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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.

_______________________________________/

PLAINTIFF TERRY BOLLEA'S MOTION IN LIMINE NO. 22 TO EXCLUDE EVIDENCE OR ARGUMENT SUPPORTING GAWKER'S GOOD FAITH DEFENSE BASED ON ADVICE OF COUNSEL

Plaintiff Terry Bollea, known professionally as "Hulk Hogan" ("Bollea"), hereby moves this Court in limine under Fla. Stat. §§ 90.104 and 90.510, for an Order prohibiting the Defendants from introducing any evidence or argument, during any portion of the trial, referencing defendants' communications with counsel to support their "good faith" defense.

In support of his motion, Mr. Bollea states the following:

1. Defendants are asserting "good faith" as a defense to Mr. Bollea's claim under Florida's Security of Communications Act and may argue "good faith" to try to avoid liability for punitive damages. They may try to elicit testimony regarding alleged communications between Gawker's employees and Gawker's counsel concerning the publication of the Sex Video. Most notably, Gawker may attempt to introduce evidence and argue that it conferred

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with counsel before publication of the Sex Video to justify a defense of "good faith." However, when asked about these communications at their depositions, Defendants refused to answer and instead asserted the attorney-client privilege.

2. A party that prevents discovery on a matter by asserting a privilege cannot later use that evidence at trial. *See* Fla. Stat. § 90.510 (stating that the court may dismiss a claim or affirmative defense when a party claims a privilege to a communication necessary to the adverse party); *see also Int'l Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) (stating that "failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence"); *S. Bell Tel. & Tel. Co. v. Kaminester*, 400 So. 2d 804, 806 (Fla. 3d DCA 1981) (same).

3. Gawker Media, LLC's Chief Operating Officer, Scott Kidder, testified as its corporate designee as follows:

> Q: To the best of your knowledge, did Gawker make any attempt to determine whether it was legal to post the Hulk Hogan sex tape video prior to its publication?
> A: Outside of any discussion with counsel, which is my understanding would be privileged, no.
> Q: Okay. Same question with respect to the, to the written sex narrative that accompanied the, the excerpts on the video?
> MR. BERLIN: Objection to the description of it as a sex narrative. You can answer the question.
> A: I mean, again it's not uncommon for editors to consult with legal, of course those discussions would be privileged, outside of that, no.

[Deposition taken October 1, 2013 at page 232, lines 7-23].

4. Defendant A.J. Daulerio, Gawker.com's Editor-In-Chief, testified as follows:

> Q: In editing the tape down from 3 minutes to 1 minute 41 seconds you could have edited out all the explicit footage, could you not?
> A: Yes.
> Q: And the decision not to do that, was that your decision solely?
> A: Yes, for the most part. I mean, I did have a discussions with Gawker's legal team.

> MR. MIRELL: And any, any question that I would ask the witness about what was said by the legal team to him or that he said to that legal team you would object to and instruct?
> MR. BERLIN: Yes.
> Q: Okay. And you would take that instruction?
> A: Yes.

[Deposition taken September 30, 2013 at page 194, lines 7-25].

5. Because Defendants invoked the attorney-client privilege to thwart discovery regarding the communications with counsel, upon which the good faith defense is based, they cannot use, make reference to, nor rely upon **any** communications with counsel at trial. *International Telephone*, 60 F.R.D. at 185 (M.D. Fla. 1973) (stating that "the privilege was intended as a shield, not a sword. Consequently, a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving."); *see also Hoyas v. State*, 456 So.2d 1225, 1229 (Fla. 3d DCA 1984) (same).

For the foregoing reasons, Mr. Bollea requests that the Court enter an Order prohibiting Defendants from introducing any evidence or argument at trial concerning communications with counsel regarding the publication of the video at issue.

Respectfully submitted,

/s/ Kenneth G. Turkel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 12th day of June, 2015 to the following:

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