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'S MOTION FOR SANCTIONS ORDER PRECLUDING DEFENDANTS FROM USING EXHIBITS NOT DISCLOSED IN DISCOVERY AS EVIDENCE AND STRIKING DEPOSITION TESTIMONY BASED ON SUCH EXHIBITS

On March 6–7, 2014, at Plaintiff Terry Gene Bollea's deposition, Gawker Media, LLC ("Gawker") marked 31 exhibits, several of which had never been produced by Gawker despite the fact that they were responsive to document requests previously propounded to Gawker by Mr. Bollea. Mr. Bollea files this motion for an order sanctioning Gawker and precluding it from using those documents as evidence, namely Deposition Exhibits 77–84, 100 and 103–06 (the "Exhibits"), and striking any deposition testimony concerning those Exhibits. The Special Discovery Magistrate should recommend the requested order, for at least the following reasons:

First, if the Exhibits were responsive to propounded discovery (they were) and Gawker intended to use them as evidence (they did), then Gawker was under an obligation to produce the

Exhibits by the deadline, which was March 4, 2014 (they did not). Gawker did not produce the Exhibits by March 4, but instead ambushed Mr. Bollea with the Exhibits at his deposition on March 6–7, only a few days later. The Florida Rules of Civil Procedure do not allow such gamesmanship.

Second, Gawker's argument that it did not produce the Exhibits because they were protected by the work product doctrine is disingenuous. Under Florida law, documents that a party intends to use as evidence are not protected by the work product doctrine. The Supreme Court of Florida has held that "those documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery." *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 112 (Fla. 1970).

Third, Gawker also is incorrect in arguing that it is not obligated to produce documents that are available to Mr. Bollea because they are available publicly. Courts in Florida, and across the country, have found that this objection is insufficient to resist a discovery request. *See Pepperwood of Naples Condominium Ass'n, Inc. v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *4 (M.D. Fla. Aug. 29, 2011) (rejecting objection based on documents being publicly available online).

Fourth, the Supreme Court of Florida has held that "[a] primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics." *Surf Drugs*, *supra*, 236 So.2d at 111. Gawker's tactic of asserting a work product objection over the Exhibits so that it could temporarily avoid their production, only to then surprise Mr. Bollea with the Exhibits at his deposition, is the worst kind of legal gymnastics and is not allowed by Florida's discovery rules or the case law interpreting them.

The appropriate sanction against Gawker is to preclude Gawker from using the Exhibits

as evidence, and striking the testimony regarding them. *Southern Bell Tel. & Tel. Co. v. Kaminester*, 400 So. 2d 804, 806 (Fla. 3d DCA 1981) (holding that court abused its discretion in allowing introduction of evidence that had been withheld in discovery on the basis of confidentiality).

I. RELEVANT BACKGROUND

On May 21, 2013, Mr. Bollea propounded his first set of requests for production of documents to Gawker. On July 25, 2013, Gawker served its objections and responses to those requests. On January 28, 2014, Mr. Bollea propounded his first supplemental request for production of documents to Gawker (the "Supplemental Demand"), which demanded that Gawker produce all documents responsive to Mr. Bollea's requests for production that had not been previously produced, such as documents acquired by Gawker after Gawker's July 25, 2013, production date. Documents responsive to the Supplemental Demand were due, at the latest, on March 4, 2014, two days before Mr. Bollea's deposition was scheduled to begin on March 6.[1] One of the purposes of the Supplemental Demand was to ensure that Mr. Bollea would not be ambushed with newly-produced documents during his deposition.

On February 4, 2014, Gawker's counsel, Alia Smith, asked for an extension of time to respond to the Supplemental Demand, until March 20. Mr. Bollea's counsel, Charles Harder, responded that he would agree to an extension to March 20, but **only** if Gawker agreed to produce any documents to be used at Mr. Bollea's deposition beforehand. Gawker refused to agree to Mr. Bollea's condition for the extension, claiming: "We do reserve the right to use

[1] The parties' meet-and-confer correspondence reflects a dispute as to the deadline to produce responses to Mr. Bollea's Supplemental Request—February 27 versus March 4. Affidavit of Charles J. Harder (the "Harder Affidavit" or "Harder Aff."), Ex. A. The issue is irrelevant because Gawker did not produce documents responsive to the Supplemental Demand by either deadline, and both dates preceded Mr. Bollea's deposition dates.

documents that we as their counsel have gathered in preparing our case – i.e., our work product, particularly those documents that are equally available to the plaintiff." Harder Aff., Ex. A. Mr. Harder responded: "Documents that you acquire, as counsel acting for your clients, are within the legal control of your clients and therefore must be produced. Unless you produce your responsive documents on the original due date, I will object to the introduction of all such documents . . . ." *Id.* The record is clear that Mr. Bollea's counsel did **not** grant an extension for the production of responsive documents that would be used at Mr. Bollea's deposition, and preserved all rights regarding objecting to the admissibility of all documents used at Mr. Bollea's deposition that were responsive to his document requests and not produced prior to the dates of his deposition.

On March 4, 2014, Gawker served its written responses to Mr. Bollea's Supplemental Demand. Gawker did not produce any responsive documents at that time. Rather, Gawker began to produce responsive documents on March 21, 2014, some two weeks *after* Mr. Bollea's deposition dates.

On March 6–7, 2014, at Mr. Bollea's deposition, Gawker marked 13 exhibits that were responsive to Mr. Bollea's previously-propounded requests for production, but that Gawker had not previously produced (the "Exhibits"). Mr. Bollea's counsel made his objections on the record at the deposition:

> I'd like to make an objection for the record. There are a lot of exhibits that are being provided that were never produced in discovery. . . . [W]e asked back in probably June for them [Gawker] to produce documents that are responsive. And then we also did a request for supplemental responses so that everything that they have acquired since the first one that they would produce. And the deadline came and went, and they didn't give us any of these things. . . . [W]hen I gave you [Gawker's counsel] an extension of time to produce things, I said, if you're going to surprise my witness with them at his deposition, we are going to object to the admissibility of these things. I said, if you want to have these things be admissible, you need to give them to us in advance, because we got our document

> request in on time so that 30 days later, you would be able to provide us prior to his deposition. You didn't give me any of these things. You obviously were holding them. You wanted to surprise him at his deposition. So we're objecting to the admissibility of all of these things.

Harder Aff., Ex. B (Bollea Depo. Tr. 170:16–171:2, 171:20–172:8). Gawker's counsel responded, arguing that Gawker had no obligation to produce the Exhibits because they supposedly constituted work product and were equally available to Mr. Bollea. *Id.* (171:4–19, 173:16–174:9). Mr. Bollea's counsel reiterated his objections on the second day of Mr. Bollea's deposition:

> I'm just going to reiterate what we - - something we discussed yesterday, which is that a lot of these things are responsive to our discovery. They were never provided to me in advance, and so we are reserving the right to bring a preclusion order as to all this evidence that you're surprising my witness with.

Id. (591:6–13). Gawker stood on its prior objections.

As described herein, Gawker's objections are contrary to the law and the purposes of Florida's discovery rules. Accordingly, the objections should be overruled, and the documents that were responsive to Mr. Bollea's document requests, and withheld until Mr. Bollea's deposition, should be precluded as evidence, including at trial, and Mr. Bollea's testimony relating to the Exhibits should be stricken.

II. DISCOVERY AT ISSUE

Each of the Exhibits is responsive to one or more of the following requests for production, originally propounded May 21, 2013, and which were included in Mr. Bollea's Supplemental Demand propounded January 28, 2014:

> **REQUEST NO. 1**: All documents that relate to Plaintiff and which were created or are dated after January 1, 2012.
>
> **RESPONSE**: Gawker objects to this Request to the extent that it seeks the production of documents protected from discovery by privilege, including but not limited to the attorney client privilege and attorney work-product doctrine. To the extent that this Request seeks the production of documents related to websites

other than gawker.com which are published by Gawker but not at issue in this lawsuit, Gawker objects on the grounds that such documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection, Gawker will produce any non-privileged documents responsive to this Request and related to Gawker.com in its possession, custody or control.

REQUEST NO. 2: All audio and/or video recordings of Plaintiff.

RESPONSE: Gawker will produce any documents responsive to this Request in its possession, custody or control.

REQUEST NO. 6: All audio and/or video recordings of Bubba Clem.

RESPONSE: Gawker will produce any documents responsive to this Request in its possession, custody or control.

REQUEST NO. 26: All documents, including communications, that refer or relate to the facts or alleged facts underlying each of your defenses to each of the claims in the Lawsuit.

RESPONSE: Gawker objects to this Request to the extent that it seeks the production of documents protected from discovery by privilege, including but not limited to the attorney client privilege and the attorney work-product doctrine. Gawker further objects to this Request to the extent that it seeks the production of the Previously Exchanged Lawsuit Documents, all of which are already in the possession of Plaintiff and his counsel. *See* note 1 *supra*. Subject to and without waiving this objection, Gawker will produce any non-privileged documents responsive to this Request in its possession, custody or control, except for the Previously Exchanged Lawsuit Documents.

Significantly, Gawker asserted no objections to producing all documents responsive to Requests 2 and 6 and, as to all of the Requests, made no objection based on "equal accessibility."

The Exhibits and testimony at issue are the following:

EXHIBIT NO.	DESCRIPTION	RELATED DEPOSITION TESTIMONY	REQUEST(S) TO WHICH EXHIBIT IS RESPONSIVE
77	Book Entitled "Hulk Hogan, My Life Outside the Ring," co-authored by Terry Bollea and Mark Dagostino	34:1–35:15, 186:9–190:5	26
78	Website post purportedly sharing Hulk Hogan's views on Personal Branding, Family Life and Reality TV. (The post contains numerous	49:7–51:21, 52:5–58:11	26

EXHIBIT NO.	DESCRIPTION	RELATED DEPOSITION TESTIMONY	REQUEST(S) TO WHICH EXHIBIT IS RESPONSIVE
	misstatements.)		
79	12/23/12 Tampa Bay Times Article, "Hulk Hogan to Open Tampa Restaurant New Year's Eve"	167:24–169:23	1, 26
80	Video Advertisement for Hogan's Beach Restaurant (depicting male roller blader in short jean shorts)	170:2–15, 174:14–21	1, 2, 26
81	Video Advertisement for Hostamania (depicting Hulk Hogan riding wrecking ball)	177:22–183:23	1, 2, 26
82	Book Entitled "Hollywood Hulk Hogan," co-authored by Terry Bollea and Michael Jan Friedman	184:1–186:8	26
83	Bubba the Love Sponge Show dated 11/14/06 (discussion regarding cameras at Bubba Clem's radio station)	258:13–260:7	2, 6, 26
84[2]	10/10/12 post on www.wrestlinginc.com titled "Hulk Hogan Interview – Sex Tape Release, Aces & 8s Reveal, Bound for Glory, Austin Aries and More"	260:8–263:10	1, 26
100	8/12/13 Cape Breton Post Article, "Hulk Hogan Talks to Toronto"	538:22–543:12	1, 26
103	Hulk Hogan YouTube Video (depicting Terry Bollea going to the bathroom in hospital while on medications following surgery)	586:11–16, 587:6–590:16	2, 26
104	Bubba the Love Sponge Show, Hour 3, dated 2/9/06 (depicting on-air conversation wherein Hulk Hogan makes reference to a "hard-on")	590:17–23, 591:18–597:3, 598:18–600:12	2, 6, 26
105	Bubba the Love Sponge Show, Hour 3, dated 10/20/06 (depicting on-air	600:13–612:10	2, 6, 26

[2] Exhibit 84 is further excludable and inadmissible because it is hearsay and lacks foundation. The article reports on alleged statements made by Mr. Bollea during an alleged radio show in 2012. Mr. Bollea testified at his deposition that he did not recall giving the interview or making the alleged statements reported on in Exhibit 84. Bollea Depo. Tr. 260:22–25; 262:24–263:1 (confidential and therefore not filed herewith). As such, Gawker has not produced any competent evidence to support that the hearsay statements allegedly made by Mr. Bollea were, in fact, made.

EXHIBIT NO.	DESCRIPTION	RELATED DEPOSITION TESTIMONY	REQUEST(S) TO WHICH EXHIBIT IS RESPONSIVE
	conversation wherein Hulk Hogan is asked to tell the audience how large his penis is)		
106	Bubba the Love Sponge Show, Hour 3, dated 8/28/06 (depicting on-air conversation regarding where radio guests prefer to ejaculate when having intercourse)	612:12–618:16	2, 6, 26

III. DOCUMENTS THAT GAWKER INTENDS TO USE AS EVIDENCE ARE NOT PROTECTED BY THE WORK PRODUCT DOCTRINE

Documents that a party intends to use as evidence are not protected by the work product doctrine. The Florida Supreme Court has expressly held that "those documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery." *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 112 (Fla. 1970); *see also Spencer v. Beverly*, 307 So.2d 461, 462 (Fla. 4th DCA 1975) ("If matter is to be introduced into evidence, it is not privileged as work product."); *Corack v. Travelers Insurance Co.*, 347 So.2d 641, 642 (Fla. 4th DCA 1977) ("if a party possesses material he expects to use as evidence at trial, that material is subject to discovery").

In *Surf Drugs*, the defendant refused to respond to certain interrogatories based on a work product objection because the information was solely in the possession of its attorneys. *Id.* at 112. The Florida Supreme Court **rejected** the defendant's position that "anything known to an attorney for a litigant constitutes 'work product' immune from discovery procedures," and held that the position was "clearly contrary to [*Hickman v. Taylor*, 329 U.S. 495, 504 (1947)], wherein the United States Supreme Court stated flatly: 'A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his

attorney.'" *Id.* at 113. The Court held "that a party may be required to respond on behalf of himself, his attorney, agent, or employee" and, where that information is intended "to be presented as evidence," it is **not** protected by the work product doctrine. *Id.* at 112–13.

The defendant's losing argument in *Surf Drugs* mirrors the argument advanced by Gawker's counsel here—namely, that the documents that "we as [Gawker's] counsel have gathered in preparing our case" are work product, as opposed to "documents that either Gawker or A.J. Daulerio created or received." Harder Aff., Ex. A. Gawker's argument should be rejected, just as the Florida Supreme Court rejected the defendant's similar argument in *Surf Drugs*. Gawker intended to use (and, in fact, **did** use) the Exhibits as evidence. Therefore, the Exhibits are not protected by the work product doctrine, even if the Exhibits were compiled by Gawker's counsel, because Gawker obviously intended to use the Exhibits as evidence. Gawker admittedly was required to produce the Exhibits no later than March 4, refused to do so on grounds of "work product" and then used the Exhibits as evidence on March 6 and 7 at Mr. Bollea's deposition. Under controlling Florida Supreme Court precedent, the Exhibits are not work product and, instead, are discoverable. As explained more fully below, because Gawker refused to produce the Exhibits in discovery, and surprised Mr. Bollea with the Exhibits at the time of his deposition, Gawker should be precluded from using the Exhibits as evidence in this case, including at trial.

Mr. Bollea anticipates that Gawker will argue that it only was required to produce written objections and responses to the Supplemental Demand by March 4, and not its responsive documents. This argument should fail. First, Gawker requested an extension of time to produce its responsive documents. Mr. Bollea's counsel refused to grant the request as to any documents that Gawker intended to use at Mr. Bollea's deposition, but did grant the request as to any other

responsive documents. Second, *Target Corp. v. Vogel*, 41 So.3d 962, 963 (Fla. 4th DCA 2010), upheld a trial court's order compelling disclosure of photos and video of an accident scene **before** the plaintiff's deposition. In *Target*, the defendant argued against producing photographs of the accident scene and a security video of the plaintiff's slip and fall prior to plaintiff's deposition, based on strategic reasons. Specifically, claiming work product protection, the defendant "contended that the plaintiff was not accurately portraying the incident, citing medical records indicating that the plaintiff told her doctor she fell flat on her back, a fact refuted by the video." *Id.* The plaintiff argued that "she should be allowed to refresh her memory of the incident with the security video and accident scene photographs before being deposed." *Id.* The Florida District Court of Appeal ("DCA") agreed with the plaintiff and affirmed the trial court's order compelling production of the photographs and video **before** the plaintiff's deposition. *Id.* The DCA specifically rejected the defendant's work product objection (the same objection raised by Gawker here) and admonished the defendant that Florida's Rules of Civil Procedure "are designed '**to prevent the use of surprise, trickery, bluff and legal gymnastics**.'" *Id.* (quoting *Surf Drugs*, 236 So.2d at 111) (emphasis added).

Similarly, here, Gawker withheld production of the Exhibits, all of which were responsive to the Supplemental Demand, based on a strategy of attempting to blindside Mr. Bollea at the time of his deposition. Gawker wanted to, and did, surprise Mr. Bollea with documents and materials that he was not familiar with, and had not prepared for, because Gawker had intentionally withheld them in discovery. As Mr. Harder made clear in his meet-and-confer correspondence with Gawker's counsel, and on the record at the deposition, the purpose for Mr. Bollea's Supplemental Demand was to prevent Gawker from employing an "ambush strategy" in discovery. As such, and pursuant to the reasoning and holding of *Target*,

the Exhibits should have been produced **prior** to Mr. Bollea's deposition.

Any argument that the Exhibits were used or will be used solely for impeachment is both false and irrelevant to the analysis, and thus should be rejected. In *Spencer v. Beverly*, which involved the discovery of surveillance videos, the DCA rejected the argument that such materials would retain work product protection if used solely for impeachment. "[W]here a litigant reasonably anticipates he may use surveillance movies for impeachment they should be subject to discovery." 307 So.2d at 462; *accord Corack*, 347 So.2d at 642 (Fla. 4th DCA 1977). Similarly, here, the Exhibits were subject to discovery even if they were intended to be used for impeachment.

Separately, Gawker cannot credibly argue that it intends to use the Exhibits solely for impeachment. By Gawker's own admission, the Exhibits were used at Mr. Bollea's deposition to support Gawker's alleged defenses to Mr. Bollea's claims, and not solely for impeachment. *See, e.g.*, Harder Aff., Ex. C (relevant excerpts of Gawker's 1/4/13 Dispositive Motion, which is noticed for hearing April 23, 2014). For example, Gawker argues that its conduct in posting a surreptitiously-recorded sex video of Mr. Bollea on the internet without his permission or knowledge "hardly qualifies" as "outrageous" for purposes of an intentional infliction of emotional distress claim, because of "plaintiff's own public discussions of his sex life."[3] *Id.*

IV. GAWKER CANNOT STAND ON ITS OBJECTION THAT THE EXHIBITS ARE PUBLICLY AVAILABLE

Gawker asserted at Mr. Bollea's deposition that it was not obligated to produce the Exhibits because they are "publicly available." Harder Aff., Ex. B (Bollea Depo Tr. 173:21).

[3] Gawker's argument on this point is not supported by the law. As the Central District of California held in *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998): "The Court is not prepared to conclude that public exposure of one sexual encounter forever removed a person's privacy interest in all subsequent and previous sexual encounters."

Gawker's position is wrong. Courts in Florida and across the country have held that "this exact objection is insufficient to resist a discovery request." *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000); *Pepperwood of Naples Condominium Ass'n, Inc. v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *4 (M.D. Fla. Aug. 29, 2011) (rejecting objection based on documents being publicly available online) (citing *St. Paul* and *Petruska v. Johns-Manville*, 83 F.R.D. 32, 35 (E.D. Pa. 1979)); *City Consumer Services v. Horne*, 100 F.R.D. 740, 747 (D. Utah 1983) (holding that it is "not usually a ground for objection that the information is equally available to the interrogator or is a matter of public record") (citing *Petruska*); *Campo v. American Corrective Counseling Services*, 2008 WL 3154754 at *2 (N.D. Cal. Aug. 1, 2008) (holding that "it is usually not objectionable when the information sought by discovery is a matter of public record") (citing *Petruska*); *Associated Wholesale Grocers, Inc. v. U.S.*, 1989 WL 110300 at *3 (D. Kan. June 7, 1989) (holding that defendant's argument of equal accessibility is not sufficient to resist discovery) (citing *City Consumer Services*).

In *Pepperwood of Naples*, the Middle District of Florida rejected the defendant's objection to producing documents because they were "publicly available online from the Florida Department of Financial Services, and that the information can be as easily obtained by the Plaintiff as by the Defendant." *Pepperwood of Naples*, 2011 WL 3841557 at *4. Similarly, the court in *Campo* held, "it is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party or obtainable from another source." *Campo*, 2008 WL 3154754 at *2. The *Campo* court reasoned that "**[m]utual knowledge of all relevant facts gathered by parties to litigation is essential** so that a party may, in good faith, compel the other to disclose what relevant facts he has in his possession, if not otherwise privileged." *Id.*

(emphasis added).

Pursuant to the wealth of authorities on this topic, some of which are cited above, Gawker's objection to production based on a claim that the Exhibits are publicly available should be rejected.

At Mr. Bollea's deposition, Gawker's counsel intimated that Mr. Bollea's counsel "surprised" the Gawker deponents by marking as exhibits publicly available documents not previously produced by Mr. Bollea. Harder Aff., Ex. B (Bollea Depo. Tr. 171:13–19). The position is insupportable because, first, each of the publicly available documents marked at the Gawker deponents' depositions were collected **after** the deadline for production of documents responsive to Gawker's document requests. Specifically, Mr. Bollea produced responsive documents on August 28, 2013. Each of the publicly available documents marked at the Gawker depositions were collected on or after September 26, 2013, which was one month after Mr. Bollea's production. Harder Aff. ¶5. As such, unlike Gawker, Mr. Bollea was under no obligation to produce such documents prior to defendants' depositions. Second, Gawker never objected to the introduction of any such exhibits prior to or at the depositions and thereby waived any and all such objections. Harder Aff., Ex. B (Bollea Depo Tr. 171:18–19).

V. THE DISCOVERY MAGISTRATE SHOULD SANCTION GAWKER, RECOMMEND AN ORDER PRECLUDING GAWKER FROM USING THE EXHIBITS AS EVIDENCE, AND STRIKE THE RELATED DEPOSITION TESTIMONY

Gawker cannot be allowed to assert a work product objection over the Exhibits to avoid their production in discovery, and then waive all privileges in order to surprise Mr. Bollea with those Exhibits at his deposition. The Florida Supreme Court has held:

> A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics. Revelation through discovery procedures of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation.

Surf Drugs, 236 So. 2d at 111. Likewise, in *Spencer v. Beverly*, the DCA held: "The discovery rules were enacted to eliminate surprise, to encourage settlement, and to assist in arriving at the truth. If that be the acknowledged purpose of those particular rules, then any evidence to be used at trial should be exhibited upon proper motion." 307 So. 2d at 462 (citing *Surf Drugs*).

Gawker's withholding of discovery to cause surprise, rather than to avoid it, is wholly contrary to the purpose of Florida's discovery rules, caused prejudice to Mr. Bollea and should not be allowed. Gawker willfully failed to disclose the Exhibits in response to valid discovery requests that required production prior to Mr. Bollea's deposition, and explains its failure based on meritless objections. As such, a sanction order precluding Gawker from using the Exhibits as evidence is appropriate. *See, e.g., Southern Bell Tel. & Tel. Co. v. Kaminester*, 400 So. 2d 804, 806 (Fla. 3d DCA 1981) (holding that court abused its discretion in allowing introduction of evidence that had been withheld in discovery on basis of confidentiality); *La Villarena, Inc. v. Acosta*, 597 So. 2d 336, 338 (Fla. 3d DCA 1992) (precluding party from using surveillance video at trial that was not previously disclosed to the other side).

In *Southern Bell*, the defendant corporation moved for a protective order over certain patient interview sheets that were requested in discovery on the basis that the interviews contained confidential and privileged medical information. The court granted the motion and the information was not produced in discovery. At trial, however, the court allowed the interview sheets to be introduced as evidence. The DCA held that "the trial court abused its discretion in admitting the patient interview sheets containing the medical information into evidence." *Southern Bell*, 400 So. 2d at 807. The DCA agreed with the trial court's original decision and

reasoning for not allowing the evidence:

> The point is, what you did was choose to protect the privilege of the patient when it suited your purpose and to ignore it when it did not suit your purpose, and to the extent that you did so, that is fine, except I am now not going to let you saddle the other side with the burden of not having been able to inquire on the basis of it.

Id. at 806. Similarly, here, Gawker chose to protect the privilege when it suited Gawker, and ignored it when it did not suit Gawker. A sanction in the form of precluding Gawker from using the Exhibits as evidence, and striking the related deposition testimony, therefore is appropriate because, absent such an order, a party can engage in gamesmanship, asserting privileges to thwart discovery and then suddenly waive the privilege to ambush the other party. Gawker did exactly this with the Exhibits introduced at Mr. Bollea's deposition. The Discovery Magistrate should not permit such litigation abuses; the appropriate consequence is preclusion.

VI. CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the Special Discovery Magistrate sanction Gawker and recommend that it be precluded from using the Exhibits as evidence, and strike all related deposition testimony.

DATED: April 4, 2014

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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 4th day of April, 2014 to the following:

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