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 aka GAWKER MEDIA; et al.,

Defendants.
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THE GAWKER DEFENDANTS' MOTION TO DISMISS
ON THE GROUNDS OF FRAUD ON THE COURT

By and through their undersigned counsel, defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, "Gawker") hereby move to dismiss this case under the doctrine of fraud on the court, and state as follows:

INTRODUCTION

This has been a hard-fought case, as perhaps it should be. But no matter how contentious litigation may be, Florida law imposes one overriding requirement on all parties: that they be candid with the Court. And, if not, it is well-settled that a trial court may, and indeed should, dismiss a lawsuit where it finds clear and convincing evidence of a fraud being perpetrated on the Court. It is now clear that for several years that is precisely what happened here.

Since almost the outset of this case, plaintiff Terry Bollea and his legal team have engaged in a systematic effort to hide from Gawker and this Court the existence of additional tapes of his encounters with Heather Clem, including one that shows him making a series of racist and homophobic statements. To that end, he and his counsel have provided false interrogatory responses, hidden plainly responsive documents, given false deposition testimony, and presented numerous false arguments to the Special Discovery Magistrate, this Court, and the

District Court of Appeal. Indeed, like most lies, Bollea's central fraud – trying to conceal the additional tapes and his racist comments – led to a web of other lies, permeating many aspects of this case.

First, in the course of this deception, Bollea and his counsel directly disclaimed any knowledge about other sex tapes or facts related to them. They did so even though (a) Bollea and at least one of his attorneys, David Houston, actually *watched* the additional tapes and heard Bollea's offensive statements *before* Gawker was even named as a defendant in this case; and (b) as they began pursuing this litigation, Bollea and Houston made official statements to the FBI directly at odds with what they later would tell Gawker and this Court on that subject.

Second, in addition to lying directly about their knowledge of the tapes, Bollea and his counsel sought to hide information that might lead to their discovery. For example, Bollea (falsely) testified under oath that he had never heard of Keith Davidson (even though Davidson was the man he accused for months of extorting him about those other tapes). Likewise, Bollea and his counsel sought to hide the details of the FBI's investigation by misrepresenting to this Court and to the District Court of Appeal that the FBI's investigation focused on the "source and distribution" of the tape excerpted by Gawker (they knew it focused on an alleged extortion driven primarily by a different tape containing Bollea's racist statements) and that the investigation was still "ongoing" (they knew it was long over). Bollea and his counsel even went behind this Court's back to implore the federal government to ignore the authorizations they were ordered to sign so that no one would know about "any language as it concerns the video whether it be audio or otherwise."

Finally, once information about the FBI investigation became known, Bollea and his lawyers doubled down. They continued to deny the existence of the additional tapes and the

racist language that was on one of those tapes, repeatedly contending to Judge Case and to this Court that the other tapes, and the offensive language, were simply the concoction of an extortionist (again, even though Bollea and Houston had actually watched the tapes and knew the claims being made to the Court were false). And, Houston sought to hid the real reason for the FBI's investigation by falsely testifying at his own deposition that Davidson did not mention Bollea's racist statements until "toward the end" of their dealings in December 2012 (even though Houston and Bollea complained to the FBI that they were concerned Davidson's client might release the racist statements before they even filed this suit in October 2012).

The extraordinary scope of this fraud first began to become apparent on the eve of the initial trial date, when the FBI produced materials on July 1, 2015, after this Court's motion *in limine* hearing. The full extent of Bollea's deception only became clear, however, on November 30 and December 2, 2015, when the FBI produced hundreds of unredacted records to Gawker's counsel. Those records reveal in vivid detail that Bollea and his counsel knew, and lied about, numerous facts concerning this litigation, and, in particular, about the additional sex tapes. As explained below, the effects of Bollea's pattern of fraud have been wide ranging. The Court and the Special Discovery Magistrate credited his assertions and ruled in his favor on many motions that, it is now clear, were procured by fraud.

While Bollea's fraud is punishable in and of itself, it is particularly egregious here because it had the effect of hiding unquestionably relevant evidence including (a) the actual existence of the other tapes; (b) the records and statements in the FBI's files, including contemporaneous statements by Bollea, Houston, Bubba Clem, and others; and (c) numerous other facts that have been concealed through Bollea's and his counsel's pattern of defrauding the

Court. All of this deception masked evidence relating to the elements of Bollea's claims and his burden to prove causation of damages, an issue that is heavily disputed in this case.

Unfortunately, Bollea has followed the same script as other litigants who have sought personal injury damages while concealing and misrepresenting their knowledge about evidence pertinent to their claims and the extent and causes of their alleged damages. Time and time again, Florida courts have held that such conduct – usually conduct far less egregious, wide ranging or prolonged than Bollea's and his counsel's conduct – constitutes a fraud on the court that warrants dismissal of a plaintiff's case. The same result should follow here.

FACTUAL BACKGROUND

A. Bollea Initiates An FBI Investigation And Two Lawsuits Only After He Learns The Sex Tapes Show Him Making Bigoted Statements.

1. The Racist Statements And The FBI Investigation

Beginning in March and April 2012, several media outlets published stories about the rumored existence of sex tapes involving Bollea, including rumors that some contained racist statements by him. *See, e.g.*, Ex. 1 (article published in *TheDirty.com* alluding to racist language on tape). On October 4, 2012, Gawker published the commentary and brief excerpts from a sex tape that led to this lawsuit. About a week later, after Bollea went on a national media tour talking and joking about the sex tape, he was told that there were other sex tapes that had not yet been published. From his perspective, the unreleased sex tape footage was far more significant than the excerpts Gawker posted because it contained racist slurs that he believed could ruin his career if they were ever released.

Specifically, on October 10, 2012, Keith Davidson, a Los Angeles attorney, initiated the first of several communications with David Houston, Bollea's attorney. Ex. 2. On October 12, shortly after that initial contact from Davidson, Bollea sent a text message to Bubba Clem,

saying: "We know there's more than one tape out there and a [sic] one that has several racial slurs were [*sic*] told." Ex. 3. His message continues: "I have a PPV ["pay per view"] and I am not waiting for anymore [sic] surprises because we know there is a lot more coming." *Id.*; *see infra* at 15-16 (explaining that Bollea hid this and other text messages from Gawker).

The next business morning, Bollea and Houston complained to the FBI about Davidson. *See* Ex. 8 (case opening document, produced by the FBI). Bollea's complaints to the FBI make plain that, by the time Bollea sent his messages to Bubba Clem, Davidson had told Houston that he had sex tape footage that included racist statements that would be highly damaging to Bollea's career, and that Davidson's client would release that footage if Bollea did not agree to "purchase" it from him. *Id.*; *see also* Ex. 9 (email from Davidson to Houston, dated October 12, 2012, stating that he has "viewed all materials" and can "now . . . speak more substantively" about their contents); Ex. 4 (memorializing Houston's statement to FBI that Davidson had claimed that "one of the tapes contained racial epitaphs [sic] which could hurt BOLLEA's career if released") [1]

2. Bollea Files His Lawsuits Against Gawker And The Clems

That same afternoon, Bollea filed two lawsuits, one in federal court against Gawker and one in state court against both of the Clems. Not knowing whether Gawker had additional tapes,

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[1] At the same time Houston was talking with Davidson, he communicated extensively with Mike Walters of *TMZ* and Nik Richie of *The Dirty*, both of whom had seen the tape with the racist language. *See, e.g.*, Exs. 4, 5, 6; http://www.tmz.com/videos/0_vqdoqg2j/ at 1:50 – 2:15 (July 24, 2015 *TMZ Live* broadcast in which Walters confirms that he had "actually seen this tape" with racist language); Ex. 7 (report confirming Richie had "listened to the Hulk tapes" with the racist language). Neither Bollea nor Houston has produced any documents reflecting those communications, or identified them in interrogatory responses, notwithstanding that they provided information and documents to the FBI reflecting their communications with Walters and Richie in October 2012. Gawker has moved for Bollea and Houston to produce those documents and information in its contemporaneously-filed motion to compel. *See* Mot. to Compel at 2-7, 12 & nn.1-4. Gawker reserves the right to supplement its fraud on the court motion with additional evidence uncovered as a result of that motion to compel.

Bollea's action against Gawker began with an application for a temporary restraining order and a motion for preliminary injunction, both of which sought to enjoin all future publication of any sex tapes, to require Gawker to immediately hand over all copies of any sex tapes in its possession, and to identify the source who provided the footage to it. Ex 10 (Federal Complaint, filed October 15, 2012). Consistent with those efforts, Bollea and his counsel held a press conference on the steps of the federal courthouse in which Houston made clear that the lawsuit was filed to deter anyone else who might have copies of the tape(s) from publishing additional footage, proclaiming: "I'm hopeful today [the lawsuit] sends [a] message to any other entities out there that might be considering posting all or part of this video." *See* Ex. 11.

While Bollea and his counsel publicly purported to object to the brief and almost indecipherable excerpts posted by Gawker, which showed very little in the way of sex, they privately complained to the FBI about the risk that someone might publish Bollea's racist statements.

3. Bollea And His Counsel Watch The Sex Tapes And Hear The Racist Statements On The Tape In December 2012.

The materials produced by the FBI show that by mid-December 2012, both Bollea and Houston actually saw multiple sex tapes, including the one that contained racial slurs. In addition, those materials demonstrate that, in the course of their dealings with Davidson, Bollea and Houston learned that the true value in the tapes was that they depicted Bollea making the racist comments.

As the FBI investigated during the Fall of 2012, it recorded phone conversations between Davidson and Houston (with Houston's consent) in which Davidson described in detail the offensive comments on the tapes. In those conversations, Houston specifically asked Davidson: "Are these three separate events, or are they just three separate . . . DVDS?" Ex. 12 at

GAWKER-1630 (excerpts from FBI transcript of recording of telephone conversation). Davidson responded, "They are three . . . separate events . . . from beginning to end and the files on the DVDs are dated." *Id.*

During subsequent conversations, Davidson explained to Houston that "there's one [sex tape] that's more inflammatory than the others and . . . carries the lion share of the value," while Houston stated: "My client is aware there's some sort of video out there with what's been said to be racial epithets on it and I think everybody is well aware that he is a public figure in a public marketplace and that would be very damaging to him." Ex. 13 at GAWKER-756 (excerpts from FBI transcript of recording of telephone conversation); Ex. 14 at GAWKER-750 (additional excerpts reflecting same). Davidson then provided Houston with a summary transcript of the sex tapes (the "Davidson Summary"), which described some of the racist and homophobic content on one of the tapes. *See* Ex. 15.

Ultimately, after many discussions about the tapes and the value of the video evidence of the racist comments, Davidson agreed to accept $300,000 for the rights to all three tapes. *See* Ex. 13 at GAWKER-762-63 (excerpts from FBI transcript of recording of telephone conversation). As part of that transaction (which, from Davidson's perspective, was a bona fide agreement), Houston and Bollea entered into a written agreement with Davidson, which specified that Davidson's client had three different recordings of three different encounters between Bollea and Heather Clem. Ex. 15. Eventually, the FBI's investigation culminated in a sting operation in which Houston and Bollea met Davidson on December 14, 2012, ostensibly to

purchase the tapes. The meeting and sting operation were recorded by the FBI, in both audio and video.[2]

As reflected on the Sting Audio, Houston and Bollea watched and listened to material portions of all three sex tapes for about ten minutes, and commented on the contents of the tapes as they were watching, with Bollea confirming that it is "definitely me" on the tapes. Ex. 16 at GAWKER-896 (excerpts from FBI transcript of Sting Audio).

After watching some of the footage, Houston specifically asked Davidson, "I'd like to be able to at least [go to] the more damaging part of the tape with the language . . . so I know that's actually on there." *Id.* at GAWKER-897. Houston and Bollea then watched about seven minutes of that tape including portions with some of the racist content, which can be heard on the audio. *Id.* at GAWKER-898; *see also* Ex. 17 (Sting Audio) at 3:01:20– 3:09:15 (Part 1).

Houston and Bollea also listened specifically to a statement by Bubba Clem at the end of that tape about being able to retire rich from the recording. In media reports, this statement was spun to suggest that Bubba Clem knew a sex tape featuring Bollea "could be worth a fortune." Ex. 63 (*TMZ* report, dated Oct. 9, 2012). In reality, as Houston and Bollea saw and heard firsthand, Mr. Clem thought the tapes were valuable for a different reason. As several of the unredacted records produced within the past few weeks uncover, Mr. Clem told his then-wife: "if we ever did want to retire, all we have to do is use that… footage of him talking about

[2] Gawker has not been permitted to see the Sting Video, which has been produced directly to Judge Case. Gawker has filed a separate motion for access to the DVDs produced by the FBI, including to request that the Sting Video be turned over to Gawker or that at a minimum Gawker's counsel be able to review it. It is particularly troubling not to be able to rely on that video here given that Bollea concealed its existence while negotiating the protocol that ultimately led to its being produced to Judge Case. Gawker reserves the right to supplement this fraud on the court motion with additional evidence uncovered as a result of its motion seeking access to the DVDs.

[REDACTED] people."[3] Those records also indisputably show that after watching that portion of the tape, Houston said to Bollea, "My God . . . That's bad," and Bollea responded, "it just totally blows my mind to see that." Ex. 16 at GAWKER-898-99; *accord* Ex. 17 at 3:08:16 – 3:09:43 (Sting Audio recording reflecting same) (Part 1).

In a phone interview with the FBI shortly after the sting operation took place, Houston confirmed to the FBI that "he [Houston], TERRY BOLLEA and KEITH DAVIDSON viewed the DVDs in DAVIDSON's hotel room" and that Davidson had "fast forwarded one of the DVDs to the section which contained racial epithets [sic] and played the section for BOLLEA and DAVIDSON." Ex. 19. Other documents produced by the FBI indicate that, in early February 2013, Bollea reviewed the FBI's transcript of the Sting Audio, including the portion in which he watched the sex tapes and heard both his racist comments and Mr. Clem's "retirement" statement, and confirmed that the audio recording was accurate in a signed statement. *See* Ex. 20 (FBI Form FD-340c indicating that Bollea reviewed transcript); Ex. 16 at GAWKER-803 (cover sheet to FBI transcript, signed by Bollea).

In short, the materials Gawker obtained from the FBI over the past few weeks make clear that, by December 2012 at the latest, Bollea and Houston were fully aware that there were three tapes of three different sexual encounters with Heather Clem, that one of them showed Bollea expressing racist views, and that any commercial value derived not from the tapes' sexual content, but from the footage of Bollea's racist statements.

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[3] *See, e.g.*, Ex. 15 at GAWKER-179 (transcript prepared by Davidson); Ex. 18 at GAWKER-406 (handwritten notes reflecting comment by Mr. Clem, apparently prepared by Davidson's client); Ex. 17 at 3:08:16 – 3:09:43 (Sting Audio recording Mr. Clem's "if we ever did want to retire" statement) (Part 1); Mot. to Access DVDs at 9 (seeking access to DVDs that would show Houston and Bollea watching sex tapes and Mr. Clem making this comment). Pursuant to this Court's order dated April 23, 2015, directing that any offensive language, including references to race, be redacted from all documents and transcripts, we have redacted these documents and the quotation from them in this motion.

B. Bollea's Campaign To Conceal The Existence Of Other Sex Tapes And His Offensive Statements.

When discovery in this case commenced in 2013, Gawker knew nothing about another sex tape with racist comments by Bollea beyond what had been reported in the media, nor did it have any idea there had been an FBI sting operation, and it certainly had no knowledge that the FBI investigation centered on an alleged threat to release Bollea's racist statements. Instead, Gawker set about to discover all facts pertinent to the taping of sexual encounters between Bollea and Heather Clem and about Hogan's public claims that he was seeking an FBI investigation into the sex tape leaked to Gawker. *See, e.g.*, Ex. 21 (*TMZ* report, dated October 14, 2012, stating the Bollea and his lawyer contacted the FBI about sex tape leaked to Gawker). Indeed, prior to this Court's order compelling Bollea to release his communications with the FBI, Houston signed an affidavit that misleadingly stated that the FBI investigation centered on the "source and distribution of the secretly-recorded sex tape" excerpted by Gawker. Ex. 22.

This Court agreed with Gawker and, beginning with the very first discovery hearing in this case, ruled that the proper scope of discovery included:

- The "sexual and/or romantic relationship between Terry Bollea and Heather Clem (as to the time period of January 1, 2002 to the present)," Ex. 23 at ¶ 4 (Feb. 26, 2014 Discovery Order);
- Any law enforcement investigation involving sex tapes depicting Mr. Bollea and Ms. Clem, Ex. 24 at ¶ 3 (April 23, 2014 Order);
- The FBI's investigation into the sex tapes, Ex. 25 (Feb. 26, 2014 FOIA Authorization Order); and
- "All audio and/or video footage that depicts any sexual activity between plaintiff and Heather Clem," Ex. 26 at ¶ 3 (May 14, 2014 Order).

Bollea fought this discovery tooth and nail, often through false statements and other conduct that is not permissible in our legal system.

1. Bollea's Misrepresentations About The Existence Of Additional Sex Tapes And His Racist Statements On One Of Those Tapes.

a. *June 2013 through April 2014*: Bollea And His Team Falsely Claim They Know Nothing About Any Other Sex Tapes

In June 2013, Gawker served its first discovery requests and began taking discovery from Bollea. For the next year, Bollea's team repeatedly disclaimed any knowledge that there were more sex tapes than the 30-minute tape Gawker had received in 2012. For example:

1. In August 2013, in a sworn response to an interrogatory seeking the identification of any sex tapes, Bollea responded: "Responding party ***does not know if any other clandestine recordings exist*** other than the video depicting Responding Party having relations with Heather Clem (which was excerpted and posted by Gawker Media on its website)."[4] Ex. 27 (Bollea's Responses to Gawker's First Set of Interrogatories) at Resp. No. 5 (emphasis added).

2. During a discovery hearing on January 17, 2014, Gawker's counsel referenced news reports about Mr. Clem's "if we did want to retire" comment, explained that comment was not on the tape Gawker received, and suggested that, if true, this statement indicated that another recording existed. In response, Bollea's counsel asserted, "***this is the first time I've ever heard of it***, that apparently maybe the Clems were having a discussion that they were going to get rich from this video." Ex. 28 (Jan. 17, 2014 Hrg. Tr.) at 32:23 – 33:10 (emphasis added).

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[4] As explained below, most fraud on the Court motions involve one significant misrepresentation. Here, Bollea's lies have permeated almost every aspect of this case for most of its life, and, in this motion, Gawker has numbered more than two dozen of the most significant, and has explained their wide-ranging consequences.

3. At his first deposition in March 2014, Bollea was asked: "Do you know whether the other encounters in the bedroom were filmed?" Bollea testified, "***I have no idea***." Ex. 29 (Bollea Dep.) at 291:12-14 (emphasis added).[5]

Each of those statements was false and knowingly so.

During this same period, Bollea and his legal team systematically concealed facts from Gawker that could have led it to learn about the existence of the additional sex tapes and/or the FBI investigation. For instance:

4. In response to an interrogatory asking him to identify all persons with knowledge concerning the allegations in his complaint, Bollea failed to identify a number of people, including (a) Davidson, (b) anyone associated with the FBI investigation, or (c) Mike Walters of TMZ or Nik Richie of *The Dirty*, both of whom Houston told the FBI had contacted him with important information about the sex tapes. *See* Ex. 30 (Bollea's

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[5] Houston attended Bollea's deposition and many of the proceedings referenced in this motion. As an officer of this Court, he had an affirmative ethical obligation at the deposition and at those proceedings to correct the record and prevent this fraud on the Court. *See, e.g.*, Fla. R. Prof'l Conduct 4-3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."); *id.* at 4-3.3(a)(4) ("If . . . the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal."); *id.* at 4-3.3 cmt. ("This rule . . . also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, subdivision (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.").

Rather than fulfill that obligation, and as detailed throughout this motion, Houston remained silent and then testified falsely at his own deposition, thereby violating additional ethical obligations. *See infra* at 13-15, 18-22; *see also* Fla. R. Prof'l Conduct 4-3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); *id.* at 4-3.3(a)(4) ("If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.").

Responses to Daulerio's Interrogatories) at Resp. No. 8; *see also supra* note 1; Ex. 5 (Houston telling the FBI that Walters was a "good source of information").

5. At Bollea's deposition, Bollea was asked whether he had ever heard of Keith Davidson, and he testified that he had no recollection of such a person, even though he had spent months pursuing Davidson's prosecution and met with him as part of the sting operation. Ex. 29 (Bollea Dep. Mar 6, 2014) at 580:22-24.

6. When asked at that deposition whether he had ever seen any documents from a criminal investigation about the sex tapes, Bollea said, "No." *Id.* at 581:12 – 582:15. This, too, was knowingly false. *See, e.g.*, Ex. 31 (FBI Form FD-302 describing meeting with Bollea in which Bollea and FBI agent reviewed the FBI transcript of the sting audio); Ex. 16 (document with Bollea's signature showing that he reviewed transcript of Sting Audio in February 2013).

7. At that same deposition, Bollea and his counsel (including Houston) repeatedly invoked attorney-client privilege as a basis for refusing to answer any questions about complaints Bollea made to law enforcement about the sex tapes, falsely contending to Judge Case that Bollea's knowledge about those topics came exclusively from private communications with Houston and thus was privileged. *See, e.g.*, Ex. 29 (T. Bollea Dep.) at 574:12-21, 576:3-11; *see also* Mot. to Compel at 14-15 (providing additional citations to deposition). Documents subsequently produced by the FBI make clear that Bollea personally met with the FBI and with Davidson. *See, e.g.*, Ex. 8 (FBI case-opening document describing in-person complaint made by Bollea and Houston); Ex. 31 (FBI Form FD-302 describing meeting with Bollea in which Bollea and FBI agent reviewed the sting audio).

8. At Bubba Clem's deposition (which was held the same week Mr. Bollea was deposed), Mr. Clem tried to tell a tale that complemented Bollea's theory of the case, no doubt influenced by his settlement agreement with Bollea that required him to "fully cooperate" with Bollea in his lawsuit against Gawker and to "maintain total confidentiality of all information regarding" Bollea. Ex. 32 (settlement agreement) at ¶¶ 3-4; *see also infra* at note 6. Yet, key portions of Mr. Clem's testimony directly contradicted what he previously had told the FBI. For instance, Mr. Clem told Gawker that Bollea did not know about the cameras in his house and that Bollea did not know he was being filmed. *See* Ex. 33 (B. Clem Dep.) at 238:15 – 239:1, 327:14-24. But, he told the FBI the opposite, stating to FBI agents that Bollea knew about his cameras *and* knew he was being filmed during his sexual encounter with Ms. Clem. Ex. 34 at GAWKER-1180 (FBI Form FD-302 memorializing interview with B. Clem). Likewise, Mr. Clem testified at his deposition that he was aware of only one sex tape featuring Bollea with his ex-wife, Ex. 33 (B. Clem Dep.) at 214:20 – 215:25, despite the fact that the FBI had evidence that he appeared in all three videos. These material inconsistencies in Mr. Clem's testimony only became clear when the FBI produced unredacted documents over the past few weeks.

9. Mr. Clem's cooperation during his deposition also extended to questions about Bollea's racist statements. When Gawker asked about a public report that Bollea used racist language on one of the sex tapes, Bollea's lead counsel objected, representing to Judge Case (who attended Mr. Clem's deposition) that the only sex tape was the one Gawker had received and that "[w]hat we're talking about here is thedirty.com, which is making some sort of an allegation." Ex. 33 (B. Clem Dep.) at 432:9 – 436:11. Mr. Clem had his lawyer follow the lead of Bollea's counsel by objecting as well, arguing that "this is not a quote from

either Mr. Hogan, nor from Mr. Clem." *Id.* at 432:10 – 436:10. Of course, Mr. Clem knew that Bollea had made those statements since he was there when they were made and commented about them to his wife. *See supra* at 8-9. Bollea and Houston, who attended Mr. Clem's deposition, knew that too – but they watched silently as Judge Case sustained the bogus objections.[6]

10. Gawker never had an opportunity to confront Mr. Clem with other contemporaneous evidence of Mr. Bollea's racist language, because Bollea had concealed it. In response to Gawker's initial document requests, Bollea produced some text messages with Mr. Clem, but failed to produce certain key texts from the days immediately before and after he filed suit in October 2012, including texts in which Bollea discussed with Mr. Clem the existence of "more than one tape" and his "racial slurs." *Compare* Ex. 36 (original

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[6] It is no coincidence that Mr. Clem's testimony complemented Bollea's claims: Two days after Bollea sued the Clems, Mr. Clem appeared on the Howard Stern radio show and confirmed that Bollea had used "the 'N' word." Ex. 33 (B. Clem Dep.) at 576:11 – 580:15 (quoting excerpts from October 17, 2012 broadcast of the *Howard Stern Show*). Within days, the two men reached a settlement in which Bollea agreed to let Mr. Clem off the hook for a nominal sum of money as long as Mr. Clem agreed to "not disparage" him, to speak about him only if "the statement is positive," and to "maintain total confidentiality of all information regarding" Bollea. Ex. 32 (settlement agreement) at ¶¶ 1, 3, 6. As Gawker has argued in opposing Bollea's pending motion *in limine* to exclude the settlement agreement at trial, that agreement is a sham. *See* Opp. to Pl.'s Mot. in Limine No. 3 to Exclude Evidence or Argument Related to Settlement at 2-3.

The newly produced FBI documents provide additional evidence that the settlement agreement was a charade. For instance, in the agreement, Bollea agreed not to seek Mr. Clem's prosecution for filming him, which, according to documents just released by the FBI, "was never an issue" to Bollea. Ex. 32 at ¶ 14; Ex. 35 (settlement communication provided to FBI by Houston).

When Gawker sought Bollea's and Clem's communications on this subject, including to demonstrate that the agreement was a sham, Bollea asserted the "settlement privilege," deliberately concealing from this Court that he had waived any privilege by disclosing the details of those negotiations and the proposed terms of a settlement with the FBI. In Gawker's contemporaneously-filed Motion to Compel, it is challenging Bollea's and Clem's invocation of privilege to hide those communications, including because he waived them and because they appear designed to mislead the Court and Gawker about relevant evidence.

production of text messages), *with* Ex. 37 (corrected production). When, over a year later, Bollea finally produced the complete exchange after Gawker had compelled production of records of his texts and phone calls, Bollea and his team tried to explain away the extraordinary coincidence that his original production had excluded some of the most significant communications. Specifically, in a letter submitted both to Judge Case and Gawker's counsel, they stated that Bollea "was not able to see" the missing text messages "when he personally searched his phone for responsive documents" in connection with the original production, and that they had to be recovered by an "IT specialist." *See* Ex. 38 (Ltr. from C. Harder to Hon. James Case and Counsel for Gawker Defendants, dated Oct. 15, 2014). This statement masked the truth. In reality, Bollea and Houston had preserved those very text messages and provided them to the FBI ***two years earlier***. *See* Ex. 39 (FBI Form FD-302, dated October 24, 2012, which references the "text messages provided by HOUSTON between BOLLEA and BUBBA"); Ex. 40 (complete set of text messages Bollea produced to the FBI, including those belatedly produced to Gawker two years later); *see also* Ex. 41 at GAWKER-16 (Bollea telling the FBI that he "keeps all text messages and provides them to Houston").

b. *April 2014 through June 2015*: The Bollea Team Falsely Accuses Davidson Of Fabrication And Makes Material Misrepresentations To The Court To Conceal Their Own Misconduct

In the Spring of 2014, Bollea's strategy of completely concealing the existence and nature of the FBI investigation and the additional sex tapes, began to become untenable. Bollea was required to produce his own communications with the FBI, including both the Davidson Summary (which he redacted to excise the racist language) and a letter from the U.S. Attorney detailing that there were three DVDs. *See* Ex. 42 (version of Davidson Summary produced by

Bollea); Ex. 55 (letter). Around the same time, a New York talent agency responded to a subpoena served by Bollea by producing a timeline of two of the tapes. That timeline, like the Davidson Summary, showed that Bollea had made racial slurs on one of the sex tapes, as well as a "real [REDACTED] comment." *See* Ex. 43. Also, just like the Davidson Summary, the timeline showed that Bubba Clem's "retirement" comment referred to Bollea "talking about [REDACTED] people." *Id.* Thus, by this point in the litigation, tangible evidence had been produced that there were three videos, including one containing racist language.

After receiving these new materials, Gawker moved for discovery sanctions against Bollea based on the misrepresentations described above – or at least the ones it knew about at the time. In response to Gawker's motion, Bollea and his legal team doubled down, responding with more obfuscation and misrepresentation. No longer able to hide the existence of the FBI investigation, the nature of that investigation, or that allegations of racist statements played some role in the investigation, they shifted gears, perpetrating a related, but different fraud. From that point on, they repeatedly maintained that (a) they did not know whether there were three tapes or three *copies* of one tape, (b) the Davidson Summary was a fabricated document concocted by an extortionist (*i.e.*, Davidson), and (c) no tape with racist comments actually existed. In order to perpetrate this fraud, Bollea's team flatly – and falsely – denied that they had ever seen any video or heard any audio of any other sex tapes. For example:

> 11. In May, Bollea sought a protective order to allow him to permanently redact "offensive language" from the timeline produced by the talent agency and from the Davidson Summary. In support of his motion, he argued that the Summary "was written by an unknown non-party and which purportedly relates to ***an alleged video that might not even exist***," claimed that "there is no competent evidence that Mr. Clem ever made the

[retirement] statement," and told the Court that "the offensive terminology, the extortion attempt, and the alleged video . . . might not even exist and ***none of the parties has ever seen*** or possessed" it. Ex. 44 (Reply in Support of Protective Order, filed on June 16, 2014) at 2, 5, 6 (emphasis added).

12. In Bollea's opposition to Gawker's sanctions motion, he argued that "***Mr. Bollea and his counsel do not have any personal knowledge that more than one sex video exists*** (the video produced by Gawker) . . . The documents created by an unknown extortionist purporting that there might possibly be as many as three different videos, are unauthenticated, lack foundation, are unreliable, and are hearsay. ***No party in this action is aware of any more than one video***. . . ." Ex. 45 (Confidential Supplemental Opposition, filed on June 18, 2014) at 3, 7 (emphasis added).

13. At a July 18, 2014 hearing before the Special Discovery Magistrate addressing Gawker's sanctions motion, Bollea's counsel argued – with Bollea sitting beside him – that Gawker "[t]alks about how there exists certain other tapes. . . . ***Mr. Bollea has never seen any of those tapes. Nobody on either side of this table . . . has ever seen any of these supposed tapes. We don't know if they exist or not.***" Ex. 46 (July 18, 2014 Hrg. Tr.) at 51:23 – 52:6 (emphasis added); *see also id.* at 78:4-8 (addressing letter from U.S. Attorney referencing three DVDs, and stating, "Maybe it's three copies of the same thing. We don't know. ***We've never seen it.***") (emphasis added).

14. During the continuation of his deposition on April 8, 2015, Bollea ultimately admitted that Davidson had displayed three DVDs during the 2012 sting operation, but falsely claimed he did not actually watch any of them. Ex. 29 (T. Bollea Dep.) at 802:15-19. Bollea's counsel then asked Judge Case (who attended the deposition) to preclude Gawker

from even asking Bollea about whether the Davidson Summary was an accurate account of the sex tapes. Bollea's counsel argued, again, that the questions were predicated on a fabricated document and there was only one sex tape:

> MR. SULLIVAN (Gawker's counsel): The whole point here is there are these three sex tapes.
>
> MR. HARDER: *No, they're not*. You don't know what you're talking about.

Id. at 822:20-23 (emphasis added). Although Bollea's counsel's statement and the basis of repeated objections were false, the fraud that Bollea and his legal team perpetrated on Judge Case was successful. Judge Case credited Bollea's objections, accepting his phony argument that the Summary was "a fictitious document" making "a fictitious allegation." *Id.* at 825:12-19. Judge Case prohibited Gawker from asking any questions about whether Bollea had actually made any racist statements to Ms. Clem or even whether Bollea knew any of the people that were named in his racist statements, "unless anything can be substantiated or proven that [the sex tape] actually existed other than in the mind of somebody who is doing blackmail against Mr. Bollea." *Id.* at 824:9-23.

15. Perhaps most disturbingly, on April 10, 2015, this pattern of misrepresentation continued during the deposition of Houston, an officer of the Court admitted *pro hac vice* in this case. At that deposition, which also was attended by Judge Case, Houston provided testimony under oath that disclaimed ***any knowledge*** about the contents of ***any of the tapes***. Houston swore that, during the December 2012 sting operation, Bollea only viewed "a very brief snippet" of one sex tape, while he himself viewed only three short clips of footage, each for just a few seconds. Ex. 47 (D. Houston Dep.) at 202:20 – 203:6, 212:1-6. As a result, Houston claimed not to know whether there were three videos or just three copies of the same video. Most strikingly, Houston swore that he had no knowledge of anything that was

said on any of the DVDs, testifying that "***I don't think the audio was turned up, now that you mention it. I don't remember hearing the audio***," and flatly telling Gawker's counsel "***No, I didn't hear any voices***." *Id.* at 214:22-23, 223:9-12. This testimony was undeniably false. The Sting Audio and FBI documents show that Bollea and Houston watched substantial portions of the tape that included Bollea's racist statements and then verified that they heard and watched those statements to the FBI. *See* Part A *supra* (describing Sting Audio and other FBI records reflecting Bollea's and Houston's statements to the FBI).

16. Just as disturbingly, Houston falsely testified that in his initial conversations with Davidson, Bollea's racist statements "***[n]ever even came up***." Ex. 47 at 157:14-18 (emphasis added). He then testified – again falsely – that Davidson first mentioned the racist statements "***toward the end***" of their dealings. *Id.* at 180:4-25 (testifying that "I know it was toward the end" and that the issue arose in their "final conversations" or "the day everybody met . . . December 12th"). In fact, as the unredacted FBI documents show, in their very first meeting with the FBI, Houston and Bollea told the FBI that on October 12, 2012, Davidson told Houston about the racist statements and emphasized that those "racial epitaphs [sic] . . . could hurt Bollea's career if released." Ex. 4; *see also* Ex. 8 (same).

17. Bollea and his legal team continued these misrepresentations directly to this Court. For instance, on April 22, 2015, Bollea's lead counsel represented to this Court – again with Houston sitting with him at counsel table – that the "allegation of . . . a racial statement" contained in the Davidson Summary has "never been substantiated. Allegedly, according to the extortionist, there is a tape that contains this. ***No one in this room or any of the parties has ever seen this tape***, has ever received this tape, ***knows anything about this***

tape other than [that] an extortionist said it occurred." Ex. 48 (April 22, 2015) at 70:23–71:23 (emphasis added).

18. On June 12, 2015, Bollea filed a motion *in limine* to exclude any evidence of additional sex tapes or any reference to his racial comments. In that motion, Bollea's counsel represented to the Court that "***Mr. Bollea did not and does not have personal knowledge whether there exist more recordings than the 30-minute video that was sent to Gawker by an 'anonymous' source.***" Ex. 49 at 3, n.1 (emphasis added); *id.* at 6 (describing the Davidson Summary as "alleged summaries of alleged recordings created by an unknown person as part of an extortion attempt; ***there is no evidence the recordings actually exist or contain the languag***e included on the alleged summaries") (emphasis added).

All of the statements described in this section, some of which were made under oath and others of which were made in filings on Bollea's behalf and signed on Houston's behalf, were false and knowingly so.

c. *July 2015*: Hogan's Team Continues To Falsely Deny Any Knowledge About Racist Comments On A Sex Tape

Bollea and his legal team continued to perpetrate this same deception up to the eve of the trial of this case, which was originally scheduled to commence in early July 2015. Incredibly, they continued their fraud even *after* the FBI produced three DVDs containing three separate sex tapes, each of which Bollea and Houston had seen years before:

19. On June 29, 2015, as a result of Gawker's FOIA litigation, the FBI produced directly to the trial court the three DVDs containing the three sex tapes. However, one of them contained defective audio and the others did not contain racist comments. On June 30, at the direction of the Court, counsel for both parties – including Houston – watched the DVDs. Houston never told Gawker's counsel that he had seen the videos previously or that

the audio did not match what he had heard in December 2012. Likewise, when the problems with the DVDs were discussed in Court the next day, he did nothing to alert the Court to what he knew to be the truth.

20. On July 1, at the Court's motions *in limine* hearing, Bollea's lead counsel, Charles Harder – with Bollea and Houston sitting at counsel table – seized on the defective audio to argue to this Court that, "even if there is another third DVD which allegedly has the things that they have been speculating might be on there, ***it could be an extortionist manipulating the audio through an impersonator, or who knows what***, and adding things." Ex. 50 (July 1, 2015 Hrg. Tr.) at 201:5-11 (emphasis added).

21. Bollea's co-counsel was even more emphatic: "These tapes – and I will be a little bit more pointed than Mr. Harder was vis-à-vis their technical constitution. . . . ***It looks like these things were manipulated. Okay? And they don't say what they said they were going to say, anyway.***" *Id.* at 246-47 (emphasis added).

After considering these arguments, the Court granted Bollea's motions to exclude all evidence that showed there was more than one sex tape or suggested Bollea had made offensive statements. However, the Court's ruling was without prejudice because the FBI had yet to produce its records. *Id.* at 216:25 – 217:8.

2. Bollea's Attempts To Thwart Gawker From Uncovering His Fraud

Gawker was only able to fully unravel the many layers of deception perpetrated by Bollea and his legal team, and piece together the true facts, because of the materials it obtained as a result of its FOIA lawsuit following the motion *in limine* hearing. Gawker was able to obtain these materials despite Bollea's and his legal team's repeated misconduct in attempting to prevent Gawker from doing so. Indeed, from the outset of Gawker's effort to obtain discovery

from the federal government, Bollea and his lawyers engaged in a systematic cover-up designed to conceal the nature of the FBI's investigation, its true focus, or what it uncovered.

First, Bollea tried to squelch Gawker's ability to learn any information from the federal government. Prior to Gawker seeking records from the government about the FBI investigation, Houston told the press that he and Bollea had "contacted the FBI to track down the sex tape leaker" for allegedly "distributing the illegal footage to the media." Ex. 21 (*TMZ* report, dated October 14, 2012). That press statement was the basis for Gawker's request for Bollea and Houston to sign FOIA authorizations permitting Gawker to obtain documents from the FBI and U.S. Attorney's office. In contesting that request, Bollea and his legal team made a series of misrepresentations to the Special Discovery Magistrate, this Court, and the District Court of Appeal about the FBI investigation. For instance:

22. In his January 29, 2014 opposition to Gawker's motion to compel the execution of the FOIA authorizations, which was heard by the Special Discovery Magistrate, Bollea contended that Gawker's FOIA request "could disrupt or destroy ***an ongoing investigation or prosecution***." Ex. 51 at 3 (emphasis added).

23. In the Exceptions to the Special Discovery Magistrate's ruling that Bollea filed with this Court on February 12, 2014, Bollea repeated this same contention and further suggested that "***Gawker (as the publisher) is one of the targets***" of the FBI's investigation. Ex. 52 at 3-4 (emphasis added).

24. And, in a sworn affidavit submitted to the District Court of Appeal in connection with Bollea's effort to appeal this Court's order, Houston attested that the FBI investigation focused on "the source and distribution of the secretly-recorded sex tape" excerpted by Gawker. Ex. 22 at ¶¶ 2-3.

Each of these representations was false – as both Bollea and Houston knew at the time. In July 2013, Houston was informed by the FBI that its investigation was over and that the United States Attorney declined to prosecute anyone. *See, e.g.*, Ex. 53; Ex. 54; *see also* Ex. 55 (correspondence to Houston from September 2013 regarding disposition of evidence collected during FBI investigation). In addition, Bollea and Houston knew at the time that Davidson, not Gawker, was the target of the FBI's investigation. And, Bollea and Houston knew that the investigation concerned Davidson's alleged extortion in connection with three sex tapes – and especially Bollea's racist comments. *See id.* (letter from U.S. Attorney to Houston identifying Davidson as target of investigation and stating that government would hold the three sex tape DVDs seized in the investigation); *see also* Ex. 56 (letter from U.S. Attorney's office stating that Gawker was not a target of the investigation).

Second, and more disturbingly, the newly produced FBI records expose the pervasiveness of Bollea's cover-up. After Bollea and his legal team lost their legal fight and were ordered to execute the FOIA authorizations, they attempted to exploit their contacts within the FBI and the United States Attorney's Office to get them not to cooperate with Gawker's FOIA request. For example:

25. On March 5, 2014, Houston sent an email to Special Agent Jason Shearn, the FBI agent who led the FBI investigation, informing him that Judge Case had recommended that Bollea and his counsel be ordered to execute the FOIA authorizations and requesting that Shearn "be so kind as to ***register our objection despite the execution of the Freedom of Information Act form***." Ex. 57 (emphasis added).

26. Then, on September 8, 2014, after the District Court of Appeal rejected Bollea's attempt to appeal this Court's order on the FOIA authorizations, Houston sent an email to

Assistant United States Attorney Sara Sweeney (copying Shearn) in which he informed her that "the Court has ordered us to have Mr. Bollea sign the FOIA Request." Ex. 58. In that email, Houston stated:

> Please be advised while Mr. Bollea is signing the FOIA [authorization], it is done so under the order of the Court and not because he made a decision to do so of his own violation [sic]. . . . I do not believe the FOIA request would require or in any way cause you to turn over the videos to anyone. If I am mistaken please advise so we may receive the necessary Court Order to protect the videos themselves. ***As you are aware, it has been our goal to prevent the dissemination of the videos and or any language as it concerns the videos whether it be audio or otherwise.***

Id. (emphasis added).

These communications, in which Houston attempted to undermine this Court's order, were never produced to Gawker by Bollea, either in response to document requests to Bollea or the subpoenas Gawker separately served on Houston and his law firm. As with so many of the materials that have revealed the misconduct of Bollea and his legal team, Gawker only learned of these documents when they were produced in response to its FOIA requests.

3. Bollea's Admission That He Made The Racist Statements

Bollea only abandoned his pretense that there was not an additional sex tape containing racist statements once that fact was reported by the *National Enquirer* on July 24, 2015. Although Bollea's team had repeatedly claimed that they knew nothing about such alleged statements and that they were fabrications, Bollea immediately issued a statement to *People Magazine* in which he admitted the accuracy of the *Enquirer*'s report. Ex. 59. Remarkably, despite this public admission, Bollea's team has continued to shade the truth in court. Most recently, his lawyers filed a brief with the District Court of Appeal in which they referred to their client's admittedly racist statements as "Davidson's use of ***alleged offensive language*** to extort

Mr. Bollea," Ex. 60 at 34 (emphasis added), and characterized the Davidson Summary as "a ***purported, unauthenticated*** 'summary transcript'," *id.* at 11 (emphasis added).

C. The Far-Reaching Ramifications Of Bollea's Fraud

It is no secret that Gawker believes that Bollea's efforts to conceal his racist slurs explain a great deal, including the manner in which he has litigated this case and the true reason he experienced distress. The FBI's records unambiguously show that Bollea's distress was caused, in whole or in substantial part, by the fact that he was concerned that the public might see and hear the footage of him making racist statements. Indeed, that is what prompted him to complain to the FBI before filing this lawsuit. *See* Mot. to Access DVDs at 10-11. But his efforts to hide that fact led him to conceal many others and to try to block discovery from the FBI at all costs. This in turn had consequences for this case that were far more wide-ranging:

1. The pattern of fraud hid the sex tapes themselves, which include evidence that directly contradicts sworn testimony not only by Bollea and Houston (who watched portions of all three tapes), but also by Bubba Clem and Heather Clem, with Mr. Clem testifying falsely that he was aware of only one encounter between Bollea and his then-wife (even though he appears on all three tapes) and with Ms. Clem testifying that she was unaware that she was being recorded (even though she is shown talking with her husband about what he will see when he watches the tape). *See* Mot. to Access DVDs at 6-7.

2. The pattern of fraud hid FBI records that contradicted Bollea's testimony that he was unaware of cameras in the Clems' house (he told the FBI he knew about them and asked Mr. Clem before the sexual encounters whether he was being filmed). *See* Ex. 41.

3. The pattern of fraud hid FBI records memorializing Bubba Clem's statements to the FBI that Bollea knew he was being filmed and was in on the taping, directly contradicting both his and Bollea's testimony in this action. *See* Ex. 34.

4. The pattern of fraud hid other FBI records that prevented Gawker from fully cross-examining Mr. Clem with evidence of his "if we ever did want to retire" comment, which bears on an array of core facts, ranging from why the Clems filmed Bollea's encounters with Heather Clem to why they kept the footage.

5. The pattern of fraud hid records about the reason the tapes had commercial value. In particular, the pattern of fraud hid (a) information about the negotiations for the proposed sale of the three tapes to Davidson, including statements by Houston and Bollea reflecting their understanding that the tapes' value – pegged by Davidson at $300,000 – was derived from Bollea's racist statements not the sexual content; (b) Bubba Clem's statement that the tapes' value derived from Bollea's statements about "[REDACTED] people"; and (c) consistent with all of this hidden evidence, that TMZ obtained portions of the tapes for a mere $8,500, *see* Ex. 61 (Form FBI FD-302 memorializing interview with witness who described sale of sex tape excerpts to *TMZ*); Ex. 62 (excerpts from Tampa Bay Police Department Report relating to same witness) at 18.

ARGUMENT

I. THE LEGAL STANDARDS GOVERNING MOTIONS TO DISMISS FOR A FRAUD ON THE COURT

A "fraud on the court" occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox v.*

Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (quoting *Aoude v. Mobil Oil Corp.,* 892 F.2d 1115, 1118 (1st Cir. 1989). Generally, litigation conduct that "undermine[s] the integrity of the courts by creating a mockery of the principles of justice through [a party's] deceitful misconduct" subjects a lawsuit to dismissal for perpetrating a fraud on the court. *Cabrerizo v. Fortune Int'l Realty*, 760 So. 2d 228, 230 (Fla. 3d DCA 2000). Florida law is clear that a "trial court has a duty and an obligation to dismiss a cause of action based upon fraud." *Long v. Swofford*, 805 So. 2d 882, 884 (Fla. 3d DCA 2001).

The conduct that has most frequently been found to constitute a fraud on the court involves plaintiffs who seek damages for personal injuries but mislead the defendants and the Court about the existence of other potential causes of their alleged injuries. Often, the fraud is discovered only because the defendants were able, through independent means, to obtain records proving a fraud.

For example, in *Cox* the Fifth District dismissed a malpractice suit after finding that the plaintiff had lied about whether she had sustained any fractures or other injuries prior to the slip and fall that was at issue in the malpractice suit. 706 So. 2d at 46. Similarly, in *Distefano v. State Farm Mut. Auto. Ins.*, 846 So. 2d 572, 574-75 (Fla. 1st DCA 2003), the District Court of Appeal affirmed the dismissal of the appellant's action, holding that she gave false information or omitted information concerning a prior accident and a prior shoulder injury, which opposing counsel discovered through medical records obtained through independent investigation. Likewise, in *Morgan v. Campbell*, 816 So. 2d 251 (Fla. 2d DCA 2002), the Second District Court of Appeal found dismissal was the proper remedy for a fraud where the plaintiff lied about prior injuries and treatment for the pain she contended was caused by the accident that was the subject of the lawsuit. And, in *Metro Dade County v. Martinsen*, 736 So. 2d 794, 796 (Fla. 3d

DCA 1999), the appeals court emphasized that "'[t]he integrity of the civil litigation process depends on truthful disclosure of facts,'" reversed a jury verdict, and remanded for dismissal a case in which the plaintiff had provided incomplete and ambiguous information about her treating physicians in discovery (quoting *Cox*, 706 So. 2d at 47). *See also Long*, 805 So. 2d at 882 (affirming dismissal because plaintiff concealed facts about alternative causes of the alleged damages); *Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233, 1234 (Fla. 4th DCA 1999) (affirming dismissal because the plaintiff made "numerous and repeated misstatements of fact designed to intentionally thwart defendants from conducting discovery"); *Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149, 150 (Fla. 1st DCA 2000) (affirming dismissal where trial court found that plaintiff "knowingly and intentionally concealed [facts about his alleged injury] in an attempt to gain an unfair advantage in this litigation"); *Savino v. Florida Drive-In Theatre Mgmt., Inc.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997) (affirming dismissal because plaintiff "lied about matters which went to the heart of his claim on damages"); *O'Vahey v. Miller*, 644 So. 2d 550, 551 (Fla. 3rd DCA 1994) (affirming dismissal where plaintiff made "repeated lies under oath . . . which were uncovered and which he was then forced to admit only because of the assiduous efforts of opposing counsel").

II. THIS CASE SHOULD BE DISMISSED FOR FRAUD ON THE COURT.

Bollea's efforts to mislead Gawker, the Special Discovery Magistrate, this Court, and the District Court of Appeal about key facts is a classic example of the type of conduct that merits dismissal. Bollea is essentially bringing a claim for alleged personal injuries, including alleged emotional distress, mental suffering, and lost income.

To recover damages for the alleged invasion of his privacy, Bollea must, among other things, prove that Gawker's publication was the proximate cause of his alleged damages.

Restatement (Second) of Torts § 652H, cmt. c (tort of publication of private facts requires a showing of "actual injury"). If he cannot make that showing, Bollea's recovery would be limited to, at most, nominal damages even if he proves all the elements of his privacy claims and overcomes Gawker's First Amendment defenses. *Cason v. Baskin*, 30 So. 2d 635, 637 (Fla. 1947) (plaintiff had failed to prove any actual mental distress and humiliation as a result of defendant's publication, so her privacy claim was limited to nominal damages); *Doe v. Beasley Broadcast Group, Inc.*, 105 So. 3d 1 (Fla. 2d DCA 2012). Moreover, to establish liability on his claim for intentional infliction of emotional distress, Bollea must prove that Gawker's publication proximately caused "severe" emotional distress. *Clemente v. Horne*, 707 So. 2d 865, 866-67 (Fla. 3d DCA 1998). As a result, for each of these claims, it is beyond dispute that, as in any other personal injury lawsuit, Gawker is entitled to discover and present to the jury evidence that (1) Bollea did not suffer emotional distress, and/or (2) any distress he may have suffered was not proximately caused by the brief excerpts of a sex tape that Gawker published, but rather was entirely or largely caused by something else for which Gawker has no responsibility.

The same is true with respect to Bollea's claim for commercial misappropriation. The measure of damages for that claim is the "loss" of potential income, such as "an amount which would have been a reasonable royalty." Fla. Stat. § 540.08(2); *see also Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1001-03 (Fla. DCA 4th 2004) (plaintiff was entitled to damages for right of publicity claim based on the royalty value of his name and likeness). Bollea has claimed that the brief, grainy Video Excerpts are worth tens of millions of dollars because those Excerpts showed him engaged in sexual conduct. But, Gawker is entitled to discover and present to the jury evidence that the value was far less, including the fact that Davidson negotiated a payment of $300,000 for three entire sex tapes and that TMZ paid just $8,500 for access to a

portion of the tapes. And, it is allowed to discover and present evidence that any value that the tapes might have had come from something other than their depiction of Bollea and Ms. Clem's sexual encounter. As Bubba Clem, Davidson, Houston, and Bollea all recognized – the value of the tapes came from what Bollea "said about [REDACTED] people."

Houston expressed the truth most clearly on the Sting Audio when he explained that "the more damaging part of the tape" from Bollea's perspective was not the portion that depicted him having sex with Heather Clem. Rather, it was the segment that contained racial slurs. There is by now a wealth of evidence that Gawker had to uncover by independent means, including by filing a separate federal lawsuit, which strongly supports its contention that if Bollea suffered any emotional distress following Gawker's publication, it was because (as he texted to Bubba Clem) he "kn[ew] there's more than one tape out there," was aware that one of the tapes showed him making "several racial slurs," and feared that "there is a lot more coming." As Bollea and Houston told the FBI at the time, the possible release of that footage – unlike the publication of the Gawker Excerpts – "would be very damaging to him." And, there is a wealth of evidence that the commercial value of the tapes was far less than Bollea claims, and that "the lion share of the value" derived not from those tapes' sexual content, but from the fact that one showed him making racist statements.

Bollea, of course, is free to dispute Gawker's defenses regarding his claims, including causation of damages and the measure of those damages, just as any plaintiff is free to do in a personal injury case. What Bollea plainly may not do is to defraud the Court and Gawker regarding the very existence of evidence bearing on those defenses. Here, the record is clear and convincing that is exactly what he and his counsel have done. For more than three years, Bollea and at least one of his counsel of record have had personal knowledge that there were three sex

tapes and that one of them contained offensive language. Yet they have repeatedly denied those facts in sworn interrogatories and deposition testimony, and presented numerous false and misleading arguments to the Court about their existence that continued up to the eve of the original trial date. They even sought, and temporarily succeeded, in barring Gawker from presenting any evidence about other causes of Bollea's alleged damages by arguing that it was likely fabricated, which they knew to be false. Gawker's counsel has been able to independently discover this fraud only after expending years of time, effort and resources; indeed, had the trial of this case commenced as originally scheduled it would have been too late. This case thus presents exactly the circumstances that supports dismissal of a case for a fraud on the Court. *See, e.g.*, *O'Vahey*, 644 So. 2d at 550.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that this Court dismiss this case, with prejudice.

December 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 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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