

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; et al.

Defendants.

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**PLAINTIFF TERRY GENE BOLLEA'S RESPONSE TO GAWKER MEDIA, LLC'S  
EXCEPTIONS TO THE SPECIAL DISCOVERY MAGISTRATE'S REPORT AND  
RECOMMENDATION GRANTING MR. BOLLEA'S MOTION TO COMPEL**

**I. INTRODUCTION**

On November 5, 2014, after extensive briefing and lengthy oral argument, Special Discovery Magistrate Judge James Case entered a Report and Recommendation **granting in its entirety** Plaintiff Terry Gene Bollea's Motion to Compel seeking Defendant Gawker Media, LLC ("Gawker") to:

- 1) Fully comply with this Court's February 26, 2014 Order by producing **all** responsive documents within Gawker's **control**, including those relating to Gawker's sister corporation, Kinja KFT, formerly known as Blogwire Hungary Szellemi Alkotast Hasznosito KFT ("Kinja");
- 2) Produce Kinja's financial statements, including all financial statements reflecting transactions between Kinja and Gawker;
- 3) Respond to targeted, follow-up discovery concerning Gawker's financial statements, including its sources of revenue, IP royalty expenses and any proposed equity, debt or other security offering by Gawker;

{BC00058454:1}

- 4) Produce documents that would show whether Gawker's affiliated websites received any downstream financial benefit from Gawker's publication of the surreptitiously-recorded video of Mr. Bollea naked and engaged in sexual relations in a private bedroom (the "Sex Video");
- 5) Provide a complete production of Gawker's policies, notices and agreements relating to protection of Gawker's privacy or confidentiality.

Exhibit 1 (11/5/14 Report and Recommendation).

As with all of the other recent recommendations from Judge Case,<sup>1</sup> Gawker filed Exceptions to producing the foregoing relevant discovery. Gawker also stated that it intended to seek a stay from the District Court of Appeal (the "DCA") immediately following any order of this Court adopting Judge Case's November 5, 2014 Report and Recommendation, so that Gawker may take an extraordinary writ to that Court. There is no reason to overrule the recommendation of Judge Case in this instance, and for the reasons set forth herein, the Report and Recommendation should be adopted and the Proposed Order provided with the Court's courtesy copy of this response should be signed and entered.

## II. ARGUMENT

Gawker's arguments in its Exceptions to the Report and Recommendation are the **same arguments** that were already fully considered by Judge Case during the October 20, 2014 hearing on this motion. Thus, Mr. Bollea hereby incorporates by reference the arguments made in his moving and reply papers before Judge Case (Exhibits 2 and 3, respectively), and his

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<sup>1</sup> See, e.g., Gawker's 9/11/14 Exceptions to the Report and Recommendation **granting** Mr. Bollea's request to propound 30 additional interrogatories to Gawker; Gawker's 10/30/14 Exceptions to the Report and Recommendation **denying** Gawker's Motion for Sanctions; and Gawker's 11/12/14 Exceptions to the Report and Recommendation **denying** Gawker's Motion to Overrule Objections to Third Party Subpoenas.

counsel’s arguments made during the October 20 hearing (Exhibit 4). For the reasons stated therein, Gawker’s exceptions to the November 5, 2014 Report and Recommendation should be rejected, and the Report and Recommendation should be adopted in its entirety.

Mr. Bollea further briefly responds to each of Gawker’s three main arguments in its Exceptions:

**1. The discovery sought by Mr. Bollea has never been ruled “out of bounds” by this Court.** Gawker’s Exceptions characterize the discovery and prior court orders in broad, general terms in an attempt to mislead the Court into believing the matters at issue here have already been ruled upon by this Court. As shown by the charts below, however, the Court’s prior orders either have no bearing whatsoever on the discovery currently at issue, or the orders expressly left open the possibility for Mr. Bollea to renew his discovery requests under certain conditions, applicable here:

**a) Interrogatory 18**

<b>Discovery Previously At Issue</b>	<b>Court Order</b>	<b>Discovery Currently At Issue</b>
<u>Request 99</u> : Documents sufficient to show all revenues received by Gawker Media, LLC, since January 1, 2012, and/or the basis for its receipt of such revenues. (Exhibit 5.)	<u>2/26/14 Order, ¶12</u> : As to Request for Production numbers 94 through 99, Defendant’s objections are sustained <b>without prejudice</b> to Plaintiff’s right to request the subject documents in the future. (Exhibit 6.)	<u>Interrogatory 18</u> : Identify every source of Gawker’s “Other Revenue,” as referred to at line 200 of Gawker Media LLC’s Income Statement (GAWKER 18323_C), for the period January 1, 2010 to the present. (Exhibit 7.)

Interrogatory 18 is a targeted, follow-up request made after a review of Gawker’s income statement, which does not provide a breakdown for Gawker’s sources of “Other Revenue.” Mr. Bollea merely requests, and Judge Case recommended, that Gawker list those sources so that Mr. Bollea might better understand where Gawker’s revenues come from, including whether and in

what percentage they can be attributed to Gawker’s content and, specifically, the Sex Video. Interrogatory 18 is in stark contrast to Request 99, where the Court found that the information sought had already been produced in aggregate form (*i.e.*, the total revenues received by Gawker), and so further documents showing revenues received would be duplicative and unnecessary. Additionally, Gawker’s prior objections were sustained **without prejudice**, allowing Mr. Bollea to seek the information in the future.

**b) Interrogatory 19**

<b>Discovery Previously At Issue</b>	<b>Court Order</b>	<b>Discovery Currently At Issue</b>
<p><u>Interrogatory 13</u>: Identify each entity and/or individual which directly or indirectly received money or other compensation that is generated by or originated by Gawker.com or any content thereon. (Exhibit 8.)</p>	<p><u>2/26/14 Order, ¶2</u>: As to Interrogatory 13, Defendant’s objections are sustained in part and overruled in part. . . . Defendant’s response may exclude individuals or entities such as employees or vendors, who may have received compensation indirectly as a result of Defendant’s use of revenues generated from the publication of the Gawker Story to pay usual and customary obligations . . . . (Exhibit 6.)</p>	<p><u>Interrogatory 19</u>: State all facts relating to Gawker’s payment of any “IP Royalty Expense,” including that which is referred to at line 8300 of Gawker Media LLC’s Income Statement (GAWKER 18323_C), for the period January 1, 2010 to the present, including the amount, to whom the payment is made, and for what products and/or services. (Exhibit 7.)</p>

Interrogatory 13 sought the identification of all individuals or entities who receive compensation from Gawker.com and its content. Interrogatory 19 seeks only the identification of individuals or entities who receive “IP Royalty Expenses” from Gawker, which is a much more narrowly tailored and targeted request than that which was at issue in the February 26 Order.

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c) Second Request 116

Discovery Previously At Issue	Court Order	Discovery Currently At Issue
<p><u>Request 30</u>: All documents that relate to the identity of the owners of Gawker or any affiliated company. (Exhibit 5.)</p>	<p><u>2/26/14 Order, ¶4</u>: As to Request for Production number 30, Defendant’s objections are sustained without prejudice to Plaintiff’s right to request the subject documents in the future based on a review of the sufficiency of disclosures made in other documents and depositions taken as of November 25, 2013. (Exhibit 6.)</p>	<p><u>Second Request 116</u>: All documents and communications that relate to any proposed equity, debt or other security offering by YOU during the period January 1, 2011, through the present. (Exhibit 9.)</p> <ul style="list-style-type: none"> <li>• YOU is defined as Defendant Gawker Media, LLC <b>and its parent company</b>, subsidiaries, affiliated companies, including but not limited to <b>Gawker Media Group, Inc. . . . . (Id.)</b></li> </ul>

The Court’s Order sustaining objections to a broad request for “all documents” relating to the identity of Gawker’s owners can have no bearing on Mr. Bollea’s right to make a targeted request for documents and communications relating to proposed equity, debt or other security offerings during a four-year period. Additionally, any equity, debt or security offerings by Gawker’s parent company, Gawker Media Group, Inc. (“GMGI”), are included in the request and must be produced so long as Gawker has the practical ability to obtain the documents. As is explained more fully in Mr. Bollea’s moving and reply papers in relation to Kinja, Gawker cannot continue to hide behind corporate formalities to avoid its discovery obligations. Documents relating to any equity, debt or security offerings by Gawker (or GMGI) will show the company’s evolution in value **prior to** the publication of the Sex Video, as compared to **after** its publication. Thus, the documents and information sought are reasonably calculated to lead to the discovery of admissible evidence and should be produced.

**d) Requests 119 & 120**

<b>Discovery Previously At Issue</b>	<b>Court Order</b>	<b>Discovery Currently At Issue</b>
<u>Request 40</u> : All documents that relate to all revenue generated by each of the Gawker websites from January 1, 2010 to the present, including the websites Deadspin, Gizmodo, io9, Jalopnik, Jezebel, Kotaku, and Lifehacker. (Exhibit 5.)	<u>2/26/14 Order, ¶5</u> : As to Request for Production numbers 39 and 40, Defendant’s objections are sustained <b>without prejudice</b> to Plaintiff’s right to request the subject documents in the future <b>based on Plaintiff’s ability to obtain the requested information through publicly available resources</b> . (Exhibit 6.)	<u>Request 119</u> : All documents and communications that relate to all revenue generated by each of the Gawker websites from January 1, 2011, to the present, including the websites gawker.com, deadspin.com, gizmodo.com, io9.com, jalopnik.com, jezebel.com, kotaku.com and lifehacker.com and any of their respective sub-sites. (Exhibit 9.)

Gawker’s previous objections were sustained **without prejudice** based on Mr. Bollea’s ability to obtain the requested information through publicly available resources. Mr. Bollea was not able to obtain the information from public sources, and so he sought the information again per the Court’s order. Links to each of Gawker’s affiliated websites were featured at Gawker.com on the same webpage where the Sex Video was published. Mr. Bollea is entitled to discover whether the publication of the Sex Video, including its association with the other websites jointly owned and affiliated with Gawker.com, benefited from increased revenue as a result of the five million people who flocked to Gawker.com to view the Sex Video. The requested information is reasonably calculated to lead to the discovery of admissible evidence and should be produced.

<b>Discovery Previously At Issue</b>	<b>Court Order</b>	<b>Discovery Currently At Issue</b>
<u>Request 99</u> : Documents sufficient to show all revenues received by Gawker Media, LLC, since January 1, 2012, and/or the basis for its receipt of such revenues. (Exhibit 5.)	<u>2/26/14 Order, ¶12</u> : As to Request for Production numbers 94 through 99, Defendant’s objections are sustained <b>without prejudice</b> to Plaintiff’s right to request the subject documents in the future.	<u>Request 120</u> : All financial statements, including but not limited to balance sheets, income statements (which shall include identification of all revenue sources and expenses), statements of retained earnings

Discovery Previously At Issue	Court Order	Discovery Currently At Issue
<p><u>Interrogatory 13</u>: Identify each entity and/or individual which directly or indirectly received money or other compensation that is generated by or originated by Gawker.com or any content thereon. (Exhibit 8.)</p> <p><u>Request 40</u>: All documents that relate to all revenue generated by each of the Gawker websites from January 1, 2010 to the present, including the websites Deadspin, Gizmodo, io9, Jalopnik, Jezebel, Kotaku, and Lifehacker. (Exhibit 5.)</p>	<p>(Exhibit 6.)</p> <p><u>2/26/14 Order, ¶2</u>: As to Interrogatory 13, Defendant’s objections are sustained in part and overruled in part. . . . Defendant’s response may exclude individuals or entities such as employees or vendors, who may have received compensation indirectly as a result of Defendant’s use of revenues generated from the publication of the Gawker Story to pay usual and customary obligations . . . . (<i>Id.</i>)</p> <p><u>2/26/14 Order, ¶5</u>: As to Request for Production numbers 39 and 40, Defendant’s objections are sustained <b>without prejudice to Plaintiff’s right to request the subject documents in the future based on Plaintiff’s ability to obtain the requested information through publicly available resources.</b> (<i>Id.</i>)</p>	<p>and cash flows, and statements of changes in financial position, for Gawker Media, LLC, including each of the GAWKER WEBSITES, covering all periods from January 1, 2011 through the present. (Exhibit 9.)</p>

As an initial matter, Mr. Bollea was not able to obtain the financial information through publicly available sources, and so he renewed his request for the information in accordance with the Court’s February 26 Order. None of the other orders apply to Mr. Bollea’s request for financial statements relating to Gawker’s affiliated websites. The discovery is relevant and reasonably calculated to lead to the discovery of admissible evidence supporting Mr. Bollea’s damages theories. The documents and information are sought for a period of three to four years surrounding Gawker’s publication of the Sex Video so that Mr. Bollea may compare the

financial information for the period prior to Gawker’s publication, and following Gawker’s publication, to ascertain the value derived by defendants, including Gawker and its affiliated websites, from the unauthorized publication, as well as where and how that value was distributed. The information will be used to show that the following adage is true: a rising tide (or a Hulk Hogan Sex Video) lifts all boats (Gawker.com and its affiliated websites). Thus, the financial statements sought are reasonably calculated to lead to the discovery of admissible evidence and, as Judge Case recommended, should be produced.

e) **Request 121**

<b>Discovery Previously At Issue</b>	<b>Court Order</b>	<b>Discovery Currently At Issue</b>
<p><u>Request 91</u>: All financial statements, including but not limited to balance sheets, income statements, and statements of changes in financial position, for . . . Blogwire Hungary Szellemi Alkotast Hasznosito KFT, and or their affiliates, including any combined financial statements, covering all periods from January 1, 2010 through the present. (Exhibit 5.)</p>	<p><u>2/26/14 Order, ¶9</u>: As to Request for Production number 91, Defendant’s objections are sustained <b>without prejudice</b> to Plaintiff’s right to request the subject documents in the future <b>based on a review of the sufficiency of disclosures made in other documents and depositions taken as of November 25, 2013.</b> (Exhibit 6.)</p>	<p><u>Request 121</u>: All financial statements, including but not limited to balance sheets, income statements (which shall include identification of all revenue sources and expenses), statements of retained earnings and cash flows, and statements of changes in financial position, for Kinja KFT f/k/a Blogwire Hungary Szellemi Alkotast Hasznosito KFT, covering all periods from January 1, 2011, through the present. (Exhibit 9).</p>

Mr. Bollea reviewed the disclosures, documents and depositions taken as of November 25, 2013, and found them insufficient in answering the request at issue. He therefore renewed his request for the information, precisely in accordance with the Court’s February 26 Order, and Judge Case found that the financial statements requested should be produced.

2. **Gawker’s argument that the discovery concerns “sensitive confidential information” is not a basis for denial of the motion to compel.** Gawker’s concerns over



confidentiality are adequately addressed by the Protective Orders in this case. Mr. Bollea seeks from Gawker the full production of Gawker's policies, notices and agreements relating to Gawker's protection of its privacy and confidentiality. Gawker refuses to fully produce these documents, but makes no showing why such a production would be unduly burdensome. The documents are relevant to Gawker's state of mind when it published private footage of Mr. Bollea nude and having sex in a private bedroom. Gawker insists that third parties respect its privacy and confidentiality but, at the same time, argues that others, including Mr. Bollea, do not have a right to privacy or confidentiality, including when they are naked and having private sex in a private bedroom. Gawker cannot pick and choose when to respect someone's privacy, just as it cannot pick and chose which responsive documents it would like to produce and "respectfully decline" to produce the remainder. Gawker must fully produce the requested policies, notices and agreements, as Judge Case recommended.

**3. The discovery relating to Kinja is appropriate:**

*First*, Gawker must produce documents within its "possession, custody, or **control**." Fla. R. Civ. P. 1.350(a) (emphasis added). Whether documents are within a party's control "is broadly construed" and includes whether the party has the "right, authority, or **practical ability** to obtain the materials sought on demand." *Costa v. Kerzner Intern. Resorts, Inc.*, 277 F.R.D. 468, 470–71 (S.D. Fla. 2011) (emphasis added). Gawker has the right, authority, and **practical ability** to obtain the records sought from Kinja. Gawker never adduced any evidence that it does not have such "right, authority, or practical ability," and the evidence shows that Gawker **does** have that ability:

- Gawker and Kinja are both wholly owned by the same entity: Gawker Media Group, Inc. ("GMGI").
- Scott Kidder, who works out of Gawker's offices in New York City, has acted as both

Vice President of Operations at Gawker **and** Managing Director of Kinja.

- Mr. Kidder testified that he alone is the **sole officer and director of Kinja**. Exhibit 10 (Kidder Tr. 20:7–18; 47:25–48:16).
- Discovery has shown that there is a close **financial relationship** between sister companies Gawker and Kinja. Mr. Kidder testified: “they have entered into various agreements between each other.” *Id.* (Kidder Tr. at 47:21–24).
- Kinja owns the GAWKER trademarks, and licenses them to Gawker. *Id.* (Kidder Tr. 103:25–105:11). In doing so, Kinja has filed with the U.S. Patent and Trademark Office (“USPTO”) applications, and received registrations, for the GAWKER trademarks indicating that Kinja’s business office is located at the exact same address as Gawker’s business headquarters.
- Kinja receives revenues and profits from Gawker by way of royalty payments from Gawker. *Id.* (Kidder Tr. at 57:8–23).
- Kinja owns the domain name Gawker.com (the URL address that published the Sex Video at issue), and permits Gawker to operate the Gawker website at that URL address. *Id.* (Kidder Tr. at 49:6; 219:11).

**Second**, Kinja’s pending jurisdictional appeal does not vitiate Mr. Bollea’s right to seek discovery **from Gawker**. Gawker points to no law whatsoever that holds that a pending appeal by one defendant precludes a party from seeking discovery from **another** defendant. Gawker argues that allowing discovery of information in **Gawker’s** control regarding Kinja will “interfere” with the Court of Appeal’s jurisdiction, but does not explain how this will happen. As Judge Case found, Gawker’s production of documents relating to Kinja in no way would intrude upon the Court of Appeal’s jurisdiction, and so they should be produced.

**Third**, the Kinja-related information sought by Mr. Bollea is relevant and reasonably calculated to lead to the discovery of admissible evidence. Kinja is the creator and licensor of the software platform used by Gawker’s websites, the domain name Gawker.com (where the Sex Video was posted), and the GAWKER trademarks. Exhibit 10 (Kidder Tr. at 39:15–49:8). **Kinja receives profits** from Gawker by way of royalty payments. *Id.* (Kidder Tr. at 57:8–23).

Thus, Mr. Bollea seeks discovery concerning Kinja's finances so that he can compare them as they were **prior** to Gawker's unauthorized publication of the Sex Video, to Kinja's finances **after** Gawker's publication, and thereby ascertain the degree to which the value to Gawker extended to its affiliated companies, including Kinja.

### III. CONCLUSION

For the foregoing reasons, as well as those in Mr. Bollea's moving and reply papers filed before Judge Case, and in his oral argument, Gawker's exceptions to Judge Case's November 5, 2014 Report and Recommendation should be overruled in their entirety.

DATED: December 5, 2014

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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 5th day of December, 2014 to the following:

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