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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,

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 LIMIT THE KINDS OF DAMAGES THAT PLAINTIFF MAY CLAIM AT TRIAL (STYLED "Publisher Defendants' Motion In *Limine* Limiting The Kind of Damages to Which Plaintiff Is Entitled")

Gawker Media, LLC's, Nick Denton's, and A.J. Daulerio's (together, the "Gawker Defendants") motion in *limine* to preclude Mr. Bollea from seeking damages for economic harm is a blatant, untimely, and improper motion for partial summary judgment prohibited by well-established Florida law. *Saunders v. Alois*, 604 So.2d 18 (Fla. 4th DCA 1992); *Rice v. Kelly*, 483 So.2d 559 (Fla. 4th DCA 1986). A motion in *limine* cannot be used as a substitute for a motion for partial summary judgment on a portion of the plaintiff's damages claims. *Saunders*, 604 So.2d at 20-21; *Rice*, 483 So.2d at 560.

Even assuming *arguendo* that Gawker Defendants could use their motion in *limine* as an untimely, unnoticed motion for partial summary judgment, there is ample authority supporting

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Mr. Bollea's damages theories and entitlement to recover for his economic harm. Unjust enrichment measures of damages are permitted under Florida law. *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 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).

These are all available remedies for the claims asserted by Mr. Bollea in order to fully and fairly compensate him for the harm caused by defendants' conduct. The fundamental principal of the law of damages is that a person injured by the wrongful act of another should receive fair and just compensation commensurate with the loss sustained. *Hanna v. Martin*, 49 So.2d 585, 587 (Fla. 1950). In a tort action, the plaintiff may recover compensation for the actual loss or injury, as well as for damages that are the natural, proximate, probable or direct consequence of defendants' wrongful acts. *Clausell v. Buckney*, 475 So.2d 1023, 1025 (Fla. 1st

DCA 1985); *Douglass Fertilizers v. McClung Landscaping*, 459 So.2d 335, 336 (Fla. 5th DCA 1984).

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' reliance upon *Doe v. Beasley Broadcast Group, Inc.*, 105 So.3d 1 (Fla. 2d DCA 2012) (which does not contain language **limiting** damages) and *Cason v. Baskin*, 20 So.2d 243, 254 (Fla. 1944) (a 70 year old case that does not bar any unjust enrichment claim

in a privacy case) is misplaced. Both cases are factually distinguishable.

There is no basis under Florida law to preclude Mr. Bollea from recovering damages for the economic harm he suffered. Accordingly, the motion in *limine* 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 25th day of June, 2015 to the following:

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