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EXHIBIT C

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA, et al.,

Defendants.
_______________________________/

NOTICE OF FILING FEDERAL COURT PLEADINGS FROM THIS ACTION

COMES NOW Defendant, GAWKER MEDIA, LLC and hereby files the following pleadings. These pleadings were timely filed in this action while this case was removed to the Middle District of Florida, where it was captioned *Bollea v. Clem*, Case No. 8:13-cv-0001 (M.D. Fla.), but were not transferred to this court when the case was remanded.

1. Defendant Gawker Media, LLC's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim (Dkt. 10, initially filed 1/04/2013).
2. Defendant Gawker Media, LLC's Notice of Constitutional Challenge to Florida Statute § 934.10 (Dkt. 11, initially filed 1/04/2013).
3. Plaintiff's Response to Defendant's [Gawker Media, LLC's] Motion to Dismiss (Dkt. 21, initially filed 1/22/2013).
4. Defendant Heather Cole's Motion to Dismiss First Amended Complaint (Dkt. 22, initially filed 1/25/2013).
5. Plaintiff's Response to Defendant's [Heather Clem's] Motion to Dismiss (Dkt. 25, initially filed 2/08/2013).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April 2013, I caused a true and correct copy of the foregoing to be served by mail and email upon the following counsel of record:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRY GENE BOLLEA professionally known as HULK HOGAN

Plaintiff,

vs.

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

Defendants.
_______________________________/

Case No.: 8:13-cv-0001-T-26AEP

DISPOSITIVE MOTION

DEFENDANT GAWKER MEDIA, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 3.01, by and through the undersigned counsel, defendants Gawker Media, LLC ("Gawker") hereby moves this Court for an order dismissing plaintiff's Complaint ("Complaint" or "Compl.") against it in its entirety for failure to state a claim upon which relief may be granted. As grounds for its motion, Gawker states as follows:

1. Plaintiff alleges various claims arising out of the publication on www.gawker.com of a report (the "Gawker Story") about a video of plaintiff, a well-known celebrity, cheating on his wife with the wife of his best friend with the friend's blessing (the "Video"), together with brief excerpts of the Video (the "Excerpts").

matter of law, that publisher did not violate right of publicity where defendants did not use plaintiff's name to directly promote a product or service); *Tyne*, 901 So. 2d at 809 (dismissing misappropriation claim for same reason); *Fuentes*, 721 F. Supp. 2d at 1260 (same where plaintiff could not allege that defendants "used his name and likeness to promote some other product or service"). As such, plaintiff's claim for common law misappropriation fails as a matter of law and should be dismissed with prejudice.[17]

D. Intentional Infliction of Emotional Distress (Sixth Cause of Action)

As discussed in Part I *supra*, the cause of action for intentional infliction of emotional distress ("IIED") is particularly disfavored in the First Amendment arena because of the likelihood that the tort might be used to punish disfavored speech. *See Snyder*, 131 S. Ct. at 1219; *Falwell*, 485 U.S. at 50-51. Even were his claim not constitutionally infirm, plaintiff has failed to state a claim for IIED, which plaintiff has previously conceded "'may be decided as a question of law.'" Dkt. 67 (Prior MTD Opp.) at 15-16 (citation omitted).

First, plaintiff has not pled *facts* that would, even if proven true, establish that that Gawker's conduct was "intentional or reckless" with respect to plaintiff's alleged emotional distress. *See Lockhart v. Steiner Mgmt. Servs., LLC*, 2011 WL 1743766, at *3 (S.D. Fla. May 6, 2011) (granting motion to dismiss because conclusory assertions that defendant engaged in "'intentional misconduct designed and intended to cause . . . severe emotional distress'" were insufficient to state a claim) (citation omitted). Plaintiff's sole factual contention in this regard is that Gawker refused plaintiff's requests not to publish and, later, to take down, the Excerpts. *See*

[17] In *Bollea I*, plaintiff erroneously relied on authorities involving either commercial use or injury. *See* Dkt. 67 (Prior MTD Opp.) at 12-14 & n.9 (relying on *Gritzke v. M.R.A. Holding, LLC*, 2002 WL 32107540, *1 (N.D. Fla. Mar. 15, 2002) (misappropriation claim stated against seller of *Girls Gone Wild* videotape where plaintiff's image was used "on the package of defendant's videotape and in advertisements therefor"); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (entire commercial value of the plaintiff's act destroyed by defendants' broadcast of key portion, circumstances different than plaintiff's attempt here to punish and enjoin publication, not preserve its commercial value)).

Compl. ¶ 86. But publishers are regularly subjected to such requests, and plaintiff's theory would expose any publisher who stood on its right to publish to a claim for IIED. Moreover, where Gawker edited the more than 30-minute Video down to less than two minutes of Excerpts, and included only approximately nine seconds of sexually explicit footage – all in connection with a news report – such conduct is a far cry from the kind of conduct that Florida courts have found to qualify as intentionally or recklessly causing severe emotional distress. *See, e.g.*, *Nims v. Harrison*, 768 So. 2d 1198, 1200-01 (Fla. 1st DCA 2000) (defendant threatened to kill teacher and rape her children in student newsletter); *Williams v. City of Minneola*, 575 So. 2d 683, 686 (Fla. 5th DCA 1991) (police officers viewed videotape of autopsy of man who died of an apparent drug overdose at officer's home in a "party atmosphere").

Second, plaintiff has not pleaded facts that would establish "outrageous" conduct for purposes of his IIED claim. "In Florida, '[t]he issue of whether or not the activities of the defendant rise to the level of being extreme and outrageous . . . is a legal question in the first instance for the court to decide as a matter of law.'" *Vance v. S. Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1575 n.7 (11th Cir. 1993) (quoting *Baker v. Fla. Nat'l Bank*, █ So. 2d 284, 287 (Fla. 4th DCA 1990)). Here, the publication of the Gawker Story and the Excerpts, including approximately nine seconds of footage of plaintiff engaged in sexual activity, hardly qualifies, especially in light of plaintiff's own public discussions of his sex life. *See Moore v. Wendy's Int'l, Inc.*, 1994 WL 874973, at *3-4 (M.D. Fla. Aug. 25, 1994) (granting motion to dismiss based on finding that, although allegations of extreme sexual harassment were "totally inexcusable and unacceptable," they did not qualify as "outrageous" conduct required to establish IIED). Moreover, because Gawker's conduct – posting a news report accompanied by excerpts – mirrored the conduct approved by the Court in *Michaels II*, it cannot as a matter of

law be outrageous. *See Toffoloni II*, 483 F. App'x at 563-64 (finding no evidence of intentional conduct to support award of punitive damages where defendants believed their use involved a matter of public concern). Accordingly, plaintiff's IIED claim should be dismissed for this reason as well. *See Nickerson v. HSNi, LLC*, 2011 WL 3584366, at *3 (M.D. Fla. Aug. 15, 2011) (dismissing IIED claim where conduct alleged, "while perhaps unlawful, [wa]s not sufficiently outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").

Finally, plaintiff has not pled facts that, if proven, would establish the publication caused him *severe* emotional distress. His Complaint pleads that "[a]s a proximate result of" defendants' conduct, he "has suffered substantial emotional distress, anxiety and worry." Compl. ¶ 89. But these conclusory assertions are insufficient to plead the sort of *severe* emotional distress required to pursue this cause of action. *See Nickerson*, 2011 WL 3584366, at *3 (granting motion to dismiss where conclusory allegations of emotional distress were insufficient to state IIED claim). *Cf. Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1254-55 (S.D. Fla. 2008) (plaintiff sufficiently demonstrated that torture of her son caused her severe emotional distress including "insomnia and constant nightmares since her son was imprisoned").[18]

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[18] To the extent plaintiff also now pleads injury to his "personal and professional reputation and career," Compl. ¶ 89, such a claim is barred by *Falwell*, which prohibits IIED claims arising out of speech, where such speech would not independently support a defamation claim, *see* 485 U.S. at 50-51. Here, because the speech was indisputably true – and therefore published without actual malice in the constitutional sense – any alleged injury to reputation may not be redressed through a claim for IIED. *Id. See also, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (in case of broadcast of indisputably true hidden camera footage, rejecting efforts "to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim" because "such an end-run around First Amendment stricture is foreclosed by" *Falwell*).

CONCLUSION

For the foregoing reasons, plaintiff's Complaint should be dismissed in its entirety as to Gawker (and each of the other Gawker Defendants).[21]

Respectfully submitted,

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[21] Plaintiffs' claims against the other Gawker Defendants fail for the same reasons as set forth above. In addition, with respect to the other entities, plaintiff has not alleged any actionable conduct by them or conduct in or directed to Florida such that the Court would have jurisdiction over them. In the event that the other Gawker Defendants are ultimately served, it is anticipated that they would move to dismiss on both of those grounds as well, as they did in *Bollea I*.

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I HEREBY CERTIFY that on this 4th day of January 2013, a true and correct copy of the foregoing is being electronically filed and will be furnished via CM/ECF to:

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