

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.

**PLAINTIFF TERRY BOLLEA'S MOTION FOR CLARIFICATION OF THE COURT'S
DECEMBER 17, 2014 DISCOVERY ORDER**

I. INTRODUCTION

Plaintiff Terry Gene Bollea respectfully requests that the Court enter an order clarifying its December 17, 2014 discovery order as to the following ruling:

(2) **Second RFP No. 116 (Equity, Debt and Security Offerings):**

The R&R on Second RFP No. 116, concerning equity/debt/security offerings is:

AFFIRMED

OVERRULED

AFFIRMED in part and OVERRULED in part as follows:

Limited to "Documents sufficient to show ^{Financial Representations} rather than ~~"All documents and communications"~~ of the Def-ent!

Time period limited to: 2011, 2012, 2013

Other limitations:

Exhibit 2 (12/17/14 Order). Mr. Bollea requests that the order be clarified to state that Defendant Gawker Media, LLC ("Gawker") is required to produce its documents reflecting

representations and communications relating to Gawker's finances in 2011, 2012, and 2013 – regardless of when those representations were created or communicated. The reason for Mr. Bollea making this request is because Gawker has made representations regarding its finances in 2011, 2012, and 2013, but those representations occurred in 2014 and 2015. Gawker takes the position that it is not required to produce any such representations or communications pursuant to the aforementioned order, because they occurred after 2013, even though they pertain to Gawker's finances in 2011, 2012 and 2013.

Gawker's finances from 2011-2013 are relevant to this case, because Mr. Bollea's damages are based in part on those finances. Gawker's **representations** to its actual and potential financiers regarding its finances from 2011-2013, and communications regarding same, likewise are relevant. They also are reasonably calculated to lead to admissible evidence. Throughout this case, Gawker has claimed that it received no financial benefit from its publication of the sex video for the six month period of October 2012 through April 2013. Mr. Bollea has already argued before this Court, and this Court has already agreed, that whether Gawker is making **materially different representations** about the state of its finances in 2011 through 2013 to potential lenders is **relevant and discoverable**.

Approximately five (5) weeks after the aforementioned Order was entered, Gawker publicly announced that it was seeking financing with a loan broker called Young America Capital, LLC ("YAC"). Mr. Bollea then served a subpoena on YAC to produce its communications with Gawker, and appear for a short deposition to answer questions regarding those communications. **Exhibit 4** (Subpoena to YAC). Gawker and YAC filed motions in New York state court to prohibit the discovery. At a court appearance on March 13, 2015 in that case, the Court attorney in New York instructed the parties to **seek clarification from this Court**

regarding the scope of the aforementioned order from December 17, 2014, so that the New York court can enter an order regarding the subpoena consistent with this Court's order. The parties agreed that they would seek clarification from this Court at the scheduled status conference on March 19, 2015.

Moreover, because the Fact Discovery Cutoff in this action is set for April 10, 2015, Mr. Bollea requests that he be permitted to complete the discovery contemplated in this motion, including discovery as to YAC, past the Fact Discovery Cutoff, if necessary.

For the reasons discussed herein, Mr. Bollea requests an order clarifying that:

“All representations and communications by Gawker to Young America Capital, LLC (‘YAC’) or any other actual or potential financier that pertain in any way to Gawker’s finances during 2011, 2012 and/or 2013, be produced within ten (10) court days of the date of this Order, regardless of when the representations or communications occurred. The documents and testimony requested in the YAC subpoena are within the scope of permissible discovery. The fact discovery cutoff in the action will be extended, only as to this issue, to allow the discovery referenced herein, including the third party discovery to YAC, to be completed.”

II. Gawker’s Third Party Subpoenas

It is worth mentioning that Gawker has served no less than **twenty-four (24)** third party subpoenas in this case, including to:

1. Elizabeth Rosenthal Traub in New York (deposed by Gawker on March 2, 2015)
2. EJ Media in New York
3. Tony Burton in New York (deposed by Gawker on March 2, 2015)
4. David Rice in Vermont (deposed by Gawker on March 9, 2015)
5. Richard Pierce in St. Petersburg, Florida (deposed by Gawker on January 27, 2015)
6. TNA Wrestling in Nashville, Tennessee (scheduled for deposition in March 2015)
7. Dixie Carter in Nashville, Tennessee (scheduled for deposition in April 2015)
8. Jules Wortman in Nashville, Tennessee (scheduled for deposition in April 2015)

9. Ron Howard in Tampa Bay area, Florida (scheduled for deposition on 3/18/15)
10. David Houston in Reno, Nevada (scheduled for deposition in April 2015)
11. Law Offices of David Houston in Reno, Nevada
12. Darren Prince in New Jersey
13. Prince Marketing Group in New Jersey
14. World Wrestling Entertainment in Connecticut
15. Bishoff Hervey Entertainment in Los Angeles, California
16. Keith Davidson in Los Angeles, California
17. Law Offices of Keith Davidson in Los Angeles, California
18. Peter Young in Los Angeles, California
19. Matt Loyd in Tampa Bay area, Florida
20. Ben Mallah in Tampa Bay area, Florida
21. Bay Harbor Hotel and Convention Center, LLC in Tampa Bay area, Florida
22. Cox Media Group in Tampa Bay area, Florida
23. Tech Assets in Tampa Bay area, Florida
24. Marc Hardgrove in Tampa Bay area, Florida

Mr. Bollea has not obstructed any of these third party subpoenas or depositions, but rather has cooperated with them. By contrast, Mr. Bollea has served very few third party subpoenas, and Gawker obstructed many of them. For example, Gawker objected to Mr. Bollea's subpoenas to Google Inc. and Fastly Inc., two companies that Gawker does business with, relating to web traffic data pertaining to Gawker.com during the time that it was running the sex video online, after Gawker claimed that it did not possess the web traffic data. Mr. Bollea was required to file discovery motions, which were granted, and permitted Mr. Bollea to

pursue the discovery. Separately, Mr. Bollea also served subpoenas to Gawker's relevant current employees located in New York. Gawker did not object to most of the subpoenas, but did object to a deposition of John Cook, the former Editor-in-Chief of Gawker.com during the time that Gawker.com was running the sex video at issue; Mr. Cook also engaged in written and oral communications with Gawker employees regarding the subject matter of the sex video throughout the relevant period of October 2012 through April 2013; and wrote the April 25, 2013 article titled: "A Judge Told Us to Take Down Our Hulk Hogan Sex Tape Post. We Won't." Gawker's objections to Mr. Cook's deposition are the subject of separate (pending) discovery motions.

The point is this: Gawker should not be permitted to have a "one way street" with respect to third party discovery, in which Gawker is permitted to obtain discovery from twenty-four (24) third party witnesses, and take several depositions of them, yet prevent Mr. Bollea from obtaining relevant discovery from third party witnesses, including YAC, which had extensive communications with Gawker regarding its 2011–2013 finances.

III. RELEVANT BACKGROUND

A. Second Request for Production No. 116

The following is a summary of the relevant background relating to the December 17, 2014 order, and this motion:

On or about May 23, 2014, Mr. Bollea served his Fourth Set of Requests for Production on Gawker, including a Second Request for Production No. 116:

All documents and communications that relate to any proposed equity, debt or other security offering by YOU during the period January 1, 2011, through the present.

Gawker refused to produce documents responsive to the Request, forcing Mr. Bollea to bring a motion to compel the documents on August 19, 2014.

After briefing on the motion, the Special Discovery Magistrate conducted a hearing on October 20, 2014. On November 6, 2014, the Special Discovery Magistrate issued his Report and Recommendation granting Mr. Bollea's motion. **Exhibit 1** (11/6/14 Report and Recommendation). The Special Discovery Magistrate's Report and Recommendation compelled:

Defendant Gawker Media, LLC ("Gawker") to produce all documents that are responsive to . . . Second Request No. 116, to the extent those documents are in Gawker's possession, custody or control as contemplated by the Florida Rules of Civil Procedure (*i.e.*, including documents that are within Gawker's power, that are available to Gawker, or that Gawker has the 'right, authority, or practical ability to obtain . . . on demand' (*Costa v. Kerzner Intern. Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011))."

Id.

Gawker filed exceptions to the Report and Recommendation, and the Court held a hearing on December 17, 2014. The Court issued a written order that day, affirming the Report and Recommendation and limiting Second Request No. 116 to "Documents sufficient to show financial representations of the Defendants" for the "Time period limited to: 2011, 2012, 2013." **Exhibit 2** (12/17/14 Order).

Despite the Court's order requiring the discovery, Gawker has taken the position that the Court's time period limitation allows it to withhold from production all documents and communications created or transmitted after 2013, even if they pertain to Gawker's finances in 2011, 2012 and/or 2013. The interpretation is self-serving, and unsupported.

B. Subpoena to Young America Capital, LLC

Approximately five (5) weeks after the Court's December 17, 2014 Order was entered, news reports published around January 28, 2015, reported that Gawker had commenced seeking debt financing through YAC, acting as its loan broker. **Exhibit 3** (1/28/15 Business Insider article wherein Gawker's CEO, Nick Denton, is interviewed and confirms that "his 2015 plan

does include raising millions of dollars of debt from a few banks and funds”). Upon reading the news reports (and being **completely unaware** of the YAC financing during the briefing and hearing before Judge Campbell relating to Second Request No. 116, though Gawker’s counsel was well aware of the YAC financing when it advocated for a time limitation in the order), Mr. Bollea immediately served a subpoena for documents and a short deposition of YAC’s corporate representative, seeking YAC’s communications with Gawker regarding Gawker’s 2011–13 finances. **Exhibit 4** (Subpoena to YAC served 2/3/15).

On February 13, 2015, Gawker filed a motion to quash the subpoena in New York state court. YAC joined Gawker’s motion. The parties appeared for a conference with the Court attorney in New York state court on March 6, 2015. The New York court attorney advised the parties to ask this Court to clarify its December 17, 2014 order regarding the proper scope of documents relating to Gawker’s communications with its financiers (and specifically with respect to YAC), and to return to the New York state court on March 31, 2015 regarding this Court’s ruling on that topic. The enforcement of the YAC subpoena turns on the issue presented in this motion to clarify, because Gawker’s communications with YAC presumably occurred after 2013, but concerned Gawker’s 2011 through 2013 finances.

Mr. Bollea seeks the information directly from YAC (as well as from Gawker) because YAC is likely to recall and/or disclose communications with Gawker (including oral communications) regarding Gawker’s finances in 2011-13 (which likely were presented by Gawker in a way that made it sound like the company was extremely successful in those years), whereas Gawker is likely not to disclose those communications in discovery because, among other things, the disclosure may go against the statements that Gawker has been making to Mr.

Bollea throughout this lawsuit. Mr. Bollea should be permitted to obtain the discovery both from YAC, and Gawker, to ensure a complete production of the information required to be disclosed.

As case in point: when the parties litigated this exact issue before Judge Campbell on December 17, 2014, Gawker's counsel failed to disclose that Gawker was communicating with loan broker YAC, at that very moment, regarding a contemplated financing. Had Mr. Bollea and the Court been made aware of that fact, then the Court could have been in a position to take that information into account when making its order, and Mr. Bollea would have been in a position to have an informed discussion about the issues. Instead, Gawker intentionally withheld information material to the issue, to avoid being required to produce it. Moreover, Gawker's counsel advocated a time limitation in the order (as a departure from the Report and Recommendation of the Special Discovery Magistrate) knowing that Gawker's counsel would seek to use that modification as a means to produce nothing at all, as opposed to Gawker's communications with YAC pertaining to Gawker's 2011–13 finances.

Mr. Bollea should be permitted to obtain directly from YAC the documents and testimony requested in the subpoena.

IV. THE COURT SHOULD CLARIFY ITS PRIOR ORDER

The New York Court attorney asked the parties to seek clarification of this Court's December 17, 2014 order. In light of the position that Gawker and YAC have taken, namely, that they can evade discovery altogether because Gawker's application to YAC occurred in 2014-15, notwithstanding the fact that it pertains directly to communications and representations regarding Gawker's finances in 2011-13, clarification is necessary.

The obvious purpose of the discovery, and the Order, was to permit discovery of Gawker's financial condition during the time period before, during, and after Gawker's

publication of the sex video. The limitation of 2011, 2012, and 2013 refers to the years for which the finances relate (and associated representations and communications). Such limitation should have no bearing on when the communications were transmitted. For example, **a communication in 2014 or 2015 regarding Gawker's finances during the period of 2011-13 is just as relevant as a communication in 2013 on that same subject matter.** Also, a 2014 or 2015 communication would be easier to produce than one from 2011, 2012 or 2013. Thus, there can be no reasonable argument of undue burden.

The years 2011, 2012, and 2013 include and surround Gawker's publication of the sex video from October 2012 through April 2013. Thus, discovery concerning Gawker's financial condition (including any change in its condition) from 2011 (pre-publication of the sex video) through 2013 (post-publication of the sex video) is relevant and discoverable. It is equally relevant **how** Gawker represents its financial condition for the years 2011, 2012, and 2013, regardless of when the representations were created or transmitted. The fact that a representation about the state of Gawker's finances at the time Gawker published the sex video was made in 2014 or 2015 does not make the information contained in that representation any less relevant.

Gawker's construction of the Order makes no sense: it would exclude relevant documents and information relating to Gawker's financial condition during the relevant period of time simply because the document or communication on that subject occurred in 2014 or 2015. The Court's purpose was to permit discovery of how the publication of the sex video affected Gawker's finances (including communications between Gawker and its financiers regarding Gawker's finances during the relevant 2011-13 time period). Only Mr. Bollea's construction of the order is reasonable.

Because Gawker has repeatedly taken the position that it has not been profitable and has

not received any financial benefits from its publication of the sex video, Mr. Bollea is entitled to test Gawker's contentions by obtaining discovery of its representations to financiers regarding its financial performance. Mr. Bollea should be able to find out whether Gawker is making diametrically opposed, self-serving statements on the subject of its finances, depending on the audience.

V. CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the December 17, 2014 discovery order should be clarified to state:

“All representations and communications by Gawker to Young America Capital, LLC (‘YAC’) or any other actual or potential financier that pertain in any way to Gawker’s finances during 2011, 2012 and/or 2013, be produced within ten (10) court days of the date of this Order, regardless of when the representations or communications occurred. The documents and testimony requested in the YAC subpoena are within the scope of permissible discovery. The fact discovery cutoff in the action will be extended, only as to this issue, to allow the discovery referenced herein, including the third party discovery to YAC, to be completed.”

DATED on March 11, 2015.

Charles J. Harder, Esq.
PHV No. 102333
Douglas E. Mirell, Esq.
PHV No. 109885
Sarah E. Luppen, Esq.
PHV No. 113729
HARDER MIRELL & ABRAMS LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com
Email: dmirell@hmafirm.com
Email: sluppen@hmafirm.com

-and-

/s/ Kenneth G. Turkel
Kenneth G. Turkel, Esq.

Florida Bar No. 867233
Shane B. Vogt, Esq.
Florida Bar No. 0257620
BAJO CUVA COHEN & TURKEL, P.A.
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: svogt@bajocuva.com

Counsel for Plaintiff

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 11th day of March, 2015 to the following:

Barry A. Cohen, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1950
Tampa, Florida 33602
bcohen@tampalawfirm.com
mgaines@tampalawfirm.com
jhalle@tampalawfirm.com
mwalsh@tampalawfirm.com
Counsel for Heather Clem

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esquire
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com
pmcgonigle@tlolawfirm.com
Counsel for Gawker Defendants

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com
krosser@houstonatlaw.com

Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Alia L. Smith, Esquire
Michael D. Sullivan, Esquire
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW, Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
msullivan@lskslaw.com
*Pro Hac Vice Counsel for
Gawker Defendants*

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
*Pro Hac Vice Counsel for
Gawker Defendants*

/s/ Kenneth G. Turkel
Attorney