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 Et al.,

Defendants.

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**REPLY IN SUPPORT OF PLAINTIFF TERRY GENE BOLLEA'S MOTION TO OVERRULE OBJECTIONS TO SUBPOENAS TO FASTLY, INC. AND GOOGLE INC.**

Plaintiff Terry Gene Bollea submits this Reply in support of his Motion to Overrule Objections to Subpoenas to Fastly, Inc. ("Fastly") and Google Inc. ("Google"). Gawker's objections should be overruled for at least the following reasons:

***First***, Gawker argues the subpoenas seek irrelevant information. As Mr. Bollea's moving papers explain, the subpoenas seek highly relevant information that is reasonably calculated to lead to the discovery of admissible evidence concerning Mr. Bollea's claims and damages. Additionally, Gawker's relevance arguments go to the *weight* of the evidence sought by the subpoenas, not to its discoverability. "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280. Thus, each of Gawker's relevance arguments should be disregarded as inapplicable and premature:

1) For example, Gawker argues that Mr. Bollea's requests for "trends" and "query" data for terms like "**sex tape**" or "**Gawker**" are too generalized to draw a connection between: (1) **Gawker's** posting of a **sex tape** of Mr. Bollea and (2) the number of people who searched for

those terms. The argument, however, has nothing to do with whether the information is discoverable. As Mr. Bollea explained in his moving papers, the information is reasonably calculated to lead to the discovery of admissible evidence concerning the virality of the Sex Video,[1] Gawker's popularity over time, the level of interest in the video and other related topics, and the links that can be drawn between Gawker's posting of the Sex Video and Gawker's increased popularity. Whether a connection can, in fact, be drawn is something for the experts and, ultimately, the jury to consider. It is not an argument against discovery.

2) Gawker argues that information concerning the flow of traffic between and among Gawker's Affiliated Websites should be limited to the traffic directly linking from the Sex Video. This is not a proper argument for a discovery motion. The traffic flow between the Affiliated Websites over time is relevant as a comparison to the traffic flow during the six months that Gawker.com hosted and featured the Sex Video. How that information can be used to support Mr. Bollea's damages theories—namely, that the Sex Video provided enormous value to Gawker in terms of popularity and increased revenues across its various websites—is an issue for the experts and jury to consider.

3) Gawker claims it is "specious" for Mr. Bollea to surmise that Gawker's intent in refusing to remove the sexually explicit video of Mr. Bollea for six months, despite Mr. Bollea's pleas that Gawker take it down, was tied to the increased popularity the video provided to

[1] The Sex Video is the Gawker-edited "highlight reel" of clandestinely-recorded footage of Mr. Bollea engaged in private, consensual sexual relations in a private bedroom that was featured at Gawker's flagship website, Gawker.com, for six months in late 2012 through 2013.

Gawker and the concomitant increase in revenues to Gawker.com and the Affiliated Websites.[2] Gawker's disagreement with Mr. Bollea's theories behind Gawker's intent does not make the argument "specious" and it is not reason to deny Mr. Bollea discovery to support an element of his causes of action.

4) The analytics information for Gawker's posting titled, "A Judge Told Us To Take Down Our Hulk Hogan Sex Tape Post. We Won't.," is reasonably calculated to lead to the discovery of admissible evidence. The article is directly related to the post at issue—by its title and content—and the related traffic and analytics data is likely to lead to the discovery of admissible evidence.

***Second***, Gawker claims that Fastly does not have the information sought by the subpoenas. If that is true, then responding to the subpoena will not impose any burden on Fastly at all. Mr. Bollea, however, is entitled to ask Fastly for the information directly, and is not required to take Gawker's word that Fastly does not have any responsive documents whatsoever. Gawker also does not appear to have a clear understanding of the services Fastly provides, so Mr. Bollea is wary of trusting Gawker's representation that Fastly does not have the requested information. *See* **Ex. A** (10/23/14 letter from Gawker's counsel) ("clarify[ing] [Gawker's] initial description of the services Fastly provides"). Mr. Bollea does not know who Gawker spoke with at Fastly, if anyone, and what information was communicated, if anything, to determine whether Fastly has responsive documents. Gawker certainly has not explained the **basis** for its conclusion that Fastly supposedly has nothing.

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[2] The Affiliated Websites include Gawker.com, which focuses on celebrity and societal gossip and sexual themes, as well as Gawker Media LLC's many other affiliated websites, each of which focuses on different specific interests or subject areas: Deadspin.com (sports), Gizmodo.com (technology), iO9.com (sci-fi), Jalopnik.com (cars), Jezebel.com (women's interests), Kotaku.com (videogames), and Lifehacker.com (general life tips and tricks).

***Third***, contrary to Gawker's argument, the requests do not seek information precluded by the Court's February 26, 2014 Order. The analytics data requested in the subpoenas is not publicly available at Quantcast or anywhere else, and thus is not covered by the Court's Order. In addition, Judge Campbell's February 26 Order does not concern, in any way, Gawker's service agreements with its vendors. The interrogatory at issue in that Order asked Gawker to identify each entity that directly or indirectly received money from Gawker.com. The Court held that, in response to that interrogatory, Gawker was not required to list every single one of its employees or vendors who may have received money from Gawker.com. The Court did not deny Mr. Bollea discovery into Gawker's relationships with its vendors (no such discovery was even before the Court), and Gawker's argument that it did simply is false.

Gawker admits that it does not track the analytics information sought by these subpoenas. The contours of Gawker's agreements with Google and Fastly are reasonably calculated to lead to the discovery of admissible evidence concerning what analytics information exists relating to Gawker.com, its Affiliated Websites, and their traffic and revenues, in what form, for what period of time, and where.

***Fourth***, the Special Discovery Magistrate has already rejected Gawker's arguments regarding the requests relating to Kinja. If Google or Fastly have possession, custody or control of documents relating to Kinja, then the documents must be produced. There is no authority for Gawker's statement that "a party should not be entitled to take third party discovery concerning an entity until jurisdiction is established," nor does Gawker cite to any such authority. Opp. at 6.

## I. The Subpoenas Seek Documents That Are Reasonably Calculated To Lead To The Discovery Of Admissible Evidence

The information sought by the subpoenas is reasonably calculated to lead to the discovery of admissible evidence, and therefore Gawker's relevance objections should be overruled.

### A. Google Trends and Query Data

Google trends and query data is reasonably calculated to lead to the discovery of admissible evidence concerning the virality of the Sex Video, Gawker's popularity over time, the level of interest in the video and other related topics, and the links that can be drawn between Gawker's posting of the Sex Video and Gawker's increased popularity. Gawker makes only one argument for sustaining its objections to these requests—namely, that the query and trends terms (*e.g.*, "sex tape" and "Gawker") are too "generalized" to draw a link between the number of people searching those terms and Gawker's posting of the Sex Video. Opp. at 5. Mr. Bollea strongly disagrees. If the data shows that "sex tape" and "Gawker" were trending at comparatively high levels during the period that Gawker hosted the Bollea Sex Video, that phenomenon is not a coincidence. Also, if the number of instances that people search for Gawker exponentially increases beginning at the time the Sex Video was published (and if it sustains that high level of interest thereafter), that too is no coincidence—the Sex Video made Gawker more popular and more valuable in the short and long-term. Regardless, however, whether links can, in fact, be drawn is not an argument against discoverability. The information is reasonably calculated to lead to the discovery of admissible evidence related to damages, and Gawker's objections should be overruled.

### B. Fastly Visitor Logs and Google Exit Data

Mr. Bollea's damages calculation includes "any increase in profits of either Gawker.com and/or Gawker Media, LLC attributable, directly or indirectly, to the existence of the Hulk Hogan Sex Video at Gawker.com." **Ex. B** (Bollea's Third Supplemental Response to Interrogatory 12). Thus, any data that would assist in ascertaining the amount of traffic that

flowed from the Sex Video to the Affiliated Websites, and *vice versa*, is relevant to calculating the extent of the benefit Gawker derived from its publication of the Sex Video. Fastly's visitor logs[3] and Google's Exit Traffic[4] is reasonably calculated to lead to the discovery of admissible evidence concerning the extent of that benefit. Visitor logs and exit data show where internet users went following their visit to the Sex Video webpage. Gawker admits that it does not track this information. **Ex. C** (Kidder Tr. 112:6–115:19) (testifying that Gawker did not track or record this data and conceding that people may have clicked through from the Sex Video and viewed other Gawker content, thereby generating advertising revenue for Gawker). Mr. Bollea thus seeks this relevant information from Fastly and Google, who are likely to have visitor logs and exit data for Gawker and the Affiliated Websites.

The traffic flow between Gawker.com and the Affiliated Websites **over time** also is relevant and reasonably calculated to lead to the discovery of admissible evidence. The information is important as comparison data to the traffic flow during the six months that Gawker.com hosted and featured the Sex Video. 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 the Affiliated Websites), and, in this instance, the effect was long-lasting, increasing the traffic flow to and among the Affiliated Websites for a sustained period of time, and thereby increasing the overall revenue, popularity and value of Gawker as a whole.

Such data is further relevant for purposes of explaining Gawker's intent in refusing to take down the Sex Video despite Mr. Bollea's repeated requests that Gawker take it down. The

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[3] Visitor logs record each IP address that accessed a Gawker website, the time accessed, the duration that visitor spent on the website, and related information.

[4] "Exit Traffic" is defined in the subpoena as "all traffic generated by users who were redirected to a webpage not belonging to the Gawker.com domain."

increased traffic flow from Gawker.com to its Affiliated Websites was hugely beneficial to Gawker as a whole and, as a result, Gawker would not take down the Sex Video no matter what the circumstances. Gawker, not surprisingly, disagrees with this theory. But whether Gawker agrees that the increased traffic flow was the reason it refused to take down the Sex Video is irrelevant to whether the information is discoverable. The fact that millions of people flocked to Gawker.com to watch the Sex Video, and presumably visited all of the Affiliated Websites as well, is a likely reason for Gawker's decision to continue publishing the Sex Video, especially since Gawker's business model is based entirely on web traffic and the corresponding advertising revenues. Whether the theory is actually provable at trial is an issue for expert witnesses and juries to weigh, but the traffic data certainly satisfies the standard for discoverability. Gawker's objections to the production of visitor logs and exit data should be overruled.

### C. "A Judge Told Us To Take Down Our Hulk Hogan Sex Tape Post. We Won't."

On April 25, 2013, Judge Campbell ordered Gawker to take down the Sex Video and accompanying article written by A.J. Daulerio. Gawker responded to Judge Campbell's Order with the following post: "A Judge Told Us To Take Down Our Hulk Hogan Sex Tape Post. We Won't." **Ex. D** (4/25/13 article). At the end of the article, Gawker encouraged its readers to read A.J. Daulerio's original article featuring the Sex Video, encouraged its readers to watch the Gawker-edited Sex Video, and **Gawker provided its readers with links to both posts.** The amount of people who clicked on the links provided by Gawker is relevant to Mr. Bollea's damages, including the continued emotional distress caused by Gawker—directing traffic to the Gawker-edited Sex Video. The relevance of the information is evident, and Gawker's claim that it is "difficult to see" is disingenuous. The objections to this request should be overruled.

### D. Google's and Fastly's Agreements with Gawker and Other Defendants

Gawker admits that it does not track the analytics information sought by these subpoenas. Mr. Bollea wants to know who does track Gawker's traffic information, for how long, in what form, to what extent, etc. Gawker's, Nick Denton's and/or Kinja KFT's agreements with companies that provide these services are likely to hold the answers to the foregoing questions. They also are reasonably calculated to show that Kinja did business in the United States and thus is subject to personal jurisdiction, as well as what Gawker did with the profits it realized from the publication of the Sex Video, because a significant portion of Gawker's profits appear to have been transferred overseas to Kinja. Thus, the agreements are reasonably calculated to lead to the discovery of admissible evidence, and Gawker's objections should be overruled.

## II. Mr. Bollea Is Entitled To Seek Third Party Discovery From Fastly, Gawker's Content Delivery Network Services Provider

Mr. Bollea is entitled to seek discovery concerning the flow of traffic between Gawker.com and its Affiliated Websites. The discovery is reasonably calculated to lead to admissible evidence concerning: (1) damages (Gawker.com's and the Affiliated Websites' increased popularity resulting from the publication of the Sex Video); and (2) intent (the increased popularity explaining why Gawker refused to remove the Sex Video for six months). Gawker has repeatedly represented in discovery that it does not have this information in its possession, custody or control. Thus, Mr. Bollea seeks this information from Fastly, Gawker's content delivery network services provider, which, as Mr. Bollea explained in his moving papers, is likely to compile the requested information, including in the form of visitor logs.

Gawker claims that Fastly does not have the requested information. Gawker's representation, however, does not preclude Mr. Bollea from seeking a response from Fastly directly. If Fastly indeed does not have the information, then Fastly can make that representation

under penalty of perjury and after a diligent search for the requested materials. Mr. Bollea cannot simply take Gawker's counsel's word that Fastly does not have the materials sought. This is especially true given Gawker's counsel's confusion as to what services Fastly provides. In its Objections to Mr. Bollea's Notice of Intent to Serve Subpoena in Another State on Fastly, Inc., Gawker claims that Fastly is "a service which Gawker uses to host certain audio and video displayed on its websites." **Ex. E** (Gawker's 9/22/14 Objections to Fastly Subpoena). After Mr. Bollea's counsel pointed out that Gawker's representation did not comport with Mr. Bollea's research, Gawker "clarif[ied]" its original representation, admitting that Fastly is a content delivery network that serves "Gawker's text and photo content to users." **Ex. A** (10/23/14 letter from Gawker's counsel). Gawker's shifting representations, based on no evidence, should not serve as a basis to preclude Mr. Bollea's relevant discovery. Gawker's objections to the Fastly subpoena should be overruled.

## III. The Documents Sought By The Subpoenas Are Not Precluded By Judge Campbell's February 26, 2014 Order

Gawker argues that the documents requested by the subpoenas are precluded by two provisions of the Court's February 26, 2014 Order:

1. Regarding traffic information for Gawker.com and the Affiliated Websites: "Defendant's objections are sustained **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**." **Ex. F** (2/26/14 Order, ¶5) (emphasis added).

2. Regarding interrogatory requesting Gawker to identify each entity that directly or indirectly received money from Gawker.com (*see* **Ex. G** (Gawker's Responses to Plaintiff's Second Set of Interrogatories, Interrogatory 13)): "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, however, shall not exclude the identification of principals or other personnel whose compensation arose from or related to, in whole or part, revenues generated from the publication of the Gawker Story." **Ex. F** (2/26/14 Order, ¶2)

Neither provision concerns the requests in Mr. Bollea's subpoenas.

First, the traffic-related information sought by the Google and Fastly subpoenas is not available at Quantcast or any other publicly available source. The analytics data and visitor logs created or held by Fastly (Requests 1–7) are in Fastly's possession, and are not available online. **Ex. H** (relevant excerpts of Subpoena to Fastly). Exit traffic statistics (Requests 7–9) are not available at Google's public websites, nor is the data underlying Google Trends (Request 11) or Queries (Request 10). **Ex. I** (relevant excerpts of Subpoena to Google). The February 26 Order only precludes Mr. Bollea from seeking traffic-related discovery that is publicly available. The information sought by the subpoenas is not, and thus it is not precluded by the February 26 Order.

Second, the February 26 Order does not, as Gawker contends, "specifically den[y] plaintiff's request for discovery concerning relationships with and payments to vendors providing usual and customary services." Opp. at 5. As an initial matter, the discovery request at issue, Interrogatory 13, did not concern Gawker's relationships with and payments to vendors. Interrogatory 13 requested that Gawker: "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." **Ex. G** (Gawker's Reponses to Plaintiff's Second Set of Interrogatories, Interrogatory 13). Gawker refused to respond and the Court agreed that Gawker would not need to list out each one of its usual or customary vendors that may have been paid by revenues generated from the publication of the Sex Video. **Ex. F** (2/26/14 Order, ¶2). This is a far cry from a finding that Mr. Bollea is not entitled to seek any discovery whatsoever concerning Gawker's relationships with its vendors and, in particular, the two vendors at issue (Google and Fastly) that are likely to have information relating to Mr. Bollea's damages theories.

The February 26 Order does not preclude Mr. Bollea from seeking such information, and Gawker's argument otherwise is completely unsupported. Gawker's objections based on the February 26, 2014 Order should be overruled.

## IV. The Requests Relating To Kinja Are Proper

Gawker argues that any discovery relating to Kinja is improper because it "constitutes an intrusion upon the Court of Appeal's jurisdiction." Opp. at 6. Gawker already made this argument in opposing Mr. Bollea's recent motion to compel Gawker to produce Kinja-related documents that are within Gawker's possession, custody or control. The Special Discovery Magistrate rejected Gawker's argument and recommended that Gawker be compelled to produce Kinja-related documents despite the fact that Kinja is currently appealing Judge Campbell's order permitting Mr. Bollea to conduct personal jurisdiction discovery. Similarly, if Fastly or Google have responsive documents relating to Kinja, the documents should be produced. Such a production in no way would intrude upon the Court of Appeal's jurisdiction. Gawker's objections to requests for Kinja-related information should be overruled.

## CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the Special Discovery Magistrate recommend that the Court: (a) grant this motion to overrule Gawker's objections to the notices of intent to serve third party subpoenas served on Fastly and Google; (b) issue such process as is necessary to effectuate the subpoenas; and (c) grant such further relief as it deems appropriate.

Respectfully submitted,

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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 24th day of November, 2014 to the following:

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