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.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

GAWKER MEDIA, LLC'S VERIFIED MOTION TO DISQUALIFY TRIAL JUDGE

Pursuant to Section 38.10, Florida Statutes, Florida Rule of Judicial Administration 2.330, and Florida Code of Judicial Conduct Canon 3 B(7) and 3 E (1)(a), Defendant Gawker Media, LLC ("Gawker"), by and through the undersigned counsel, hereby moves to disqualify The Honorable Pamela A.M. Campbell from the above-styled case. As explained below, Gawker has an objectively reasonable fear that it will not receive a fair adjudication and trial before the Court because (1) the Court has displayed bias and prejudice against Gawker due to the nature of the content at the core of this case and (2) the Court has engaged in improper *ex parte* communications with counsel for Defendant Heather Clem ("Clem") regarding Plaintiff's Motion for Temporary Injunction. As further grounds for this motion, Gawker states as follows:

1. On April 19, 2013, Plaintiff filed a Motion for Temporary Injunction (the "Motion") seeking, among other things, to have the Court order Gawker to take down from the Internet a story it had written regarding a videotape depicting an extramarital affair between Plaintiff Terry Bollea, also known as "Hulk Hogan" ("Hogan"), and the then-wife (defendant

Heather Clem) of Hogan's best friend, Bubba the Love Sponge Clem, with his best friend's blessing (the "Gawker Story"). The Gawker Story was accompanied by brief excerpts (the "Excerpts") from a full Video (the "Video") of the affair provided to Gawker.

2. Gawker filed its Opposition to the Motion on April 23, 2013.

3. A hearing was held on the Motion on April 24, 2013.

4. The Court made numerous statements at the hearing evidencing a prejudice against Gawker and the Gawker Story.

5. At the beginning of the hearing, the Court took issue with the pleadings filed by Gawker's attorneys. The Court stated that "You write pleadings for legal proceedings, not for tabloid or sensational effect." (Hearing Tr. 3:19-20.)[1] The Court continued that "I think some of the language that was used, *especially in the response*, is offensive. I think that it is unnecessary, that it is more written for sensational issues." (Id. at 3:24-4:2 (emphasis added).)

6. In response to argument from Gawker's counsel regarding whether the speech at issue in this case is protected even if not "of the highest quality or tenor" (id. at 21:21-23), the Court said "Let me ask you this. I'm sorry for interrupting, but directly on that point. This is the part that was irritating to me in the lawyers' pleading, where they are describing comments that are made allegedly during this tape" (id. at 22-1-6).

7. While the Court criticized Gawker and its counsel for describing such comments, it was *Plaintiff* who submitted a full copy of the Gawker Story and whose brief and supporting affidavits used far more graphic language describing the Gawker Story and Excerpts. *Compare* Plaintiff's Motion for a Temporary Injunction at 7-8 (graphic description of sexual acts) *and* Harder Declaration Exs. A-G (attaching seven copies of full Gawker Story) *with* Gawker's

[1] The hearing transcript is on file with the Court. (Notice of Filing Hearing Transcript Dated April 24, 2013.)

Opposition to Plaintiff's Motion for a Preliminary Injunction at 4 (describing principally non-graphic conduct and referencing sexual acts in non-graphic way).

8. The Court went on to explain that even though the issue before it was whether to enjoin publication of the Excerpts, it would not review them. Specifically, the Court stated: "No. I'm not going to look at the tape. I don't think at this point in time I need to look at the tape." (Id. at 24:4-6.)

9. After entering the injunction, as the hearing concluded, the Court also stated that one of Ms. Clem's attorneys contacted her office and that Ms. Clem "has no objection to the entry of an injunction." (Hearing Tr. 35:24-36:2.) That communication involved the substance of the pending request for an injunction, the entry of which benefitted Ms. Clem.

10. Based upon these statements and actions by the Court, Gawker has a well-founded fear of a lack of impartiality by the Court.

Motion to Disqualify Standard

11. "The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged." Fla. R. Jud. Admin 2.330(f).

12. "In deciding the legal sufficiency of a motion to disqualify, a court must determine whether the facts alleged would prompt a reasonably prudent person to fear he would not receive a fair trial." Rollins v. Baker, 683 So. 2d 1138, 1139-40 (Fla. 5th DCA 1996) (citations omitted); see also Heier v. Fleet, 642 So. 2d 669, 669-70 (Fla. 4th DCA 1994) ("The facts asserted by a petitioner in a motion to disqualify a judge must be reasonably sufficient to create a well-founded fear in the mind of the party that he or she will not receive a fair trial." (citation omitted).)

13. "[A] trial judge confronted by a motion for disqualification, is obligated to dispose of that motion by 'an immediate ruling ....'" D'Ambrosio v. State, 746 So. 2d 508, 510 (Fla. 5th DCA 1999).

Argument

I. Gawker Has a Well-Founded Fear that it Will Not Receive a Fair Trial.

14. As the Florida Supreme Court has stated on multiple occasions:

> Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse [her]self. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.
>
> ...
>
> The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

Livingston v. State, 441 So. 2d 1083, 1085-85 (Fla. 1983) (quoting Dickenson v. Parks, 140 So. 459, 462 (Fla. 1932)).

15. *Ex parte* communications are similarly problematic to the administration of justice. "Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided conversation between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts." Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). The prohibition on *ex parte* communications is also applicable to "law clerks or other personnel on the judge's staff." Commentary on Code of Judicial Conduct Canon 3 B(7).

16. This case couples a well-founded belief the Court is prejudiced against Gawker and its content, and an *ex parte* communication about substantive relief being requested from the Court, both of which would justify disqualification.

17. The facts of this case are analogous to those found sufficient to justify disqualification in Rollins v. Baker, 683 So. 2d 1138 (Fla. 5th DCA 1996).

18. In Rollins, a retired professional basketball player and then Orlando Magic coach, Wayne "Tree" Rollins sought to disqualify the judge in a dissolution of marriage case. Id. at 1139, 1139 n.1.

19. The grounds for the disqualification were two-fold.

20. First, the presiding judge had *ex parte* communication with Mr. Rollins' counsel. Specifically, the trial judge told Mr. Rollins counsel that "if the petitioner accepted the wife's proposed stipulation, he would not enter the injunction." Id. at 1139.

21. Second, the trial judge make "gratuitous comments" about Mr. Rollins, including that the judge "was not an Orlando Magic fan," that Mr. Rollins had to attend court because people with less means also must do so, and that "although Mr. Rollins may be a 'Tree' in the 'Arena,' he was not 'Tree' in this court." Id.

22. The appellate court held "that the ex parte communications, together with [the trial judge's] comments at the ... hearing, were sufficient to create a well-grounded fear of lack of impartiality." Id. at 1140.

23. Similarly, in this case, the combination of *ex parte* communications and comments by the Court are sufficient to justify disqualification under the applicable rules, statutes and canon.

24. The comments of the Court further support Gawker's well-founded fears that the Court is prejudiced against it.

25. The Court took issue with language used by Gawker in its opposition to the Motion, accusing Gawker of posturing for "tabloid or sensation effect" and explaining that the Court found portions of Gawker's filing "offensive" and "unnecessary." (Hearing Tr. 3:19-4:2.)

26. Similarly, the Court described portions of Gawker's papers as being ""irritating to me." (Hearing Tr. 22:3.) Those "irritating" portions were those in which the substance of the publication at issue was described. (Id. at 22:3-6).

27. A side by side comparison of Plaintiff's Motion and Gawker's Opposition reveals that Gawker's language describing the substance of the publication at issue was far less "offensive" than Plaintiff's description, which referred to Plaintiff's erect penis nearly a dozen times and used words like "dick" and "pussy" to explain the contents of the Gawker Story and Excerpts. (Motion at 2, 6-13, 18, 22.) By contrast, Gawker's supposedly "offensive" and "unnecessary" pleading simply explained the length of the Excerpts published, that a third person not featured in the Excerpts encouraged the two to have sex, and described the fact that Hogan said during the encounter that he should be home, that he had just eaten, that he felt like a pig and that his son's girlfriend's twin proposed a liaison between Hogan and the twin. (Gawker's Opposition to Motion at 3-4, 9, 31.) Gawker's description of the contents of the publication at issue was neither offensive, nor unnecessary. Indeed, it is necessary to address the contents of a publication in the context of an action to enjoin that very publication.

28. As further evidence of the lack of impartiality of the tribunal, the Court went so far as to enjoin publication of the Excerpts without even looking at them. (Id. at 24:4-6.)

29. Based upon the Court's expressed disdain for what it perceived as Gawker's factual recitation of the contents of Gawker Story and Excerpts, characterizing those facts as "offensive," "unnecessary," and interposed for "tabloid or sensational" effects, and based on the Court's refusal to even review the speech at issue before enjoining it, Gawker has a well-founded fear that the Court is prejudiced against it because it was predisposed to find Gawker's work, speech, and position abhorrent.

30. Likewise, the Court's remarks at the end of the hearing that Clem's lawyer "has no objection to the entry of an injunction" (Hearing Tr. 36:1-2) raises the specter of impropriety on the part of the Court and reveals a substantive *ex parte* communication that further places Gawker in fear that it cannot receive a fair trial with the Court.

31. Based upon the facts of this case and the analogous case law, Gawker has both satisfied and surpassed the requisite threshold – that a reasonably prudent person would fear that he would not receive a fair trial based upon the *ex parte* communications and comments by the Court.

32. The Florida Supreme Court explained that

> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

Hayslip v. Douglas, 400 So. 2d 553, 557 (Fla. 4th DCA 1981) (quoting Davis v. Parks, 194 So. 613, 615 (Fla. 1939)).

33. Gawker respectfully requests that this Court disqualify itself and have this case assigned to another judge.

WHEREFORE, Defendant Gawker respectfully requests that the Court grant this Motion and assign this case to another judge.

Respectfully submitted,

THOMAS & LOCICERO PL

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VERIFICATION

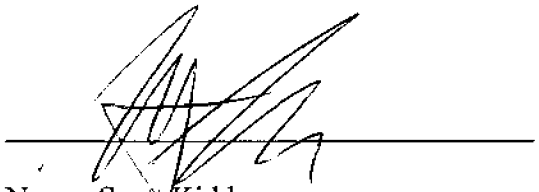
STATE OF NEW YORK

COUNTY OF NEW YORK

BEFORE ME, the undersigned authority, personally appeared, Scott Kidder, who, being first duly identified and sworn, deposes and says that this **VERIFIED MOTION** is based on records and information available to him/her, the statements contained therein are true and correct to the best of his/her knowledge, information, and belief, and Gawker possesses a substantial fear it cannot obtain a fair trial, hearing, or adjudication because of the prejudice and bias of the judge described in this motion.

He is personally known to me.

By: Gawker Media, LLC



Name: Scott Kidder

Its: Executive Director of Operations

Jesse Ma
Notary Public State of New York
New York County
Reg. No.: 02MA6225360
My Comm. Exp. 7-19-14

State of New York
County of New York
Sworn to before me this 3rd day
of May, 2013
Notary Public

(SEAL)

Printed/Typed Name: Jesse Ma
Notary Public-State of New York
Commission Number: 02MA6225360

Dated: 5/3/13

GOOD FAITH CERTIFICATE

Pursuant to Florida Rule of Judicial Administration 2.330(c), we hereby certify that this motion and Gawker's statements in it are made in good faith.

/s/ Gregg D. Thomas
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May 2013, I caused a true and correct copy of the foregoing to be served by hand delivery on The Honorable Pamela A.M. Campbell, 545 First Avenue North, Room 300, St. Petersburg, FL 33701 and by mail and email upon the following counsel of record:

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