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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

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 OPPOSITION TO GAWKER DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF KEVIN BLATT (STYLED "Publisher Defendants' Motion *In Limine* to Preclude Plaintiff From Calling Their Retained Expert Kevin D. Blatt as a Witness")

Gawker Media, LLC, Nick Denton, and A.J. Daulerio (together, the "Gawker Defendants") published on the Internet, for millions of people to watch, a secretly recorded, pornographic sex tape of Plaintiff Terry Bollea ("Mr. Bollea"), featuring him naked and engaged in sexual intercourse. Mr. Bollea was an unwilling participant in the recording of this sex tape, and never wanted it to see the light of day. However, because Gawker Defendants chose to produce and publish the sex tape online, they forced Mr. Bollea to place a value on the damages he suffered.

In recognition of their publication of pornography, and in an effort to avoid compensating Mr. Bollea for the damages he suffered, Gawker Defendants retained Kevin Blatt, a "celebrity

sex tape broker," to testify that the nonconsensual sex tape of Mr. Bollea, which Gawker Defendants edited and published online, was worthless. However, Mr. Bollea has confirmed through Mr. Blatt's testimony that the sex tape was actually very valuable. Because of this, Gawker Defendants want to exclude Mr. Blatt's testimony at trial. Florida law does not support their position.

Mr. Blatt has an extensive background in the pornography industry and, in particular, pornographic websites and celebrity sex tapes. He has been involved in publicity and marketing for these websites and sex tapes, and is well-versed in Internet advertising and revenue generation. He also was personally involved in some of the events surrounding the efforts to obtain and market the sex tape of Mr. Bollea at issue in this case.

Mr. Blatt's deposition provided a wealth of information that is relevant to this case and will assist the jury in deciding Mr. Bollea's damages. Based on his experience in the pornography industry, Mr. Blatt testified as an expert about the value of various celebrity sex tapes—even confirming that such tapes featuring celebrities much less famous than Mr. Bollea are worth hundreds of millions of dollars. Mr. Blatt also testified as an expert about the amounts typically charged by pornography websites to allow viewers access to celebrity sex tapes—confirming one of the measures of damages Mr. Bollea is asserting in this case. Mr. Blatt also testified as an expert about the publicity generated by sex tapes, and the use of such tapes as marketing to attract viewers to websites, which is how Gawker Defendants used the Bollea sex tape to bring millions of unique visitors to Gawker.com and thereby substantially increase their revenues and profits, and the overall economic value of that website. He also, based on his experience in the industry, testified about the importance of unique visitors and keyword searches within the context of celebrity sex tapes. Mr. Blatt testified as an expert in the

pornography industry about the importance of following laws and obtaining consents before publishing sex tapes. He also testified about lawsuits in which he was personally involved involving celebrity sex tapes.

Mr. Blatt also confirmed, as an expert and fact witness, the immense value of the sex tape involving Mr. Bollea. In fact, Mr. Blatt personally authored the letter from Sex.com (which he acknowledged during his deposition was true) offering to buy the rights to the "sex tape" of Mr. Bollea and confirming that the website had an "open checkbook" to do so.

Gawker Defendants chose to force Mr. Bollea into the realm of Mr. Blatt's industry when they decided to publish the sex tape. Gawker Defendants chose to retain Mr. Blatt as an expert witness in the hopes of diminishing the value of Mr. Bollea's rights. Both of these decisions backfired. Unfortunately for Gawker Defendants, Mr. Blatt's testimony cannot be swept under the rug simply because it helps prove Mr. Bollea's damages.

Well-established Florida law gives Mr. Bollea every right to call Mr. Blatt as an expert and fact witness. Moreover, as long as Gawker Defendants refrain from attacking Mr. Blatt's credibility, they have the ability to prevent the jury from learning about his prior affiliation as an expert retained by Gawker Defendants.

In *Bogosian v. State Farm Mutual Automobile Insurance Co.*, 817 So.2d 968 (Fla. 3d DCA 2002), the Court endorsed the rule announced in *Sun Charm Ranch, Inc. v. City of Orlando*, 407 So.2d 938, 940 (Fla. 5th DCA 1981), holding that a party **can call the opposing**

party's expert, but should not bring out on direct examination[1] the expert's prior engagement. *Bogosian*, 817 So.2d at 973; *accord Jacksonville Transportation Authority v. ASC Associates*, 559 So.2d 330 (Fla. 1st DCA 1990) (holding that other side's expert may be called but prior engagement cannot be brought out on direct examination). Against this weight of authority, Gawker Defendants offer non-binding precedent from one **unpublished** federal district court case, as well as a treatise whose author advocates against the existing rule. *Moving Papers* at 4. Two of the cases cited by the Gawker Defendants, *Sun Charm Ranch* and *Peterson*, actually hold that there is no rule barring one side from using the other side's expert testimony. The Gawker Defendants' position, therefore, is even inconsistent with the law they cite in their own motion *in limine*.

The weight of federal and out-of-state authority is in accord with *Bogosian* and *Sun Charm Ranch*. In *Peterson v. Willie*, 81 F.3d 1033, 1037-38 (11th Cir. 1996), the Eleventh Circuit held that an expert who was originally engaged by plaintiff could be called by defendant at trial, and that eliciting testimony as to the expert's prior engagement was harmless error: "Once a witness has been designated as expected to testify at trial, there may be situations when the witness should be permitted to testify for the opposing party. In such situations, however, we believe that a party should not generally be permitted to establish that the witness had been previously retained by the opposing party." *See also Kerns v. Pro-Foam*, 572 F. Supp. 2d 1303, 1309 (S.D. Ala. 2007) ("Neither the parties' briefs nor the Court's own research reveals any *per*

[1] If Gawker Defendants decide to attack their own expert's credibility, then Mr. Bollea can raise his prior engagement by Gawker Defendants. The court in *Bogosian* held: "We add that if on cross-examination the plaintiff opens the door to further inquiry, then State Farm can walk through the door. Thus, if plaintiff were to attack Mr. Bynum's credentials as an expert, then State Farm could bring out the fact that Bynum was originally hired, and relied on, by the plaintiff. Similarly, if plaintiff were to take the position that D.O.T.'s negligence played no part in the accident at all, then State Farm could bring out the fact that Bynum was originally hired by plaintiff to testify that D.O.T. was, in fact, negligent." *Bogosian*, 817 So. 2d at 973.

se rule forbidding a party from calling an adversary's expert during his case-in-chief."); *Guinn v. CRST Van Expedited, Inc.*, 2011 WL 2414393 (W.D. Okla. Jun. 10) ("[O]nce a party designates an expert, the party will have to live with the consequence that the opposing party will likely be given the opportunity to depose the expert or even to call the expert at trial on their own behalf.") (internal quotation omitted); *Fitzgerald v. Stanley Roberts, Inc.*, 895 A.2d 405, 415 (N.J. 2006) ("[W]e hold that access to the testifying witness is allowed and the adversary may produce a willing expert at trial.").

Mr. Blatt's testimony is highly relevant, and directly arises out of his experience in the online pornography industry and as a broker who assists in the distribution of celebrity sex tapes. To the extent his opinions rely upon any hearsay, Florida law specifically permits him to do so. Fla. Stat. § 90.702. There is no factual or legal basis to exclude Mr. Blatt's testimony. The Gawker Defendants' motion *in limine* therefore should be denied.

Respectfully submitted,

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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 26th day of June, 2015 to the following:

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