

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 aka GAWKER MEDIA; et al.,

Defendants.

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**THE GAWKER DEFENDANTS' MOTION TO DISMISS  
ON THE GROUNDS OF FRAUD ON THE COURT**

By and through their undersigned counsel, defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, "Gawker") hereby move to dismiss this case under the doctrine of fraud on the court, and state as follows:

**INTRODUCTION**

This has been a hard-fought case, as perhaps it should be. But no matter how contentious litigation may be, Florida law imposes one overriding requirement on all parties: that they be candid with the Court. And, if not, it is well-settled that a trial court may, and indeed should, dismiss a lawsuit where it finds clear and convincing evidence of a fraud being perpetrated on the Court. It is now clear that for several years that is precisely what happened here.

Since almost the outset of this case, plaintiff Terry Bollea and his legal team have engaged in a systematic effort to hide from Gawker and this Court the existence of additional tapes of his encounters with Heather Clem, including one that shows him making a series of racist and homophobic statements. To that end, he and his counsel have provided false interrogatory responses, hidden plainly responsive documents, given false deposition testimony, and presented numerous false arguments to the Special Discovery Magistrate, this Court, and the



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While Bollea's fraud is punishable in and of itself, it is particularly egregious here because it had the effect of hiding unquestionably relevant evidence including (a) the actual existence of the other tapes; (b) the records and statements in the FBI's files, including contemporaneous statements by Bollea, Houston, Bubba Clem, and others; and (c) numerous other facts that have been concealed through Bollea's and his counsel's pattern of defrauding the

Court. All of this deception masked evidence relating to the elements of Bollea’s claims and his burden to prove causation of damages, an issue that is heavily disputed in this case.

Unfortunately, Bollea has followed the same script as other litigants who have sought personal injury damages while concealing and misrepresenting their knowledge about evidence pertinent to their claims and the extent and causes of their alleged damages. Time and time again, Florida courts have held that such conduct – usually conduct far less egregious, wide ranging or prolonged than Bollea’s and his counsel’s conduct – constitutes a fraud on the court that warrants dismissal of a plaintiff’s case. The same result should follow here.

## FACTUAL BACKGROUND

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Bollea's action against Gawker began with an application for a temporary restraining order and a motion for preliminary injunction, both of which sought to enjoin all future publication of any sex tapes, to require Gawker to immediately hand over all copies of any sex tapes in its possession, and to identify the source who provided the footage to it. Ex 10 (Federal Complaint, filed October 15, 2012). Consistent with those efforts, Bollea and his counsel held a press conference on the steps of the federal courthouse in which Houston made clear that the lawsuit was filed to deter anyone else who might have copies of the tape(s) from publishing additional footage, proclaiming: "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. 11.

While Bollea and his counsel publicly purported to object to the brief and almost indecipherable excerpts posted by Gawker, which showed very little in the way of sex, they privately complained to the FBI about the risk that someone might publish Bollea's racist statements.

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In short, the materials Gawker obtained from the FBI over the past few weeks make clear that, by December 2012 at the latest, Bollea and Houston were fully aware that there were three tapes of three different sexual encounters with Heather Clem, that one of them showed Bollea expressing racist views, and that any commercial value derived not from the tapes' sexual content, but from the footage of Bollea's racist statements.

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3. At his first deposition in March 2014, Bollea was asked: “Do you know whether the other encounters in the bedroom were filmed?” Bollea testified, “*I have no idea.*” Ex. 29 (Bollea Dep.) at 291:12-14 (emphasis added).<sup>5</sup>

Each of those statements was false and knowingly so.

[REDACTED]

4. In response to an interrogatory asking him to identify all persons with knowledge concerning the allegations in his complaint, Bollea failed to identify a number of people, including (a) Davidson, (b) anyone associated with the FBI investigation, or (c) Mike Walters of TMZ or Nik Richie of *The Dirty*, both of whom Houston told the FBI had contacted him with important information about the sex tapes. *See* Ex. 30 (Bollea’s

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Responses to Daulerio's Interrogatories) at Resp. No. 8; *see also supra* note 1; Ex. 5 (Houston telling the FBI that Walters was a "good source of information").

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7. At that same deposition, Bollea and his counsel (including Houston) repeatedly invoked attorney-client privilege as a basis for refusing to answer any questions about complaints Bollea made to law enforcement about the sex tapes, falsely contending to Judge Case that Bollea's knowledge about those topics came exclusively from private communications with Houston and thus was privileged. *See, e.g.*, Ex. 29 (T. Bollea Dep.) at 574:12-21, 576:3-11; *see also* Mot. to Compel at 14-15 (providing additional citations to deposition). Documents subsequently produced by the FBI make clear that Bollea personally met with the FBI and with Davidson. *See, e.g.*, Ex. 8 (FBI case-opening document describing in-person complaint made by Bollea and Houston); [REDACTED]

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12. In Bollea's opposition to Gawker's sanctions motion, he argued that "**Mr. Bollea and his counsel do not have any personal knowledge that more than one sex video exists** (the video produced by Gawker) . . . The documents created by an unknown extortionist purporting that there might possibly be as many as three different videos, are unauthenticated, lack foundation, are unreliable, and are hearsay. **No party in this action is aware of any more than one video.** . . ." Ex. 45 (Confidential Supplemental Opposition, filed on June 18, 2014) at 3, 7 (emphasis added).

13. At a July 18, 2014 hearing before the Special Discovery Magistrate addressing Gawker's sanctions motion, Bollea's counsel argued – with Bollea sitting beside him – that Gawker "[t]alks about how there exists certain other tapes. . . . **Mr. Bollea has never seen any of those tapes. Nobody on either side of this table . . . has ever seen any of these supposed tapes. We don't know if they exist or not.**" Ex. 46 (July 18, 2014 Hrg. Tr.) at 51:23 – 52:6 (emphasis added); *see also id.* at 78:4-8 (addressing letter from U.S. Attorney referencing three DVDs, and stating, "Maybe it's three copies of the same thing. We don't know. **We've never seen it.**") (emphasis added).

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20. On July 1, at the Court’s motions *in limine* hearing, Bollea’s lead counsel, Charles Harder – with Bollea and Houston sitting at counsel table – seized on the defective audio to argue to this Court that, “even if there is another third DVD which allegedly has the things that they have been speculating might be on there, ***it could be an extortionist manipulating the audio through an impersonator, or who knows what***, and adding things.” Ex. 50 (July 1, 2015 Hrg. Tr.) at 201:5-11 (emphasis added).

21. Bollea’s co-counsel was even more emphatic: “These tapes – and I will be a little bit more pointed than Mr. Harder was vis-à-vis their technical constitution. . . . ***It looks like these things were manipulated. Okay? And they don’t say what they said they were going to say, anyway.***” *Id.* at 246-47 (emphasis added).

After considering these arguments, the Court granted Bollea’s motions to exclude all evidence that showed there was more than one sex tape or suggested Bollea had made offensive statements. However, the Court’s ruling was without prejudice because the FBI had yet to produce its records. *Id.* at 216:25 – 217:8.

## **2. Bollea’s Attempts To Thwart Gawker From Uncovering His Fraud**

Gawker was only able to fully unravel the many layers of deception perpetrated by Bollea and his legal team, and piece together the true facts, because of the materials it obtained as a result of its FOIA lawsuit following the motion *in limine* hearing. Gawker was able to obtain these materials despite Bollea’s and his legal team’s repeated misconduct in attempting to prevent Gawker from doing so. Indeed, from the outset of Gawker’s effort to obtain discovery

from the federal government, Bollea and his lawyers engaged in a systematic cover-up designed to conceal the nature of the FBI's investigation, its true focus, or what it uncovered.

*First*, Bollea tried to squelch Gawker's ability to learn any information from the federal government. Prior to Gawker seeking records from the government about the FBI investigation, Houston told the press that he and Bollea had "contacted the FBI to track down the sex tape leaker" for allegedly "distributing the illegal footage to the media." Ex. 21 (*TMZ* report, dated October 14, 2012). That press statement was the basis for Gawker's request for Bollea and Houston to sign FOIA authorizations permitting Gawker to obtain documents from the FBI and U.S. Attorney's office. In contesting that request, Bollea and his legal team made a series of misrepresentations to the Special Discovery Magistrate, this Court, and the District Court of Appeal about the FBI investigation. For instance:

22. In his January 29, 2014 opposition to Gawker's motion to compel the execution of the FOIA authorizations, which was heard by the Special Discovery Magistrate, Bollea contended that Gawker's FOIA request "could disrupt or destroy *an ongoing investigation or prosecution.*" Ex. 51 at 3 (emphasis added).

23. In the Exceptions to the Special Discovery Magistrate's ruling that Bollea filed with this Court on February 12, 2014, Bollea repeated this same contention and further suggested that "*Gawker (as the publisher) is one of the targets*" of the FBI's investigation. Ex. 52 at 3-4 (emphasis added).

24. And, in a sworn affidavit submitted to the District Court of Appeal in connection with Bollea's effort to appeal this Court's order, Houston attested that the FBI investigation focused on "the source and distribution of the secretly-recorded sex tape" excerpted by Gawker. Ex. 22 at ¶¶ 2-3.

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These communications, in which Houston attempted to undermine this Court’s order, were never produced to Gawker by Bollea, either in response to document requests to Bollea or the subpoenas Gawker separately served on Houston and his law firm. As with so many of the materials that have revealed the misconduct of Bollea and his legal team, Gawker only learned of these documents when they were produced in response to its FOIA requests.

### **3. Bollea’s Admission That He Made The Racist Statements**

Bollea only abandoned his pretense that there was not an additional sex tape containing racist statements once that fact was reported by the *National Enquirer* on July 24, 2015. Although Bollea’s team had repeatedly claimed that they knew nothing about such alleged statements and that they were fabrications, Bollea immediately issued a statement to *People Magazine* in which he admitted the accuracy of the *Enquirer*’s report. Ex. 59. Remarkably, despite this public admission, Bollea’s team has continued to shade the truth in court. Most recently, his lawyers filed a brief with the District Court of Appeal in which they referred to their client’s admittedly racist statements as “Davidson’s use of *alleged offensive language* to extort

Mr. Bollea,” Ex. 60 at 34 (emphasis added), and characterized the Davidson Summary as “a *purported, unauthenticated* ‘summary transcript’,” *id.* at 11 (emphasis added).

**C. The Far-Reaching Ramifications Of Bollea’s Fraud**

It is no secret that Gawker believes that Bollea’s efforts to conceal his racist slurs explain a great deal, including the manner in which he has litigated this case and the true reason he experienced distress. The FBI’s records unambiguously show that Bollea’s distress was caused, in whole or in substantial part, by the fact that he was concerned that the public might see and hear the footage of him making racist statements. Indeed, that is what prompted him to complain to the FBI before filing this lawsuit. *See* Mot. to Access DVDs at 10-11. But his efforts to hide that fact led him to conceal many others and to try to block discovery from the FBI at all costs. This in turn had consequences for this case that were far more wide-ranging:

1. The pattern of fraud hid the sex tapes themselves, which include evidence that directly contradicts sworn testimony not only by Bollea and Houston (who watched portions of all three tapes), but also by Bubba Clem and Heather Clem, with Mr. Clem testifying falsely that he was aware of only one encounter between Bollea and his then-wife (even though he appears on all three tapes) and with Ms. Clem testifying that she was unaware that she was being recorded (even though she is shown talking with her husband about what he will see when he watches the tape). *See* Mot. to Access DVDs at 6-7.

2. The pattern of fraud hid FBI records that contradicted Bollea’s testimony that he was unaware of cameras in the Clems’ house (he told the FBI he knew about them and asked Mr. Clem before the sexual encounters whether he was being filmed). *See* Ex. 41.

3. The pattern of fraud hid FBI records memorializing Bubba Clem's statements to the FBI that Bollea knew he was being filmed and was in on the taping, directly contradicting both his and Bollea's testimony in this action. *See* Ex. 34.

4. The pattern of fraud hid other FBI records that prevented Gawker from fully cross-examining Mr. Clem with evidence of his "if we ever did want to retire" comment, which bears on an array of core facts, ranging from why the Clems filmed Bollea's encounters with Heather Clem to why they kept the footage.

5. The pattern of fraud hid records about the reason the tapes had commercial value. In particular, the pattern of fraud hid (a) information about the negotiations for the proposed sale of the three tapes to Davidson, including statements by Houston and Bollea reflecting their understanding that the tapes' value – pegged by Davidson at \$300,000 – was derived from Bollea's racist statements not the sexual content; (b) Bubba Clem's statement that the tapes' value derived from Bollea's statements about "[REDACTED] people"; and (c) consistent with all of this hidden evidence, that TMZ obtained portions of the tapes for a mere \$8,500, *see* Ex. 61 (Form FBI FD-302 memorializing interview with witness who described sale of sex tape excerpts to *TMZ*); Ex. 62 (excerpts from Tampa Bay Police Department Report relating to same witness) at 18.

## **ARGUMENT**

### **I. THE LEGAL STANDARDS GOVERNING MOTIONS TO DISMISS FOR A FRAUD ON THE COURT**

A "fraud on the court" occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox v.*

*Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). Generally, litigation conduct that “undermine[s] the integrity of the courts by creating a mockery of the principles of justice through [a party’s] deceitful misconduct” subjects a lawsuit to dismissal for perpetrating a fraud on the court. *Cabrerizo v. Fortune Int’l Realty*, 760 So. 2d 228, 230 (Fla. 3d DCA 2000). Florida law is clear that a “trial court has a duty and an obligation to dismiss a cause of action based upon fraud.” *Long v. Swofford*, 805 So. 2d 882, 884 (Fla. 3d DCA 2001).

The conduct that has most frequently been found to constitute a fraud on the court involves plaintiffs who seek damages for personal injuries but mislead the defendants and the Court about the existence of other potential causes of their alleged injuries. Often, the fraud is discovered only because the defendants were able, through independent means, to obtain records proving a fraud.

For example, in *Cox* the Fifth District dismissed a malpractice suit after finding that the plaintiff had lied about whether she had sustained any fractures or other injuries prior to the slip and fall that was at issue in the malpractice suit. 706 So. 2d at 46. Similarly, in *Distefano v. State Farm Mut. Auto. Ins.*, 846 So. 2d 572, 574-75 (Fla. 1st DCA 2003), the District Court of Appeal affirmed the dismissal of the appellant’s action, holding that she gave false information or omitted information concerning a prior accident and a prior shoulder injury, which opposing counsel discovered through medical records obtained through independent investigation. Likewise, in *Morgan v. Campbell*, 816 So. 2d 251 (Fla. 2d DCA 2002), the Second District Court of Appeal found dismissal was the proper remedy for a fraud where the plaintiff lied about prior injuries and treatment for the pain she contended was caused by the accident that was the subject of the lawsuit. And, in *Metro Dade County v. Martinsen*, 736 So. 2d 794, 796 (Fla. 3d

DCA 1999), the appeals court emphasized that “[t]he integrity of the civil litigation process depends on truthful disclosure of facts,” reversed a jury verdict, and remanded for dismissal a case in which the plaintiff had provided incomplete and ambiguous information about her treating physicians in discovery (quoting *Cox*, 706 So. 2d at 47). *See also Long*, 805 So. 2d at 882 (affirming dismissal because plaintiff concealed facts about alternative causes of the alleged damages); *Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999) (affirming dismissal because the plaintiff made “numerous and repeated misstatements of fact designed to intentionally thwart defendants from conducting discovery”); *Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149, 150 (Fla. 1st DCA 2000) (affirming dismissal where trial court found that plaintiff “knowingly and intentionally concealed [facts about his alleged injury] in an attempt to gain an unfair advantage in this litigation”); *Savino v. Florida Drive-In Theatre Mgmt., Inc.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997) (affirming dismissal because plaintiff “lied about matters which went to the heart of his claim on damages”); *O’Vahey v. Miller*, 644 So. 2d 550, 551 (Fla. 3rd DCA 1994) (affirming dismissal where plaintiff made “repeated lies under oath . . . which were uncovered and which he was then forced to admit only because of the assiduous efforts of opposing counsel”).

## **II. THIS CASE SHOULD BE DISMISSED FOR FRAUD ON THE COURT.**

Bollea’s efforts to mislead Gawker, the Special Discovery Magistrate, this Court, and the District Court of Appeal about key facts is a classic example of the type of conduct that merits dismissal. Bollea is essentially bringing a claim for alleged personal injuries, including alleged emotional distress, mental suffering, and lost income.

To recover damages for the alleged invasion of his privacy, Bollea must, among other things, prove that Gawker’s publication was the proximate cause of his alleged damages.

*Restatement (Second) of Torts* § 652H, cmt. c (tort of publication of private facts requires a showing of “actual injury”). If he cannot make that showing, Bollea’s recovery would be limited to, at most, nominal damages even if he proves all the elements of his privacy claims and overcomes Gawker’s First Amendment defenses. *Cason v. Baskin*, 30 So. 2d 635, 637 (Fla. 1947) (plaintiff had failed to prove any actual mental distress and humiliation as a result of defendant’s publication, so her privacy claim was limited to nominal damages); *Doe v. Beasley Broadcast Group, Inc.*, 105 So. 3d 1 (Fla. 2d DCA 2012). Moreover, to establish liability on his claim for intentional infliction of emotional distress, Bollea must prove that Gawker’s publication proximately caused “severe” emotional distress. *Clemente v. Horne*, 707 So. 2d 865, 866-67 (Fla. 3d DCA 1998). As a result, for each of these claims, it is beyond dispute that, as in any other personal injury lawsuit, Gawker is entitled to discover and present to the jury evidence that (1) Bollea did not suffer emotional distress, and/or (2) any distress he may have suffered was not proximately caused by the brief excerpts of a sex tape that Gawker published, but rather was entirely or largely caused by something else for which Gawker has no responsibility.

The same is true with respect to Bollea’s claim for commercial misappropriation. The measure of damages for that claim is the “loss” of potential income, such as “an amount which would have been a reasonable royalty.” Fla. Stat. § 540.08(2); *see also Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1001-03 (Fla. DCA 4th 2004) (plaintiff was entitled to damages for right of publicity claim based on the royalty value of his name and likeness). Bollea has claimed that the brief, grainy Video Excerpts are worth tens of millions of dollars because those Excerpts showed him engaged in sexual conduct. But, Gawker is entitled to discover and present to the jury evidence that the value was far less, including the fact that Davidson negotiated a payment of \$300,000 for three entire sex tapes and that TMZ paid just \$8,500 for access to a

portion of the tapes. And, it is allowed to discover and present evidence that any value that the tapes might have had come from something other than their depiction of Bollea and Ms. Clem's sexual encounter. As Bubba Clem, Davidson, Houston, and Bollea all recognized – the value of the tapes came from what Bollea "said about [REDACTED] people."

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Bollea, of course, is free to dispute Gawker's defenses regarding his claims, including causation of damages and the measure of those damages, just as any plaintiff is free to do in a personal injury case. What Bollea plainly may not do is to defraud the Court and Gawker regarding the very existence of evidence bearing on those defenses. Here, the record is clear and convincing that is exactly what he and his counsel have done. For more than three years, Bollea and at least one of his counsel of record have had personal knowledge that there were three sex

tapes and that one of them contained offensive language. Yet they have repeatedly denied those facts in sworn interrogatories and deposition testimony, and presented numerous false and misleading arguments to the Court about their existence that continued up to the eve of the original trial date. They even sought, and temporarily succeeded, in barring Gawker from presenting any evidence about other causes of Bollea's alleged damages by arguing that it was likely fabricated, which they knew to be false. Gawker's counsel has been able to independently discover this fraud only after expending years of time, effort and resources; indeed, had the trial of this case commenced as originally scheduled it would have been too late. This case thus presents exactly the circumstances that supports dismissal of a case for a fraud on the Court. *See, e.g., O'Vahey*, 644 So. 2d at 550.

### **CONCLUSION**

For the foregoing reasons, Gawker respectfully requests that this Court dismiss this case, with prejudice.

December 22, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

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Nick Denton and A.J. Daulerio*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of December, 2015, 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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