawker failed to make the requisite showing:

- In *U.S.B. Acquisition*, the Court of Appeal **reversed** the dismissal of a complaint where the plaintiff failed to produce all documents (and thus did not comply with its discovery obligations) but did produce a "substantial" portion of the documents requested. *Id.*
- In *Steele v. Chapnick*, 552 So.2d 209, 209–10 (Fla. 4th DCA 1989), the plaintiff served "less than complete" responses to discovery **and** failed to produce a "key" piece of evidence. Nonetheless, the Court **reversed** the trial court's order dismissing the suit.
- In *Flanzbaum v. Stans Lounge*, 377 So.2d 750, 751 (Fla. 4th DCA 1979), the court reversed a dismissal order despite the plaintiff's noncompliance with its discovery obligations.

Gawker also did not show that it was entitled to an evidentiary preclusion sanction. In Florida, "the severity of the sanction must be commensurate with the violation." *Ferrante v. Waters*, 383 So.2d 749, 750 (Fla. 4th DCA 1980).

In sum, Gawker sought (and continues to seek) the most drastic sanctions available because Gawker contends it suffered prejudice from the following:

- Mr. Bollea did not interpose his law enforcement privilege objection to Gawker's **initial** round of discovery asking for communications relating generically to the "Sex Video," and rather did so in response to Gawker's **second** round of discovery asking specifically for law enforcement communications. As of the date of Judge Case's Report and Recommendation, Gawker had received all of the communications with law enforcement that it requested.
- Mr. Bollea redacted a few words from a document **consistent with** Judge Case's earlier ruling at depositions. Mr. Bollea properly brought a motion for protective

order on this issue, and Judge Case confirmed the redaction was appropriate and granted the motion.

- Mr. Bollea initially estimated that the date of the sexual encounters with Ms. Clem was "**in or about** 2006," later estimated that the date was "**in or about** 2008," and shortly thereafter—months **before** Mr. Bollea's deposition or the deposition of Bubba Clem (Heather Clem's deposition has yet to be scheduled)—Mr. Bollea was able to deduce that the encounters occurred in approximately late Spring/early Summer 2007.
- Mr. Bollea initially had difficulty obtaining his phone records from non-parties, but all such records have now been produced and provided to Gawker.

Gawker suffered no prejudice whatsoever from the foregoing. Gawker has had a full opportunity to ask Mr. Bollea about all these issues, and will have an additional opportunity to question Mr. Bollea about these matters during a third day of deposition, still to be scheduled. Judge Case properly ruled that it would be grossly disproportionate to exclude evidence at trial or find Mr. Bollea in contempt based on these facts.

B. The Recently-Produced Text Messages Were Not At Issue In Gawker's Sanctions Motion And Have Not Caused Gawker Any Prejudice.

Gawker's second new argument is that this Court should consider the production of certain text messages between Mr. Bollea and Bubba Clem, that an IT specialist was able to locate and Mr. Bollea's counsel immediately produced, several weeks after the sanctions motion was heard. Gawker never moved for sanctions with respect to these later-produced text messages, and thus they are **not properly before this Court** in this exceptions proceeding. In any event, the delay in locating these messages (they were produced as soon as they were located) did not prejudice Gawker, which still has many months to prepare for trial, and will

have a full opportunity to question Mr. Bollea regarding these messages at the resumption of his deposition.

IV. CONCLUSION

For the foregoing reasons, Gawker's exceptions to Judge Case's report and recommendations should be overruled in their entirety, and Judge Case's Report and Recommendation denying Gawker's sanctions motion should be adopted and entered by this Court.

DATED: November 18, 2014

/s/ Charles J. Harder

Charles J. Harder, Esq.
PHV No. 102333
HARDER MIRELL & ABRAMS LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com

-and-

Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Christina K. Ramirez, Esq.
Florida Bar No. 954497
BAJO CUVA COHEN & TURKEL, P.A.
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: cramirez@bajocuva.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 18th day of November, 2014 to the following:

Barry A. Cohen, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1950
Tampa, Florida 33602
bcohen@tampalawfirm.com
mgaines@tampalawfirm.com
jhalle@tampalawfirm.com
mwalsh@tampalawfirm.com
Counsel for Heather Clem

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esquire
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com
Counsel for Gawker Defendants

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com
krosser@houstonatlaw.com

Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Alia L. Smith, Esquire
Michael D. Sullivan
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW, Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
msullivan@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

/s/ Kenneth G. Turkel
Attorney