

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, *et al.*,

Defendants.

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**REPLY MEMORANDUM ON DEFENDANTS' MOTION FOR SANCTIONS**

By and through their undersigned counsel, defendants Gawker Media, LLC (“Gawker”) and A.J. Daulerio (“Daulerio”) respectfully submit this reply memorandum in support of their Motion for Sanctions, and state as follows:

1. Defendants’ Motion for Sanctions is not, as Bollea suggests, about some technical violations of the four discovery rulings at issue or some brief delay in compliance. While there are also plenty of those, the primary basis for the motion is to remedy a demonstrated pattern of concealing from and misrepresenting to defendants – as well as to Judge Case, to Judge Campbell, and even to the District Court of Appeal – both key facts in the case and even the existence of evidence.

**BOLLEA’S LITIGATION MISCONDUCT**

2. Because Bollea has designated significant portions of the record that demonstrates this pattern of misconduct as “CONFIDENTIAL,” and, in some instances, “CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” Defendants had previously advised the Court that they would address those matters in greater detail at the June 19, 2014 hearing scheduled before Judge Case. Bollea now complains that it is “impossible” for him to know what this Motion could be about or

to understand the import of the FBI documents that they had strenuously resisted producing. Opp. at 4, 10.

3. Accordingly, and given the extent of the misrepresentations that this evidence has revealed (a list which has now grown to a length that would be difficult to address solely during a hearing), Defendants are filing herewith a Confidential Statement of Violations of Court Orders and Misrepresentations by Plaintiff and Plaintiff's Counsel (the "Confidential Statement"), which sets forth in detail the effort by Bollea and his counsel to conceal evidence, to misstate facts, and to make material misrepresentations to Defendants as well as to Judge Campbell and Judge Case. Defendants refer this Court to the Confidential Statement for a complete and detailed description of the conduct at issue, which, given the extent of Bollea's confidentiality designations, cannot be meaningfully discussed in a publicly filed document.<sup>1</sup>

### **ARGUMENT**

4. Bollea attempts in his Opposition to rely on technicalities to excuse his misconduct. As an initial matter, Bollea contends that he is somehow excused from compliance with Judge Campbell's April 23 Order because he had not agreed to the deadline for him to provide the discovery directed. Since there were only three document requests and two interrogatories at issue, and since the FBI documents were already gathered at the time of the hearing (and offered to Judge Campbell to inspect *in camera*), this should be a non-issue. In any event, the repeated representations by both Bollea and his counsel that Defendants' counsel improperly handed up the order at the April 23 hearing, Opp. at 2, 3, 6, 13, 16; C. Harder Aff.

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<sup>1</sup> While Defendants question Bollea's assertion that it was "impossible" for him and his counsel to apprehend the import of the FBI documents or the basis for Defendants' Motion, they appreciate the seriousness of both the misconduct described and the sanctions requested. Accordingly, taking Bollea's assertion at face value, Defendants have no objection if Bollea files a response to the Confidential Statement and, if more time is needed, to postponing the scheduled hearing by a reasonable period to allow him to do so.

¶ 12, are demonstrably incorrect. That proposed order had been submitted to Judge Campbell on March 18, 2014, five weeks prior to the hearing. Ex. 1 (letter submitting proposed order). The order was not “handed up” at the hearing, as the transcript itself makes this clear, when Judge Campbell stated:

in the packet of all of the information was a proposed order by the defense accepting Judge Case’s report and recommendations. And at this time I’ve reviewed . . . all the [exceptions] and I reviewed the responses. I’m going to sign the proposed order by Mr. Berlin.

Ex. 2 (Apr. 23, 2014 Hrg. Tr.) at 92:4-11. As such, even assuming that an order entered without Bollea’s agreement could legitimately be disregarded, the various representations in Bollea’s Opposition and his counsel’s affidavit on this subject are simply not correct.<sup>2</sup>

5. Next, Bollea contends that “if there are any violations at all, they consist of Defendants receiving documents a few days later than the production date.” Opp. at 14; *see also id.* at 3 (“Even if some technical violation of a discovery order is found, there is no basis for a sanction”). Bollea cites several cases seeking to distinguish his purportedly “technical” violations, such as “mere foot dragging,” from “a deliberate and contumacious disregard of the court’s authority, bad faith, willful disregard or gross indifference to an order or the court, or conduct which evinces deliberate callousness.” *Id.* at 11-12 (quoting *U.S.B. Acquisition Co. v. U.S. Block Corp.*, 564 So. 2d 221, 222 (Fla. 4th DCA 1990)). In so doing, Bollea concedes that, under applicable law, such conduct does in fact “justify a dismissal of pleadings for a violation of discovery procedures.” *Id.* The other cases Bollea cites, *id.* at 12, similarly hold that “willful, contumacious disregard of the court’s order [warrants] dismissal with prejudice,” and that even less serious discovery misconduct justifies other sanctions such as: “precluding

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<sup>2</sup> Bollea also argues that he cannot be sanctioned for violating orders related to interrogatories served by Daulerio, Opp. at 6 n.2, instead of by Gawker, even though both Gawker and Daulerio are moving parties.

[plaintiff] from presenting evidence on those issues where [plaintiff] has failed to respond to discovery demands; entering findings of fact adverse to [plaintiff] on such issues; [and] imposition of fines and/or attorney's fees." *Steele v. Chapnick*, 552 So. 2d 209, 209-10 (Fla. 4th DCA 1989); *see also Flanzbaum v. Stans Lounge*, 377 So. 2d 750, 751 (Fla. 4th DCA 1979) (*per curiam*) (while dismissal was not warranted because discovery violations were largely "due more to the withdrawal of counsel and [plaintiffs'] subsequent difficulties in securing representation than to [plaintiffs'] deliberate refusal to comply," even those "circumstances may well justify the imposition of sanctions").

6. With respect, the pattern of conduct described in the accompanying Confidential Statement is far more serious than "mere foot dragging." Opp. at 12. As explained in detail therein, the FBI documents that Bollea ultimately was compelled to produce demonstrate that he and his counsel repeatedly made false and misleading statements in discovery responses, in deposition testimony, and in statements to Judge Campbell and Judge Case. Specifically, Bollea and his counsel (a) concealed the existence of the recently-produced documents, (b) offered shifting stories as the basis for withholding them from disclosure once their existence was revealed, and (c) made numerous other representations that those documents now demonstrate were false.

7. The misconduct at issue is not academic. It required both Defendants and the Court to devote substantial effort to pursuing discovery and deciding discovery issues without the benefit of truthful information. It has cost Defendants meaningful sums in unraveling these misrepresentations, in investigating and taking discovery in the matter – including the depositions of Bollea and Clem – with materially incomplete and often misleading information, and in allowing Bollea to testify falsely without the ability to cross-examine him with

information and documents that had been concealed. This pattern of misconduct has polluted the discovery process, and deserves to be sanctioned to the full extent as outlined Defendants' motion and their accompanying Confidential Statement.

8. Indeed, Judge Case has already advised that the conduct at issue here merits sanctions. When Defendants filed a renewed motion to compel in February, in order to enforce the Court's October 2013 ruling directing Bollea to produce information and documents related to his sexual relationship with Heather Clem that is at the heart of this case, Bollea's counsel represented to Judge Case that Bollea had already responded fully and that there was no further discovery left to compel. Judge Case took that representation at face value but expressly cautioned that sanctions, including a "strong recommendation of a preclusion order," would follow if it turned out that Bollea was "less than candid in these proceedings and with the Court." Mot. for Sanctions, Ex. 5 (Feb. 28, 2014 Order). The Confidential Statement demonstrates that Bollea and his counsel have in fact been "less than candid in these proceedings and with the Court," and sanctions are therefore warranted.<sup>3</sup>

### **CONCLUSION**

For the foregoing reasons, movants respectfully request that their motion be granted, that the Court enter the relief requested therein and explained more fully in the Confidential Statement, as well as any other relief that the Court deems just and proper given the extraordinary violations of this Court's rules and numerous Court orders.

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<sup>3</sup> For the avoidance of doubt, Defendants oppose Bollea's request that sanctions be imposed on them for bringing to the Court's attention such a serious pattern of misrepresentations.

Dated: June 6, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of June 2014, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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