EXHIBIT D to
Plaintiff's Notice of Filing
Amended Motions in Limine #7, 8, 9 and 18

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 AMENDED MOTION IN LIMINE NO. 18 TO EXCLUDE EVIDENCE OR ARGUMENT RELATED TO UNDISCLOSED EXHIBITS USED TO AMBUSH PLAINTIFF AT HIS DEPOSITION

Plaintiff Terry Bollea, professionally known as "Hulk Hogan" ("Mr. Bollea"), hereby moves this Court in limine under Fla. Stat. §§ 90.104, 90.401, 90.402 and 90.403 for an Order prohibiting Defendants from introducing any evidence or argument, during any portion of the trial, associated with documents that were required to be produced in discovery by Defendants **before** Mr. Bollea's deposition, but which Defendants intentionally failed and refused to produce (even after Mr. Bollea's meet and confer efforts to obtain them prior to the deposition), and then used to ambush Mr. Bollea during his deposition.

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

1. Mr. Bollea's claims in this case arise out of defendant Gawker Media, LLC's ("Gawker") publication of a secretly filmed recording of Mr. Bollea naked and engaged in sexual

relations with Heather Clem (the "Sex Video"). Mr. Bollea has brought claims for invasion of privacy and related torts. Gawker's central defense is that the publication of the Sex Video is protected by the First Amendment as a matter of "legitimate public concern."

2. Gawker intends to introduce evidence or argument relating to exhibits it intentionally withheld from discovery and then used to ambush Mr. Bollea at his deposition. These exhibits (Deposition Exhibits 77-84, 100 and 103-106) included:

a. Depo. Ex. 77 – Book Entitled "Hulk Hogan, My Life Outside the Ring," co-authored by Terry Bollea and Mark Dagostino [Gawker Trial Exhibit #68];
b. Depo. Ex. 78 – Website post purportedly sharing Hulk Hogan's views on Personal Branding, Family Life and Reality TV;
c. Depo. Ex. 79 – December 23, 2012 *Tampa Bay Times* article entitled "Hulk Hogan to Open Tampa Restaurant New Year's Eve" [Gawker Trial Exhibit #69];
d. Depo. Ex. 80 – Video Advertisement for Hogan's Beach Restaurant (depicting male roller blader in short jean shorts) [Gawker Trial Exhibit #234];
e. Depo. Ex. 81 – Video Advertisement for Hostamania (depicting Mr. Bollea riding wrecking ball) [Gawker Trial Exhibit #232];
f. Depo. Ex. 82 – Book Entitled "Hollywood Hulk Hogan," co-authored by Terry Bollea and Michael Jan Friedman [Gawker Trial Exhibit #70];
g. Depo. Ex. 83 – Bubba the Love Sponge Show dated 11/14/06 (discussion regarding cameras at Bubba Clem's radio station).
h. Depo. Ex. 84 – October 10, 2012 post on www.wrestlinginc.com titled "Hulk Hogan Interview – Sex Tape Release, Aces & 8s Reveal, Bound for Glory, Austin Aries and More" [Gawker Trial Exhibit #71];
i. Depo. Ex. 100 – August 12, 2013 *Cape Breton Post* article entitled "Hulk Hogan Talks to Toronto" [Gawker Trial Exhibits #82, #446];
j. Depo. Ex. 103 – Hulk Hogan YouTube Video (depicting Mr. Bollea going to the bathroom in hospital while on medications following surgery) [Gawker Trial Exhibit #271];
k. Depo. Ex. 104 – Bubba the Love Sponge Show, Hour 3, dated February 9, 2006 (on-air conversation with Mr. Bollea) [Gawker Trial Exhibit #238];
l. Depo. Ex. 105 – Bubba the Love Sponge Show, Hour 3, dated October 20, 2006 (on-air conversation with Mr. Bollea) [Gawker Trial Exhibit #242];
m. Depo. Ex. 106 – Bubba the Love Sponge Show, Hour 3, dated August 28, 2006 (on-air conversation with radio guest regarding sex) [Gawker Trial Exhibit #239].

3. On May 21, 2013, Mr. Bollea propounded his first set of requests for production of documents to Gawker. On July 25, 2013, Gawker served its objections and responses to those

requests. On January 28, 2014, Mr. Bollea propounded his first supplemental request for production of documents to Gawker (the "Supplemental Demand"), which demanded that Gawker produce all documents responsive to Mr. Bollea's requests for production that had not been previously produced, such as documents acquired by Gawker after Gawker's July 25, 2013 production date. Documents responsive to the Supplemental Demand were due, at the latest, on March 4, 2014, two days before Mr. Bollea's deposition was scheduled to begin on March 6, 2014. One of the purposes of the Supplemental Demand was to ensure that Mr. Bollea would not be ambushed with newly-produced documents during his deposition.

4. On February 4, 2014, Gawker's counsel, Alia Smith, asked for an extension of time to respond to the Supplemental Demand, until March 20, 2014. Mr. Bollea's counsel, Charles Harder, responded that he would agree to an extension to March 20, 2014, but only if Gawker agreed to produce any documents to be used at Mr. Bollea's deposition before the deposition. Gawker refused to agree to Mr. Bollea's condition for the extension, claiming: "We do reserve the right to use documents that we as their counsel have gathered in preparing our case – i.e., our work product, particularly those documents that are equally available to the plaintiff." Harder Aff., Ex. A (The Affidavit of Charles J. Harder and exhibits thereto filed with Mr. Bollea's previous motion for sanctions and preclusion is appended hereto). Mr. Harder responded: "Documents that you acquire, as counsel acting for your clients, are within the legal control of your clients and therefore must be produced. Unless you produce your responsive documents on the original due date, I will object to the introduction of all such documents . . . ." *Id.* The record is clear that Mr. Bollea's counsel did not grant an extension for the production of responsive documents that would be used at Mr. Bollea's deposition, and preserved all rights

regarding objecting to the admissibility of all documents used at Mr. Bollea's deposition that were responsive to his document requests and not produced prior to the dates of his deposition.

5. On March 4, 2014, Gawker served its written responses to Mr. Bollea's Supplemental Demand. Gawker did not produce any responsive documents at that time. Rather, Gawker began to produce documents responsive to the Supplemental Demand on March 21, 2014, some two weeks **after** Mr. Bollea's deposition.

6. On March 6-7, 2014, Mr. Bollea was deposed, and Gawker marked the 13 exhibits, referenced above, all of which were responsive to Mr. Bollea's previously-propounded requests for production. Gawker had not produced those documents in discovery and disclosed them for the first time **at** Mr. Bollea's deposition while questioning him.

7. Mr. Bollea's counsel objected at the deposition to these exhibits because they had not been produced by Gawker before the deposition, even though they were in Gawker's possession for some time and were responsive to document requests previously propounded to Gawker by Mr. Bollea, and were required to be produced prior to the deposition. Harder Aff., Ex. B (Bollea Depo. Tr. 170:16–171:2, 171:20–172:8). Gawker's counsel claimed that Gawker had no obligation to produce the exhibits because they supposedly constituted "work product" and were "equally available" to Mr. Bollea. *Id.* (171:4–19, 173:16–174:9). Mr. Bollea's counsel reiterated his objections on the second day of Mr. Bollea's deposition when Gawker, once again, questioned Mr. Bollea with documents that were responsive to discovery requests and were required to be produced in advance of the deposition, yet were withheld from production in order to surprise him with the documents during his deposition. *Id.* (591:6–13). Gawker cited its prior response. *Id.*

8. Gawker's position has remained that it was supposedly justified in withholding the documents until the time of Mr. Bollea's deposition on grounds of privilege, namely that the documents constituted "work product" until the time of Mr. Bollea's deposition. Gawker then supposedly waived its work product assertion at the time of the deposition, when it introduced the documents. Such gamesmanship, trickery, and surprise has no place in civil litigation (at least in Florida). The discovery rules exist to eliminate surprise and afford each side an opportunity to receive the documents in the case before being required to answer questions about them under oath. *See Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 112 (Fla. 1970) (holding that materials "which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery"); *Target Corp. v. Vogel*, 41 So.3d 962 (Fla. 4th DCA 2010) (affirming an order compelling disclosure of photos and video of an accident scene **before** the plaintiff's deposition, and specifically rejecting the defendant's work product objection).

9. Mr. Bollea filed a motion to preclude defendants from using exhibits not disclosed in discovery as evidence and striking the deposition testimony based on those exhibits. On June 6, 2014, the Special Discovery Magistrate issued his Report and Recommendation recommending the motion be denied, however, the recommendation specifically stated that "the denial be without prejudice to plaintiff's ability to raise the issues addressed by the Motion in a motion *in limine* prior to trial." (Report and Recommendation, June 6, 2014). The Special Discovery Magistrate further recommended that any future deposition exhibits had to be produced at least five days prior to the deposition, and that failure to do so could result in those documents being disallowed as exhibits at the deposition or other sanctions. *Id.*

10. "A primary purpose in the adoption of the Florida Rules of Civil Procedure is **to prevent the use of surprise, trickery, bluff and legal gymnastics**." *Surf Drugs, Inc. v.*

Vermette, 236 So.2d 108, 111 (Fla. 1970) (emphasis added). In *Spencer v. Beverly*, the DCA held: "The discovery rules were enacted to eliminate surprise, to encourage settlement, and to assist in arriving at the truth. If that be the acknowledged purpose of those particular rules, then any evidence to be used at trial should be exhibited upon proper motion." 307 So. 2d at 462 (citing *Surf Drugs*).

11. A party that **prevents discovery** on a matter by **asserting a privilege** cannot later use that evidence at trial. *See* Fla. Stat. § 90.510 (providing 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) (holding 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).

12. Gawker's withholding of documents it intended to use at Mr. Bollea's deposition under the guise of "work product" clearly was intended to ambush Mr. Bollea. This litigation tactic was wholly contrary to the purpose of Florida's discovery rules, caused prejudice to Mr. Bollea, and should not be tolerated. Gawker willfully failed to disclose the exhibits in response to valid discovery requests that required production prior to Mr. Bollea's deposition. As such, an order precluding Gawker from using the exhibits as evidence is appropriate, as is an order prohibiting Gawker from using any deposition testimony regarding those exhibits. *See, e.g., Southern Bell Tel. & Tel. Co. v. Kaminester*, 400 So.2d 804, 806 (Fla. 3d DCA 1981) (holding that court abused its discretion in allowing introduction of evidence that had been withheld in discovery on basis of confidentiality); *La Villarena, Inc. v. Acosta*, 597 So.2d 336, 338 (Fla. 3d

DCA 1992) (precluding party from using surveillance video at trial that was not previously disclosed to the other side).

13. Gawker undeniably abused the work product privilege as both a sword and a shield—to prevent Mr. Bollea from obtaining documents to which he was entitled, only to later waive this privilege at his deposition so they could ambush him with these materials. Gawker's intentional failure and refusal to produce the documents prior to Mr. Bollea's deposition, based on a claim of privilege, prohibits the use of these documents and/or testimony regarding them at trial. *International Telephone*, 60 F.R.D. at 185 (M.D. Fla. 1973) (holding 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).

14. These 13 exhibits, and Mr. Bollea's corresponding deposition testimony about them, are also **irrelevant**. Fla. Stat. §§ 90.401, 90.402. The central issues in this case are the elements of Mr. Bollea's privacy claims, the elements of Gawker's First Amendment defense, and Mr. Bollea's damages. None of these issues turn on any of these 13 exhibits or Mr. Bollea's testimony about them. These exhibits and testimony have no probative value concerning any material fact at issue.

15. Assuming arguendo that they had some relevance, any potential probative value is substantially outweighed by the prejudice of putting these matters before the jury. Fla. Stat. § 90.403. Any mention of these exhibits or Mr. Bollea's testimony about them will do nothing more than confuse the jury and unfairly prejudice Mr. Bollea. *Perper v. Edell*, 44 So. 2d 78, 80 (Fla. 1949) (stating that "if the introduction of the evidence tends in actual operation to produce a

confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence– if it tends to obscure rather than illuminate the true issue before the jury–then such evidence should be excluded").

For the foregoing reasons, Mr. Bollea requests that the Court enter an Order prohibiting Defendants from introducing any evidence or argument at trial referencing exhibits used to ambush Mr. Bollea at his deposition, as well as Mr. Bollea's deposition testimony about those exhibits.

Respectfully submitted,

/s/ Kenneth G. Turkel
Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Shane B. Vogt
Florida Bar No. 0257620
BAJO | CUVA | COHEN | TURKEL
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: svogt@bajocuva.com

Charles J. Harder, Esq.
PHV No. 102333
Douglas E. Mirell, Esq.
PHV No. 109885
Jennifer J. McGrath, Esq.
PHV No. 114890
Sarah E. Luppen, Esq.
PHV No. 113729
HARDER MIRELL & ABRAMS LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com
Email: dmirell@hmafirm.com
Email: jmcgrath@hmafirm.com
Email: sluppen@hmafirm.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 18th day of June, 2015 to the following:

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esquire
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com
Counsel for Gawker Defendants

Barry A. Cohen, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1950
Tampa, Florida 33602
bcohen@tampalawfirm.com
mgaines@tampalawfirm.com
jhalle@tampalawfirm.com
mwalsh@tampalawfirm.com
Counsel for Heather Clem

Seth D. Berlin, Esquire
Michael Sullivan, Esquire
Alia L. Smith, Esquire
Paul J. Safier, Esquire
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW, Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

Kirk S. Davis, Esquire
Akerman LLP
401 E. Jackson St., Suite 1700
Tampa, FL 33602
kirk.davis@akerman.com
Co-counsel for Gawker Defendants

/s/ Kenneth G. Turkel
Attorney