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

TERRY GENE BOLLEA, professionally
known as HULK HOGAN,

Plaintiff, Case No. 12012447CI-011

v.

GAWKER MEDIA, LLC, *et al.*,

Defendants.

_________________________________/

**DEFENDANTS' OPPOSITION TO BOLLEA'S MOTION TO STRIKE**

Plaintiff's overblown motion to strike should be denied. After acknowledging Defendants' right "to disagree with a verdict and take issue with the trial process," Plaintiff's Motion to Strike (Mot.) at 3, Plaintiff spends nearly 20 pages complaining of that very disagreement. The motion to strike is a transparent attempt to divert this Court's attention from the serious legal issues raised in Defendants' post-trial motions. As we show in this opposition:

- Plaintiff fails to address or acknowledge, let alone satisfy, the extraordinarily high standard required to justify a motion to strike. Florida law requires this Court to rule on the merits of Defendants' post-trial motions, not strike them.
- Defendants have not misrepresented the facts or the law. Defendants' closing argument simply acknowledged the reality of the verdict, which was relevant to the amount of punitive damages the jury could award under Florida law. In fact, this Court already rejected one of the premises of Plaintiff's motion to strike, ruling that the parties were required to make their arguments during the punitive damages phase



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based on the assumption that the jury's verdict was valid and without regard to any possible remittitur or reversal in this Court or on appeal.

- Defendants have not misrepresented the net worth stipulation. Defendants quoted the stipulation in full and accurately noted the procedural context in which it was entered. Defendants were then entitled to point out the wide gulf between the net worth stipulated by Plaintiff and the arguments his experts made to the jury on damages. Plaintiff disagrees, but that disagreement is for the merits of Defendants' post-trial motions, not a motion to strike.

**Motions to Strike are Highly Disfavored**

Plaintiff does not inform the Court of the high standard for succeeding on a motion to strike, nor even attempt to satisfy it. Motions to strike are an "extreme measure . . . disfavored in the law." *Upland Dev. of Cent. Fla., Inc. v. Bridge*, 910 So. 2d 942, 944 (Fla. 5th DCA 2005). Thus, the Second District Court of Appeal has warned trial courts to "be very cautious in considering" motions to strike and to award such a sanction only in an "extreme case." *Harrell v. Mayberry*, 754 So. 2d 742, 744 (Fla. 2d DCA 2000) (citation omitted). The trial court must "resolve all doubts" against striking a pleading. *Parrish & Yarnell, P.A. v. Spruce River Ventures, LLC*, 180 So. 3d 1198, 1200 (Fla. 2d DCA 2015); *see also Sunex Int'l, Inc. v. Colson*, 964 So. 2d 780, 782 (Fla. 4th DCA 2007) (all doubts are to be resolved in favor of the pleadings); *Hully v. Cape Kennedy Leasing Corp.*, 376 So. 2d 884, 885 (Fla. 5th DCA 1979) (motions to strike should be used sparingly).

Underscoring the extraordinary nature of the relief he seeks, Plaintiff's motion fails to cite a single instance of a post-trial pleading being stricken as a result of any form of equitable or judicial estoppel, and we have found no such case. This is because such arguments, even if they

had any validity, are more properly for the merits. *See Boswell v. Boswell*, 877 So. 2d 829, 830 (Fla. 4th DCA 2004) ("A motion to strike should rarely be used to challenge the merits of a pleading"). This Court should reject out of hand Plaintiff's unprecedented and unsupported attempt to avoid the merits of Defendants' arguments.

**Defendants have not Misrepresented the Facts or the Law.**

The central premise of Plaintiff's motion is that Defendants played fast and loose with the facts in their closing argument during the punitive damages phase, first by acknowledging that they "owe" and "must pay" the jury's $115,000,000 compensatory damages award, and second, by telling the jury that Defendants heard its message and took that message seriously. But what is untruthful about either of those statements? As to the $115,000,000 award, until remitted by this Court or reversed on appeal, Defendants certainly owe and must pay it. And who can disagree that a $115,000,000 award sends a serious message, whether one agrees with it or not?

*Defendants Owe and Must Pay*

It is odd that Plaintiffs complain about Defendants' acknowledgement of the reality that, for now, they owe and must pay the jury's award. No doubt Plaintiff will attempt to collect it, if judgment is entered and not stayed. Defendants' statements did nothing more than recognize the reality in which the parties found themselves at the time of the argument on punitive damages, which, as we discuss below, was what this Court ruled the parties were required to do.

Plaintiff argues that the jury heard these statements as a promise to pay and not to appeal. Mot. at 3 (suggesting that Defendants said that the $115,000,000 award was "just, appropriate and would be paid"). Defendants said no such thing. Acknowledging that, for the present, Defendants "must pay" (a true statement) is far different from admitting the award is legally or factually correct or will not be the subject of an appeal. Moreover, it defies common sense and

insults the jury to suggest that the jurors would have assumed that Defendants would simply give up and meekly pay the award, without exercising their rights before this Court and the appellate courts after the jurors heard Defendants' strong defense of their legal position throughout the trial.

Indeed, although Plaintiff improperly relies on juror statements to give credibility to the verdict,[1] Plaintiff cites no juror statement that would suggest the jury was misled by closing arguments into thinking Defendants were giving up their fight. To the contrary, the same press statements cited by Plaintiff show that the jurors knew Defendants were going to appeal the verdict. *See* Ex. H to Mot. (ABC News article reporting on an interview with all six jurors: "Asked how they would feel if their decision was overturned on appeal, [one juror] replied: 'We drew a line, and we hope others will draw a line.'" Another juror stated "'I hope [Hogan] fights it all the way for all of us'").[2]

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[1] *See, e.g.*, *Travent, Ltd. v. Schecter*, 678 So. 2d 1345, 1348-49 (Fla. 4th DCA 1996) (post-trial statements by jurors "constitute nothing more than subjective impressions and opinions as to why" a particular verdict was reached, "and are immune to judicial inquiry"); *cf.* Fla. R. Civ. P. 1.431(h) (party seeking to challenge verdict based on alleged juror misconduct must seek leave of the court to interview jurors).

[2] Plaintiff has also been very selective in the juror comments presented to this Court. Other comments reveal the prejudicial impact of the Court's evidentiary rulings. For example, one juror told ABC News that "[i]f Hulk Hogan and his lawyers had asked them to take the post down and the verbage, it would have been a First Amendment issue. . . . We would have sided with Gawker, for sure, but it just wasn't the case. They asked him to take the video down . . . ." Ex. H to Mot. (ABC News article). Of course, Plaintiff and his lawyers ***filed suit*** about the "verbage," but this Court denied Defendants' repeated requests to be able to tell the jury that incontestable fact or question Plaintiff's counsel David Houston about his misrepresentation about that fact while testifying at trial. *See, e.g.*, Tr. 1590:11-159191:4, 2007:10-2012:2 (excerpts attached hereto). Likewise, the jurors discussed the persuasiveness of evidence and testimony about "ethical journalism," Mot. at 15 & n.7 (CNN interview), when that evidence (the Society of Professional Journalists' Code of Ethics) and testimony (Plaintiff's journalism expert, Mike Foley) should have been excluded as irrelevant, confusing, prejudicial, and wholly improper, as argued in Defendants' motion *in limine* and *Daubert* motion on those issues.

Plaintiff's real complaint is that the jury was misled into awarding too low an amount of punitive damages because it was told that its punitive damages verdict needed to take into consideration the jury's $115,000,000 compensatory verdict. To begin with, $25,100,000 can hardly be brushed aside as an insignificant amount of punitive damages. As Defendants demonstrated in their post-trial motions, it far exceeds what Florida law permits in these circumstances.

Equally important, Plaintiff's argument is wrong, as this Court has already ruled. Florida law is clear that the current verdict amount was of great relevance to the jury's consideration of punitive damages, for two reasons. First, the amount of the compensatory award must be considered in determining whether the amount of a punitive damages award may be sustained. *See, e.g.*, *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1264 (Fla. 2006) ("[W]e now hold, consistent with United States Supreme Court decisions . . . that recognize due process limits on punitive damages, that a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two"). Plaintiff acknowledged this to the jury. *See* Tr. at 3895:20-3896:1 ("one guiding light that you get from the law is that the amount of punitive damage you will award, if any, must not be unreasonably large when considered in relation to the amount of compensatory damages you have awarded to the plaintiff").

Second, punitive damages may not bankrupt or destroy a defendant. *See Engle*, 945 So. 2d at 1263-64 ("[A]n award must be reviewed to ensure that it bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy of the defendant"). Plaintiff acknowledged this controlling legal principle when he argued to the jury,

albeit incorrectly, that it could consider the assets of the entire Gawker Media Group in determining the amount of its award. Tr. at 3896:2 – 3897:24.

Thus, Defendants had every right to point out the relationship between the amount of the liability verdict and the jury's award of punitive damages. The fact that the liability award may ultimately be reduced (and should be reduced or eliminated in its entirety) is an argument for Defendants' post-trial motions, exactly where Defendants have made this point. Simply telling the jury about the necessary relationship between the liability award and any award of punitive damages—an accurate statement of Florida law, recognized by Plaintiff himself—did not result in a waiver of the right to challenge that verdict.

As this Court will recall, the parties vetted this issue extensively with the Court prior to closing argument. In that discussion, Plaintiff made the same complaint that is now the central feature of his motion to strike. Plaintiff argued to the Court that it would be unfair to remind the jury of its $115,000,000 award when discussing the appropriate amount of punitive damages. Tr. at 3856:19 – 3858:7. Defendants disagreed and left no question what they would be arguing:

> As for this issue of remittitur, we're here on the facts that we're here on. At this point, the facts are there's been a $115 million compensatory damage [a]ward. That might get reduced later and it might be an issue that will emerge with respect to a punitive damage award. But at this stage, we have to deal with the facts that we have, not the facts that we think might happen after the remittitur process plays itself out, when the appellate process plays itself out.

Tr. at 3860:16-25. Putting a finer point on it, Defendants made clear that the parties' punitive damages arguments to the jury needed to acknowledge the current reality:

> The jury has awarded what it's awarded. That may get knocked down later. But at this point, those are the facts we're dealing with.

Tr. at 3862:22-24.

This Court rejected Plaintiff's argument and specifically permitted Defendants to make the very arguments that are now the subject of Plaintiff's motion to strike. Tr. at 3862:5 – 3865:9. This Court recognized that for the purpose of closing argument, it was required to assume that the award was proper and would deal with arguments on the merits of the award later. *Id.*

Simply put, Defendants cannot be accused of lack of candor when they told the Court exactly what they would be arguing and then explicitly followed the Court's rulings, which were firmly based in Florida law.

*Defendants Heard the Jury's Message.*

Plaintiff's second accusation of misconduct is equally overblown. Plaintiff complains that Defendants misled the jury when they acknowledged that Defendants received the jury's message and take it seriously. As with Defendants' statements about the compensatory award, there is nothing improper or inaccurate about such statements.

As a threshold matter, let us be clear about exactly what Defendants said in closing. Several times, Defendants acknowledged the seriousness of the verdict and the message it sent:

- "You have spoken, and we have heard your judgment. We have heard your judgment, and we take it very seriously. $115,000,000." Tr. at 3907:24-3908:1.
- "My clients have heard your judgment. That judgment is serious and it is clear and it is punishment enough." Tr. at 3911:6-8.
- "As I have said, your verdict has already punished my clients, and it will no doubt deter others. Your verdict will send a chill down the spine of publishers, producers, and writers throughout the country. It has sent a message of deterrence already." Tr. at 3912:6-11.

Again, what is false about any of this? It is self-evident that a $115,000,000 award sends a strong message that must be taken seriously. Plaintiff seems to suggest that Defendants did not truly take the award seriously because they continue to press their legal position in their court filings and in public. There is a big difference, however, between acknowledging and respecting the seriousness of a verdict—what all of Defendants' statements, truthfully, did—and agreeing with it. As Plaintiff himself concedes, Defendants have the perfect right to disagree with the verdict and to challenge it in this Court and on appeal. One can receive a message, acknowledge it, and act upon it, without agreeing with it.

Moreover, Plaintiff already made this point to the jury in his closing. In rebuttal, Plaintiff argued, "It is interesting to me when a defendant comes before a jury and talks about how your message has been heard loud and clear after they spent two weeks telling how proud they were of what they did." Tr. at 3913:3-7. In other words, the question of just how remorseful Defendants were, to the extent it is relevant at all, was expressly presented to the jury. And, as described above, the jury's post-trial comments confirm they were aware that Defendants planned to appeal. Nothing suggests that the jury was misled.

Finally, Plaintiff overlooks that Defendants were absolutely correct in stating that the verdict's message has been heard. Florida and federal precedent has long recognized the chilling effect of large damage awards on the media. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("[T]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."); *Karp v. Miami Herald Publ'g Co.*, 359 So. 2d 580, 581 (Fla. 3d DCA 1978) (recognizing the chilling effect of damage awards on press freedoms). In fact, commentators have already acknowledged the message this particular jury sent, exactly as

Defendants represented to the jury. *See* Paul Farhi, *Hulk Hogan's $140.1 million KO in courtroom could have a 'chilling effect' on media*, Wash. Post. (Mar. 21, 2016).[3]

Obviously, the parties have a strong disagreement about whether this "chilling effect" is a good thing. But that is not the point. The point is, the award itself has had an impact, whether ultimately remitted or reversed, and that impact is a legitimate topic of debate that the parties have the right to argue before the jury, this Court, and the appellate court. Simply put, Defendants made arguments that were truthful and proper. Plaintiff may disagree on their merits, but he has no right to duck these arguments by filing a motion to strike.

Plaintiff's authorities, all of which stand for the unremarkable proposition that parties may not mislead the Court or the jury, are inapposite. *See* Mot. at 2. The *Green* case is representative. *Philip Morris USA, Inc. v. Green*, 175 So. 3d 312 (Fla. 5th DCA 2015). The plaintiff, the estate of a cigarette smoker, had acknowledged from the beginning of the case and throughout the evidentiary presentations that the deceased smoker was partially at fault for his death from cigarette smoking. Having accepted partial fault, the Fifth District held that it was misleading and unfair for the plaintiff to later argue to the court that the principle of comparative fault did not apply and to oppose any allocation of fault to the deceased smoker.[4] *Id.* at 314-15.

*Green* is nothing like this case because, as discussed above, the jury was not misled and Defendants did not take inconsistent positions. Defendants have not acknowledged fault or liability. Defendants have not conceded the correctness of the verdict. Defendants simply

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[3] The article can be found at https://www.washingtonpost.com/lifestyle/style/hulk-hogans-115-million-ko-in-courtroom-could-have-chilling-effect-on-media/2016/03/21/0fa94aa4-ef81-11e5-89c3-a647fcce95e0_story.html.

[4] Even *Green* was a close case. Other *Engle* progeny tobacco cases on similar facts have rejected that estoppel applies, even when the plaintiff has affirmatively accepted some fault. *See R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 851-52 (Fla. 1st DCA 2013).

acknowledged the *reality* of the verdict, which this Court has already ruled was appropriate and necessary in the context of determining the appropriate amount of punitive damages. Tr. at 3862:5 – 3865:9.

*Green* also implicitly rejects the procedure adopted by Plaintiff here. *Green* addressed the argument concerning the smoker's concessions in the context of considering the merits of the post-trial motions. In other words, the court did not strike the argument, it considered its merits. *Green*, 175 So. 3d at 314-15.

Indeed, Plaintiff does not cite a single instance where these principles have been applied to strike an argument in the post-trial motion context. It would be absurd to do so. Does a death penalty defendant waive the right to challenge the jury's guilty verdict by acknowledging the jury's verdict and then asking for mercy in the penalty phase? Does a defendant confronting a liability verdict in a bifurcated trial waive the right to challenge liability by participating in the damages phase and arguing for the lowest possible damage award? Of course not, and no case so holds. Plaintiff's equally outlandish argument must be rejected.

**Defendants did not Misrepresent the Net Worth Stipulation.**

The balance of Plaintiff's motion disagrees with Defendants' passing reference to the net worth stipulation in their new trial motion. To begin with, Plaintiff's arguments are simply arguments on the merits of the issues that are more properly directed to the post-trial motions themselves, not in a motion to strike, as we have discussed above. *See supra* at 4.

In any event, Defendants did not misrepresent the stipulation to the Court, let alone engage in a "blatant falsehood" as Plaintiff accuses. Mot. at 16. Defendants explicitly acknowledged in their new trial motion that the stipulation was entered "*at the net-worth stage of the proceedings*." Defs.' Mot. for New Trial at 23 (emphasis added). In their motion papers, the

Defendants cited to and attached the verbatim text of the stipulation as read by the Court. *See* Tr. at 3891:10-20 (included in the excerpts from the trial transcript accompanying the motion for new trial). Thus, the language and circumstances of the stipulation were fully presented to the Court.

Having fully informed the Court, Defendants' motion does nothing more than draw attention to the fact that Plaintiff presented two very different valuations at different stages of the proceeding. Anderson opined that the gawker.com website alone was worth $286 million as of April 2013. Yet for purposes of punitive damages, Plaintiff was ready to stipulate that Gawker Media, LLC—the company that owns gawker.com, ***along with six other websites***—has a value of $83 million. Tr. at 3891:14-20; *see* Defs.' Mot. for New Trial at 23. That stipulation was based on a report filed by Plaintiff's own net worth expert.[5] *Id.* Defendants are allowed to point out those substantial discrepancies in valuation, just as Plaintiff is allowed to respond on the merits of that argument. Having placed the language and circumstances of the stipulation fully before the Court, the parties are free to argue on its significance and relevance. A disagreement on that score should be addressed on the merits, not by a motion to strike. *See Boswell*, 877 So. 2d at 830 (rejecting the use of motions to strike to challenge the merits of a pleading).[6]

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[5] Plaintiff claims that he was prepared to use Anderson (Plaintiff's intellectual property valuation expert) to establish the ceiling of Defendants' net worth. But that is not true because Plaintiff never identified Anderson as an expert on financial worth, so he could not have been called in the second phase of the trial. Moreover, Anderson never offered an opinion on the value of Gawker Media. He valued only the gawker.com website, not Gawker Media as a whole.

[6] The same is true with Plaintiff's misrepresentations in his motion to strike supposedly justifying the economic damages award. For example, to support the fiction that the Hogan post resulted in a "steady increase in web traffic," Mot. at 8, Plaintiff relies on his damages expert, Jeff Anderson, even though Anderson admitted the data showed the number of monthly unique visitors to gawker.com "before . . . and after" the Hogan post actually was "pretty close." Tr. at 2543:25-2544:8; *see also, e.g.*, Trial Ex. D-138 (Quantcast chart showing that the number of unique visitors in September 2012 and April 2013 was nearly identical).

**Conclusion**

For all the foregoing reasons, Plaintiff's motion to strike should be denied. Defendants have neither misrepresented the facts nor changed their position. As to the stipulation, Plaintiff's arguments should be vetted in connection with the merits of the post-trial motions. Disagreement on the merits is not the basis for a motion to strike.

Dated: May 18, 2016

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Ignoring this concession, Plaintiff argues that "a steady increase in traffic was evident" (Mot. at 8), and his motion includes a chart purportedly showing "audience growth in global unique visitors" (Mot. at 9). Plaintiff, however, includes no citation for this contention or the chart. The reason for this omission is simple: The chart was not before the jury during the trial's liability phase at all. (It is found at page 22 of Plaintiff's Exhibit 563, which was admitted in the punitive damages phase. *See* Tr. at 3892:24 – 3893:5.) And, the text on that page explicitly states that the chart shows unique visitors for the ***entire company***. *See* Trial Ex. P-563, p. 22. It says nothing about the unique visitors to the gawker.com website, which was the sole focus of Plaintiff's damages claim and of Anderson's testimony. If Plaintiff's arguments about striking pleadings were correct, Defendants could have filed a motion to strike his motion to strike. Instead, they have pursued the proper course of addressing their merits, which is what the law required Plaintiff to do as well.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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