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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' MOTION FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, FOR REMITTITUR

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio hereby move, pursuant to Fla. R. Civ. P. 1.480(c) and Fla. Stat. § 768.74, for a new trial, or, in the alternative, for remittitur of the damages awarded.[1] In support of this motion, Defendants state as follows:

I. DEFENDANTS ARE ENTITLED TO A NEW TRIAL AS TO BOTH LIABILITY AND DAMAGES.

Defendants are entitled to a new trial because (a) the jury's verdict was against the manifest weight of the evidence, (b) the verdict was the product of passion and prejudice, which infected both the jury's liability determination and its damages award, and (c) Plaintiff's improper closing argument undermined the fairness of the trial.

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[1] This motion is being filed in conjunction with Defendants' motion for judgment notwithstanding the verdict ("JNOV Motion"). The issues raised herein need only be reached if the JNOV Motion is denied in whole or in part. In addition, while Defendants would have no objection if the Court wishes to do so, this motion does not seek to burden the Court by asking it to re-visit Defendants' prior objections to discovery matters, evidentiary rulings, jury instructions, and other similar rulings, all of which are preserved for any appeal, if necessary. *Smith v. McCullough Dredging Co.*, 152 So. 2d 194 (Fla. 3d DCA 1963), *cert denied* 165 So. 2d 178 (Fla. 1964).

A. The Verdict Was Against the Manifest Weight of the Evidence.

In *Pierce v. Nicholson Supply Co.*, 676 So. 2d 70, 71 (Fla. 2d DCA 1996), the court explained that "the trial judge has a duty to grant . . . a motion [for new trial] when . . . the verdict fails to comport with the manifest weight of the evidence." For all the reasons set forth in Defendants' JNOV Motion – which Defendants incorporate by reference here – the verdict reached by the jury went against the manifest weight of the evidence in this case. Indeed, the manifest weight of the evidence adduced at trial showed that:

a) The publication at issue related to a matter of public concern;

b) Defendants did not know or believe that the publication *did not* relate to a matter of public concern;

c) Plaintiff lacked a reasonable expectation of privacy in his sexual encounters with Heather Clem;

d) Defendants did not intrude, physically or electronically, into a physical place;

e) Defendants did not use Plaintiff's name and/or likeness for a commercial purpose as Florida law defines the term;

f) Plaintiff did not suffer severe emotional distress;

g) Defendants did not cause severe emotional distress;

h) Defendants did not engage in extreme and outrageous conduct;

i) Defendants did not engage in intentional or reckless conduct with respect to Plaintiff's alleged emotional distress;

j) Defendants had a good-faith belief that the publication of the Video was newsworthy and therefore lawful;

k) Mr. Denton did not participate in the publication of the Video;

l) Mr. Denton did not have a culpable state of mind as to the publication;

m) None of the Defendants engaged in intentional misconduct because, at worst, they were guilty of having an over-expansive conception of what is newsworthy, not of publishing material that they knew not to be newsworthy; and

n) None of the Defendants had any specific intent to harm Plaintiff.

Because the verdict reached by the jury in this case failed to comport with the manifest weight of the evidence on each and all of these issues, the Court has a duty to grant Defendants' motion for a new trial. *Pierce*, 676 So. 2d at 71.

B. The Verdict Was the Product of Passion and Prejudice.

Under Florida law, where it is manifest that a jury was improperly influenced by passion and prejudice in reaching its verdict, a new trial is warranted. *See, e.g.*, *Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1977); *Phillip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948 (Fla. 4th DCA 2012). Here, there is substantial evidence that this is precisely what happened.

This is demonstrated most centrally by the substantial amount in damages awarded by the jury, which, as explained in detail below, bore no relation to the damages actually proved at trial and far exceeded what Plaintiff actually asked for. For example, the jury's award of $60 million in emotional distress damages is ***7.5 times*** the amount courts have deemed excessive in cases involving far more severe injuries, such as permanent disfigurement or death. *See* Section II.A.2 *infra*; *see also, e.g.*, *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 339 (Fla. 1st DCA 2012) (award of $8 million in emotional distress damages in wrongful death case was indication that the "award [wa]s the product of passion, an emotional response" to the evidence presented).

The shocking size of the damages award is, however, not the only indication that the jury based its verdict on passion and prejudice, and, in particular, on its general distaste for the Defendants. Specifically:

- Throughout the trial, Plaintiff pursued a strategy of attempting to cultivate animus against the Defendants based on factors other than the conduct at issue in the lawsuit. This strategy included, among other things, repeated references (over Defendants' objections) to other posts published by Defendants that were likely to offend the jury's sensibilities, repeated references (also over Defendants' objections) to statements that Denton, Daulerio, and other employees of Gawker

made about privacy unrelated to Plaintiff, the post about the sex tape, or any analogous circumstance, and a closing argument that appealed to prejudice by castigating Defendants as decadent New Yorkers "playing God" and describing Mr. Denton (inaccurately) as a "porn king." *See, e.g.*, Tr. at 1865:4 – 1870:2, 2394:13 – 2397:25, 3706:3-8, 3708:22 – 3709:5, 3724:17-25.[2]

- The jury awarded $100,000 against Mr. Daulerio in punitive damages after being informed both that Mr. Daulerio has a negative net worth and that its punitive damages award could not financially destroy or bankrupt any of the Defendants. Tr. at 3890:20-22, 3892:19-21, 3925:12-18.

- The jury asked whether it was permitted to subject the Defendants to community service, a remedy reserved for criminal sentences. Tr. at 3920:21-23.

- The jury asked Nick Denton, "Didn't you know Mr. Hogan's sex tape topic was controversial prior to Gawker releasing the sex video post?" Tr. at 3066:23 – 3067:4, even though punishing a defendant for engaging in speech that is controversial is impermissible under the First Amendment.

- The jury posed numerous questions unrelated to the video excerpts, including, for example, asking Mr. Denton whether "sex is part of your branding of Gawker," Tr. at 3068:15-16, even though publishing about sex is protected under the First Amendment.

- The jury asked Mr. Denton, "[k]nowing of the Mr. Hogan/Mr. Houston cease and desist letter, why did you not ask your staff to remove the A.J. Daulerio Hogan video," Tr. at 3065:19-21, illustrating that the jury was improperly focused on whether the post was removed rather than its publication.

- The jury questioned various witnesses about whether they were motivated by drawing readers to the challenged post or more generally to Gawker.com, Tr. at 2839:13-15 (A.J. Daulerio); 3127:17 (Mia Libby); 3375:23 – 3376:2, 3379:11-13, 3382:6-9 (Peter Horan), even though a desire to draw attention to speech is protected under the First Amendment.

- The jury asked Emma Carmichael whether she had had sexual relations with her bosses, even though that question was not prompted by, or relevant to, any of her testimony. Tr. at 2886:9-13.

- As the Court is aware, the parties have had numerous disputes over the course of this case concerning discovery matters, evidentiary issues, jury instructions, and other related matters. We do not wish to belabor the court by re-briefing each of those matters, which are already in the record and incorporated herein by reference, but Defendants maintain that individually and cumulatively the Court's

[2] Citations to "Tr." can be found in the attached Excerpts of the Trial Proceedings.

rulings on those issues warrant a new trial because their effect was to render the trial unfair and inconsistent with due process.

In short, there is substantial evidence that, in reaching its verdict as to both liability and damages, the jury was guided by passion and prejudice, rather than the pertinent facts and the law. Accordingly, a new trial is warranted.

C. Plaintiff's Improper Arguments at Closing Fundamentally Undermined the Fairness of the Trial.

Under Florida law, an improper closing argument requires a new trial, even if it were deemed not to have been objected to contemporaneously, where the impropriety was (1) harmful, (2) incurable, and (3) "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." *Murphy v. Int'l Robotic Sys., Inc.*, 766 So.2d 1010, 1028-30 (Fla. 2000).[3] Each of those conditions applies here. During his closing argument, Plaintiff repeatedly urged the jury to award damages by applying standards that plainly violated the First Amendment because they had nothing to do with whether Defendants' speech involved a matter of public concern.

First, Plaintiff repeatedly argued that Defendants' speech was not protected by the First Amendment because it was not "serious journalism" that followed "basic journalism practices," such as "don't do things that harm other people unless you have to" and "be decent" in gathering information. Tr. at 3688:11-13, 3708:8-21, 3710:13-17; *see also* Tr. at 3741:15-16 (referring to the "disgusting, disgusting narrative that Daulerio wrote"). Indeed, Plaintiff argued that Defendants' speech did not "deserve protection under our First Amendment" because

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[3] Defendants note that Plaintiff's closing argument summarized themes based on evidence, such as Professor Mike Foley's testimony, that had already been the subject of numerous objections and prior rulings. Defendants thus believe that it was unnecessary to renew their objections at every juncture in the closing. Nonetheless, Plaintiff's closing would warrant a new trial even if the court were to conclude otherwise, and is therefore addressed here in an abundance of caution.

Defendants did not have the "common decency" to contact Plaintiff before publishing the story. Tr. at 3686:9-15. But the First Amendment protects all manner of speech regardless of whether it satisfies any of these criteria. For example, even in public figure defamation cases involving allegedly false speech, courts have made clear that there is no requirement to contact the subject of a news report. *D.A.R.E. America v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1284 n.3 (C.D. Cal. 2000) ("Defendants were not required to contact the subjects of the article before publication"), *aff'd*, 270 F.3d 793 (9th Cir. 2001); *Secord v. Cockburn*, 747 F. Supp. 779, 788 (D.D.C. 1990) ("If the caselaw is clear on any point it is that an author is under no duty to divulge the contents of a book prior to publication in order to provide the subject an opportunity to reply"). That is especially so here, where the Video Plaintiff complains about was concededly accurate.

Second, Plaintiff argued that individuals, not journalists, have the right "to decide what they get to make public and private," and that a journalist's choice to publish something that the subject matter of a story considers private is "not something the First Amendment protects in this case or any case." Tr. at 3704:15 – 3705:3. That is plainly wrong. The First Amendment protects speech about a matter of public concern regardless of whether the subject would prefer that the matter remain private. *See, e.g.*, *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426 (Fla. 5th DCA 1982) (no liability for publishing picture of plaintiff wearing nothing but a dish towel that plaintiff objected to because picture related to a matter of public concern). Even more strikingly, in his rebuttal, Plaintiff argued that this case involves "a different part of the First Amendment" because it "is not about the protection of political speech." Tr. at 3798:24 – 3799:5. That, too, is fundamentally erroneous. The First Amendment does not distinguish between speech about politics, other news, and/or entertainment in the manner Plaintiff urged. *See Winters v. New*

York, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right.").

No curative instruction could have eliminated the prejudice caused by these arguments, and it is well-established that inviting a jury to sanction speech on the basis of constitutionally infirm standards is fundamental error. *Time, Inc. v. Hill*, 385 U.S. 374, 394 (1967); *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 362-63 (11th Cir. 1987). As a result, a new trial is required. *See, e.g.*, *Owens Corning Fiberglas Corp. v. Morse*, 653 So. 2d 409, 411 (Fla. 3d DCA 1995) (improper and inflammatory arguments made in closing warranted new trial, even without contemporaneous objection); *Pippin v. Latosynski*, 622 So. 2d 566, 569 (Fla. 1st DCA 1993) ("cumulative effect of counsel's remarks [at closing] precluded the jury's rational consideration of the evidence and the merits, resulting in an unfair trial and thus constituting fundamental error").

II. THE DAMAGES AWARDED TO PLAINTIFF MUST BE VACATED OR GREATLY REDUCED.

Even if Defendants are not entitled to a new trial, the amount in damages awarded to the Plaintiff – $140.1 million, consisting of $55 million in economic damages, $60 million for emotional distress, and $25.1 million in punitive damages – was grossly excessive by any measure and should be vacated or else substantially remitted. Florida law mandates that "awards of damages be subject to close scrutiny by the courts" to ensure that "such awards [are] adequate and not excessive." Fla. Stat. § 768.74(3). A court is required to consider the following in determining "whether an award is excessive . . . in light of the facts and circumstances presented to the trier of fact":

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;

> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
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> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
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> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
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> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Fla. Stat. § 768.74(5)(a)-(e).

Applying those statutory criteria to the jury's $140.1 million award, no part of it can withstand legal scrutiny. The damages awarded are not supported by the evidence, bear no reasonable relationship to the damages Plaintiff suffered, are so grossly excessive as to indicate the jury was motivated by passion or prejudice, and do not comport with due process and other limitations on awards of punitive damages.

To put this award in some perspective, the $140.1 million award is roughly eight times the total amount ever even initially awarded by a Florida jury against a media defendant for an allegedly tortious publication – and that judgment was promptly reversed on appeal. *See Gannett Co. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA 2006) (reversing judgment for $18.3 million in total compensatory damages for false light invasion of privacy against the *Pensacola News-Journal*), *aff'd on other grounds*, 994 So. 2d 1048 (Fla. 2008). In fact, the jury's decision to award $115 million in compensatory damages is, to Defendants knowledge, about twelve times the largest compensatory damages award in American history arising from a media publication that has ever survived post-trial motions and appeal. And even that verdict, for $9.5 million in a defamation case in Buffalo, New York, was primarily (in the amount of $6 million)

for injuries to reputation, which Plaintiff acknowledged he did not suffer at all here. *See Prozeralik v. Capital Cities Commc'ns, Inc.*, 635 N.Y.S.2d 913 (N.Y. App. Div. 4th Dep't 1995).[4]

Perhaps even more striking is the fate of jury verdicts in cases involving sexually-oriented material, including those involving publications that indisputably publish "pornography," which Defendants very much dispute is even implicated here. A survey of such cases demonstrates that it is not uncommon for jurors to be swayed by passion and prejudice when confronted with sexually-oriented material, and to award large numbers (though even so, no more than a small fraction of the verdict here). But trial and appellate courts have not hesitated to respond appropriately, as this Court should do here.

For example, the largest such verdict of which we are aware was for a total of $40.3 million in a suit against *Hustler Magazine* and its publisher Larry Flynt. That was initially remitted by the trial judge to $5.15 million, and then vacated entirely on appeal on the grounds that even the remitted amount was grossly excessive. *Guccione v. Hustler Magazine, Inc.*, 1981 WL 3516 (Ohio App. Oct. 8, 1981). Similarly, a well-known author of risqué novels won a verdict of $40 million for being erroneously portrayed as a topless participant in an orgy scene. That verdict was first remitted to $10 million by the trial judge, and then reversed entirely on appeal. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984). Similarly, in *Pring .v Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), a jury award of $26.5 million was first cut in half by the trial judge and then reversed entirely on appeal.

[4] And even that amount was the result of a second trial – the jury in the first trial awarded $18.5 million, which was reversed. *Prozeralik v. Capital Cities Commc'ns, Inc.*, 593 N.Y.S.2d 662 (N.Y. App. Div. 4th Dep't 1993).

Perhaps the best comparison is the damages phase of the *Toffoloni* case, relied upon throughout this litigation by Plaintiff and this Court (over Defendants' objection). In that case, the plaintiff emphasized exactly what Plaintiff claimed to the jury here – that *Hustler* should have checked with the plaintiff before publishing the nude photographs, and should have removed the pictures after receiving a cease and desist letter. The jury awarded $125,000 in compensatory damages and $19.6 million in punitive damages – which notably is still less than a seventh of the total verdict in this case. The trial court remitted the punitive damages award to ***$250,000***, whereupon the Eleventh Circuit reversed even that figure entirely – on the grounds that, just as Defendants maintain here, there was no clear and convincing evidence contradicting the defendants' testimony that they thought the pictures were newsworthy. *Toffoloni v. LFP Publ'g Grp., LLC*, 483 F. App'x 561 (11th Cir. 2012). Final judgment was therefore affirmed for ***$125,000***. Even crediting Plaintiff's repeated assertion that *Toffoloni* is analogous to this case – which Defendants dispute, at least as to liability – that case confirms that by any fair measure the jury award here is stratospherically excessive.

A. The $60 Million Award of Damages For Emotional Distress Was Grossly Excessive and Should be Reduced.

The jury's award of $60 million just to compensate Plaintiff for his emotional distress was grossly excessive by any reasonable measure. This is true in at least two respects. First, Plaintiff asserted and proved only "garden variety" emotional distress, and Florida law imposes significant limitations on the amount that can be recovered on such a claim. Second, even if Plaintiff is for some reason deemed not subject to Florida's limitation on recovery for "garden variety" emotional distress – notwithstanding his own concession to limit his damages to that measure – the award was completely out of proportion to other non-economic damages awards in the state of Florida in cases involving far more serious personal injuries.

1. Plaintiff Cannot Recover Even Close to $60 Million To Compensate Him For Enduring "Garden Variety" Emotional Distress.

In this case, Plaintiff expressly limited his emotional distress to what the law terms "garden variety" emotional distress. *See, e.g.*, Ex. 1 (Pl.'s Resp. to Interrog. No. 19, Aug. 21, 2013). This limitation is consistent with the proof of emotional distress Plaintiff actually offered at trial. Plaintiff testified that, as a result of the publication of the Video, he felt humiliated and ashamed and worried what people might think of him. *See, e.g.*, Tr. at 1423:2 – 1424:20, 1426:3-5, 1596:18 – 1597:11. He also testified that he experienced some loss of sleep and loss of appetite as a result of the publication of the Video, though he did not produce any witness to corroborate that. Tr. at 1658:21-25, 1661:13-19. And Plaintiff put forward the testimony of the publicist who accompanied him on the media tour he undertook shortly after the publication of the Video, who testified that he seemed "a little more reserved" than usual on that tour, and that, on one occasion, he became "teared up" on the set of the *Today Show*. Tr. at 1716:20-21, 1719:15-1721:12. Plaintiff conceded, however, that he did not seek any medical or other treatment in relation to this alleged emotional distress. Tr. at 1607:3-19. All of this is consistent with the proof typically offered in "garden variety" cases. *See, e.g.*, *City of Hollywood v. Hogan*, 986 So. 2d 634, 649 (Fla. 4th DCA 2008) (explaining that, for "garden variety" emotional distress, "the evidence usually is limited to the testimony of the plaintiff, who describes the emotional distress in vague or conclusory terms, presents minimal or no evidence of medical treatment, and offers little detail of the duration, severity, or consequences of the condition") (citation omitted); *Taylor v. ABT Elecs., Inc.*, 2007 WL 1455842, at *2 (N.D. Ill. May 14, 2007) ("[T]he very nature of 'garden variety' emotional distress damages contemplates that they are not necessarily medically based, but rather compensation for 'humiliation, embarrassment, and similar emotions.'") (citation omitted).

Florida law is clear that the upper limit on amounts that can be recovered to compensate for "garden variety" emotional distress is nowhere near what was awarded in this case. In fact, courts in Florida have capped garden variety damages at a maximum of $100,000, with awards more typically falling between $5,000 and $50,000. For example, in *City of Hollywood*, 986 So. 2d at 647-48, the plaintiffs sought compensation for "garden variety" emotional distress, testifying that, as a result of the conduct complained of, they felt "embarrassed and hurt," "depressed for four to six months," and had trouble sleeping, while conceding that, like Plaintiff in this case, they never sought medical treatment or psychological counseling. At trial, the jury awarded each plaintiff $1 million for his emotional distress. *Id.* at 640. On appeal, the court deemed the emotional distress award "grossly excessive" and remanded for what it described as a "substantial remittitur." *Id.* at 647, 649. In so doing, the court noted that the "typical" award for "garden variety" emotional distress should be in the "range of $5,000 to $30,000," and expressly instructed the trial court, on remand, to award emotional distress damages in that range to the plaintiff who, like Plaintiff here, was not claiming that his distress caused him physical injuries. *Id.* at 649-50.

Similarly, in *Ernie Haire Ford, Inc. v. Atkinson*, 64 So. 3d 131, 132-33 (Fla. 2d DCA 2011), the Second District Court of Appeal held that the trial court had abused its discretion in not granting remittitur on an award of $3.5 million in non-economic damages. In so holding, the court observed that plaintiff had proved only "garden variety" damages and noted that, in such cases, "courts have been reluctant to uphold damages awards which exceed six figures." *Id.* In *Stone v. GEICO General Insurance Co.*, 2009 WL 3720954, at *5-7 (M.D. Fla. Nov. 5, 2009), the court found that a jury award of $200,000 in compensatory damages for emotional pain and suffering was excessive for what the court determined to be a "garden-variety emotional distress

claim." On that basis, the court held that "$50,000 [wa]s the maximum reasonable recovery" available to plaintiff. *Id.* at *6; *see also Myers v. Cent. Fla. Invs., Inc.*, 2008 WL 4710898, *13-14 (M.D. Fla. Oct. 23, 2008) (observing that an award of $100,000 was "certainly at the upper end of that range" of reasonable awards for "compensatory damages for intangible, emotional harms") (collecting cases). These Florida decisions are consistent with decisions in other jurisdictions, which have similarly limited awards for "garden variety" emotional distress to below six figures. *See, e.g.*, *Epstein v. Kalvin-Miller Int'l, Inc.*, 139 F. Supp. 2d 469, 480 (S.D.N.Y. 2001) (surveying garden variety emotional distress claims in the Second Circuit and finding courts consistently remitted jury awards to between $5,000 and $75,000).

It was Plaintiff's choice to limit his claims to "garden variety" emotional distress, and that choice had significant ramifications both for the discovery that Defendants were permitted to take and the evidence they were permitted to present to the jury. Consistent with Plaintiff's express limitation of his emotional distress to "garden variety" emotional distress, and the evidence he presented at trial, the damages awarded Plaintiff for that category of damages should be remitted to no more than $100,000 to bring this case in line with clear Florida law on this issue.

2. The Damages Awarded for Plaintiff's Emotional Distress Is Grossly Excessive Even in Comparison to Non-Garden-Variety Cases.

Even if Plaintiff were not limited to the amount in emotional-distress damages recoverable in "garden variety" cases, the $60 million awarded to him by the jury would still be grossly excessive. The Second District Court of Appeal has explained that "comparison of verdicts is a recognized method of assessing whether a jury verdict is excessive or inadequate." *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010). The excessiveness of the jury's award in this case is made plain by the fact that it vastly exceeds the amounts awarded even in cases

where plaintiffs experienced emotional distress as a result of serious physical harm, permanent disfigurement, or the death of a child, parent or spouse.

For instance, in *Aillis*, the jury awarded the plaintiff $8 million in non-economic damages for suffering she endured due to complications from breast surgery. As a result of medical malpractice, plaintiff's breast tissue became necrotic, causing serious pain and extensive scarring. Plaintiff endured thirteen additional surgeries, ultimately losing most of her breast tissue and both of her areola and nipples. *Aills*, 41 So. 3d at 1024. In reviewing the damages award, the appellate court recognized that plaintiff "experienced ***significant emotional suffering*** as a result of her physical injuries." *Id.* at 1029 (emphasis added). Nonetheless, the court deemed the award of $8 million for non-economic damages to be excessive. The court reviewed jury verdicts from Florida and other jurisdictions in the United States and found that "the awards in similar cases ranged from $55,000 to amounts in the low seven figures, with most awards in the low-to-mid six figures. The highest verdict in a similar case was a $3,500,000 verdict from a Massachusetts jury in a case that arguably involved injuries even more severe than those sustained by [plaintiff]." In light of those verdicts, the District Court of Appeal affirmed remittitur of plaintiff's non-economic damages to $1,750,000. *Id.*

In *Glabman v. De La Cruz*, 954 So. 2d 60 (Fla. 3d DCA 2007), the jury awarded $4 million each for non-economic pain and suffering to two parents whose daughter died as a result of a treating physician's failure to diagnose lupus. Despite the "tragic facts" of the case, the appellate court was "compelled to reverse the jury verdict on damages as they are so excessive that they could only have been a product of passion and emotion." *Id.* at 63.

In *Webb*, 93 So. 3d 331, the daughter of a smoker who died of lung cancer brought a wrongful death case against the tobacco company that manufactured her father's cigarettes. The

jury awarded the daughter $8 million in non-economic damages for the loss of parental companionship "and for mental pain and suffering" experienced from the death of a parent. *Id.* at 337. Based on its survey of wrongful death cases in Florida, the appellate court vacated the compensatory damage award, concluding that an award of $8 million in non-economic damages was so excessive as to "suggest[] an award that is the product of passion," describing it as clearly "an emotional response" by the jury to evidence regarding the daughter's difficult life and her close relationship to her father. *Id.* at 337-39; *see also Philip Morris USA, Inc. v Putney*, 117 So. 3d 798, 803 (Fla. 4th DCA 2013) (remanding for remittitur because $5 million in non-economic damages to each adult child of deceased smoker was excessive and "shock[ed] the judicial conscience.").

In *Kammer v. Hurley*, 765 So. 2d 975 (Fla. 4th DCA 2000), the jury awarded $2.5 million for non-economic emotional damages to each parent of an unborn child who was killed as a result of medical error. In the final stages of labor and delivery, the parents witnessed the defendant doctor misuse a vacuum extractor and crush their infant's skull. The appellate court held that the substantial award was not excessive specifically "***in light of the horrible way in which this full-term, 'unborn child' was killed moments before delivery, and the overwhelming evidence of the mental pain and anguish suffered by the parents***. . . ." *Id.* at 978 (emphasis added).

Here, Plaintiff's emotional distress is not remotely comparable to the distress experienced by plaintiffs who suffered disfigurement, debilitating medical conditions, the death of a loved one, or witnessing their baby's skull being crushed. Yet, Plaintiff was awarded ***24 times*** the emotional distress damages awarded to the parents in *Kammer*, who witnessed their child killed by a vacuum extractor. He was awarded ***15 times*** the amount judged to be "***so excessive***" as to

"***have been a product of passion and emotion***" in *Glabman*, a case involving the death of a child as a result of a medical misdiagnosis. 954 So. 2d at 63. He was awarded ***7.5 times*** the amounts deemed ***excessive*** in *Aillis*, a case in which the plaintiff suffered permanent disfigurement, and *Webb*, a wrongful death case. Against that background, the jury's award of $60 million to compensate Plaintiff for his emotional distress was clearly so excessive as to have been the product of passion and prejudice. Accordingly, it must be substantially remitted even if Plaintiff is for some reason judged not to be bound by the cap that applies to plaintiffs claiming only "garden variety" emotional distress, a limitation to which he agreed early in this case.

B. The $55 Million Economic Damages Award Should Be Vacated, or Else Greatly Reduced.

During closing, Plaintiff asked for $50,378,342.95 in economic damages, which he broke down into two distinct parts. Tr. at 3743:17 – 3744:12. One part was arrived at by multiplying the over 7 million times the Video was supposedly viewed by $4.95, a number that corresponds to the minimum amount that would have to be paid for three days of subscription access to an entire catalogue of complete celebrity sex tapes. Tr. at 3733:25 – 3736:11, 3743:17 – 3744:17. That part came to $35,378,342.95. The other part corresponded to the maximum amount ($15 million) that Plaintiff's expert, Jeff Anderson, opined that the Hogan post added to the value of the gawker.com website. Tr. at 3729:6 – 3733:3, 3743:17 – 3744:17.

The jury gave Plaintiff everything he asked for, and then threw in an additional roughly $4.7 million for good measure. That alone is a reason to be highly skeptical of the validity of the award. *See Webb*, 93 So. 3d at 339 ("A verdict is not per se excessive because the jury awards the full amount of damages suggested by counsel for the prevailing party, but we would be exceedingly naïve should we fail to recognize that as a matter of practice the advocate usually suggests to the jury a figure for damages substantially in excess of the amount that is clearly

supportable by the evidence and likewise in excess of the amount which he deems to be supportable in point of law should the jury happen to return a verdict approaching the amount suggested."). Nonetheless, in this case, there are multiple specific reasons why that award cannot stand.

1. Neither Category of Economic Damages Sought Is Recoverable.

As a threshold matter, the economic damages award should be vacated because the jury compensated Plaintiff for "harm" that is not legally recoverable under Plaintiff's causes of action. The only claim for which Bollea can recover economic damages is his claim for misappropriation of his right of publicity.[5] And, Florida law is clear that recovery is limited to "damages for *any loss or injury* sustained" by the plaintiff "by reason" of an unauthorized use of his name or likeness, "including an amount which would have been *a reasonable royalty*." Fla. Stat. § 540.08(2) (emphases added); *see also Cason v. Baskin*, 20 So. 2d 243, 254 (Fla. 1944) ("the publication of a book containing a biographical sketch of a person does not legally entitle[] such person to share whatever profit is realized from the sale of such book"). In other words, recovery on such a claim is limited to loss or injury to the plaintiff, not benefit to the defendant.[6]

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[5] *See, e.g.*, 19A Fla. Jur. 2d Defamation and Privacy § 232 ("an invasion of the right of privacy by a publication confers no right on the plaintiff to share in the proceeds of the publication"); *Doe v. Beasley Broad. Grp., Inc.*, 105 So. 3d 1, 2 (Fla. 2d DCA 2012) (holding that a plaintiff may recover damages for emotional distress on invasion of privacy claim); 32 Fla. Jur. 2d Interference § 19 (plaintiff suing for intentional infliction of emotional distress through outrageous conduct is limited to damages "for mental pain and anguish"); Fla. Stat. § 934.10(1)(b) (Florida Wiretap Act provides for statutory damages).

[6] Courts have consistently followed this rule in cases involving both statutory and common law right of publicity claims. For example, in *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990 (Fla. 4th DCA 2004), the court indicated that there was no reason to disturb the jury's finding on compensatory damages for misappropriation where the jury heard competing testimony on "*the royalty value* of [plaintiff]'s name for [defendant]'s uses." *Id.* at 1002 (emphasis added). And in *Jackson v. Grupo Indus. Hotelero, S.A.*, 2009 WL 8634834, at *9 (S.D. Fla. Apr. 29, 2009), the court held that "[w]ith regard to the violation of his right of publicity, the Plaintiff is entitled to recover damages for any loss or injury sustained by reason

That means that Plaintiff is essentially limited to recovering a lost licensing fee, the amount he would have received for the rights to his name or likeness had he licensed the use.

In this case, none of the evidence Plaintiff presented regarding his economic damages was evidence of an injury or loss to him, let alone a lost licensing fee. First, Plaintiff presented evidence regarding the supposed benefit to Gawker in the form of an alleged increase in value of the website gawker.com attributed to the Hogan post. That evidence, even if credited, goes to the alleged benefit to *Gawker* – not the loss or injury to *Plaintiff* – and is not recoverable under well-established Florida law. Second, Plaintiff presented evidence relating to how much the leading commercial distributor of subscription access to celebrity sex tapes – VividCeleb – charges consumers for access to its *entire* catalogue of *complete* celebrity sex tapes. That is not evidence of the loss or injury suffered by Plaintiff because it is not evidence of how much he would have been paid as a licensing fee by VividCeleb for the rights to include his complete sex tape in the catalogue of sex tapes to which it sells subscription access. And it certainly does not speak to how much, if anything, a celebrity licensing a sex tape to VividCeb would receive if only nine seconds of sexual activity from a much longer tape were licensed. (Indeed, as noted below, VividCeleb allows people to watch longer and more explicit excerpts of celebrity sex tapes for free. *See* note 9 *infra*.) Accordingly, because Plaintiff did not present any evidence regarding the injury or loss to him in the form of a lost licensing fee or royalty, which is the only

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thereof, including an amount which would have been *a reasonable licensing fee* for the use made of Plaintiff's likeness" (emphasis added). *See also Stockwire Research Grp., Inc. v. Lebed*, 577 F. Supp. 2d 1262, 1269 (S.D. Fla. 2008) (finding that "recover[ing] monetary damages for Defendants'" common law misappropriation claim requires "conclusively demonstrat[ing] the manner in which [p]laintiff . . . was *personally* damaged") (emphasis added); *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1311, 1313 (M.D. Fla. 2010) (plaintiff was not entitled to damages for common law right of publicity claim because only available damages would be identical to the lost "licensing fee" recoverable on her statutory claim).

category of economic damages he was conceivably permitted to recover, the economic damages award should be vacated.

2. The Economic Damages Award Was Not Reasonably Supported By the Evidence.

Even if the categories of economic damages Plaintiff attempted to prove *were* recoverable, he would still not be entitled to the $55 million awarded to him. It is a bedrock legal principle that "[a] court cannot allow a jury to award a greater amount of damages than what is reasonably supported by the evidence at trial." *Montage Grp., Ltd. v. Athle-Tech Comput. Sys., Inc.*, 889 So. 2d 180, 197 (Fla. 2d DCA 2004); *see also Truelove v. Blount*, 954 So. 2d 1284, 1287 (Fla. 2d DCA 2007) (same). In this case, not only did the jury award more than Plaintiff himself sought as his maximum economic damages, but neither component of Plaintiff's economic damages award was reasonably supported by the evidence.

The-$4.95-A-View-Theory. Plaintiff's $4.95-per-view theory of damages – which accounted for roughly ***$35.4 million*** of the jury's economic damages award – was not supported by competent evidence, or even by the evidence Plaintiff offered. First, Plaintiff failed to establish that the Video was in fact viewed by 7,057,214 people, the number he asked the jury to multiply by $4.95. Plaintiff attempted to establish most of that number through the testimony of one his experts, Shanti Shunn. Tr. at 2405:17 – 2412:5. But, as Mr. Shunn conceded during cross examination, he had no idea whether that number is accurate, or even whether it is meant to correspond to actual views of the Video as opposed to some other activity on the websites on which it appeared (such as viewing the page itself, as opposed to playing the video), and, if so, whether it corresponded to unique views or multiple views by some smaller number of potential consumers (including multiple views during the three-day period that would have been covered by the $4.95 fee). *See, e.g.*, Tr. at 2446:21 – 2447:18, 2448:3 – 2452:16. Indeed, Plaintiff's

expert did not even know whether the numbers posted on those web pages had been artificially inflated, and even conceded that he could not tell from them whether *anyone* actually watched the video. *See, e.g.*, Tr. at 2447:3 – 2448:2.[7]

Moreover, even apart from that problem, Mr. Shunn's testimony consisted merely of adding up, and vouching for the accuracy of, the numbers on the screenshots Plaintiff's counsel provided to him. Tr. at 2446:13-24, 2435:3-9. The numbers themselves are hearsay, and expert testimony may not be used, as it was here, merely as a conduit for the admission of hearsay. *See, e.g.*, *Linn v. Fossum*, 946 So. 2d 1032, 1037-38 (Fla. 2006) ("Florida courts have routinely recognized that an expert's testimony 'may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence.'") (citation omitted); *Maklakiewicz v. Berton*, 652 So. 2d 1208, 1209 (Fla. 3d DCA 1995) (same); *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430, 431-32 (Fla. 2d DCA 1989) (same).[8]

Second, and more importantly, even if Plaintiff *had* established the 7,057,214 number with competent evidence, there was no reasonable basis for the jury to then jump from there to the nearly $35.4 million it ultimately awarded for this category of damages. In his closing, Plaintiff represented to the jury that the sum arrived at by multiplying 7,057,214 by $4.95

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[7] Similarly, with respect to the approximately 2.5 million views occurring through Gawker's website, the undisputed evidence is that number reflected the total number of times that any portion of the video was viewed, not the number of unique views, meaning that the same individuals could have viewed the video multiple times. *See, e.g.*, Tr. at 3176:21 – 3177:14 (S. Kidder testimony).

[8] There is an additional problem. Most of the 7,057,214 number – 4,452,266 to be exact – involved alleged views of the Video at third-party sites. But Defendants are only legally responsible for such views if those other sites' republication of the Video was "reasonably foreseeable" to Defendants when they initially posted it. *Granda-Centeno v. Lara*, 489 So. 2d 142, 143 n.3 (Fla. 3d DCA 1986). Plaintiff failed to put on any evidence to indicate that it was, and, in fact, there was evidence suggesting precisely the opposite. *See, e.g.*, Tr. at 3143:20-3144:10 (testimony of Mr. Kidder explaining that the third-party cites posted the Video without Gawker's permission).

represented the value of "the opportunity that was taken from him if [Mr. Bollea] had been one of those people who had chosen to actually sell this thing out there on the market." Tr. at 3736:7-11. There was literally no evidence supporting that assertion. As Mr. Shunn testified, each of the 7,057,214 views of the Video he opined about involve someone watching the Video for free. Tr. at 2418:12-21. Mr. Shunn made very clear that he was not offering any opinion as to whether anyone who watched the Video for free would have been willing to pay to do so, and there was no testimony from any other witness speaking to that issue. *See, e.g.*, Tr. at 2418:6-11, 2418:22 – 2419:2 (testimony of Mr. Shunn). In fact, Mr. Shunn admitted that he did not have "any factual basis to believe that the people . . . would pay any of those fees to watch" the Video and opined that the most he could do was "***assume*** that some percentage" of people who watched the Video for free "would" have paid to do so "based on just general user conversion rates for things like that." Tr. at 2419:12-20 (emphasis added). Mr. Shunn then testified that, while he does not know the conversion rate "for websites that sell celebrity sex tapes," a 1.5%. conversion rate is standard within e-commerce. Tr. at 2421:21 – 2422:11. Under that theory, a 1.5% conversion rate would translate into 105,858 paid views and an award of just under $525,000 in economic damages (105,858 x $4.95), even if the balance of Plaintiff's proof on this issue was proper (which, as discussed herein, it was not).[9]

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[9] Even that amount is almost certainly far too high. On that question, as Brett Goldenberg of MindGeek testified, VividCeleb makes excerpts of its celebrity sex tapes – excerpts that are both longer than and much more sexually explicit than what was posted at Gawker's website – available for free on the website PornHub. Tr. at 3423:4 – 3435:8. No contrary evidence was presented to the jury. So the notion that Gawker was giving away for free a product that Plaintiff could have charged consumers to watch could not properly have been credited by the jury.

In addition, Goldenberg's testimony suggested that the conversion rate for celebrity sex tapes is far less than the 1.5% conversion rate stated by Shunn for the e-commerce industry generally. Goldenberg explained that on PornHub of the over 105 million views of the Kim

Nonetheless, Plaintiff asked for, and received from the jury, economic damages based on an assumption of a ***100% conversation rate***. But, Plaintiff's own expert agreed that "it would be ***pure speculation*** to say that that number of people would have paid" the Vivid fee to watch the Video. Tr. at 2419:21-24 (emphasis added). The law is clear that "[d]amages cannot be based on speculation, conjecture or guesswork." *Swindell v. Crowson*, 712 So. 2d 1162, 1164 (Fla. 2d DCA 1998); *see also Florida Sunrise, Ltd. v. Tri-M Invs. of S. Fla., Inc.*, 942 So. 2d 421, 424 (Fla. 4th DCA 2006) (rejecting component of damages award as "simply too speculative" to stand). In this case, not only was the assumption that everyone who watched the Video for free would have paid to do so "guesswork," it was guesswork that was directly at odds with the testimony of Plaintiff's own e-commerce expert. Plaintiff is not entitled to have the jury credit his own expert but disregard the conversation rate he espoused, particularly in the absence of any other evidence to the contrary.

Finally, even if the jury were permitted simply to assume, with no supporting evidence, that every single person who supposedly watched the Video for free would have been willing to pay $4.95 to VividCeleb in order to do so, that would still not provide a reasonable basis for awarding Plaintiff roughly $35.4 million in economic damages. Even in Plaintiff's hypothetical, the number arrived at by multiplying $4.95 by the total number of views is the ***gross amount*** paid to VividCeleb, *not* the amount paid to any of the specific celebrities who appear in the collection of sex tapes to which the $4.95 buys access. Plaintiff did not put forth any evidence regarding what percentage, if any, VividCeleb pays to such celebrities out of its gross receipts, which is what he needed to do to translate this theory into money payable to *him*.

Kardashian sex tape there were only 15,000 subscriptions to the ***free*** VividCeleb channel, a conversion rate of .01%. *See* Tr. at 3429:13-16, 3430:24 – 3432:9, 3433:5-17.

In short, the jury's award of roughly $35.4 million based on the $4.95-per-view theory was not reasonably supported by the evidence and should be vacated or dramatically reduced.

The-$15-Miillion-Increase-In-Value Theory. The second component of the jury's economic damages award – the $15 million increase to the value of gawker.com supposedly brought about by the Hogan post – was no more based in the actual evidence than Plaintiff's $4.95-per-view theory. In support of that $15 million increase, plaintiff presented the testimony of Jeff Anderson to opine that the gawker.com website alone was worth $286 million as of April 2013, testimony clearly designed to make a $15 million increase for just one post seem modest by comparison. Tr. at 2523:20 – 2524:16 (testimony of Mr. Anderson). But then, at the net-worth stage in the proceedings, Plaintiff stipulated that Gawker Media, LLC – the company that owns gawker.com, ***along with seven other websites*** – has a value of $83 million. Tr. at 3891:8-20 (net-worth stipulation entered into for purposes of this case). That valuation was based on a report submitted by Plaintiff's net worth expert, which was based on Gawker and its parent company's actual records and financial performance. That is a clear signal that Mr. Anderson's analysis is unsupportable and must be set aside.

As Defendants previously argued at the *Daubert* motion stage, there are a number of threshold reasons why it was not reasonable for the jury to credit Mr. Anderson's conclusions.[10]

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[10] These threshold reliability issues include Mr. Anderson's concessions that (1) he was not aware of any prior instance in which the methodology he employed was used to value a single web post, (2) if he were actually advising someone who was considering purchasing gawker.com for $286 million, he would advise that person to examine gawker.com's revenue and profits, even though he did not do so and was asking the jury to accept a valuation that did not take either revenue or profits into account, and (3) he has no idea whether the "content-based" websites he used as comparables were valued based on monthly unique users or other factors, including their revenues, profits and growth rate, even though the "market multiple" he derived from those comparables was based on the assumption that unique users was the only factor driving the valuation. Tr. at 2509:15-20, 2524:8 – 2572:7, 2558:14 – 2559:23.

Even disregarding those threshold problems, the $15 million figure accepted by the jury was not supported by the actual data on which Mr. Anderson purported to rely.

First, the data showed that the fundamental premise of Mr. Anderson's analysis – *i.e.*, that gawker.com received a sustained boost in traffic as a result of the Hogan post – was false. As Mr. Anderson was forced to concede during cross examination, the number of unique users for the month before the Hogan post was published (September 2012) was nearly identical to the number unique users for the last month the Video was up (April 2013), showing no sustained growth. Tr. at 2541:11 – 2544:8. Even more revealingly, unique users dropped sharply in the month immediately following the Hogan post (November 2012), only to then rise again in the following month, a rise Mr. Anderson himself conceded was likely attributable to a post other than the Hogan post. Tr. at 2542:4 – 2543:4. In effect, as Mr. Anderson was forced to concede, there was no "Hogan" effect on Gawker's traffic.

Second, Mr. Anderson only arrived at his conclusion that the Hogan post was responsible for 28.5% of the supposed increase in average monthly unique users by switching traffic statistics in the last step of his analysis. Specifically, in calculating the supposed increase in traffic to gawker.com, Mr. Anderson focused on unique users to gawker.com, *i.e.*, the number of people who visited ***any page*** on gawker.com at least once. However, in calculating how much of that supposed increase was attributable to the Hogan post, he switched to unique page views of the Hogan post, *i.e.*, the number of people who visited ***that specific page*** at least once. Tr. at 2574:22 – 2575:12. As Mr. Anderson conceded during cross examination, unique users and unique page views measure very different things, with "[t]he total number of unique views for items posted on gawker.com far exceed[ing] the total number of unique users." Tr. at 2580:10-13. When asked to justify this statistical sleight of hand, Mr. Anderson offered only the

conclusory observation that "based on everything that I reviewed, every indication is that these views, the unique views to the Hulk Hogan sex page, are just as valuable as a monthly unique user with which I based my analysis on." Tr. at 2586:8-12.[11] He further conceded that the Hogan post accounted for just 0.7% (.007) of unique views on gawker.com in 2012. *See* Tr. at 2582:15-25.

It is fundamental that "no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." *Hajianpour v. Maleki*, 932 So. 2d 459, 464 (Fla. 4th DCA 2006) (quoting *Div. of Admin. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 4th 1981)). In this case, the critical steps in Mr. Anderson's analysis – *i.e.*, the assumption that traffic increased when it did not, and the assumption that unique page views and unique users can be treated the same – were purely conclusory and not supported by any facts. Indeed, those assumptions were contradicted by his actual testimony. Accordingly, the portion of the jury's damages based on Mr. Anderson's testimony should be vacated because it was not reasonably supported by the evidence. *See, e.g.*, *Whitby v. Infinity Radio Inc.*, 951 So. 2d 890, 899-900 (Fla. 4th DCA 2007) (vacating damages award because it was based on the "speculative and conjectural" methodology of plaintiff's expert).

3. Plaintiff Cannot Recover Under Both Theories Of Economic Damages.

Finally, even if Plaintiff *were* permitted to recover under either his $4.95-per-view theory or his $15 million-increase-in-value theory, he was certainly not permitted to recover under both

[11] Mr. Anderson also complained that he was not provided with data showing what percentage of unique visitors to the Hogan post were unique users to gawker.com. Tr. at 2583:5-9, 2594:22 – 2596:1. The undisputed evidence showed that no such data was available. *See, e.g.*, Tr. at 2595:8-22. Regardless, the absence of such data did not give Mr. Anderson license simply to conflate unique page views and unique users, which is what he did.

theories. Those two theories represented alternate methods for measuring the purported value of Plaintiff's publicity rights, which is the only claim for which Plaintiff could recover economic damages. Plaintiff asked the jury both to force Defendants to disgorge what they supposedly gained from the unauthorized use of his name or likeness, and to compensate Plaintiff for the benefit some other company might have gotten had it given subscribers access to the full sex tape. Putting aside that neither of these damages theories is recoverable as a matter of black-letter Florida law, an award of both of them, as happened here, amounts to a double recovery of the supposed value of Plaintiff's publicity rights. The law is clear that such "[a] double recovery based on the same element of damages is prohibited." *Montage Group*, 889 So. 2d at 199. Accordingly, Plaintiff's economic damages award must, at the very least, be reduced so that he is not compensated twice for the alleged misappropriation of his publicity rights.

In sum, Plaintiff failed to prove *any* economic damages to the degree of certainty required by the law, let alone categories of damages that the law actually permitted him to recover. Nonetheless, the jury awarded him for his economic damages *twice over*, and then added an additional roughly $4.7 million that Plaintiff did not ask for or attempt to prove. That is a clear indication that the jury, swayed by passion and prejudice, simply wanted to award a big number and did so regardless of what proofs were actually submitted. Although Plaintiff did not in fact prove any amount in economic damages, the most he could even conceivably be awarded under the erroneous damages theories permitted to be presented to the jury is around $525,000, which is the amount arrived by applying the full $4.95 number to the greatest number of views his own expert's 1.5% conversion rate would have yielded.

C. The Punitive Damages Award Was Grossly Excessive.

Finally, the jury's award of $25.1 million in punitive damages against Defendants – $15 million against Gawker, $10 million against Mr. Denton, and $100,000 against Mr. Daulerio – also cannot stand. A jury's award of punitive damages is cabined by a defendant's constitutional due process rights. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a 'grossly excessive' punishment on a tortfeasor.") (citation omitted). While there is no precise formula for applying this due process limitation to specific punitive damages awards,

> [t]he United States Supreme Court has . . . identified three guideposts for assessing the reasonableness of punitive damages: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Young v. Becker & Poliakoff, P.A., 88 So. 3d 1002, 1008 (Fla. 4th DCA 2012) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)). Florida law additionally requires that the amount in punitive damages awarded "bear[ ] some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy to the defendant." *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1263-64 (Fla. 2006). All of these factors require setting aside, or substantially remitting, the punitive damages award as a matter of both Florida law and federal constitutional law.[12]

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[12] In addition, because the jury's finding that Defendants had a specific intent to harm Plaintiff was erroneous as a matter of law and/or against the manifest weight of the evidence, should the compensatory damages award be reduced, any punitive damages award would be capped at three times the amount of the reduced compensatory damages award, separate and apart from the constitutional due process limits on such an award. Fla. Stat. § 768.73(1)(a).

1. The Punitive Damages Award Was Out of Proportion to the "Reprehensibility" of Defendants' Conduct.

The United States Supreme Court has explained that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. The reprehensibility of a defendant's conduct is determined

> by considering whether: 'the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.'

Young, 88 So. 3d at 1008 (quoting *State Farm*, 538 U.S. at 419); *see also* Phase II Jury Instruction No. 2 (same). These factors all weigh against the amount awarded here. Plaintiff did not suffer, or claim, any physical harm. There was no threat to the health or safety of anyone; the claims are based on a publication, not the manufacture of a dangerous product. The conduct at issue was a single publication, not a sustained course of alleged wrongdoing. Finally, there is no evidence of intentional malice. Neither Mr. Daulerio nor Ms. Carmichael, who edited and published the video, bore any personal ill-will towards Plaintiff. *See* Tr. at 1888:21 – 1889:11 (testimony of Mr. Daulerio), 2862:24 – 2863:2, 2865:1-19 (testimony of Ms. Carmichael). Instead, the undisputed testimony showed that Defendants believed the article and video were newsworthy and protected by the First Amendment at the time of publication. Tr. at 1888:14-16 (testimony of Mr. Daulerio that he "thought it was newsworthy and it was something that was worth discussing and putting up on the site"); Tr. at 2863:3-13 (testimony of Ms. Carmichael that she believed the article and accompanying video to be newsworthy and "we felt we had the right to move forward with publishing it."). For his part, Mr. Denton further testified that, as President of Gawker Media, he had no direct involvement in the day-to-day operation of gawker.com, did not involve himself in the editorial process around individual stories, and

played no role in reviewing or editing the Video at issue. Tr. at 2964:7 – 2967:20, 2994:11-20, 3067:15-22. While Plaintiff argued that perhaps Mr. Denton should have been more involved or imposed different practices, that is not intentional conduct of the type that would justify a mammoth punitive damages award.

Despite this evidence, the jury awarded punitive damages of more than $25 million. As discussed further below, comparable punitive awards have only been made in cases where defendants engaged in decades of intentional misconduct, knowingly causing death and physical suffering. For example, in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1071 (Fla. 1st DCA 2010), the District Court of Appeal affirmed a punitive damages award of $25 million where it was proven defendants engaged in "decades-long purposeful concealment of the health risks from smoking cigarettes, refusal to take nicotine out of [cigarettes] because sales would decrease, and collusion with other tobacco industry entities to affirmatively mislead the public into thinking cigarettes indeed may not be harmful." Such conduct simply is not comparable to what occurred here.

2. The Punitive Damages Awarded Is Out of Proportion to the Harm Plaintiff Suffered.

Additionally, the punitive damages award was entirely disproportionate to the *actual* harm Plaintiff suffered, which consisted simply of "garden variety" emotional distress and, as set forth elsewhere in this motion, if there were any compensable economic damages, they were far less than what the jury awarded. Moreover, as the U.S. Supreme Court has explained, where a plaintiff receives a sizable award for emotional distress, that award likely already included a substantial punitive element. *See Campbell*, 538 U.S. at 426 (quoting RESTATEMENT (SECOND) OF TORTS § 908, cmt. c, to the effect that "[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the

defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both"). It would be double punishment to permit a substantial award of punitive damages on top of the sizable award for emotional distress.

3. The Punitive Damages Award Here Is Out of Proportion to What Has Been Awarded in Similar Cases.

The award of $25.1 million in punitive damages is also entirely out of proportion to what has been awarded in similar cases. Awards in that range have rarely been awarded in Florida, and never in the context of an invasion of privacy claim. As discussed above, the same is true of cases involving sexually-oriented material from other jurisdictions. To find comparable sums being awarded, it is necessary to look to wrongful death cases, for example, the numerous cases brought in Florida against tobacco conglomerates following *Engle*. Punitive damages in such cases have topped out at $30 million, close to what the Plaintiff was awarded in this case. *See, e.g.*, *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11 (Fla. 4th DCA 2012) ($10 million in punitive damages split between two tobacco companies); *Lorillard Tobacco Co. v. Alexander,* 123 So.3d 67 (Fla. 3d DCA 2013) ($25 million punitive damages); *R.J. Reynolds Tobacco Co. v. Martin,* 53 So.3d 1060 (Fla. 1st DCA 2010) ($25 million in punitive damages); *Philip Morris USA, Inc. v. Naugle,* 103 So.3d 944 (Fla. 4th DCA 2012) ($25,965,000 punitive damages); *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487 (Fla. 4th DCA 2015) ($30 million in punitive damages). Those are, of course, against tobacco companies who have net worths in the *billions* – many, many times the net worth of Defendants here.

By contrast, in cases in which punitive damages have been awarded for legal claims actually similar to those at issue here, the punitive awards have been a small fraction of what the jury awarded. For example, in *Genesis Publications, Inc. v. Goss*, 437 So. 2d 169 (Fla. 3d DCA

1983), plaintiff brought suit for invasion of privacy as a result of publication of her nude photograph in a commercial advertisement. The jury awarded compensatory damages of $100,000 and punitive damages of $400,000.[13] The District Court of Appeal vacated the punitive damages because there was no evidence of "wanton and malicious disregard for laws designed to protect people's rights." Similarly, in *Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990 (Fla. 4th DCA 2004), which involved a claim for misappropriation of the right of publicity, the jury awarded $15,000 in punitive damages. The District Court of Appeal reversed and remanded, finding that the trial court should have entered a directed verdict on the punitive damages claim because "there is no evidence of intentional, malicious misconduct, undertaken with knowledge that injury to [plaintiff] would result." *Id.* at 1001. In *Sun International Bahamas, Ltd. v. Wagner*, 758 So. 2d 1190 (Fla. 3d DCA 2000), another case involving a misappropriation claim, the District Court of Appeal remitted $250,000 in punitive damages to $42,000. In *Cape Publications, Inc. v. Bridges*, 423 So. 2d at 427, the jury awarded just $9,000 in punitive damages for publishing a photograph of plaintiff "clutching a dish towel to her body in order to conceal her nudity," an award that was later vacated by the appeals court. And, in *Toffoloni*, as previously discussed, punitive damages were remitted to $250,000, before being vacated in their entirety. As these cases indicate, $25 million in punitive damages is grossly disproportionate to awards involving similar legal claims.

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[13] Pursuant to the United States Department of Labor Inflation Calculator, an award of $400,000 in 1983 is equivalent to approximately $953,000 today, a fraction of the punitive damages awarded in this case. *See* United States Department of Labor, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm.

4. Particularly in Light of the Compensatory Damages Awarded, the Punitive Damages Awarded Would Result in Economic Castigation or Bankruptcy for Defendants.

Finally, the punitive damages award cannot stand because it would economically destroy or bankrupt the Defendants, which is expressly forbidden by the law governing punitive damages. *See Bill Branch Chevrolet, Inc. v. Burkert*, 521 So. 2d 153, 155 (Fla. 2d DCA 1988) ("The purposes of punitive damages are served by extracting a sum of money from the defendant which . . . will hurt but not bankrupt."); Phase II Jury Instructions No. 7 (instructing the jury that it "may not award an amount in punitive damages that would financially destroy or bankrupt any of the Defendants"). For purposes of this case, the parties negotiated a stipulation as to the assets of the Defendants as follows: Gawker Media, LLC had a prejudgment value of $83,000,000; Mr. Denton had a prejudgment net worth of $121,000,000 (nearly all of which is attributable to his ownership interest in Gawker's parent company); and Mr. Daulerio had no material assets and $27,000 in debt. *See* Tr. at 3891:14 – 3892:21. Based on those numbers, any award of punitive damages against any of the Defendants would be ruinous in light of the compensatory damages already awarded. Nonetheless, the jury disregarded this Court's instructions and returned substantial punitive damages awards, including against Mr. Daulerio, who has no assets. That cannot stand. *See, e.g.*, *City Stores Co. v. Mazzaferro*, 342 So. 2d 827, 828 (Fla. 4th DCA 1977) (jury was not permitted to award $10,000 in punitive damages against an insolvent defendant). Indeed, even without considering the compensatory award, the magnitude of the awards here relative to the defendants' net worth would be among the largest in Florida's history, and are grossly excessive considering the conduct at issue. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 457 (Fla. 3rd DCA 2003), *aff'd in part, rev'd in part by Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

In short, the $25 million in punitive damages awarded by the jury is excessive, unsupported by the record, and must be set aside in its entirety or significantly remitted. Although Defendants believe that *no* award of punitive damages can be defended under the facts of this case, the most that could possibly be awarded is a token amount against Mr. Daulerio (*i.e.*, less than $100), and then, as to Gawker and Mr. Denton, an award capped at *two times* a compensatory damages award that has been reduced as set forth above (*i.e.*, no more than $100,000 in emotional distress damages and no more than $525,000 in economic damages). That would bring the award in line both with U.S. Supreme Court decisions indicating that even a 1:1 ratio is at the higher end of what is constitutionally permitted, *see Exxon Shipping Co. v. Baker*, 445 U.S. 471, 513 (2008), and the massive discrepancy between the conduct at issue in this case and the conduct at issue in cases in which Florida courts have permitted higher punitive damages multiples.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants' motion for a new trial, or else enter an order vacating, or substantially remitting, each of the components of the damages awarded.

April 4, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

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