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.
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GAWKER MEDIA, LLC'S (1) OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL FURTHER CORPORATE DEPOSITION AND (2) MOTION FOR PROTECTIVE ORDER

Gawker Media, LLC ("Gawker") hereby respectfully submits its Opposition to the motion of Plaintiff Terry Gene Bollea ("Bollea") to compel it to submit to a second deposition, and its Motion for Protective Order pursuant to Florida Rule of Civil Procedure 1.280(c).

INTRODUCTION

Bollea seeks another bite at the apple. He elected to take Gawker's deposition early in the case – without waiting for discovery to be complete, for the issues to develop, or for the resolution of his then-pending motion to compel documents from Gawker. But now he apparently regrets that decision and therefore seeks to force Gawker to submit to deposition again. This is entirely inappropriate. Gawker's corporate representative, Scott Kidder, has already endured the burden of preparing for a deposition covering 50 separate deposition topics, as he was obliged to do as a corporate designee. Having devoted substantial time to preparing for that testimony in Fall 2013, he should not be required to undertake that significant burden again eighteen months later. This is particularly the case because (a) none of the 36 "new"

deposition topics Bollea has enumerated in his latest notice – most of which relate to the finances of and corporate relationships among Gawker, its parent Gawker Media Group, Inc. ("GMGI"), and Kinja, KFT ("Kinja") – concern new issues in the case given that Kinja and GMGI were named as parties at the outset; (b) Bollea's counsel in fact asked Mr. Kidder about Kinja, GMGI, and related topics when he was previously prepared and deposed, and could have and should have asked any additional questions then, (c) no "unfairness" would result from the lack of a second corporate deposition, as it was Bollea's choice to take Gawker's deposition early, and Bollea has noticed the contemporaneous depositions of at least six Gawker employees, including several Gawker executives, and (d) Bollea's service of a deposition notice seeking detailed testimony about the financial circumstances of Gawker, Kinja and GMGI – just days after a hearing at which the Court significantly limited the scope of discovery on those topics – is entirely improper. And Bollea's attempts to convince this Court that he should be permitted to take a second corporate deposition to somehow "make up" for Gawker's alleged discovery failings should also be rejected. Gawker has provided substantial and copious discovery in this case, and should not be punished for its proper and timely challenges to a small subset of the vast amounts of information Bollea has sought from it.

ARGUMENT

1. Plaintiff already took the deposition of Gawker, and should not be permitted a second bite at the apple. In the fall of 2013, Bollea noticed the deposition of Gawker. He asked that its corporate representative (Scott Kidder) be prepared to testify on approximately 50 separate topics and to make himself available for two consecutive days of testimony in early October 2013. *See* Ex. A (plaintiff's first amended notice of deposition to Gawker, listing deposition topics and scheduling two days of testimony). Mr. Kidder, as required by the rules,

then spent significant time reviewing documents and otherwise preparing for the deposition, and he also cleared his calendar for two full days (per plaintiff's request) to provide testimony on behalf of the company. Among the topics on which Mr. Kidder prepared was "the ownership, relationships, organizational charts, lines of business, corporate purposes, management, places of incorporation, principal places of business, and activities of Gawker Media, LLC and its affiliated, parent, subsidiary, and/or related companies," including Kinja and GMGI. *See* Ex. A at 9; *accord* Pl. Mot., Ex. 1 at 9.

Separately, in the summer of 2013, Bollea served Gawker with some 106 document requests and multiple interrogatories which covered a variety of topics including the finances of and corporate relationships between and among GMGI, Gawker and Kinja. In response, Gawker produced vast numbers of documents (including documents about Gawker's finances) and meaningful interrogatory responses (including to explain the corporate relationships), but objected to some of the requests concerning Kinja and GMGI as irrelevant, overbroad and burdensome. On August 21, 2013, Bollea filed a motion to compel, which was scheduled to be heard at the end of October 2013 (and then rescheduled for the end of November 2013).

Despite the facts that (a) it was still very early in the case, and (b) there was a pending motion and hearing scheduled to address (among other things) the scope of discovery that plaintiff was entitled to take, including about GMGI and Kinja, Bollea nevertheless made the strategic decision to go forward with the deposition of Gawker (and Gawker's then-President Nick Denton) in early October 2013. Then, the week before the deposition was scheduled to occur, Bollea's counsel informed Gawker that he would be taking only one day of testimony from Gawker (even though Mr. Kidder had prepared for, and cleared his schedule for, two days of testimony). *See* Pl. Mot., Ex. 1 (second amended deposition notice to Gawker, dated Sept. 26,

2013). On October 1, 2013, therefore, Mr. Kidder provided a full day of testimony, and discussed (among other things) topics related to the companies' finances, corporate structure and relationships. Counsel for Gawker did not prevent Mr. Kidder from answering any and all questions posed to him about Kinja or GMGI, and Mr. Kidder freely testified about both. *See, e.g.*, Dep. of S. Kidder (Oct. 1, 2013) at 39:12 – 41:4, 42:11-15, 44:6 – 50:6, 54:25 – 62:17, 104:10 – 105:1, 216:9 – 220:25.

Now, a year-and-a-half later, Bollea has decided that perhaps he should have waited until later in the case to depose Gawker (after some narrow discovery disputes were resolved and additional documents produced) – or that he should have asked more or different questions about the corporate relationships among Kinja, GMGI and Gawker at Mr. Kidder's deposition – and is therefore seeking a second bite at the apple. *See* Pl. Mot., Ex. 3 ("Notice of Deposition of Corporate Representative of Gawker" dated Dec. 29, 2014, listing 36 purportedly "new" deposition topics, but mostly concerning the finances of and corporate relationships among GMGI, Kinja and Gawker). Such a position is fundamentally unfair to Gawker and Mr. Kidder, who already undertook the burden of preparing for a two-day deposition, including on the exact subject areas on which Bollea seeks a second deposition. Gawker should not be made to suffer for Bollea's strategic decision to take Gawker's testimony so early in the case or his failure to ask questions he now deems relevant. And Gawker's witness should not have to prepare once again and sit for a second deposition to be asked about (a) documents that were the subject of a pending motion to compel at the time of Gawker's deposition or (b) documents that were not even requested until long after that deposition occurred, when the issues related to corporate

relationships have been at issue since the outset of this case.[1] If Bollea wanted more testimony on behalf of the company on these topics, he could have and should have asked Mr. Kidder about them at his deposition in October 2013. *See, e.g., J.S. v. Florida*, 45 So. 3d 910, 911 (Fla. 4th DCA 2010) (refusing to allow a second deposition where there "were areas that [counsel] should have covered, but didn't" in the first deposition and finding that "counsel's oversight is not the sort of 'good cause shown'" to burden a person with a second deposition).[2]

The cases Bollea cites on this point, *see* Pl. Mot. at 7-8, are entirely inapposite. Bollea cites *Medina v. Yoder Auto Sales, Inc.*, 743 So. 2d 621 (Fla. 2d DCA 1999), to suggest that a second deposition can be had as a matter of course. But, in *Medina*, the court allowed the defendants to be re-deposed after evidence emerged that cast significant doubt on the veracity of

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[1] Plaintiff misleadingly contends that "Gawker made a supplemental production of additional documents" after Mr. Kidder's deposition and thus he should be allowed to ask about those documents. Pl. Mot. at 4. But any documents that Gawker produced after Mr. Kidder's deposition were either (a) the subject of a motion to compel at the time of the deposition which were not ordered to be produced until after the deposition, or (b) were not even requested until long after the deposition. This just confirms that Bollea should have waited until discovery was further along and discovery disputes were resolved before deposing the defendant. His failure to do so should not subject Gawker to a second deposition.

[2] Plaintiff has repeatedly argued that federal rules governing depositions should inform deposition practice in this case. Under those rules, a witness may only be deposed once without leave of court. As one federal court explained:

> The policy against permitting a second deposition of an already-deposed deponent is equally applicable to depositions of individuals and organizations. Taking serial depositions of a single corporation may be as costly and burdensome, if not more so, as serial depositions of an individual. In both cases, each new deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony. In addition, allowing for serial depositions, whether of an individual or organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last.

State Farm Mutual Auto. Ins. Co. v. New Horizont, Inc., 254 F.R.D. 227, 235 (E.D. Pa. 2008); *see also Blackwell v. City & Cnty. of San Francisco*, 2010 WL 2608330, *2 (N.D. Cal. 2010) (denying request for second deposition where "plaintiff should have been able to cover the subject matters identified in the notice for the second deposition at the time of the first deposition").

the testimony they had given in their first depositions. Here, Bollea has not claimed (and could not claim) that Mr. Kidder's testimony – about Kinja, GMGI or any other topic – was in any way untruthful. And *Plantation-Simon Inc. v. Bahloul*, 596 So. 2d 1159, 1162 (Fla. 4th DCA 1992) (Pl. Mot. at 7, n.2), and *Racetrac Petroleum, Inc. v. Sewell*, 150 So. 3d 1247, 1252 (Fla. 3d DCA 2014) (Pl. Mot. at 7, n.2), simply stand for the unremarkable proposition that corporate officers may be deposed on mere notice – *i.e.*, without a subpoena – even if the company itself has been deposed. They say nothing about taking a second deposition of the corporation itself or the circumstances under which such a thing might be warranted.

2. No "unfairness" would result from Bollea's inability to take a second deposition of Gawker. Bollea also appears to contend that he is entitled to a second deposition of Gawker in the interest of "fairness" because Gawker has somehow treated discovery as a "one-way" street, Pl. Mot. at 9, asking much of Bollea and providing little in return. Even if this were a proper basis upon which to compel a second deposition (which it is not), it is simply not true.

The Gawker Defendants have provided roughly 25,000 pages of documents in response to Bollea's nearly 250 document requests. They have responded to dozens of interrogatories and requests for admission. Mr. Kidder, Mr. Daulerio (the author of the post at issue), and Mr. Denton (the then-President of Gawker) all sat for full-day depositions, and Gawker is producing six more employees (including several other executives). Not satisfied, Bollea has noticed the depositions of two additional Gawker employees (one who left the company before the post at issue was published), and an outside financial advisor that Gawker began working with in late 2014. He has likewise served numerous document subpoenas on non-parties (some of which initially also included deposition subpoenas which Bollea subsequently withdrew). And while

Bollea is correct that Gawker has asserted objections to some of his discovery requests (as is its right), he is incorrect that "the Court has already ruled [that] this discovery is relevant and proper." Pl. Mot. at 8. In fact, the Court has substantially limited the types of financial and other discovery Bollea may have. *See* Court Orders dated February 26, 2014 and December 17, 2014. Moreover, Gawker has not, as Bollea claims, Pl. Mot. at 9, filed "numerous interlocutory appeals" on discovery matters – in fact, it has filed *none*.[3]

Thus, for plaintiff to assert that "fairness" requires a second deposition of Gawker because it has lawfully objected to providing a small portion of the overly broad discovery sought by Bollea is utterly disingenuous. It is *Bollea* who has refused to participate meaningfully in discovery, requiring Gawker to file at least five motions to compel information from him. And those motions, in significant part, resulted in Bollea being ordered to provide information to Gawker or withdrawing various damages theories so as not to have to provide financial information about himself. For his part, Bollea voluntarily submitted to a second limited deposition, Pl. Mot. at 3, when Gawker raised the issue of his failure to timely provide documents he had been ordered to produce prior to his deposition, and his refusal to delay the deposition until after those documents were produced. *See* Exhibit E (Order dated Dec. 10, 2014, directing that Bollea submit to limited second deposition). That is a far different circumstance from the one presented here, particularly given that Bollea is permitted to testify

[3] By contrast, Bollea and his publicist (represented by Bollea's same counsel) have twice unsuccessfully sought appellate review of adverse discovery orders. *See* Exhibit B (order from Court of Appeal dismissing Bollea's writ petition seeking review of order directing him and his counsel to provide FOIA authorization); Exhibit C (order from New York appellate court rejecting plaintiff's publicist's request for a stay of lower court's order requiring production of documents); Exhibit D (second order from New York appellate court denying motion for reconsideration and request to certify issue to New York's highest court).

based on his own knowledge and memory but a corporate designee is expected to prepare so that he can speak on behalf of the full corporation.

The idea that Gawker should be compelled to submit to a second deposition for reasons of "fairness" is further undermined by the fact that, in the next month, Bollea will be taking the depositions of numerous Gawker employees, including numerous other executives. *See, e.g.,* Exhibit F (notices of deposition of six Gawker witnesses, including Andrew Gorenstein, Gawker's President of Advertising and Partnerships; Erin Pettigrew, Gawker's Chief Strategy Officer; and Tom Plunkett, Gawker's Chief Technology Officer). In light of the significant discovery Gawker has already provided – and the fact that Gawker's corporate designee already took the time to prepare for a corporate deposition that Bollea insisted go forward more than a year ago – requiring another corporate deposition is entirely unreasonable and unwarranted.

3. Additional discovery concerning the corporate relationships is improper and premature. Discovery concerning GMGI and Kinja (about which Bollea seeks to question Gawker at a second deposition) is also not appropriate at this time given that (a) the Court dismissed GMGI from the case for lack of jurisdiction and denied discovery related to GMGI as a result (*see* Exhibit G (Order dated May 14, 2014)), (b) the Court has severed Kinja from the case (*see* Exhibit H (Order dated Nov. 4, 2014)), such that additional discovery related to it is at the very least premature, (c) Kinja's personal jurisdiction appeal is awaiting resolution by the Court of Appeals, and is being argued on March 11, 2015, and (d) at a hearing on December 17, 2014, the Court limited the discovery that Bollea could have related to Kinja while that appeal remains pending (*see* Pl. Mot., Ex. 2 (Order dated Dec. 17, 2014)).

Indeed, at the December 17, 2014 hearing, the Court heard more than two hours of argument, and then carefully delineated the scope of permissible discovery from Gawker,

including concerning Kinja, allowing discovery in some areas and prohibiting discovery into others. Nevertheless, just after that hearing, Bollea served his new deposition notice, Pl. Mot., Ex. 3, which goes far beyond what the Court permitted on December 17, in that it seeks testimony on 36 topics which delve deeply into the finances of not only Gawker (the defendant which had already provided comprehensive financial information to plaintiff prior to the time of its deposition in October 2013), but also of Kinja (which, as mentioned, has been severed and is challenging personal jurisdiction) and GMGI (which is not even a defendant in the case). *See* Pl. Mot., Ex. 3 at, *e.g.,* ¶ 12 (seeking testimony about "Gawker's, Kinja's and GMGI's financial accounts," since 2012, including account numbers and balance information) and ¶ 13 (seeking testimony on the "profits, losses, assets, liabilities, and equity" of all three companies since 2011). If Bollea wanted *more* information about Kinja and its relationship to Gawker and GMGI than what he placed at issue on December 17, he should have addressed that with the Court then, particularly given his expressed desire to move the case forward to trial expeditiously. But it is entirely inappropriate for plaintiff to have participated in a lengthy hearing setting limits on the scope of discovery, only to far exceed those limits in a subsequently-served deposition notice.

CONCLUSION

Simply put, Mr. Kidder, who diligently prepared for a two-day deposition in October 2013 and testified at length on the questions put to him by plaintiff's counsel, should not be required to devote significant time to preparing again. Moreover, the topics enumerated in the deposition notice have either been expressly ruled out of bounds or are premature given that Kinja has been severed and the issue of its role in the case is before the Court of Appeals. For the foregoing reasons, Gawker respectfully requests that the Court deny Bollea's motion to compel it to submit to a second deposition, and issue a corresponding protective order.

Dated: February 6, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2015, 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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