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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 OPPOSITION TO PLAINTIFF'S MOTION TO OVERRULE OBJECTIONS TO SUBPOENAS TO FASTLY, INC. AND GOOGLE, INC.

Plaintiff wants to send subpoenas to two companies, Google, Inc. ("Google") and Fastly, Inc. ("Fastly"), for web traffic information as well as for other information related to Gawker's business relationships with these companies. But Gawker has already produced the traffic data plaintiff wants to subpoena from Google for the post at issue and for gawker.com. And Fastly does not maintain such data and had no involvement in the post at issue – indeed, Gawker did not begin using Fastly's services until months after that post was published. The other information plaintiff seeks – such as comprehensive analytics data from *other* websites and contracts between Gawker and these vendors – is in no way relevant to this case and has, in significant part, already been ruled out of bounds by Judge Campbell. Because these subpoenas serve no good purpose other than to create busy-work for Google and Fastly, Gawker objected to the subpoenas and respectfully requests the Court to sustain those objections.

BACKGROUND

In the course of discovery in this case, Gawker has produced multiple years of detailed information related to its web traffic – for both the post at issue here (the "Gawker Story") and for gawker.com generally – from three separate sources: from the web traffic rating service

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Quantcast (*see* www.quantcast.com), from Gawker's own internal traffic tracking program, and, as is relevant here, from Google Analytics. Gawker has also explained this data in detail in both written discovery responses and in deposition testimony.[1]

Despite all this, plaintiff now seeks to issue subpoenas to two outside services. But the Google Analytics data Google compiled for both the Gawker Story and for gawker.com generally has already been supplied to plaintiff by Gawker. For its part, Fastly is a "content delivery network" that provides backend technical services to Gawker – specifically, when a reader requests a particular page from a Gawker website, Fastly pulls the page from Gawker's servers and facilitates its delivery it to the reader's computer or other device. Fastly does not create, publish or host any material found on Gawker's websites, nor does it contribute in any way to Gawker's editorial processes. Significantly, for present purposes, Fastly does not maintain logs of traffic information of the content it "serves," all such traffic is already included in the substantial traffic data previously provided to plaintiff, and in any event Gawker did not begin using Fastly to provide these IT services until months after the Gawker Story was published. Despite communicating all that to plaintiff, he has now moved to overrule Gawker's objections and to burden these third parties with subpoenas seeking 22 categories of documents from Google and 29 categories from Fastly.[2] Because the information sought has already been

[1] *See* Doc. Nos. Gawker 01148-01185, Gawker 18331-18333, Gawker 23410-23411 (Ex. 1); Gawker's Resp. to Pl.'s RFP No. 13 (Ex. 2); Kidder Dep. at 118:2 – 119:16, 146:18 – 149:4, 162:17 – 164:11, 194:17 – 195:17, 197:11 – 200:24 (explaining systems and methods for analyzing traffic used by Gawker generally) (Ex. 3).

[2] *See* Exs. 1 and 2 to plaintiff's motion. After plaintiff filed his motion, the parties held a "meet and confer," and plaintiff revised his Request No. 8 to Fastly as follows: "All COMMUNICATIONS with GAWKER from January 1, 2011 through the present, regarding one or more of the following topics: analytics data, visitor logs, web traffic, DENTON, KINJA, the LAWSUIT, the SEX VIDEO, the POSTED SEX VIDEO, the POSTED NARRATIVE, the WEBPAGE, or PLAINTIFF (identified as either Terry Bollea, Bollea, Hulk Hogan, Hulk or Hogan)." The email containing this revised request is attached hereto as Exhibit 4.

provided by Gawker, does not exist, and/or is not in any way germane to the issues in this case, the proposed subpoenas are improper and plaintiff's motion should be denied.

ARGUMENT

A. The Objections to the Proposed Subpoena for Fastly Traffic and Analytics Data Should be Sustained.

Plaintiff seeks to obtain from Fastly "all" its analytics data for each of Gawker's eight websites and Kinja (Req. Nos. 1-4, 6-7); "all" communications between Fastly and Gawker's President Nick Denton and between Fastly and Kinja (Req. Nos. 9-10); all other documents concerning the relationships between and among Fastly, Denton, and Kinja (Req. Nos. 12-13, 15-20, 22); and "all" documents that relate to the Gawker Story and the plaintiff (Req. Nos. 5, 23-29). But as Gawker has explained to plaintiff:

(1) Fastly does not store analytics or traffic data for Gawker's websites (*i.e.*, it does not keep track of user IP addresses or otherwise maintain logs of user sessions).

(2) Fastly does not have, and has never had, any relationship with Denton.

(3) Gawker did not even begin its relationship with Fastly until February 2013, four months after the Gawker Story was published.

See Ex. 5 (Oct. 23, 2014 correspondence). Thus, Fastly does not have documents responsive to plaintiff's requests for analytics-related data, does not have "communications" with or other documents relating to Denton, and does not have any information about the Gawker Story or the plaintiff. Plaintiff's continued inclusion of these document requests, despite being informed about the actual nature of the relationship between Fastly and Gawker can only be seen as an improper attempt to burden one of Gawker's IT support vendors to put added pressure on Gawker.

B. The Objections to the Proposed Subpoena to Google Should Be Sustained Because The Same Information Has Either Been Provided or Ruled Out of Bounds.

In addition to traffic data from Quantcast and Gawker's own internal tracking software, Gawker has already provided plaintiff with multiple years' worth of *Google's* traffic data both related to the Gawker Story (Req. Nos. 6-8; *see* Exs. 1-3) and related to Gawker.com more generally (Req. No. 9; *see* Exs. 1-3). While plaintiff surmises that Google must have something different, Gawker has access to the same data that Google has, and has so advised plaintiff. Ex. 5 (Oct. 23, 2014 correspondence).

To the extent that plaintiff's requests to Google seek information concerning "all" analytics data (and descriptions of same) (Req. Nos. 4-5) for "any of the Gawker websites" (not limited to Gawker.com) for a nearly four-year period, such requests are incredibly overbroad and call for evidence that is not even remotely relevant. The Gawker websites collectively publish more than 100,000 posts a year, and thus, read literally, plaintiff's requests would require Google to provide traffic and analytics data on roughly 400,000 posts. But even if the requests were interpreted to require only the production of aggregate traffic data to the other websites (as opposed to data concerning individual posts), they would still be improper because (1) Judge Campbell, in her February 26 Order, already held that traffic information about *other websites* was not subject to discovery unless it was not otherwise publicly available (*see* Feb. 26, 2014 Order at ¶ 5; Gawker's Resp. to Pl.'s RFP No. 39 (Ex. 6)), and (2) such aggregate data is publicly available through quantcast.com, as Gawker has repeatedly advised plaintiff.[3]

Finally, plaintiff's Request No. 6 – seeking analytics data for a different post on Gawker.com (not the Gawker Story) which it never requested from Gawker itself – calls for

[3] For the same reasons, plaintiff's requests to Fastly for data relating to websites other than gawker.com would be improper. In any event, as explained above, Fastly does not maintain such data.

irrelevant information. It is difficult to see how traffic to this other story, published six months after the Gawker Story (and after the video portion was removed), could possibly lead to the discovery of admissible evidence concerning plaintiff's claims.

C. Plaintiff's Requests to Both Companies Concerning Their Business Relationships with Gawker Are Beyond the Scope of Discovery Permitted by Judge Campbell.

Plaintiff also seeks from both Google and Fastly information concerning their business dealings with Gawker, Kinja and Denton (Fastly Req. Nos. 8-22; Google Req. Nos. 1-3). But these requests are improper because the nature of these business relationships is not at issue in this lawsuit. Indeed, Judge Campbell, in her February 26, 2014 Order at ¶ 2 (Ex. 6), specifically denied plaintiff's request for discovery concerning relationships with and payments to vendors providing usual and customary services. Plaintiff has not and cannot demonstrate that major companies like Google and Fastly, who provide services to thousands of customers, have any involvement – through their business relationships with Gawker – in the allegedly tortious conduct at issue and are anything other than usual and customary vendors. If such discovery were allowed, Google and Fastly would receive subpoenas in hundreds if not thousands of lawsuits a year, based on some far-fetched contention that they have information about the actions of their customers.

D. Plaintiff's Requests to Google for "Trends" and "Query" Data are Overbroad and Call for Irrelevant Information.

Plaintiff's requests for "trends" and "query" data about generalized terms like "sex tape" and "Gawker" for a nearly four-year period (Google Req. Nos. 9-10) also are overbroad and do not appear to request relevant information. For example, the video at issue in this lawsuit is not the only "sex tape" that appeared on the Internet during this period, and the Gawker Story is far from the only reason a person might search for the term "Gawker," given that Gawker is a

successful media company with multiple properties which publishes thousands of posts per month (and is frequently mentioned in other media). Without some showing of how these generalized terms could possibly result in information in any way useful to the plaintiff, the requests are improper. Again, if such generalized discovery were allowed from Google, it would receive hundreds if not thousands of such subpoenas each year.

E. The Requests Related to Kinja are an Improper Intrusion Into a Matter That Is Pending Before the Appellate Court.

Plaintiff has proposed a number of requests that concern Kinja (Fastly Req. Nos. 4, 9, 12, 15, 17, 19; Google Req. No. 2). Such requests are improper because the information sought is requested to address either (a) whether this Court has personal jurisdiction over Kinja or (b) whether there is any basis to recover from Kinja if and only if there is jurisdiction over it. Given that Kinja's personal jurisdiction appeal is currently pending before the DCA, the DCA just ordered oral argument, *see* Ex. 7, and the trial court has severed Kinja, ordering discovery concerning Kinja constitutes an intrusion upon the Court of Appeal's jurisdiction. Simply put, a party should not be entitled to take third party discovery concerning an entity until jurisdiction is established.

F. Plaintiff's Relevance Arguments Do Not Withstand Scrutiny.

Plaintiff claims that the overbroad subpoenas he proposed to serve on both of these companies are proper because they seek evidence relevant to "the amount of traffic that flowed from the Sex Video to the Affiliated Websites." Motion at 6. Even assuming that the traffic flowing to and from the Gawker Story is relevant, most of the requests do no go to this issue – they go to the parties' business relationships and traffic to the websites *generally*, not traffic specifically connected to the Gawker Story. And, even those requests that are tied directly to the

Gawker Story are not proper because, as explained, Fastly does not have such information, and Google does not have information other than what Gawker has already provided on this topic.

Plaintiff also claims that "such data also is relevant to the reason behind Gawker's refusal to take down the video despite [plaintiff's] repeated demands that Gawker do so," given that "[i]n other situations where Gawker posted private images . . ., Gawker removed the content." Motion at 6. To support this argument, plaintiff cites *one* instance – of Gawker's 100,000 plus posts per year – in which a different Gawker-owned website, Deadspin.com, removed sexual content about a non-celebrity who had sex in a public sports arena. From this, plaintiff infers that Gawker must have left up the Gawker Story because it resulted in more traffic than the Deadspin story. Putting aside the speciousness of this argument – there are many journalistic reasons why editors may decide to agree to take down one story but not another, totally different story – plaintiff's document requests are not relevant to the point plaintiff is trying to make. Plaintiff does not need all the traffic data from each of Gawker's eight websites and/or information concerning Gawker's business arrangements with these two companies in order to show that one post with explicit content was removed from one of its sites while a *different* post published years later with *different* content was removed from a *different* site. The notion that two companies providing technical services to Gawker have anything to say about Gawker's "reasons" for that exercise of editorial discretion makes no sense.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that this Court sustain its objections to plaintiff's proposed subpoenas to Google and Fastly.

Dated: November 7, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

By: *__/s/ Gregg D. Thomas__*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th 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:

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