

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, *et al.*,

Defendants.

**GAWKER MEDIA, LLC'S EXCEPTIONS TO REPORT AND
RECOMMENDATION TO GRANT PLAINTIFF'S MOTION TO COMPEL**

Pursuant to Rule 1.490 of the Florida Rules of Civil Procedure, defendant Gawker Media, LLC ("Gawker") hereby files these exceptions to the Special Discovery Magistrate's November 5, 2014 Report and Recommendation (attached as Exhibit 1) to grant plaintiff's motion to compel Gawker to produce certain additional financial and other sensitive information. In an effort not to burden the court with extra paper, Gawker incorporates herein by reference the arguments it advanced in its Opposition (filed September 22, 2014) to plaintiff's motion ("Gawker Opp."). Gawker submits herewith that Opposition, and for the sake of completeness, plaintiff's motion (filed August 19, 2014) and reply (filed October 3, 2014), plus, as Exhibit 3, the relevant portion of the transcript of the hearing before the Special Discovery Magistrate held on October 20, 2014.

Briefly, in support of its exceptions, Gawker states as follows:

1. **Discovery Already Ruled Out of Bounds:** In the Report and Recommendation, the Special Discovery Magistrate recommended that Gawker be compelled to produce detailed financial discovery that this Court already ruled was out of bounds at a hearing on November 25, 2013, and in an order dated February 26, 2014 (the "February 26 Order," attached as Exhibit 2).

Indeed, by the time of that earlier hearing, Gawker had already produced extensive information about its finances, and the Court accepted Gawker's arguments that further production of the granular details about its finances was not warranted. *See* Gawker Opp. at 15-16. Given that earlier ruling, it is unclear why Judge Case recommended otherwise. Gawker respectfully requests that its exceptions be sustained, since Gawker should not be subjected to a forensic accounting review of individual line items on its financial statements or other individual transactions that do not bear on this case. Specifically:

a) In Interrogatory No. 18, plaintiff requested that Gawker identify every source of its "other revenue" shown in line 200 of its income statement, and in RFP No. 120, he requested (among other things) income statements that would "identif[y] . . . all [its] revenue sources." But in its February 26 Order, at ¶ 12, the Court ruled that Gawker was not required to produce any additional documents – beyond the extensive documents already produced – showing "revenues received by Gawker . . . *and/or the basis for its receipt of such revenues*" (addressing RFP No. 99; emphasis added). *See* Gawker Opp. at 10-11.

b) In Interrogatory No. 19, plaintiff requested that Gawker "state all facts relating to Gawker's payment of any IP Royalty Expense" shown "at line 8300" of its income statement, and in RFP No. 120 he requested (among other things) income statements that would identify "all" of Gawker's "expenses." But in its February 26 Order, at ¶ 2, the Court ruled that Gawker was not required to identify "individuals or entities such as employees or vendors, who may have received compensation indirectly as a result of [Gawker's] use of revenues generated from the publication of the Gawker Story to pay usual and customary obligations" (addressing Interrog. No. 13). *See* Gawker

Opp. at 10-11. Gawker has separately provided detailed information about payments based on the publication at issue, as the Court directed. The additional payments plaintiff seeks here are routine vendor payments unconnected to the post at issue, and this Court has already ruled, for good and valid reasons, that they need not be produced.

c) In his Second RFP No. 116, plaintiff requested “[a]ll documents and communications that relate to any proposed equity, debt or other security offering” by Gawker from January 2011 to the present. But in its February 26 Order, at ¶ 4, the Court ruled that Gawker was not required to produce “documents that relate to the identity of the owners of Gawker or any affiliated company” (addressing RFP No. 30). *See* Gawker Opp. at 10-11. Regardless, Gawker is wholly-owned by Gawker Media Group, Inc., which is no longer a defendant in this action, so there are no equity, debt or security offerings by Gawker in any event.

d) In his RFP Nos. 119 and 120, plaintiff requested detailed information about revenues of *other* websites operated by Gawker (*i.e.*, other than Gawker.com, where the post at issue was published), and all communications about those revenues, including: “[a]ll documents and communications that relate to all revenue generated by each of the Gawker websites” (No. 119) and “[a]ll 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” each of the Gawker websites (No. 120). But in its February 26 Order, at ¶ 5, the Court denied plaintiff’s motion to compel responses to virtually identical requests and specifically held that Gawker was not required to produce “documents that relate to all revenue generated by each of the

Gawker websites” (sustaining objections to RFP No. 40). Instead, the Court credited Gawker’s argument that, having provided detailed financial information for both the gawker.com website and the whole company, breaking down revenue information for the seven other websites Gawker publishes was burdensome and unnecessary. *See* Gawker Opp. at 15-16.

e) In his RFP No. 121, plaintiff requested from *Gawker* financial statements for *Kinja, KFT*, formerly known as Blogwire Hungary Szellemi Alkotást Hasznosító, KFT (“Blogwire Hungary” or “Kinja”). Specifically, he requested “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*, covering all periods from January 1, 2011, through the present.” But in its February 26 Order, the Court denied plaintiff’s motion to compel a response to a virtually identical request and held that Gawker was not required to produce such information. *See* Feb. 26 Order at ¶ 9 (denying plaintiff’s motion to compel “all financial statements, including but not limited to balance sheets, income statements, and statements of changes in financial position, for” Blogwire Hungary, “including any combined financial statements, covering all periods from January 1, 2010 through the present”) (addressing RFP No. 91). *See also* Gawker Opp. at 13-15.

Given that this Court previously ruled that the materials described above were off-limits in discovery, the Special Discovery Magistrate’s recommendation that such information and documents nevertheless be produced is erroneous. Plaintiff did not make any showing of changed circumstances that justify upsetting this Court’s prior order, entered after exhaustive

briefing and a lengthy hearing. Indeed, the arguments that plaintiff made in connection with his motion to compel here are precisely the same arguments that he made, and that the Court rejected, in connection with his motion to compel that was heard in November 2013. *See* Gawker Opp. at 16 (citing earlier briefing).¹

2. **Sensitive Confidential Information:** The Special Discovery Magistrate also recommended compelling Gawker to produce sensitive confidential information that is not relevant to any issue in this case, nor likely to lead to the discovery of admissible evidence, especially given the comprehensive discovery Gawker has already produced on the same topics, as detailed at some length in Gawker's Opposition, at 1-4, 7-8, 12-13, 17-18. Specifically:

a) In addition to being improper for the reasons discussed above, plaintiff's requests for further financial information (Interrog. Nos. 18-19, RFP Nos. 119-121 & Second RFP No. 116) are also improper because the detailed information they seek is not germane to plaintiff's damages claims. Gawker has already provided nearly four years' worth of Gawker's income statements, balance sheets, monthly revenue statements (for the company as a whole *and* for *gawker.com*), and every advertising order for almost five years (indeed, just the advertising orders resulted in a production of approximately 10,000 pages). Even assuming that plaintiff is entitled to recover Gawker's alleged profits as damages (which he is not, *see* Gawker Opp. at 12 n.14), he cannot conceivably need multiple years' worth of information about specific line items, about equity or debt

¹ Because that hearing predated Judge Case's involvement in this case, and there was no transcript of that hearing, he was understandably operating without complete information about this Court's prior rulings on the discovery sought here for a second time by plaintiff. Recognizing that this Court has additional prior familiarity with these matters, in rendering his Report and Recommendation, Judge Case advised that Judge Campbell could "fine tune" the order "as she sees fit," in light of her prior rulings. Ex. 3 (Oct. 20, 2014 Tr.) at 101:10-13; *see also* Ex. 1 at 1 (Report and Recommendation "subject to any modifications by Judge Campbell in light of her prior rulings").

offerings, about a sister company's finances, or a breakdown of other websites' finances to do so.

b) In addition to the detailed financial information discussed above, plaintiff requested every agreement Gawker has entered for a four year period that contains a confidentiality clause, as well as every document referring or relating to those agreements. Specifically, Request No. 126 seeks "all documents that constitute, refer to, or relate to any and all of [Gawker's] policies, notices and agreements, for the period January 1, 2011, through the present, relating to the protection of [its own] privacy or confidentiality." Plaintiff claims he needs this information to show that Gawker also cares about maintaining its privacy about certain aspects of its affairs. In response, Gawker produced the templates for its standard agreements which contain confidentiality language (*e.g.*, its independent contractor agreement, employment agreement, and non-disclosure agreement), which would allow plaintiff to make that argument, for whatever it is worth. But requiring Gawker to produce each and every actual agreement it has entered into for a nearly four-year period – as the Special Discovery Magistrate recommended – would be improper because: (a) the individual specific agreements are not themselves relevant – the only thing even arguably relevant is the "confidentiality" language, which Gawker already produced; (b) locating, retrieving, reviewing and producing a substantial number of agreements and documents about them (documents which are not kept in a central location because they involve many different aspects of the company's operations, ranging from advertising contracts to employment agreements) would be unduly burdensome, especially where (again) the relevant language has already been produced, and (c) production would require Gawker to violate its confidentiality

agreements with numerous vendors, employees and contractors who have nothing whatsoever to do with this case and where the subject matter of the agreements likewise has nothing to do with this case.

As explained in its Opposition, Gawker and its co-defendants have already responded to more than 300 written discovery requests, produced roughly 25,000 pages of documents, and submitted to multiple full-day depositions. *See* Gawker Opp. at 1-4. Gawker has provided extensive information about its finances and confidentiality agreements. Plaintiff's requests for still more information are improper and harassing absent some showing (which he has not made) that they are anything more than a fishing expedition.

3. **Discovery Regarding Blogwire Hungary/Kinja**: Finally, the Special Discovery Magistrate's recommendation is also in error to the extent that it recommends the production of documents and information concerning Blogwire Hungary/Kinja that are in Gawker's control (RFP Nos. 89, 90, 92, 93, 120, 121; Interrog. No. 19). As an initial matter, Judge Case limited his recommendation to documents within Gawker's control,² and Gawker reiterates its position that it cannot be deemed to have "control" for this purpose over documents maintained by another entity in Hungary. Regardless, Gawker should not be required to produce any documents concerning Blogwire Hungary at this juncture:

² *See* Ex. 1 at 1 (Report & Recommendation that motion to compel be granted "to the extent [information is within] Gawker's possession, custody or control"); Ex. 3 (Oct. 20, 2014 Tr.) at 103:4 – 105:2 (recommending same only "as it is directed to Gawker and the related defendants over which jurisdiction is currently not an issue I'm not saying that [Blogwire Hungary] is under the control of Gawker. I'm just saying that if that information that has been required or ordered to compel by Gawker, if they have it and it's available to them and it's within their control, then they would be required to comply."). Although Judge Case therefore did not appear to rule that Blogwire Hungary was under Gawker's "control" for this purpose, had he done so that would have been erroneous both for the reasons stated herein, and because plaintiff has not met his burden of establishing such "control" for this purpose, as explained more fully in Gawker's Opposition at 18-23.

(a) The question of Blogwire Hungary’s involvement in this case – including whether additional discovery concerning it is warranted – is squarely before the Court of Appeals at this time. Specifically, the appellate court is currently considering: (1) the role – or lack thereof – that Blogwire Hungary played in connection with creating, editing or publishing the post at issue (*i.e.*, whether it directly engaged in tortious conduct in or directed at the State of Florida sufficient to satisfy Florida’s long-arm statute and the Due Process Clause); (2) the nature of the relationship between Blogwire Hungary and Gawker, including whether the former can be held responsible for the conduct of the latter under a corporate veil piercing theory; and (3) whether additional discovery concerning Blogwire Hungary is warranted. For this Court to address these very same issues now – as would be required to order further discovery from or about Blogwire Hungary – would create an improper risk of inconsistent determinations. Moreover, it would undermine the District Court’s consideration of the appeal and would run afoul of that court’s admonition that a trial court may not take action which would “interfere with the power and authority of the appellate court or with the rights of a party to the appeal which are under consideration by the appellate court.” *Palma Sola Harbor Condo, Inc. v. Huber*, 374 So. 2d 1135 (Fla. 2d DCA 1979); *see also* Philip J. Padovano, FLORIDA APPELLATE PRACTICE, § 24:6 (“Appeals from orders determining personal jurisdiction are unlike appeals from most other nonfinal orders in the respect that almost all proceedings in the trial court, *including discovery*, will be suspended until resolution of the appeal. Nearly any action in the trial court during the pendency of the appeal could be characterized as an interference with the appellate court’s jurisdiction.”) (emphasis added).

(b) Such interference with the jurisdiction of the appellate court is not only improper, it is also wholly unnecessary. Since Judge Case ruled, Blogwire Hungary has been severed from the case pending the outcome of the appeal, *see* Ex. 5 (severance order dated Nov. 4, 2014), and thus plaintiff has no immediate need for documents concerning Blogwire Hungary. Either it will be kept in the litigation, in which case this issue can be addressed at that time, or it will be dismissed for lack of jurisdiction, in which case such information is irrelevant. Because there is a pending appeal directly addressing Blogwire Hungary's role, if any, and because trial against Blogwire Hungary has been severed, such discovery should proceed only once the Court of Appeals rules, and then only based on the substance of that ruling. The proper course is therefore to defer any ruling concerning the discovery related to Blogwire Hungary until after the appellate court rules.³

(c) Finally, to the extent that the Court nevertheless elects to adjudicate this issue now and to the extent that the Report and Recommendation is somehow interpreted as directing Gawker to produce Blogwire Hungary/Kinja's documents, *see* note 2 *supra*, such a recommendation is erroneous because Gawker does not, as a matter of law,

³ In this regard, although Interrogatory No. 19, which is also addressed above, requests that Gawker "state all facts" relating to its payment of any "IP Royalty Expense," plaintiff's principal justification for seeking this "expense" data is to learn about royalty payments to Blogwire Hungary/Kinja. *See, e.g.*, Ex. 3 (Oct. 20, 2014 Tr.) at 56:15-21 ("What we've been told is that Kinja receives IP royalty expenses for providing the domain name Gawker.com and the trademark Gawker and the others and the software. So the IP expenses are either entirely or in large part Kinja. Kinja is the company that receives these profits."); *see also* RFP 120 (seeking income statements reflecting all expenses). To the extent that plaintiff's conceded purpose is to seek information about payments to Kinja, such payments are not relevant to any issue currently before this Court and any ruling on it should be deferred for the same reason. The remaining components of the "IP Royalty Expense" category are comprised of routine vendor payments to licensors like the Associated Press and Getty Images, and the other non-IP expenses sought in Request No. 120 have no bearing on this action – as this Court previously recognized in its February 26 Order when it denied plaintiff's earlier motion to compel information and documents concerning such routine vendor payments, as discussed above. *See* Feb. 26 Order at ¶ 2. At a minimum, any order should be limited to exclude such other payments.

control those documents for this purpose, as explained in Gawker’s Opposition at 18-23. In analyzing that question, courts consider, among other things, whether the requesting party has shown that the affiliated corporation has a connection to the “transaction at issue in the litigation.” Plaintiff has not, and could not, make such a showing here, as the undisputed evidence demonstrates that Blogwire Hungary/Kinja had nothing to do with that “transaction” – namely, the writing, editing, or publication of the post at issue. Indeed, at a hearing two days after the hearing before Judge Case on the instant motion, counsel for plaintiff admitted as much, telling this Court that (a) “it’s not that Kinja was editing or Kinja was posting, and the allegations are not that Kinja was engaged in those activities,” Ex. 4 (Oct. 22, 2014 Tr.) at 27:22-24; (b) the “main defendants” – *i.e.*, “Gawker Media, LLC, Nick Denton and A.J. Daulerio” – are “the ones who received the sex video that’s at issue, they edited, they put [a] subtitle to it, and they posted the video their site,” *id.* at 24:22 – 25:5; (c) “Gawker Media” – and not Kinja – “was providing the employees who did the editing and the posting and received the advertising revenues,” *id.* at 28:4-6; and (d) as a result the claims against Blogwire Hungary and the claims against Gawker “are not intermingled,” *id.* at 54:7-10. While Judge Case did not have the benefit of these admissions, now that plaintiff has conceded that Blogwire Hungary’s conduct is unrelated to the allegedly tortious conduct challenged in this action – publishing the post at issue – it would be erroneous to conclude that he had satisfied his burden of establishing that Gawker has “control” for this purpose over documents maintained by Blogwire Hungary, a separate entity in another country which is challenging this court’s jurisdiction over it.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Report and Recommendation be overruled, that plaintiff's motion be denied, and that the Court grant such other and further relief as it deems just and proper.

Dated: November 17, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Gregg D. Thomas

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

601 South Boulevard

P.O. Box 2602 (33601)

Tampa, FL 33606

Telephone: (813) 984-3060

Facsimile: (813) 984-3070

gthomas@tlolawfirm.com

rfugate@tlolawfirm.com

Seth D. Berlin

Pro Hac Vice Number: 103440

Michael D. Sullivan

Pro Hac Vice Number: 53347

Michael Berry

Pro Hac Vice Number: 108191

Alia L. Smith

Pro Hac Vice Number: 104249

Paul J. Safier

Pro Hac Vice Number: 103437

LEVINE SULLIVAN KOCH & SCHULZ, LLP

1899 L Street, NW, Suite 200

Washington, DC 20036

Telephone: (202) 508-1122

Facsimile: (202) 861-9888

sberlin@lskslaw.com

msullivan@lskslaw.com

mberry@lskslaw.com

asmith@lskslaw.com

psafier@lskslaw.com

Counsel for Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November 2014, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Christina K. Ramirez, Esq.
cramirez@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Sarah E. Luppen
sluppen@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines, Esq.
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ Gregg D. Thomas
Attorney