

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 GENE BOLLEA'S MOTION TO OVERRULE OBJECTIONS TO
SUBPOENAS TO FASTLY, INC. AND GOOGLE INC.**

Pursuant to Florida Rules of Civil Procedure 1.351 and 1.410, Plaintiff Terry Gene Bollea respectfully requests that the Special Discovery Magistrate recommend that the Court (a) grant this motion to overrule Gawker's objections to the notices of intent to serve third party subpoenas on Fastly, Inc. ("Fastly") and Google Inc. ("Google"); and (b) issue such process as is necessary to effectuate the subpoenas. Mr. Bollea's notices of intent to serve subpoenas to Fastly and Google were filed September 5, 2014, and are attached hereto as Exhibit 1 (Fastly) and Exhibit 2 (Google). On September 22, 2014, Gawker Media, LLC ("Gawker") filed objections to both notices, which are attached hereto as Exhibit 3 (Gawker's Objections to Fastly Subpoena) and Exhibit 4 (Gawker's Objections to Google Subpoena).

INTRODUCTION

For six months in late 2012 through 2013, Gawker's flagship website, Gawker.com, featured a Gawker-edited "highlight reel" of clandestinely-recorded footage of Mr. Bollea engaged in private, consensual sexual relations in a private bedroom (the "Sex Video"). It is undisputed that **millions of people** visited the Gawker.com website during that time to watch the Sex Video. It also cannot reasonably be disputed that Gawker benefitted from the massive increase in traffic to its websites, derived from its publication of the Sex Video (both financially and in popularity). The discovery sought from Google and Fastly seeks to identify the extent of that benefit, which is both relevant and reasonably calculated to lead to the discovery of admissible evidence regarding: (1) Mr. Bollea's damages; and (2) Gawker's intent and state of mind in publishing the Sex Video for six months despite knowing that the video was illegally recorded and Mr. Bollea did not consent to its publication.

Gawker.com, which focuses on celebrity and societal gossip and sexual themes, functions as a traffic generator to Gawker Media LLC's many other affiliated websites, each of which focuses on different specific interests or subject areas: Deadspin.com (sports), Gizmodo.com (technology), iO9.com (sci-fi), Jalopnik.com (cars), Jezebel.com (women's interests), Kotaku.com (videogames), and Lifehacker.com (general life tips and tricks) (collectively, the "Affiliated Websites"). Gawker has represented in discovery that it does not track the flow of internet traffic between and among its websites. This information is highly relevant to the issue of the flow of traffic from Gawker.com to the other Affiliated Websites, and thus Mr. Bollea's damages, calculated by Gawker's unjust enrichment of the millions of Internet users who flocked to its site (and then to its Affiliated Websites) to watch the illegally published Bollea Sex Video. The information also is relevant to Gawker's intent in keeping the Sex Video up at its website for

six months despite Mr. Bollea's repeated demands to take it down. The increased traffic flow from Gawker.com to its Affiliated Websites was hugely beneficial to Gawker as a whole and, as a result, Gawker would not take down the Sex Video no matter what the circumstances.

In the apparent absence of information at Gawker regarding traffic flow between its sites, Mr. Bollea seeks the information from Fastly and Google. Both Fastly and Google likely track that information, and possess other relevant traffic statistics, all of which are directly relevant to this action and reasonably calculated to lead to the discovery of admissible evidence.

Mr. Bollea also seeks from these third parties the information they hold regarding each of the Affiliated Websites, as well as the relationship between each of the Gawker defendants, including Gawker, Nick Denton and/or Kinja KFT, and the contacts that Kinja KFT has with the United States. Such information is directly relevant to this lawsuit, and the claims and defenses therein.

Gawker's objections to the foregoing discovery are without merit because:

- (1) the subpoenas are not overbroad;
- (2) it is appropriate to seek this information from third parties;
- (3) the Court has not imposed any limits on discovery that preclude these requests;
- (4) Mr. Bollea's request for internet traffic data is not an attempt to obtain private information about the identity of third parties who visited the Gawker site, and certainly is not an attempt to invade their privacy; and
- (5) Gawker cannot properly claim undue burden.

ARGUMENT

A. Factual Background

In October 2012, Gawker posted illegal, surreptitiously-recorded footage of a sexual

encounter involving Mr. Bollea. Mr. Bollea's damage theory is based, in part, on "any increase in profits of either Gawker.com and/or Gawker Media, LLC attributable, directly or indirectly, to the existence of the Hulk Hogan Sex Video at Gawker.com." Ex. 5 (Bollea's Third Supplemental Response to Interrogatory 12). This damages theory includes an analysis of how many people viewed the Sex Video itself, as well as how many people "clicked through" and viewed other content, both on Gawker.com and on the Affiliated Websites, thereby driving substantial advertising revenue and potentially other forms of revenue to Gawker, both in the short term as well as in the long term.

An apt analogy is this: If a developer builds a large shopping mall and entertainment complex, and hires a popular band to play at the grand opening, and the band attracts five million people from throughout the region to show up to the event, the financial benefit derived from the band is both the revenue that those five million people generate for the mall on that first day, as well as revenue from that same population over time—because the band attracted them to the mall in the first place. Here, the illegal Bollea Sex Video is the band, and the five million people who flocked to Gawker to watch it came from throughout the world, and Gawker and each of its Affiliated Websites were provided substantial advertising revenue (and overall value) every time those five million people visited a Gawker webpage.

When discovery commenced in this lawsuit, Mr. Bollea sought to establish the extent to which Gawker benefitted and profited from the posting of the Sex Video. Mr. Bollea sought the traffic statistics at issue from Gawker directly. At the deposition of Scott Kidder, Gawker's corporate designee, Mr. Kidder testified that Gawker did not track or record this data, but conceded that people may have clicked through and viewed other Gawker content, thereby generating advertising revenue for Gawker. Ex. 6 (Transcript of Deposition of Scott Kidder,

112:6–115:4). Thus, unable to obtain this information from Gawker directly, Mr. Bollea seeks to serve the subpoenas at issue, to obtain the internet traffic data from Fastly and Google, two companies that compile and record such information.

Mr. Bollea also requests information regarding Fastly’s and Google’s dealings with Gawker and/or Kinja, and for any information they hold regarding the relationship between them. Mr. Bollea seeks to determine whether any profits from the Sex Video were transferred by Gawker to its affiliated companies and individuals, such as Kinja and/or Denton, and to determine Kinja’s contacts with the United States. Gawker seeks to prevent Mr. Bollea from obtaining this discovery, and has refused to compromise on any of it. Ex. 7 (Gawker’s Responses to Second Request for Production of Documents). And so has Kinja. Even after the Court granted Mr. Bollea’s request to obtain the discovery from Kinja, Kinja refused to provide any information of any kind. Ex. 8 (May 14, 2014 court order); Ex. 9 (Notice Regarding Discovery Directed to Specially-Appearing Defendant Kinja KFT). Mr. Bollea therefore is entitled to, and by Kinja’s bad faith litigation practices has been forced to, seek this relevant information from third parties.

B. The Information Requested in the Subpoenas Is Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Gawker’s relevance objections are without merit. The information sought by Mr. Bollea in the subpoenas to Fastly and Google is directly relevant to the claims and defenses in this lawsuit, including Mr. Bollea’s damages and Gawker’s intent in publishing the unlawfully-recorded video for six months:

First, Mr. Bollea’s damages calculation includes “any increase in profits of either Gawker.com and/or Gawker Media, LLC attributable, directly or indirectly, to the existence of

the Hulk Hogan Sex Video at Gawker.com.” Ex. 5 (Bollea’s Third Supplemental Response to Interrogatory 12). Gawker’s business model is based on the amount of traffic flowing to its various websites. Thus, the amount of traffic that flowed from the Sex Video to the Affiliated Websites, and *vice versa*, is relevant to calculating the extent of the benefit Gawker derived from its publication of the Sex Video.

Second, such data also is relevant to the reason behind Gawker’s refusal to take down the video despite Mr. Bollea’s repeated demands that Gawker do so. The Sex Video generated substantial traffic flow between Gawker.com and its Affiliated Websites, a circumstance that is extremely valuable to Gawker. Gawker thus refused to take down the Sex Video. In other situations where Gawker posted private images or video of individuals without their permission, Gawker removed the content once the traffic flow decreased and the story no longer generated the same level of interest. For example, A. J. Daulerio testified to the following, regarding Gawker’s decision to take down its publication of a video of a young girl having sex on a bathroom floor:

A. Yeah. The – this was a story that, you know, as it’s stated in the GQ article was a video of a girl having sex in a bathroom in Indiana, I believe [I]t was not something that was, I was very committed to keeping up for any reason at all and I happily obliged and took it down. . . .

Q. The upshot of this incident, as reflected in the GQ story, is that the video was removed from the site, correct?

A. Yes.

Q. How long did it remain up?

A. I believe it was only less than a day.

Q. And why did you believe it was appropriate to take the video down?

A. She was a, not a public figure, and it was also a story that was not ours, nor did I work very hard to acquire it, it was more a, you know, as I said in here, **it’s basically a very failed series about people having sex in bathrooms** that, you know, never really materialized anything, but maybe three or four posts of that

type of material. . . .

Ex. 10 (Daulerio Depo. Tr. 98:8–100:6) (emphasis added). In contrast, Gawker did not remove the Bollea Sex Video because it continued to be extremely valuable to it.

Gawker contends that the discovery to Fastly is not reasonably calculated to lead to the discovery of admissible evidence, because Fastly supposedly did not host the Sex Video on its servers. Even if this were true, that is not the standard for discovery relevance. Fla. R. Civ. P. 1.280(b)(1) (discovery may be had of any material **reasonably calculated to lead to the** discovery of admissible evidence). Visitors, when accessing Gawker.com or the Affiliated Websites from different parts of the country, are directed to different servers, but **always** to servers owned and operated by Fastly. Thus, any visitor accessing Gawker.com or the Affiliated Websites must pass through a Fastly-owned server. Fastly likely records such movements, and maintains visitor logs for each of the Gawker websites—that is, a log of each IP address that accessed a Gawker website, the time accessed, the duration that visitor spent on the website, and related information. This information is directly relevant to Mr. Bollea’s damages theory, and Gawker’s objections to this discovery appear calculated to prevent Mr. Bollea from proving damages caused by Gawker’s wrongful and illegal conduct.

On the issue of Google’s traffic data, Gawker contends that such data is irrelevant to this action. This is, again, plainly incorrect. Mr. Bollea has requested two sets of data from Google, both of which are reasonably calculated to lead to the discovery of admissible evidence, and both of which are directly relevant to Mr. Bollea’s calculation of damages in this matter:

- The first, **exit data**, shows where internet users went following their visit to the Sex Video webpage, and is directly relevant to whether the Gawker Affiliated Websites benefited from the unlawful dissemination of the Sex Video;
- The second, **Google Trends data**, shows the number of persons who, using Google

Search, searched for certain terms listed in the subpoenas over the relevant time periods and is directly relevant to the **increased popularity of Gawker** following the dissemination of the Sex Video and to the “virality” of both the Sex Video and the Gawker Sex Video webpage (“virality” refers to the tendency of an item, such as the Sex Video, to be circulated rapidly and widely among internet users).

The information sought by Mr. Bollea therefore is reasonably calculated to show Gawker’s benefit from the Sex Video, both in the form of internet traffic and in terms of increased popularity following its release. The information sought thus is directly relevant to Mr. Bollea’s calculation of damages. “Proper discovery includes records and information that are relevant to the calculation of damages.” *Behm v. Cape Lumber Co.*, 834 So.2d 285, 287 (Fla. 2d DCA 2002). The information sought also goes to Gawker’s intent and state of mind in ignoring multiple demands from Mr. Bollea that Gawker take down the video: the increased traffic flow between its websites (and concomitant increase in revenues and popularity) explaining why Gawker refused to remove the video.

The communications and agreements between the third parties, on the one hand, and Gawker and/or Kinja, on the other hand, also are reasonably calculated to show that Kinja did business in the United States and thus is subject to personal jurisdiction, as well as what Gawker did with the profits it realized from the publication of the sex video.

C. Gawker’s Additional Objections to the Subpoenas Are Without Merit

1. Bollea’s Subpoenas to Fastly and Gawker Are Not Overbroad.

Gawker’s objection based on the supposed overbreadth of the requests lacks merit. Mr. Bollea seeks information that will show the extent to which Gawker benefited from increased traffic and reputation as a result of its unlawful posting of the illegal Sex Video, as well as

information regarding the business relationships of and among the Gawker defendants. The requests are appropriately limited, including as to time, but Gawker's position seems to be that there can be no discovery of any information that does not concern the Sex Video itself. This is not the case—the information sought is reasonably calculated to lead to the discovery of admissible evidence.

2. Mr. Bollea Is Not Required to Seek the Information from Gawker and, Even if He Were, Mr. Bollea has Requested the Information from Gawker, which Either Cannot or Will Not Provide It.

Gawker argues that Mr. Bollea should seek information about business relationships with and among the Gawker defendants from Gawker and Kinja themselves. Gawker cites no authority for this requirement and ignores the fact that Mr. Bollea **has** sought this information from Gawker and Kinja, who in turn have refused to provide it. Thus, Mr. Bollea is forced and permitted to seek this information from third parties. *General Motors Corp. v. McGee*, 837 So.2d 1010, 1031 (Fla. 4th DCA 2002) (third party subpoena of in-house counsel proper where documents not produced in response to party discovery).

Gawker and Kinja have consistently refused to provide Mr. Bollea with discovery concerning the corporate relationship between Kinja and Gawker or Kinja's contacts with the United States. Both issues are directly relevant to the instant lawsuit and the claims and defenses therein. Mr. Bollea is now forced to seek such information from third parties and should be permitted to do so.

3. Mr. Bollea's Subpoenas Are Within the Bounds of the February 26, 2014 Order

Gawker argues that Mr. Bollea's requests violate the Court's February 26, 2014 discovery order by asking for traffic-related data for websites other than Gawker.com. Gawker

already made this argument in response to Mr. Bollea's recent motion to compel, and the argument was rejected. The February 26, 2014 order denied Mr. Bollea's motion to compel production of documents that relate to website traffic at each of the Affiliated Websites **without prejudice** to Mr. Bollea's ability to renew the request if the material was not available from publicly available sources. Ex. 11 (February 26, 2014 discovery order). The information requested by Mr. Bollea in the subpoenas to Fastly and Google is not available from publicly available sources. Thus, and as the Special Discovery Magistrate recently found at the October 20, 2014 telephonic hearing, the requests are proper and do not violate the February 26 order.

4. Mr. Bollea's Subpoenas Are Not Invasive of Third Parties' Privacy

Gawker's objection that third parties' privacy rights are implicated by Mr. Bollea's request for traffic-related data and statistics held by Fastly and Google is without merit and is hypocritical of Gawker's prior position on similar discovery requests to Mr. Bollea.

Mr. Bollea does not seek the names or identities of visitors to the Gawker websites or any information that would identify them without recourse to further discovery. Rather, Mr. Bollea seeks to compile information as to how many people clicked through from the Sex Video webpage and other Gawker webpages, to material on the Affiliated Websites, and related information. Mr. Bollea requests sufficient information from Fastly and Google to do so, and expects to receive this information in the form of a list of IP addresses which, without further subpoenas to multiple non-parties, Mr. Bollea would not be able to use to identify individual persons.

Gawker previously moved to compel, and received an order compelling the production of, Mr. Bollea's personal telephone logs for the entire year of 2012. Gawker obtained that information based on arguments that non-parties' privacy would be protected by the Protective

Order in this action. The Court agreed with Gawker. Gawker cannot now argue the opposite: that non-party IP addresses are too private or confidential to produce, even if designated as “Confidential” under the Protective Order. To be consistent, the Court should likewise permit Mr. Bollea to subpoena the requested information from Fastly and Google.

5. Gawker is not in a Position to Object Based on Burden.

Lastly, Gawker argues that the subpoenas to Fastly and Google should not be permitted due to the supposed burden on Fastly and Google to respond to them. Such an objection is not Gawker’s to raise and is premature. As the subpoenaed third parties, it is for Fastly and Google to raise any objections based on burden and they will be given the opportunity to do so upon service of the subpoenas. It is pure conjecture on the part of Gawker to raise such an objection at this stage.

CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the Special Discovery Magistrate recommend that the Court: (a) grant this motion to overrule Gawker’s objections to the notices of intent to serve third party subpoenas served on Fastly and Google; (b) issue such process as is necessary to effectuate the subpoenas; and (c) grant such further relief as it deems appropriate.

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 22nd day of October, 2014 to the following:

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