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 TERRY GENE BOLLEA'S CONFIDENTIAL SUPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS AND RESPONSE TO EVIDENCE RAISED BY GAWKER ON THE FIRST TIME ON REPLY

FILED UNDER SEAL

I. INTRODUCTION

Gawker once again has waited until its reply papers to make its motion. This time, Gawker filed 33 exhibits, and made 70 numbered paragraphs (plus subparagraphs) of arguments, in its reply papers that were **not filed or argued** in its motion papers. In other words, Gawker finally articulated the alleged discovery violations **ten days after** Plaintiff Terry Bollea filed his opposition to Gawker's motion. There was no reason why these materials and arguments could not have been included with Gawker's moving papers, so that Mr. Bollea would have had an opportunity to respond to them in his opposition. The materials and arguments in the reply should not be considered by the Court.

If Gawker's sandbagging tactics are permitted, the single most salient point to consider in Gawker's late-filed materials is that **every single alleged discovery violation that Gawker complains about relates to completely collateral issues**. Gawker essentially concedes this—while nevertheless outrageously asking for dismissal of the action, and with it the denial of Mr. Bollea's fundamental due process right to seek redress for his grievances against Gawker, which published a video of him naked and engaged in private sexual relations in a private bedroom, without his knowledge or permission, which millions of people watched because of Gawker's wrongful and unlawful acts.

With regard to the so-called evidentiary sanctions that Gawker seeks as alternative relief, Gawker does not actually identify a single evidentiary issue it wants decided in its favor. Rather, Gawker asks for a ruling (which is not even a proper evidentiary sanction) that unauthenticated, hearsay, highly prejudicial and completely irrelevant evidence that Plaintiff supposedly made offensive comments relating to race should come into evidence, presumably so Gawker can attempt to prejudice the jury against him.

Plaintiff has produced **all** information in his possession or control that is **actually relevant** to the issues—such as whether Gawker invaded his privacy (it did), whether he knew about or consented to the filming or publication (he did not), whether the publication of the sex video was newsworthy (it was not), and the damages Plaintiff has suffered (they are substantial). Thus, Gawker knows that it cannot seek an evidentiary sanction (such as asking that the newsworthiness issue be determined in its favor) because Gawker has not identified any alleged discovery violation by Plaintiff that goes to those issues. (For that matter, Gawker does not identify any alleged discovery violation by Plaintiff that goes to **any** of the elements of **any** of Plaintiff's causes of action.)

Moreover, Gawker's laundry list of allegations does not identify any actual violations of Plaintiff's discovery obligations. Instead, Gawker's complains that:

(1) Plaintiff supposedly should have interposed his law enforcement privilege objection to Gawker's **initial** round of discovery asking for communications relating generically to the "Sex Video," rather than to Gawker's **second** round of discovery asking specifically for law enforcement communications. Gawker makes this argument even though this issue has now been fully litigated and Gawker has received all of the information it requested, including all of the information regarding the FBI investigation.

(2) Plaintiff redacted a few irrelevant words, and the three digit prefix from telephone numbers of people who are neither parties nor witnesses to this case and instead have no involvement whatsoever in the claims, defenses or facts relating to this case. Plaintiff properly filed a Motion for Protective Order as to those redactions.

(3) Plaintiff initially estimated that the date of the sexual encounters with Ms. Clem was "**in or about** 2006," later estimated that the date was "**in or about** 2008," and shortly thereafter—months **before** Mr. Bollea's deposition or the deposition of Bubba Clem—Plaintiff was able to deduce that the encounters occurred in approximately late Spring/early Summer 2007. Like Gawker, Plaintiff would have much preferred to have the information earlier rather than later, but the earlier estimations **did not prejudice Gawker** in any way, because the earlier estimations were later clarified, and Gawker had that information months before taking any depositions at all in this case.

(4) Plaintiff and his counsel allegedly made incomplete statements about the number of sex videos that exist. This is a false argument by Gawker; Mr. Bollea and his counsel do not have any personal knowledge that more than one sex video exists (the video produced by

Gawker from which it derived the one minute, forty-one second highlight reel that it played on the Internet for six months and allowed more than five million people to view. Gawker makes much of a letter from an Assistant U.S. Attorney that lists three videos, two of which are dated the same day (thus, they could be copies of the same video) and a third that has no date (and could be a third copy of the same video). The truth, however, is that the issue is irrelevant to this case because Gawker only published content from the **one single video** that the parties have ever possessed and know exists. Mr. Bollea makes no claims in this action regarding videos **other than** the one video published by Gawker, because that is the video that caused his damages, even if a second or third video exists—which has yet to be established.

None of Gawker's arguments warrant the imposition of any discovery sanctions whatsoever.

Finally, even if the Special Discovery Magistrate agrees that any of Gawker's claims constitute sanctionable conduct (which Mr. Bollea strenuously opposes), well established law provides that any such sanctions must be **precisely tailored** to fit the claimed violation. Here, the violations asserted by Gawker do not come close to the level necessary to dismiss this action or to strip Plaintiff of his due process right to pursue his claims. Further, the evidentiary sanctions sought by Gawker are outrageous. Gawker asks that it be allowed to call Plaintiff a racist in front of the jury, based on an alleged "summary," written by an unknown person and sent by an extortionist, of an alleged video that no one in this case has ever seen, and that is irrelevant to this case because any such video was not posted by Gawker. Moreover, it has yet to

be established that Plaintiff made any of the statements alleged, even if such statements were relevant—which they most certainly are not.[1]

Plaintiff's position has been consistent from the outset: this case should be **tried on the merits**. Gawker's actions invaded his privacy and caused him significant harm. Gawker, however, wants this case to be about anything **other than the merits**—it wants to argue about **other** alleged sex videos, about FBI investigations of an unrelated extortion attempt, about alleged racially offensive hearsay, and other completely collateral matters. The sideshows should be put to an end, and the case should proceed to a trial on the merits. Gawker's motion should be denied in its entirety.

II. GAWKER WAIVED ITS REPLY ARGUMENTS AND MATERIALS BY INTENTIONALLY WITHHOLDING THEM FROM THE MOTION PAPERS.

It is well-established that new evidence and arguments may not be submitted for the first time on reply. *Department of Highway Safety & Motor Vehicles v. Dellacava*, 100 So.3d 234, 236 (Fla. 5th DCA 2012) (holding that it is a due process violation to consider arguments raised for first time in a reply brief); *J.A.B. Enterprises v. Gibbons*, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992) (holding that an argument raised for first time in reply is deemed abandoned). Gawker has broken this rule in the past; Plaintiff has objected; and Gawker has broken it again in the instant motion for sanctions. The Magistrate should no longer tolerate such tactics, and

[1] At most, if the Special Discovery Magistrate finds a discovery violation, the appropriate response is a modest monetary sanction. For instance, if Plaintiff should have further objected to Gawker's initial discovery request on the basis of the law enforcement privilege, the cost to Gawker of serving a second, more specific discovery request could form the basis for a modest monetary sanction. Similarly, a modest monetary sanction to compensate Gawker for some attorney time relating to fixing the precise (though ultimately irrelevant) dates of the sexual encounters between Plaintiff and Ms. Clem could be commensurate with that violation, if one is found.

should rule that the materials and arguments in the reply, which were not raised in or attached to the motion papers, are waived.

Gawker submitted **none** of the evidence contained in its dossier of alleged discovery violations at the time it filed its moving papers. Instead, Gawker waited until after Plaintiff filed his opposition to sandbag Plaintiff (and the Magistrate) with 33 new exhibits, 70 paragraphs and countless subparagraphs of brand new argument. By waiting to unload these materials and arguments until ten days after Mr. Bollea's opposition papers were filed, Gawker obviously intended to deny him an opportunity to respond to the evidence before the hearing, and to get a free preview of Plaintiff's opposing arguments before filing its evidence and arguments for the first time. Such conduct is contemptible, and a clear violation of the rules. It is especially improper in a proceeding in which Gawker seeks a judicial ruling stripping Mr. Bollea of his fundamental due process right to seek redress for his claims. In bringing such a motion, Gawker should want to follow every rule that applies, rather than flagrantly violate them.

Gawker presumably will seek to argue, either at the hearing or in yet another unpermitted filing to the Magistrate on this same motion (or both), that the only remedy available to Mr. Bollea for Gawker's sandbagging tactics is to allow him an opportunity to file a response to the reply papers. Mr. Bollea respectfully submits this would be an unacceptable remedy to address Gawker's ongoing and repeated violation of the rules. If every litigant were allowed to file new evidence and arguments after the opposition has been filed, all litigants would withhold their evidence and detailed arguments until their reply papers, knowing that the worst that could happen from such tactics would be the possibility of a response brief. Instead, the only proper remedy to address Gawker's continued sandbagging of Mr. Bollea in its motion practice is for the Court to disregard the new materials and arguments submitted by Gawker in its "reply,"

because those materials and arguments could and should have been submitted with Gawker's moving papers.

III. GAWKER HAS NOT ESTABLISHED ANY DISCOVERY VIOLATIONS.

If Gawker's evidentiary submission is considered at all, it fails to establish any actual discovery violations. Gawker's arguments are taken in turn:

A. *Gawker alleges that Plaintiff failed to identify that there **may have been** three videos.*

Response:

1. Only one video—the video produced by Gawker in discovery, and from which Gawker drew the one minute and forty-one seconds of "highlights" from the sexual encounter that it posted on its website, and which gave rise to this lawsuit—has actually been confirmed to exist. 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, and the only identifiable witness with actual knowledge—Bubba Clem, who solely created the video—testified under oath that, to his knowledge, there exists only one sex video, and not more. Harder Aff., Ex. A (Bubba Clem Depo. Tr. 322:1–324:7). Moreover, the letter Gawker refers to from the Assistant U.S. Attorney makes reference to three discs, but they could be three copies of the same sex video: two discs purportedly bear the same exact date, and one bears no date at all. Conf. Statement Ex. 8. Thus, there is no basis whatsoever for Gawker to "charge" Plaintiff or his counsel with "knowledge" of the purported existence of three videos.

2. Importantly, whether there exist three videos, two videos, or one video, is **irrelevant** to the merits of this case. Gawker possessed only one video, edited it into a one minute and forty-one second highlight reel, and posted it to the Internet for six months, where

millions of people viewed it. (Plaintiff and his counsel possess only that video—and did not possess it until after it was produced by Gawker in discovery.) Plaintiff's claims pertain exclusively to that one video, and it has no bearing on the case whether a second (unpublished) or even a third (unpublished) video exists. Either way, it would not change the fact that Gawker posted footage of Mr. Bollea naked and having sex in a private bedroom, where he had an expectation of privacy, and when he never knew about, nor consented to, either the taking of the footage or its publication. Nothing in the unauthenticated, hearsay documents cited by Gawker purports to support any of Gawker's defenses, such as its "newsworthy" defense, or its claim that Mr. Bollea's privacy supposedly was not invaded; Gawker does not even attempt to make such a contention. Nor does Gawker claim that the delay in its receipt of these unauthenticated, hearsay documents caused it any prejudice whatsoever in this case. How could it? The documents are inadmissible, pertain to irrelevant issues, are highly prejudicial, and do not support or come anywhere close to supporting any of Gawker's defenses, or for that matter any of Mr. Bollea's claims against Gawker.

3. Gawker's contention that Plaintiff made inaccurate interrogatory responses on this topic is wrong. The one and only recording that Plaintiff knew about, and could verify under oath, is the one video that Gawker possessed, produced in this lawsuit, and edited to a one minute, forty-one second sex video, which it posted on its website. The law enforcement documents to which Gawker refers do not **establish** that there were three different videos. Perhaps there were three copies of the same video. Perhaps three different videos. Law enforcement knows the contents. Mr. Bollea and his counsel do not. Those recordings have been held by the government, not Mr. Bollea or his counsel, who never had, and do not now have, any of these recordings.

4. Plaintiff's counsel's statement, "if there happens to be more video," is not a false statement. It was made in Court during a conversation where Gawker's counsel claimed that there were or might be more than one video. Harder Aff., Ex. B. Plaintiff's counsel did not know the true number of videos, and was discussing with the Court how the Court and the parties should treat any such new video or videos **if** they exist and were ever produced. None have been produced. *Id.* It may well be the case that none exist. Plaintiff and his counsel do not know. Moreover, this statement cannot possibly be the basis of any discovery sanction. *Chmura v. Sam Rodgers Properties, Inc.*, 2 So.3d 984, 987 (Fla. 2nd DCA 2008) (holding that sanctions are only appropriate where a party has been instructed by the court to comply with a discovery request and has refused to do so).

5. Mr. Bollea's statements at deposition were not false—there is no evidence that he had any idea which acts were filmed or not filmed. His testimony confirms that he did not know about any security cameras in Bubba Clem's house. Harder Aff., Ex. C (Bollea Depo. Tr. at 258:5–21). Further, Plaintiff has personal knowledge of only one video—the one that Gawker published on its website. He has never even seen that video, nor has he seen or possessed any other sex videos depicting him and Heather Clem.

6. Even if a discovery response or deposition answer is later proven to be inaccurate, that is not a basis for sanctions. It is only where discovery is not **provided** in violation of a court order that a sanction may be ordered. *Chmura*, 2 So.3d at 987 ("Where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate.") (quoting *Thomas v. Chase Manhattan Bank,* 875 So.2d 758, 760 (Fla. 4th DCA 2004)). Here, Mr. Bollea has not been found to have provided an inaccurate discovery response

or deposition answer, and even if one is determined to exist, he certainly did not violate any court order in doing so.

7. The discovery order that Gawker contends was violated—initially made orally on October 29, 2013, and subsequently memorialized in writing on February 26, 2014—did not order Mr. Bollea to answer the specific interrogatories to which Gawker contends he did not sufficiently respond. Rather, it **granted Plaintiff's motion to limit discovery** of his private sex life, his medical history and his finances. Because there was no specific order, there was no violation, and thus it would violate due process to impose a sanction. *See Surf-Tech Intern., Inc. v. Rutter*, 785 So.2d 1280, 1282 (Fla. 5th DCA 2001) (holding that the court may not dismiss the complaint where the discovery order that was violated was vague and "subject to interpretation").

B. *Gawker alleges that Plaintiff misstated the date of the sexual encounters.*

Response:

1. At the time of the filing of the initial complaint, as well as the amended complaint (and initial discovery responses served shortly after the amended complaint), Plaintiff was unsure about the date of his sexual encounters with Heather Clem. He did not have any documents contemporaneous with the encounters; the encounters had occurred several years prior to the publication of the sex video by Gawker and the filing of the complaint; and Mr. Bollea testified at deposition that his memory is poor when it comes to names (he refers to people as "Brother") and also dates – he has trouble recalling when things happened in the past. Plaintiff's initial complaint, filed only a few days after the sex video was published by Gawker, alleged that the sexual encounters occurred "in **or about** 2006." Am. Compl. ¶1. Subsequently, he believed that the encounters occurred in our about 2008, rather than 2006, and thus his

responses to initial discovery identified the dates as "in **or about** 2008." Conf. Statement Ex. 12. Shortly thereafter, Mr. Bollea, with the aid of his counsel, was able to piece together past events in his life in 2006, 2007 and 2008, including where the Heather Clem encounters fell within the timeline of other events, and further clarified that the encounters occurred "in or about late Spring/early Summer 2007." Conf. Statement Ex. 17. These discovery responses were provided before Gawker took **any** depositions in this case, in particular, the depositions of Mr. Bollea and Bubba Clem.

2. Gawker has suffered no prejudice whatsoever from the fact that Mr. Bollea provided certain time estimates initially, and later provided more accurate time estimates of the sexual encounters. First, Gawker had the more specific time estimates before it began to take depositions, and Gawker then proceeded to ask both Mr. Clem and Mr. Bollea detailed questions regarding the sexual encounters at their respective depositions. *See, e.g.,* Harder Aff., Ex. D (Bollea Depo. Tr. at 269:1–15 (confirming dates of encounters); 273:19–22 (answering questions regarding how the encounters began), 282:12–14 (answering questions regarding Bubba Clem's knowledge of the encounters), 290:22–291:11 (describing encounter with Heather Clem at radio station)). Gawker points out in its reply that it obtained the documents from the law enforcement investigation which, while hearsay, **do corroborate** Mr. Bollea's amended discovery responses, and subsequent deposition testimony, regarding the dates of the encounters.

Second, despite Gawker's statement that the dates of the encounters are "a key fact," Gawker does not identify a single issue in this lawsuit that turns on the date of the sexual encounters. Conf. Statement ¶34. Gawker's violation of Mr. Bollea's privacy and other rights is the same whether the encounters occurred in 2006, 2007 or 2008. Gawker's "newsworthiness" defense is exactly the same. Moreover, the statute of limitations (the only "issue" Gawker

identifies) runs from the date of **Gawker's publication** in October 2012, not from the date of any encounter.

In light of the total lack of prejudice to Gawker, including the fact that Mr. Bollea did not engage in any discovery violation based on the foregoing, there is no basis for any sanction. Mr. Bollea violated no court order. Even if he served an incorrect discovery response (which Mr. Bollea disputes), any such conduct is **not** cause for a discovery sanction. *Cooper v. Lewis*, 719 So.2d 944, 945 (Fla. 5th DCA 1998) ("This record simply does not indicate that the doctor was attempting to obfuscate the requested data. . . . At least before imposing such sanctions, the trial court should find that *someone* is in contempt of court or has violated an appropriate court order.").

C. *Gawker alleges that Plaintiff suppressed evidence of racially offensive language and that Bubba Clem's alleged "retirement" comment was about that subject matter and not the sex video.*

Response:

Plaintiff has properly brought a motion for protective order on this issue. The issue will be determined pursuant to that motion. To summarize the arguments in the motion for protective order:

1. The alleged use of offensive language by Plaintiff has nothing whatsoever to do with this case. The Special Discovery Magistrate already made this ruling at Bubba Clem's deposition, and that ruling was correct. Gawker's publication of the sex video did not include any such alleged offensive language, and the claims against Gawker regarding its invasion of Plaintiff's privacy and other rights, and its defenses including "newsworthiness," have nothing whatsoever to do with the allegations of alleged use of offensive language in a supposed

different video recording that none of the parties has even seen or possessed, and might not even exist. The fact that a document written by an unidentified extortionist exists, and that an unauthenticated hearsay summary (written for the purpose of extorting Plaintiff for money) contends that another video exists, and that Plaintiff supposedly used offensive language on it, does not mean that such language was ever used, or that it is in any way relevant to Plaintiff's claims in this lawsuit, and it certainly does not form a basis for Gawker's request for onerous sanctions. Plaintiff produced the materials when ordered to do so, and properly filed a motion for protective order relating to the irrelevant offensive language in the unauthenticated hearsay documents, consistent with the Magistrate's prior ruling.

2. Gawker has not shown why it matters to this case whether Bubba Clem's alleged comment about supposedly "getting rich"—an alleged statement that was reported by other news media organizations (not Gawker) in Spring 2012, and that did **not** appear on the sex video obtained by Gawker, concerned sex or race. This is because it does not matter.

3. Gawker is seeking dismissal of this entire action, because of an alleged delay in producing an unauthenticated, hearsay document that will never be admitted at trial and will not lead to any admissible evidence. Gawker characterizes the document as a "transcript," but it clearly is not that at all—it is a document written by an unknown person who was in the process of attempting to extort Plaintiff for money by claiming that an alleged video existed of Plaintiff allegedly having sex with Heather Clem and allegedly making offensive statements.

4. The FBI expressly instructed Plaintiff's counsel not to disclose any aspect of the investigation, and the unauthenticated hearsay document is irrelevant to this case because the sex video that Gawker posted (and also the long version that Gawker produced in discovery) does

not contain the alleged offensive language or any alleged statement by Bubba Clem relating to "getting rich."

5. Gawker has suffered no prejudice whatsoever from any alleged delay in discovery with respect to the foregoing matters.

D. *Gawker alleges that Plaintiff's personal participation in the FBI investigation regarding an unrelated extortionist is somehow grounds for sanctions.*

Response:

1. Not a single issue in this case turns on whether Plaintiff personally participated in the FBI's investigation of an unrelated extortionist. It does not lessen Gawker's invasion of Plaintiff's privacy; it does not make the sex video published by Gawker "newsworthy," or otherwise affect any of the parties' claims or defenses. Moreover, it does not matter who provided the video to Gawker in the first place. It was not Mr. Bollea, and there is not a single piece of evidence that even suggests Mr. Bollea had anything to do with Gawker's procurement of the video.

2. There is no significance to Gawker's discovery of this fact. And there is no prejudice whatsoever to Gawker as a result of having discovered Plaintiff's participation when it did, rather than earlier in the litigation.

3. The FBI expressly instructed Plaintiff and his counsel not to disclose the FBI investigation. Houston Aff. ¶¶4–5. Gawker later obtained a letter from the Assistant U.S. Attorney stating that, to her knowledge, any such instruction by the FBI was not in effect, from the point of view of the U.S. Attorney's Office. Conf. Statement Ex. 28. That letter was sent **after** the discovery at issue was provided. *Id.*

4. Plaintiff properly asserted privileges with respect to these communications, including the law enforcement privilege. When those privilege assertions were overruled, Plaintiff promptly produced the communications. Plaintiff properly litigated his privilege claim and then turned over the information when he did not prevail.

5. Plaintiff's deposition responses were not false, as Gawker contends. He was asked about a report that a sex video was being shopped to media outlets, and he had no knowledge of that fact. Harder Aff., Ex. E (Bollea Depo. Tr. 343:17–344:8). An attempted extortion is not the same thing as "shopping" a video to media outlets. Further, Plaintiff asserted the attorney-client and law enforcement privileges as to his communications with the FBI. Gawker never brought a motion to compel and never obtained a court order requiring his testimony on this issue.

6. In any event, even if Plaintiff did give an inaccurate deposition answer (which has not been demonstrated, and Plaintiff denies), such an occurrence is **not** a violation of a court order and is not sanctionable. *Chmura*, 2 So.3d at 987 ("Where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate."), *quoting Thomas v. Chase Manhattan Bank,* 875 So.2d 758, 760 (Fla. 4th DCA 2004); *Cooper*, 719 So. 2d at 945 ("This record simply does not indicate that the doctor was attempting to obfuscate the requested data. The fact that the doctor's staff asserted the other patients' right of privacy concerning delivery of copies of their IMEs does not constitute such a showing. At least before imposing such sanctions, the trial court should find that *someone* is in contempt of court or has violated an appropriate court order.").

7. If every time a party answered a question at a deposition that the other party believed was inaccurate resulted in a motion for terminating sanctions, the courts would be

clogged with motions for terminating sanctions. This is why the law and the court rules do not provide for the relief that Gawker is seeking here, even if Gawker was able to establish the factual basis for its requested relief—which is not the case as a threshold matter.

E. *Gawker argues that Plaintiff did not produce all documents relating to his media appearances.*

Response:

1. Once again, Gawker does not identify a court order that Plaintiff has violated, in order to justify its request for sanctions. The facts are as follows: Gawker served a subpoena to Plaintiff's publicist in New York who was **not** involved in the scheduling of his October 2012 media appearances, and therefore does **not** possess any documents relating to those matters. (These facts have been explained to Gawker countless times, but it continues in its conduct, undeterred.) In response to Gawker's false claims that Plaintiff supposedly organized the media tour as a result of the Gawker sex video being published, Plaintiff's counsel voluntarily obtained from TNA Wrestling Plaintiff's October 2012 media tour itinerary. Harder Aff., Ex. J. TNA Wrestling scheduled these media appearances using its in-house media department. The purpose of the media tour was to promote an October 2012 TNA pay-per-view wrestling event. *Id.* The media itinerary, obtained by Plaintiff's counsel, was produced to Gawker's counsel **before** Plaintiff's deposition. Those documents are dated **prior to** Gawker's publication of the sex video, thus showing that the entire media tour (including appearances on the Howard Stern radio show and the Today show) was scheduled by TNA Wrestling **before** Gawker posted the sex video. *Id.*

In response to Gawker's New York subpoena, Plaintiff's publicist produced her non-privileged documents that she possessed, which pertained to the press release and press

conference contemporaneous with the filing of this lawsuit, but the publicist asserted a privilege objection as to her communications with Plaintiff's counsel relating to the filing of this lawsuit and press issues regarding same. Gawker filed a motion to compel against the publicist in the New York state courts, and that privilege issue is currently being litigated in that state. Gawker chose to sue the publicist in New York, rather than litigate the same issue before the Special Discovery Magistrate in this Court with a motion to compel against Plaintiff. Having made that election, Gawker cannot now claim that Plaintiff (who is not a party to the New York litigation) has violated any court order, or that a discovery sanction should be imposed against him. The New York state court issues are currently pending before an appellate division of the trial court in that jurisdiction.

2. Gawker has not shown any prejudice whatsoever in connection with its arguments relating to media documents. Gawker received Plaintiff's October 2012 media itinerary before his deposition, and questioned him in detail at his deposition regarding those issues. Harder Aff., Ex. F (Bollea Depo. Tr. 389:1–412:25).

3. None of the media appearance documents has anything to do with the merits of this case, except for the fact that they confirm that Plaintiff's media appearances in October 2012 were scheduled **before** Gawker published the sex video, and thus were not (as Gawker has falsely claimed in this lawsuit) organized in an effort to supposedly capitalize off of the publicity of Gawker's publication of the sex tape. On the contrary, Mr. Bollea testified clearly that he was "not going to hide" from the sex tape issue, and instead proceeded with the pre-scheduled media appearances to promote the TNA pay-per-view event and, in the process, had to "face" the media questions that he did not want to answer regarding the sex tape. Harder Aff., Ex. G (Bollea Depo. Tr. 415:12–20).

4. The **content** of Plaintiff's media appearances is publicly available and, at his deposition, Gawker extensively questioned Plaintiff about his public statements about sex and his personal life. Harder Aff., Ex. H (Bollea Depo. Tr. 34:1–35:24 (testimony regarding his autobiography "My Life Outside the Ring;" 460:7–468:23 (eight pages of testimony regarding Plaintiff's comments about sex on the Howard Stern Show); 602:7–604:14 (testimony regarding comments about sex made in 2006 on Bubba Clem's radio show)).

5. Gawker's extensive accusations that it supposedly received these documents late is simply not accurate. Gawker received the October 2012 media tour itinerary promptly after Plaintiff's counsel obtained them from TNA Wrestling, and it received the publicist's non-privileged documents promptly after serving its New York subpoena.

6. Gawker does not cite a **single** portion of any of these documents that is actually relevant to any issues in this case. If there was anything in those documents that Gawker could use to substantiate its defenses, Gawker presumably would have cited to them, and explained its position, in its extensive "reply" papers.

7. There is no evidence that Plaintiff suppressed any evidence, as Gawker recklessly alleges. At his deposition, Plaintiff testified extensively about his media appearances, and stated under oath that he did not recall deleting any relevant text messages on that topic. Harder Aff., Exhibit I (Bollea Depo. Tr. at 93:20–94:3, 95:5–12, 389:13–401:16, 412:8–416:20 and 443:7–444:22).

8. The October 29, 2013, and February 26, 2014, orders did not specifically require any further response; rather, they granted **Plaintiff's motion to limit discovery**. Imposing a sanction based upon a non-specific order would violate due process. *Ross Dress for Less Virginia, Inc. v. Castro*, 134 So. 3d 511, 523 (Fla. 5th DCA 2014) ("It is well established that a

party cannot be sanctioned for contempt for violating a court directive or order which is not clear and definite as to how a party is to comply with the court's command.").

9. Gawker has shown no prejudice whatsoever regarding its allegations relating to media documents.

F. *Gawker alleges that Plaintiff did not produce his telephone records.*

Response:

1. Gawker seeks sanctions because Plaintiff is attempting to protect the privacy rights of uninvolved third parties. Plaintiff has appropriately moved for a protective order on the issue of redacting the three digit prefix from third parties' telephone numbers. If he does not prevail, the redacted digits will be produced.

2. Gawker has shown no prejudice whatsoever in having not received the three digit prefixes of uninvolved third parties' telephone numbers. Gawker has not articulated what evidence will be revealed by the disclosure of the three digits. Gawker certainly has not stated that any of the disclosed phone numbers (with prefixes redacted) match to any party or third party witness in this case. Gawker has not made any argument regarding how the redacted prefixes could possibly affect the invasion of privacy and "newsworthiness" arguments that are at the core of this case. Further, there is no trial date and, even if this evidence ultimately is ruled discoverable, and produced, Gawker has not shown that any delay will harm it in any way whatsoever.

3. The assertion that the Special Discovery Magistrate rejected Plaintiff's argument regarding third party privacy is not a basis for a discovery sanction. The issue in the earlier ruling was whether the documents were discoverable at all, not whether they could be redacted.

IV. THE SANCTIONS SOUGHT BY GAWKER ARE UNWARRANTED.

As noted in Plaintiff's earlier opposition, it is black letter law that any discovery sanctions must be **tied directly** to the violations that are proven. "[T]he severity of the sanction must be commensurate with the violation." *Ferrante v. Waters*, 383 So.2d 749, 750 (Fla. 4th DCA 1980). Plaintiff submits that Gawker has not proven a single violation. But even if the Magistrate determines there to have been a violation, Gawker has alleged, at most, that there was some delay in its receipt of certain documents that do not concern the relevant issues in this case. **None** of the alleged discovery issues concern any of the matters pertinent to Plaintiff's claims or Gawker's defenses. None of them address whether Gawker's publication of the sex video was "newsworthy" or whether Gawker had a First Amendment right to post it. Thus, the entire motion is a sideshow.

Gawker tacitly admits this. It does not seek an evidentiary sanction that an aspect of "newsworthiness" be decided in its favor, which Gawker surely would do if it had any credible proof that Plaintiff suppressed evidence relevant to its "newsworthiness" defense. Instead, the **only** specific evidentiary sanction that Gawker requests is a ridiculous one: that Gawker be permitted to introduce to the jury unauthenticated, irrelevant, highly prejudicial, hearsay evidence of Plaintiff's alleged use of offensive language relating to race, without objection. This is not a proper sanction at all, on many levels. First, **no legal authority** supports Gawker's position that permitting a defendant to poison the jury with prejudicial, inadmissible "evidence" is a proper sanction for a discovery violation. Gawker's motion and reply certainly do not cite to any legal authority for such a proposition. Second, there is no competent evidence that any such offensive language was ever used, even if the law permitted the requested sanction (which it does not), and even if such language was used, it is not relevant to the claims and defenses in this

lawsuit because the Gawker sex video contained no such language, nor any other video that the parties have ever seen or possessed.

Gawker does not identify any other **specific** sanctions for an obvious reason—because it has not shown a single instance where it has been denied a piece of evidence that it can actually use at trial to advance its contentions, or rebut Plaintiff's contentions.

As stated in Plaintiff's earlier opposition, Gawker's requested dismissal sanction is a matter of due process, and reserved for only the most serious violations of the discovery process—*i.e.*, where a party wilfully fails to respond to essential discovery despite court orders. *Surf-Tech Intern., Inc.*, 785 So.2d at 1283 (there can be no dismissal sanction absent "willful failure to comply or extensive prejudice to the opposition"); *Killstein v. Enclave Resort, Inc.*, 715 So.2d 1165, 1169 (Fla. 5th DCA 1998) (there can be no dismissal sanction where violation was in the nature of "information is trickling in slowly").

Before dismissing a case as a discovery sanction, the court is required to make explicit findings on six factors:

"1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;

2) whether the attorney has been previously sanctioned;

3) whether the client was personally involved in the act of disobedience;

4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;

5) whether the attorney offered reasonable justification for noncompliance; and

6) whether the delay created significant problems of judicial administration."

Buroz-Henriquez v. De Buroz, 19 So.3d 1140, 1141 (Fla. 3d DCA 2009), *citing Kozel v. Ostendorf*, 629 So.2d 817, 818 (Fla. 1993). Here, none of these factors are present. Thus, there is no basis for a dismissal sanction to even be requested, let alone imposed.

As to factor #1: there is no evidence of a willful violation as opposed to an act of neglect.

As to factor #2: there have been no previous sanctions on any counsel in this action.

As to factor #3: Plaintiff was not personally involved in any act of disobedience. Plaintiff was present at his two-day deposition and the Magistrate personally observed that he was forthcoming with all information requested, except as to matters where his counsel's objections were sustained.

As to factor #4: Gawker has not shown any prejudice.

As to factor #5: Plaintiff's counsel have made an appropriate showing.

As to factor #6: there has been no showing that any delay has caused "significant problems of judicial administration." Accordingly, Gawker's request for a dismissal of the case, and with it the denial of Plaintiff's right to due process, is an unsubstantiated and outrageous overreach.

Likewise, an evidentiary sanction is not appropriate where the only alleged violations concern collateral issues. If the Magistrate finds that a violation occurred (a finding that Plaintiff strongly opposes), the only sanction that possibly could be commensurate would be a modest monetary sanction (and even that sanction Plaintiff strongly opposes). For instance, Gawker might have a colorable claim that it should be reimbursed for the attorney's fees required to serve a second round of more specific discovery, because Plaintiff's responses supposedly were not sufficiently specific, or for its attorney time related to Plaintiff's initial time estimates of the dates of his sexual encounters with Heather Clem, if those initial estimates

caused Gawker to incur attorney's fees separate and apart from what it otherwise would have incurred had the initial time estimates been more specific.

Any more severe sanction would interfere with Plaintiff's due process right to bring his claims to trial. **"[D]iscovery rules should *not* be employed to shut out parties from their day in court. In Florida, access to the courts is guaranteed by our state constitution.** The protection of this constitutional right is no doubt a major factor operating in the resolution of cases such as this." *Killstein*, 715 So.2d at 1168 (emphasis added).

All Plaintiff has ever asked for is a trial of his claims on the merits. Gawker seeks, at any cost, to avoid being held to account for its invasion of Plaintiff's privacy, before a Florida jury. It is time to bring this case to trial, and for a jury to determine the parties' claims and defenses.

V. CONCLUSION

For the foregoing reasons and those stated in Plaintiff's opposition papers, Defendants' motion should be denied in its entirety; monetary sanctions should be imposed against Gawker to reimburse Mr. Bollea for the legal costs to oppose this motion. If any discovery violation is demonstrated, Gawker at most should receive a modest monetary sanction commensurate with the alleged violation.

DATED: June 17, 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 18th day of June, 2014 to the following:

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