IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Case No.: 12012447-CI-011

Plaintiff,

vs.

GAWKER MEDIA, LLC aka GAWKER MEDIA,
NICK DENTON and A.J. DAULERIO,

Defendants.
_____/

**PLAINTIFF TERRY BOLLEA'S COLLECTED POSITION STATEMENTS ON DISPUTED EVIDENTIARY ISSUES**

In accordance with the Second Order Setting Jury Trial & Pretrial Conference and the agreement between counsel for the parties following a conference concerning same, Mr. Bollea submits the following position statements on certain disputed evidentiary issues identified by the parties:

**Preliminary Statement**

Mr. Bollea reserves all arguments and objections regarding the admissibility of evidence falling under the categories set forth herein on other grounds and for purposes other than those specified in each category. The names of the categories should not be construed or interpreted to mean that evidence which may fall thereunder can only be used or is intended to be used for the sole purpose of that category, nor should the name of the category be used to classify the evidence as a whole. The agreed-upon purpose of the parties' position statements is to seek preliminary rulings from the court concerning whether certain evidence may be used for certain purposes, while recognizing that the same evidence may ultimately be admitted at trial for another purpose, including on other issues, impeachment and/or rebuttal purposes.

## SUMMARY OF MR. BOLLEA'S POSITIONS

| Category of Evidence | Mr. Bollea's Position |
|---|---|
| 1. Evidence Relating to the "Bad Acts" of Defendants | **ADMISSIBLE** |
| 2. Evidence Concerning Communications Sent to and From Gawker Media LLC Regarding Posts Other Than The Post at Issue | **ADMISSIBLE** |
| 3. Evidence Relating to Defendants' Views on Privacy | **ADMISSIBLE** |
| 4. Evidence Relating the Plaintiff's Discussion of his Personal Life | **INADMISSIBLE** |
| 5. Evidence Relating to Media Reports Concerning Plaintiff's Personal Life | **INADMISSIBLE** |
| 6. Evidence Containing the October 16 and 17 Radio Broadcasts of the Bubba the Love Sponge Show | **INADMISSIBLE** |
| 7. Evidence Relating to Letters Concerning Offers to Exploit the Video of Plaintiff | **ADMISSIBLE** |

## INDIVIDUAL POSITION STATEMENTS

### Category 1:

### Evidence Relating to the "Bad Acts" of Defendants

Mr. Bollea submits that evidence relating to what is characterized as "bad acts" of Defendants is highly probative and relevant to Mr. Bollea's claims as well as Defendants' intent, knowledge that their conduct was wrong, and awareness of the high probability that injury or damage would result. Accordingly, this evidence should be **ADMITTED**.

"Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of **motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,** but it is inadmissible when the evidence is relevant **solely** to prove bad character or propensity." Fla. Stat. § 90.404(2)(a) (emphasis added). Here, Mr. Bollea's claims for intentional torts and punitive damages make Defendants' other invasions of privacy and admissions about privacy

and journalistic ethics admissible to show intent, knowledge of the wrongfulness of the conduct at issue, and a **conscious disregard** of privacy rights for purposes of liability and punitive damages.

Evidence of Gawker's prior "bad acts" also is relevant to the **outrage** element of intentional infliction of emotional distress, Defendants' **"good faith" defense** to the Wiretap Act claim, and the **depravity** of Defendants' conduct for purposes of punitive damages. Florida law has long approved the use of other wrongful conduct and/or prior similar acts to show scienter. *See, e.g., Einstein v. Munnerlyn*, 13 So. 926, 928 (Fla. 1893).

Further, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 423 (2003) permits the trier of fact to consider prior similar conduct of the defendant in determining punitive damages. "[C]ourts should look to 'the existence and frequency of similar past conduct' in making punitive damages determinations." *Id.* *Campbell* merely requires a showing that the acts are sufficiently similar. Here, on its face the evidence at issue is sufficiently (and substantially) similar to Defendants' misconduct directed towards Mr. Bollea. Among other purposes, the highly probative evidence of Defendants' misconduct is admissible under *Campbell* as it shows that Defendants repeatedly acted in callous disregard for privacy rights by posting and linking to images and footage of nudity and sex that were highly invasive of the privacy rights of the people being depicted.

Conversely, the evidence is not unfairly prejudicial to Defendants. Evidence of prior incidents, even those not similar to the incident that gives rise to a lawsuit, may be admissible. *See, e.g., Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991) (court also held that the Fla. Stat. § 90.403 (undue prejudice) objection had "no merit"). In *Vincent v. State*, 885 So.2d 963 (Fla. 3d DCA 2004), the defendant was on trial for stabbing her boyfriend, and

the Court of Appeal held that evidence that she stabbed her **prior** boyfriend was admissible to show she acted intentionally. "The evidence was relevant, probative, and not unfairly prejudicial." *Id.* at 967.

In light of the foregoing, evidence establishing the similar "bad acts" of Defendants **is admissible** because it is relevant, probative, and not unfairly prejudicial.

**Category 2:**

**Evidence Concerning Communications Sent to and From Gawker Media LLC Regarding Posts Other Than the Post at Issue**

Mr. Bollea submits that cease and desist demands sent to Defendants by other victims who's privacy was violated by their postings, and Defendants' response to same, establishes Defendants' scienter, knowledge of, and intent to invade people's privacy, as well as the harm those invasions cause, and therefore comprises an important category of evidence that should be **ADMITTED**.

Under Fla. Stat. § 90.408, communications relating to offers to compromise are not admissible to establish **liability for the claim that is the subject of the offer**. This doctrine does not apply here. Primarily, the doctrine would apply only to offers to compromise the claims at issue in this litigation (*e.g.*, Mr. Bollea's claims against Defendants and the Clems). *See, e.g. Rease v. Anheuser-Busch, Inc.*, 644 So.2d 1383, 1388 (Fla. 1st DCA 1994); *accord Ritter v. Ritter*, 690 So.2d 1372, 1376 (Fla.2d DCA 1997) ("A fundamental premise for the application of this rule is that the offer to compromise must relate to the claim disputed in the lawsuit."), *Levin v. Ethan Allen, Inc.*, 823 So.2d 132, 135 (Fla. 4th DCA 2002) ("Although settlement offers are generally not admissible as evidence in the lawsuit in which the offers are made, an offer of settlement in one case can be relevant in another case."). The cease and desist demands in this category involve other claims asserted by other victims.

Further, contrary to Defendants' position, the cease and desist demands are not "offers to compromise" under § 90.408. *Sunstar, Inc. v. Alberto-Culver Co.*, 2004 WL 1899927 at *22 (N.D. Ill. Aug. 23) (holding "a demand for payment accompanied by a threat of legal action is not a settlement offer or a part of settlement negotiations excludable" under Federal Rule of Evidence 408, the analogous federal offer to compromise rule). Thus, the cease and desist demands do not even fall under § 90.408, Fla. Stat.

The cease and desist demands also do not constitute improper character evidence. As set forth above, and pursuant to Fla. Stat. § 90.404(2)(a), Mr. Bollea is entitled to introduce evidence to prove Defendants' motive, intent, and knowledge, as well as the outrage element of intentional infliction of emotional distress; and he is also entitled to introduce evidence to disprove Defendants' "good faith" defense. Mr. Bollea is also entitled to introduce evidence to establish intent for his punitive damages claims.

Finally, there is no basis to exclude this evidence on grounds of alleged undue prejudice. The danger of unfair prejudice does not substantially outweigh the high probative value of direct evidence of Defendants' prior misconduct in proving notice, intent, motive, outrageousness, lack of good faith, and entitlement to punitive damages. The evidence is "relevant, probative, and not unfairly prejudicial," as proscribed by *Vincent v. State*, 885 So.2d 963, 967 (Fla. 3d DCA 2004).

Therefore, evidence of the cease and desist demands sent to Defendants by other victims of its postings is a category **admissible** at trial.

**Category 3:**

**Evidence Relating to Defendants' Views on Privacy**

Evidence establishing Defendants' abhorrence of privacy is vital to this case, and should be **ADMITTED**.

**Intent** is a central issue in this case—specifically, whether Defendants intentionally invaded Mr. Bollea's privacy and inflicted emotional distress upon him by posting an illegally recorded video of him naked and engaged in consensual sexual activity, and inviting millions of people to watch it on the website Gawker.com. Evidence establishing Defendants' blatant disregard of privacy in pursuit of unreasonable financial gain is critical to proving intent, as well as Defendants' true motivation for the posting. This evidence also is crucial to establishing Defendants' knowledge that their actions were wrong, but nevertheless chose to victimize Mr. Bollea.

Defendants have been outspoken about their views on privacy for many years. Gawker Media LLC's CEO, Defendant Nick Denton, in particular, has frequently expressed his philosophy that privacy does not exist, should not exist, and that he and the public do not care about it. At trial, Defendants will argue, consistent with Mr. Denton's editorial philosophy, that Mr. Bollea had no right to privacy when he was naked and engaged in sexual intercourse in a private bedroom. They will make this argument even though the video they posted was illegally recorded, edited, subtitled and exhibited without Mr. Bollea's knowledge or consent.

On several occasions, Defendants have publicly stated very inconsistent positions about privacy—even acknowledging the wrongfulness of posting illegally-obtained images of celebrities on the Internet. Defendants even want to exclude **their own postings**, from Gawker.com and its affiliated sites, addressing the issue of nonconsensual posting of

pornography on the Internet. These postings condemned such acts as "wrong" and a "crime." These admissions against interest are precisely the type of evidence that Florida's hearsay exceptions and impeachment rules were designed to **admit**.

This substantially probative and relevant category of exhibits establishes intent, motivation and liability through conflicting admissions made by Defendants concerning privacy. These admissions also prove their central philosophy—a philosophy that was followed when they posted the video of Mr. Bollea to the Internet, inviting millions of people to watch it, and later refusing the multiple cease and desist demands of Mr. Bollea's counsel to remove it, because traffic and revenue take priority over privacy. Defendants' admissions about privacy, including their self-righteous condemnation of others for engaging in the same conduct and harm Defendants inflicted upon Mr. Bollea is quintessential evidence of **intent and knowledge of the wrongfulness of their conduct**. Ultimately, Defendants seek to exclude this highly probative evidence because it is highly damaging. However, this is not justification for exclusion.

Finally, this evidence is not unfairly prejudicial. "Relevant evidence is inherently prejudicial; however it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matters." *State v. Gad*, 27 So.3d 768, 770 (Fla. 2d DCA 2010); accord *Carr v. State*, 156 So.2d 1052, 1063 (Fla. 2015) (evidence must "go beyond the inherent prejudice associated with . . . relevant evidence" to be excluded as unfairly prejudicial). Defendants' admissions and statements against interest are precisely the sort of evidence that should not be excluded as unduly prejudicial—while it may be damaging, highly probative and inherently prejudicial, it is not **unfairly** prejudicial in any way.

In light of the foregoing, evidence relating to Defendants' views on privacy **is admissible** at trial.

**Category 4:**

**Evidence Relating Plaintiff's Discussion of his Personal Life**

Mr. Bollea submits that evidence relating to discussions or public comments about his private life are irrelevant to the claims and defenses at issue in this case, particularly those of a graphic and sexual nature which will only serve to inflame the jury and/or improperly and unfairly attack Mr. Bollea's character and reputation. This evidence is **INADMISSIBLE** at trial.

The true purpose for which Defendants intend to use these statements is to inflame and prejudice the jury by improperly attacking Mr. Bollea's character in a manner prohibited by Florida law. See Fla. Stat. §§ 90.404, 90.609. A number of the statements in the aforementioned evidence also are hearsay and inadmissible under Fla. Stat. §§ 90.801, 90.802. Defendants' strategy to use this highly prejudicial and inflammatory evidence will be to argue that it somehow justifies their posting of the video, in which Mr. Bollea was secretly filmed in a private bedroom while fully naked and engaged in consensual sex, claiming the video to be a matter of legitimate public concern.

The aforementioned evidence has no bearing on, and no tendency to prove, whether images of Mr. Bollea naked and engaged in sexual activity were in and of themselves newsworthy. Images of public figures naked and having sex impart no information to the reading public and, by themselves, serve no legitimate purpose of disseminating news, while needlessly exposing aspects of private life to the public. *Toffoloni v. LFP Publ'g. Group*, 572 F.2d 1201, 1210 (11th Cir. 2009). The issue for the jury to decide will be whether Defendants' posting of the video containing specific images and audio of Mr. Bollea naked

and engaged in sexual activity ceased to be the giving of information to which the public is entitled, and became a morbid and sensational prying into Mr. Bollea's private life for its own sake. *Toffoloni*, 572 F.2d 1201, 1210 (11th Cir. 2009). Mr. Bollea's public discussion of his personal life has no bearing on this issue.

Even assuming arguendo that there is some attenuated relevance to the evidence cited above, any probative value it might have in this case is substantially outweighed by the prejudice of putting these matters before the jury, especially materials of a graphic nature with a high likelihood of inflaming the jury. Fla. Stat. § 90.403.

Evidence relating to Mr. Bollea's discussions or public comments about his private life are irrelevant to the claims and defenses at issue in this case, and will only serve to inflame the jury and/or improperly attack Mr. Bollea's character and reputation. This evidence should not be allowed at trial and should be ruled **inadmissible**.

**Category 5:**

**Evidence Relating to Media Reports Concerning Plaintiff's Personal Life**

Mr. Bollea submits that the evidence Defendants seek to introduce containing statements made by third parties about Mr. Bollea, his sexual activities and the video at issue, which were not published by Gawker but rather by other companies, is irrelevant, highly prejudicial, inflammatory and improper hearsay and character evidence. They should not be introduced at trial, and should be ruled **INADMISSIBLE**.

This category of evidence that Defendants seek to introduce is comprised almost entirely of inadmissible hearsay. Fla. Stat. §§ 90.801, 90.802. The evidence includes articles and speculation published by tabloids (including Radar Online, National Enquirer and US Magainze), much of which further includes hearsay within hearsay, none of which fall within

hearsay exceptions. Fla. Stat. § 90.805. In some cases, the statements are not even attributed, and thus lack authenticity and foundation.

Defendants will argue that such statements are not being offered for the truth of the matters asserted therein, but only to demonstrate that Mr. Bollea's private life was the subject of public discussion. However, such highly inflammatory evidence has no bearing on, and no tendency to prove, the issue that the jury must decide: whether Defendants' posting of a video containing images and audio of Mr. Bollea naked and engaged in sexual activity ceased to be the giving of information to which the public is entitled, and became a morbid and sensational prying into Mr. Bollea's private life for its own sake. *Toffoloni v. LFP Publ'g. Group*, 572 F.2d 1201, 1210 (11th Cir. 2009). Hearsay articles about totally unrelated, attenuated and/or temporally unconnected events have no tendency to prove or disprove this issue. Accordingly, this evidence is not relevant to the claims and defenses of this litigation. Fla. Stat. §§ 90.401, 90.402.

Assuming *arguendo* that there is some relevance to the evidence cited above, any probative value is substantially outweighed by the prejudice of putting before the jury the salacious, inflammatory, unsubstantiated and anonymous rumors and gossip, cherry-picked by Defendants to prejudice Mr. Bollea. Fla. Stat. § 90.403. The real impact of this evidence is to improperly attack Mr. Bollea's character and reputation by painting him in a negative light before the jury. This unfair prejudice substantially outweighs any minimal probative value of the evidence in showing that, like many celebrities, Mr. Bollea's private life was discussed in the tabloids. Fla. Stat. §§ 90.404, 90.609. Any mention of these articles and statements about Mr. Bollea will confuse and inflame the jury, substantially prejudicing Mr. Bollea. *Perper v. Edell*, 44 So. 2d 78, 80 (Fla. 1949) (stating that "if the introduction of the evidence tends in

actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence–if it tends to obscure rather than illuminate the true issue before the jury–then such evidence should be excluded").

Alternatively, if any such evidence is to be admitted at trial, the specific content of each exhibit should be carefully reviewed and all inflammatory statements about Plaintiff should be redacted. Such a measure would allow Defendants to publish the exhibit to the jury without causing unfair prejudice to Plaintiff.

In light of the foregoing, the evidence in this category—comprised of various unsubstantiated hearsay statements about collateral and attenuated events, made by third parties about Mr. Bollea, his sexual activities, and the video at issue that were not published by Defendants—should be ruled **inadmissible** and excluded at trial.

**Category 6:**

**Evidence Containing the October 16 and 17, 2012 Radio Broadcasts of the Bubba the Love Sponge Show**

Mr. Bollea submits that the evidence Defendants seek to introduce consisting of the wholesale radio broadcasts of Bubba Clem disparaging Mr. Bollea and members of his family is irrelevant, highly prejudicial and inflammatory hearsay and should be ruled **INADMISSIBLE**.

Defendants have identified hours of Mr. Clem's radio broadcasts relating to topics other than the material facts relevant to this case as potential exhibits. In particular, Defendants seek to introduce Mr. Clem's statements during radio programs disparaging Mr. Bollea, as well as disparaging Mr. Bollea's family members, including his daughter, son, current wife, and ex-wife. Defendants used this evidence during depositions, and may try to introduce it at trial as improper hearsay and character evidence against Mr. Bollea.

Mr. Clem was a named defendant in this lawsuit, filed on October 15, 2012. During the two days following the filing of this case (October 16-17, 2012), Mr. Clem used the highly popular platform of radio show as a platform to attack Mr. Bollea and his family members. Mr. Bollea's desire to put an end to these disparaging, public attacks, particularly against his wife and children, was a major factor in his decision to settle his claims against Mr. Clem (a subject matter Mr. Bollea has also moved to exclude). Mr. Clem testified that his statements about Mr. Bollea and his family members were **not true**, and that he made them to deflect the negative media attention he was receiving.

Mr. Clem's statements are inadmissible for several reasons. First, they do not tend to prove any material facts in this case. Fla. Stat. §§ 90.401, 90.402. Second, the statements are hearsay, which Defendants would be offering for the truth of the matters asserted. Fla. Stat. §§ 90.801, 90.802. Third, the statements improperly attack Mr. Bollea's character and tarnish his reputation. Fla. Stat. §§ 90.404, 90.609. Fourth, any probative value these statements may have is substantially outweighed by the prejudice of putting these matters before the jury. Fla. Stat. § 90.403. These unfairly disparaging remarks concerning Mr. Bollea and his family will inflame the jury and unfairly prejudice Mr. Bollea.

Therefore, the evidence of radio broadcasts by Mr. Clem, disparaging and attacking Mr. Bollea and members of his family in October 2012, should be ruled **inadmissible** and excluded from trial.

**Category 7:**

**Evidence Relating to Letters Concerning Offers to Exploit the Video of Plaintiff**

Mr. Bollea submits that offers to exploit the commercial value of the secretly recorded video of Mr. Bollea are documents of independent legal significance which tend to prove his damages theories and should be **ADMITTED**.

Defendants seek to exclude two substantial offers to purchase the rights to the video of Mr. Bollea naked and engaged in sexual activity. These offers are not hearsay. They are instead verbal acts—words that have independent legal significance. *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996); *State v. Welker*, 536 So.2d 1017, 1020 (Fla. 1988); *Zeigler v. State*, 402 So.2d 365, 374 (Fla. 1981). Documents such as offers are verbal acts constituting matters of independent legal significance. *Crawford v. Franklin Credit Management Corp.*, 2015 WL 1378882 at *3 (S.D.N.Y. Mar. 26); *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992).

Defendants' assertion that Mr. Bollea has not designated any witnesses that will testify and lay the proper predicate foundations, and that their first encounter with the witnesses would be on cross-examination at trial, is **knowingly false**. Kevin Blatt, Defendants' **own expert witness**, testified under oath that he authored the offer letter from Sex.com.

Moreover, Defendants waived any objection to the admissibility of the offer letters from Vivid.com by including as one of their own trial exhibits (Defendant's Ex. 402), an article on TMZ.com titled "Porn King to Hulk Hogan: There's a HUGE Appetite for Your Sex Tape." This article includes the image of the very letter Defendants now seek to exclude, and also discusses its contents. Under the rule of completeness, Mr. Bollea is entitled to introduce this letter. The offers are not hearsay, as their purpose is to prove that they were sent and that offers were made.

In light of the foregoing, evidence relating to letters establishing offers to exploit the commercial value of the video of Mr. Bollea is highly probative, and should be **admitted** at trial.

*/s/ Kenneth G. Turkel*
Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Shane B. Vogt

Florida Bar No. 0257620
BAJO | CUVA | COHEN | TURKEL
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: svogt@bajocuva.com

-and-

Charles J. Harder, Esq.
PHV No. 102333
Jennifer J. McGrath, Esq.
PHV No. 114890
HARDER MIRELL & ABRAMS LLP
132 South Rodeo Drive, Suite 301
Beverly Hills, CA 90212-2406
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com
Email: jmcgrath@hmafirm.com

## 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 12th day of February, 2016 to the following:

Barry A. Cohen, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1950
Tampa, Florida 33602
bcohen@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
abeene@tlolawfirm.com
*Counsel for 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, Esquire
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 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 Defendants*

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hklaw.com

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amnestec@aol.com
asteele@rahdertlaw.com
ncampbell@rahdertlaw.com
*Attorneys for Intervenor Times Publishing Company*

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hklaw.com

*Attorneys for Intervenors, First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, Vox Media, Inc., WFLA-TV, Media General Operations, Inc., Cable News Network, Inc., Buzzfeed and The Associated Press.*

*/s/ Kenneth G. Turkel*
Attorney