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 GENE BOLLEA'S OPPOSITION TO MOTION *IN LIMINE* OF GAWKER MEDIA, LLC, DENTON, AND DAULERIO TO EXCLUDE ALL EVIDENCE OF GAWKER MEDIA'S REVENUES OR PROFITS (STYLED "Publisher Defendants' Motion In Limine to Exclude All Evidence Concerning Gawker Media, LLC's Revenues or Profits During the Liability Phase of Trial And Incorporated Memorandum of Law")

Gawker Media, LLC's ("Gawker"), Nick Denton's, and A.J. Daulerio's (together, the "Gawker Defendants") motion *in limine* regarding Gawker's revenues and profits is an untimely and improper motion for partial summary judgment[1] filed under the guise of a motion *in limine*. Gawker Defendants are trying to exclude one entire category of Mr. Bollea's damages and also prevent Mr. Bollea's damages expert, Jeff Anderson, from testifying at trial.

It is well-established in Florida that litigants cannot use motions *in limine* as unnoticed motions for partial summary judgment. *Saunders v. Alois*, 604 So.2d 18 (Fla. 4th DCA 1992);

[1] The dispositive deadline in this case has already passed.

Rice v. Kelly, 483 So.2d 559 (Fla. 4th DCA 1986). In both *Saunders* and *Rice*, the appellate court recognized that it is improper to allow a defendant to use a motion *in limine* as a substitute for a motion for partial summary judgment on a portion of the plaintiffs' damages claims. *Saunders*, 604 So.2d at 20-21; *Rice*, 483 So.2d at 560. "The purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." *Saunders*, 604 So.2d at 20.

Even assuming *arguendo* that Gawker Defendants could use their motion *in limine* as an untimely, unnoticed motion for partial summary judgment, evidence of Gawker Media, LLC's revenues and profits is admissible because there is ample authority supporting Mr. Bollea's entitlement to damages based on an unjust enrichment measure (*i.e.,* the value of the benefit obtained by publishing the surreptitiously recorded video depicting Mr. Bollea naked and engaged in sexual intercourse (the "Sex Video") on gawker.com). *Garcia v. Kashi Co.*, 2014 WL 4392163 (S.D. Fla. Sep. 5) (holding plaintiffs stated a claim for unjust enrichment based on false advertisements); *see Berry v. Budget Rent-a-Car Systems, Inc.*, 497 F. Supp. 2d 1361 (S.D. Fla. 2007); *Aceta Corp. v. Therapeutics MD, Inc.*, 953 F.Supp.2d 1269 (S.D. Fla. 2013); *Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 485 B.R. 460 (S.D. Fla. 2013); *Banks v. Lardin*, 938 So.2d 571 (Fla. 4th DCA 2006).

In *Benchmark Mgmt. Co. v. Ceebraid Signal Corp.*, 292 Fed. Appx. 784 (11th Cir. 2008), an unjust enrichment remedy was permitted where the defendant usurped confidential information and used it to seek a profitable distribution contract. And in *Montage Group, Ltd. v. Athle-Tech Computer Systems, Inc.*, 889 So.2d 180 (Fla. 2d DCA 2004), an order by Judge James Case disgorging profits was upheld (though the amount awarded was reduced).

Restitution for the reasonable value of services rendered also is an available remedy under Florida law. *Aldebot v. Story*, 534 So.2d 1216 (Fla. 3d DCA 1988) (care provider for decedent was entitled to reasonable value of services rendered); *Ocean Communications, Inc. v. Bubeck*, 956 So.2d 1222 (Fla. 4th DCA 2007) (restitution also is an available remedy).

Mr. Bollea is entitled to recover damages based on the value of the benefit Gawker Defendants received by posting the Sex Video. The U.S. Supreme Court recognized in *Zacchini v. Scripps-Howard Broadcasting Co.*, that "[t]he rationale for protecting the **right of publicity** is the straight-forward one of preventing **unjust enrichment** by the theft of good will." 433 U.S. 562, 576 (1977) (emphasis added).

In the context of privacy torts, unjust enrichment is a widely recognized remedy. For example, the Restatement 3d of Unfair Competition § 49 recognizes that "one who is liable for an appropriation of the commercial value of another's identity . . . is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater . . . . " The comment further provides that this monetary relief can consist of "restitutionary relief measured by the **unjust gain to the defendant**," and that "an accounting of the defendant's profits from an unauthorized use of the plaintiff's identity is most often justified as a means of deterring infringement and **recapturing gains attributable to wrongful conduct**." *Id.* (emphasis added).

The right of publicity "prevents unjust enrichment by providing a remedy against exploitation of the goodwill and reputation that a person develops in his name or likeness through the investment of time, effort and money." *Comment, Restat. 3d Unfair Comp. § 46*; citing *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, 1198 (S.D.N.Y. 1983);

Uhlaender v. Henrickson, 316 F.Supp. 1277 (D. Minn. 1970); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (1979).

Gawker Defendants mischaracterize Mr. Bollea's damages as being a claim for a portion of their profits. The fact that Mr. Anderson uses a valuation of gawker.com as part of his methodology to arrive at the value of the benefit of posting the Sex Video does not mean that Mr. Bollea is seeking to disgorge profits. Gawker Defendants actually concede this point in Footnote 2 of their motion: "Plaintiff's proffered expert Jeff Anderson intends to opine about the supposed increase in the company's 'market value' – what a reasonable investor would pay to acquire the website www.gawker.com – **a figure that does not address the defendant's profits**." Gawker Defendants' current argument based on an inconsistent position is factually inaccurate and mischaracterizes controlling law.

Gawker Defendants' efforts to exclude all evidence of revenues or profits is equally untenable because their own expert—Peter Horan—bases his opinions on a revenue multiple method. Unless Gawker Defendants intend to withdraw their own expert, the premise of their motion is fatally flawed.

For instance, *Doe v. Beasley Broadcast Group, Inc.*, 105 So.3d 1 (Fla. 2d DCA 2012), does not contain language **limiting** damages. Instead, *Doe* holds that emotional distress damages **are** available in an invasion of privacy case. Nothing in *Doe* says that emotional distress is the exclusive measure of damages.

Cason v. Baskin, 20 So.2d 243, 254 (Fla. 1944), a 70 year old case cited by Gawker Defendants, does not bar damages based on unjust enrichment in a privacy case. Rather, it holds (as an alternative holding, because it also dismissed the complaint on public concern grounds) that a plaintiff was not entitled to disgorgement of the profits of a book that contained

biographical information about the plaintiff because plaintiff could not establish a causal relationship between that biographical content and the defendants' profits. This case is distinguishable because Quantcast traffic data proves that Gawker Defendants obtained millions of unique viewers by posting the Sex Video.

Jackson v. Grupo Industrial Hotelero, S.A., 07-22046-CIV, 2009 WL 8634834 at *13 (S.D. Fla. Apr. 29, 2009) also is factually distinguishable, and awards a disgorgement of profits on the plaintiff's Lanham Act claim but contains no reasoning as to why such an award would not be available on the right to publicity claim.[2]

Finally, Gawker Defendants' undue prejudice arguments are based on the artifice that Mr. Bollea is attempting to prove the net worth of Gawker at the liability phase of trial to prejudice the jury. This is simply inaccurate. Mr. Anderson did not calculate Gawker Media, LLC's net worth. Gawker Defendants' concern that learning the extent to which Gawker benefited from publishing the Sex Video will cause prejudice is therefore unfounded. Gawker's financial condition is directly relevant to calculating the financial benefit it received by posting the Sex Video. The probative value of this evidence is significant, while any danger of prejudice is very minimal, if any.

The motion *in limine* should be denied in its entirety.

Respectfully submitted,

/s/ Kenneth G. Turkel
Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Shane B. Vogt
Florida Bar No. 0257620

[2] Gawker Defendants also argue that the statement in the Wiretap Act that "actual damages" are available supposedly precludes unjust enrichment awards. Mr. Bollea strongly disagrees with that contention, and Gawker Defendants cite no authority to support it.

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

- and -

Charles J. Harder, Esq.
PHV No. 102333
Jennifer J. McGrath, Esq.
PHV No. 114890
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: jmcgrath@hmafirm.com

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:

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

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com
krosser@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
Shawn M. Goodwin, Esquire
Akerman LLP
401 E. Jackson Street, Suite 1700
Tampa, Florida 33602
kirk.davis@akerman.com
shawn.goodwin@akerman.com
Co-Counsel for Gawker Defendants

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
abeene@tlolawfirm.com
Counsel for Gawker Defendants

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

/s/ Kenneth G. Turkel
Kenneth G. Turkel