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 OPPOSITION TO GAWKER MEDIA, LLC'S MOTION TO RECONSIDER RULING REGARDING PRODUCTION OF "CEASE AND DESIST" COMMUNICATIONS OR, IN THE ALTERNATIVE, FOR A STAY PENDING APPELLATE REVIEW

I. INTRODUCTION

Gawker Media presents no valid grounds for reconsidering the Court's ruling that communications relating to cease and desist letters it received over a **limited time period** are discoverable. Gawker Media reargues the very legal grounds (its claim that the communications are neither relevant nor likely to lead to the discovery of admissible evidence) that the Court already rejected. As for its belated declaration from its in-house counsel about the supposed burden that it will face in producing the documents: (1) Gawker waived any claim of supposed undue burden by failing to argue it in its opposition papers despite the fact that all the facts supporting it were available to Gawker at that time; and (2) independently, Gawker's argument

that it would be too difficult and costly to do keyword searches of the e-mails of employees who ordinarily would be involved in such communications is implausible and Gawker adduces no evidence that the searches would actually be burdensome.

Gawker also is not entitled to a stay pending appeal. Gawker cannot show a likelihood of success on the merits. This Court's ruling that a limited-in-time production of three years of cease and desist letters falls within the broad standard of discovery relevance is correct and Gawker will not be able to show an abuse of discretion. Independently, Gawker also has not shown that production of these documents will cause substantial harm; at worst, Gawker will be required to perform some keyword searches and produce some documents that it contends are irrelevant but which do not contain any privileged information.

Finally, Gawker's contention that the documents are being amassed for an improper purpose is false. Gawker's intent and the outrageousness of Gawker's underlying conduct are elements of the tort claims pleaded by Bollea. Gawker's prior conduct and its policies and practices when faced with claims that it violated the rights of the subjects of its stories are relevant to these claims. Gawker also has provided no evidence that Bollea or his attorneys are assembling any sort of a "dossier"; the claim is based on pure speculation. Finally, the parties have a protective order in place that permits Gawker to prevent the use of the documents for any purpose other than this lawsuit; thus, Gawker's fears that this will happen are baseless.

II. THE MOTION FOR RECONSIDERATION SHOULD BE DENIED.

Caselaw offers guidance as to when courts should exercise the discretion to reconsider a previous order. For instance, a motion for reconsideration is not a vehicle for correcting a **party's** errors in its earlier filings. *Holloway v. State*, 792 So.2d 588, 588 (Fla. 5th DCA 2001) (where motion to set bail had erroneously stated that no bail had yet been set, motion for

reconsideration that asked the trial court to reconsider based on the corrected facts was properly denied). Further, a motion for reconsideration cannot simply reargue the previous motion but must show a **change in circumstance** that justifies revisiting the Court's ruling. *Hunter v. Dennies Contracting Co.*, 693 So.2d 615, 616 (Fla. 2d DCA 1997) (motion to dissolve injunction which did not show changed circumstances was properly denied even though evidence had been insufficient to grant injunction in first instance). Where a motion for reconsideration relies on an affidavit presenting purportedly "new" facts, and those facts could have been presented before the Court's initial ruling, the Court may properly deny the motion. *Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc.*, 381 So.2d 1164, 1167 (Fla. 5th DCA 1980) (appellate court declines to consider content of affidavit submitted with motion for reconsideration where party failed to offer affidavit in opposition to initial motion).

Under these fundamental principles, Gawker's motion for reconsideration should be denied. The discovery at issue was served in May 2013. Gawker thus had **six months** notice that Bollea was asking for cease and desist communications and could have determined how burdensome production of the documents would be and submitted an affidavit to the Court in advance of the hearing, which was held on November 25, 2013. Bollea's motion to compel was filed on August 21, 2013, so Gawker also had **three months** notice that Bollea was seeking to compel production of these documents; however, again, Gawker failed to submit any affidavit claiming that production would be burdensome.

Further, it is perfectly clear that the information Gawker is presenting to the Court—an assessment of the burden of production—was available to Gawker at all times. Gawker had Bollea's requests and Bollea's motion to compel; it knew exactly what it would need to produce. Gawker is simply attempting to relitigate a motion based on facts that it could have easily

presented to the Court the first time around. That is not a valid basis for a motion for reconsideration.

Independently, even if the belatedly-presented Dietrick Affidavit is considered by the Court, it does not establish that Gawker will suffer an undue burden. A party objecting to a document demand on the ground of undue burden has the burden of proof on the issue. *Kyker v. Lopez*, 718 So.2d 957, 959 (Fla. 5th DCA 1998) (where information was routinely generated and stored in computer systems, the objecting party did not prove that it would be unduly burdensome to produce the documents).

The Dietrick Affidavit, even if taken as true, establishes that the cease and desist communications were stored in employees' e-mail accounts, and that they can be located by means of a keyword search of those e-mails, a process Gawker already used to respond to other document demands. Indeed, the searches could have been done at the time Gawker was responding to the other Bollea document demands (and thus presumably at no further expense to Gawker), but Gawker chose not to do that.[1] The Dietrick Affidavit further claims that the searches would be costly, but includes no cost estimate, instead relying on generic claims that it would burden the company to look for the documents. It does not meet Gawker's burden of proving that it would not only be burdened, but **unduly** burdened, by this discovery.

[1] It is important to note that Gawker's decision to object to the discovery does not excuse Gawker from its burden of establishing the foundation for its undue burden objection—Gawker could have gathered the documents in case its objections were overruled, assessed the cost of gathering and producing the documents and included it in its opposition. Gawker has acted as though it is entitled to multiple bites at the apple, first objecting to discovery on the ground of relevance, and only after it has put its adversary to the cost of a motion to compel, claiming undue burden and cost. This strategy is an attempt to profit from Gawker's failure to gather information and make its arguments earlier, and is a tremendous drain on the resources of Bollea, his counsel and the Court.

III. THERE IS NO BASIS FOR A STAY PENDING APPEAL.

To prevail on a stay motion, Gawker is required to establish: "(1) a likelihood of success on the merits, and (2) a likelihood of harm absent the entry of a stay." *Kirkland's Stores, Inc. v. Felicetty*, 931 So.2d 1013, 1015–16 (Fla. 4th DCA 2006). To determine whether it is appropriate to grant a stay, a court must consider and balance the interests of both parties. *Tampa Sports Authority v. Johnston*, 914 So.2d 1076, 1080 (Fla. 2d DCA 2005) (balancing potential harms to both plaintiff and defendant in determining that order enjoining use of suspicionless searches at football games should not be stayed pending review).

Gawker has not established a likelihood of success on the merits. This Court carefully limited discovery to cease and desist communications dating from October 1, 2009, to the present. Thus, the Court already took into account Gawker's concerns about the breadth of Bollea's request. The documents that fall within the Court's order are discoverable, as the Court has already ruled. Bollea will be required to establish Gawker's intent and the outrageousness of its conduct as elements of his privacy and intentional infliction of emotional distress claims. Gawker's prior conduct, and its policies and practices with respect to handling claims that Gawker violated the rights of other parties, may disclose relevant information regarding those issues.

In addition, Gawker will be required to overcome a deferential standard of review in its appeal. The trial court's order must not only be found to be erroneous, but to be "a departure from the essential requirements of the law," and must also be found to "cause[] material injury throughout the law suit." *Old Republic National Title Insurance Co. v. HomeAmerican Credit, Inc.*, 844 So.2d 818, 819 (Fla. 5th DCA 2003). Gawker has little likelihood of succeeding on its appeal under this standard; therefore, a stay pending review is unwarranted.

Independently, Gawker also has not shown a serious injury should it be required to produce the documents. As noted above, the Dietrick Affidavit does not contain any specific facts establishing how much it would cost to produce the responsive documents, and any such costs could have been avoided anyway had Gawker gathered these documents when it was identifying the other documents it produced to Bollea. Moreover, this category of documents is **not privileged**; at most, Gawker will have produced some documents that turn out not to have been relevant if it succeeds on its appeal. That happens all the time in litigation; it is not a sufficient injury to justify a stay pending review. Moreover, if every discovery order in litigation was stayed pending an appeal, discovery in civil litigation would cease to exist. The request in this sense in nonsensical.

IV. GAWKER'S INSINUATIONS ABOUT BOLLEA'S COUNSEL ARE UNSUPPORTED BY THE EVIDENCE, AND THE PARTIES' PROTECTIVE ORDER ALREADY PROHIBITS ANY MISUSE OF CONFIDENTIAL INFORMATION.

Finally, Gawker argues, both in its moving papers and in the Dietrick Affidavit, that Charles Harder, counsel for Bollea, supposedly is seeking this discovery to compile a litigation dossier for use against Gawker in other cases. This argument, which could have been raised in opposition to the motion to compel, is unsupported by any evidence. Gawker has not shown a single instance where Mr. Harder, or any other attorney for Mr. Bollea, has misused confidential information produced in this lawsuit. The fact that Mr. Harder may represent other celebrities, or that Mr. Harder's other clients may have, in the past, made cease and desist requests to Gawker, does not establish that any sort of "dossier on Gawker" is being compiled. Gawker's argument rests on pure speculation, and nothing more.

In any event, the protective order already in place in this action provides a procedure for parties to ensure that confidential information produced in this litigation is not used for improper purposes. Gawker is fully protected to the extent it properly designates responsive documents as "confidential." Absent a court order to the contrary, such documents would not be usable for any purpose other than this litigation and thus no "litigation dossier" could be compiled using them.

V. CONCLUSION

For the foregoing reasons, Gawker's motion for reconsideration, or in the alternative for a stay pending appeal, should be denied.

DATED: January 6, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service mail this 6th day of January, 2014 to the following:

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