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.
_____/

OPPOSITION TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO SUPPLEMENT EXPERT DISCLOSURES

Plaintiff Terry Bollea asked the Court to set a firm trial date in the Summer of 2015, assuring it that he could comply with any deadlines that were necessary to meet that date and to make the pretrial proceedings run smoothly. He then asked the Court to order that all initial expert disclosures be made by March 6, 2015. After the Court granted that request, he drafted, and agreed to, a pretrial order that provides a clear consequence: If the deadline is not met for any expert witness, the expert cannot testify.

Plaintiff missed the deadline. He offers no explanation for failing to comply. There is no excuse. Nearly a year-and-a-half ago, the Court ordered plaintiff to describe his damages theory and the basis for calculating those damages. Plaintiff has had more than enough time to retain experts and assess their opinions. Indeed, he provided appropriate expert disclosures for two damages experts. There is no reason for failing to complete the third damages expert disclosure.

Now that the Court has granted plaintiff's requests for a trial date and pretrial deadlines, he should not be given relief from those deadlines, especially for an expert disclosure completely within his own control.

BACKGROUND

I. Plaintiff Files Suit Claiming $100 Million In Damages, But Refuses To Say How He Calculates Those Exorbitant Damages.

On October 15, 2012, plaintiff filed suit against defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio. At that time, he and his attorneys stood on the courthouse steps and said that they were planning to ask a jury to award plaintiff $100 million.

As discovery began, Gawker sought information about how plaintiff calculated these astronomical damages. Thus, in June 2013, it asked plaintiff to "[i]dentify any and all damages purportedly suffered by you as a result of alleged actions by the Gawker Defendants or any of them, explaining with particularly the basis for your calculation of such alleged damages." Ex. 1 (Gawker's First Set of Interrogatories, No. 12). Plaintiff refused to answer that interrogatory, asserting that "[d]iscovery is continuing, and Responding Party is still assessing and calculating his damages." Ex. 2 (Plaintiff's Response to Gawker's First Set of Interrogatories, No. 12). Gawker then moved to compel a response.

At the hearing on Gawker's motion in October 2013, Judge Campbell implored plaintiff that "the time to let [defendants] know [the damages he seeks to recover] is now." Ex. 3 at 14:6-8 (excerpt from transcript of Oct. 29, 2013 hearing). Accordingly, the Court ordered plaintiff to respond to the damages interrogatory by November 8, 2013. *Id.* at 95:12 – 96:12; *see also* Ex. 4 (Feb. 26, 2014 Order, requiring plaintiff to respond to interrogatory). Plaintiff then served an interrogatory response, which he subsequently supplemented several times. In each response, plaintiff articulated four damages theories:

- "The reasonable value of a publicly released sex tape featuring Hulk Hogan";
- "The reasonable value of 5.35 million unique Internet users visiting the Gawker.com homepage and/or the webpage featuring the Hulk Hogan sex tape";

- "Gawker Media's profits, and the profits of Gawker's owners, managers and/or employees, resulting from the unlawful dissemination of the Hulk Hogan sex tape"; and
- "General emotional distress damages that would naturally and foreseeably result from being the subject of a publicly released sex tape on the Internet." Ex. 5 (Plaintiff's Third Supplemental Response to Interrogatory No. 12).

Despite announcing to the public on the day he filed suit that he was seeking $100 million, none of his discovery responses in the litigation explained how he calculated those damages.

II. Plaintiff Presses For A Trial Date, Assuring Court That He Will Meet His Proposed Deadlines.

In the meantime, plaintiff began asking the Court to set a trial date, first asking for the trial to be held in 2014 and then asking for it to be scheduled in June 2015. At each of those times, Gawker took the position that plaintiff's requested dates were not reasonable given the amount of discovery that remained to be done. When plaintiff moved the Court to set a trial date last Fall, the Court agreed that, after Blogwire Hungary Szellemi Alkotast Hasznosito KFT ("Kinja, KFT") was severed from the case and Heather Cole's motion to dismiss was denied, a trial date should be set. In expressing its view that the trial should be held in July 2015, the Court explained that it "holds everybody's feet to the fire and we go according to the schedule and that makes things I think work more smoothly for everyone." Ex. 6 at 62:6-19 (excerpt from transcript of Oct. 22, 2014 hearing). The Court reiterated: "I like to keep deadlines." *Id.*

Following that hearing, plaintiff pressed for a July 2015 trial date, while Gawker continued to say that a trial date a few months later would allow the case to proceed more reasonably and allow for unforeseen consequences. Ultimately, plaintiff formally asked the Court to schedule the trial in July and advocated that initial expert disclosures be made by March 6. At the hearing where the Court set the trial date, plaintiff's counsel explained that if the proposed schedule for July "assumes everybody does everything right," then "let's try to make

that work." Ex. 7 at 125:25 (excerpt from transcript of Dec. 17, 2014 hearing). He also explained that "if you've got a trial date and a judge that's going to stick to it, that tends to make everybody stick to their better behavior to get it done." *Id.* at 124:3-6. The Court agreed, adopting plaintiff's proposed pretrial and trial schedule.

III. Plaintiff Drafts, And Agrees To, A Pretrial Order Requiring Expert Disclosures By March 6 And Promises To Provide Damages Theories By Then.

After the Court set the trial date, plaintiff drafted a pretrial order providing that initial expert disclosures must be made by March 6. The parties agreed upon an order mandating that expert disclosures include:

- "the substance of the facts and opinions about which the expert is expected to testify;"
- "a summary of the grounds for each opinion;"
- "a list of all documents relied upon by the expert in forming his/her opinions . . . and copies of any of those documents that are not pleadings in this case, transcripts of deposition testimony taken in this case, or documents previously produced by a party in this case."

Ex. 8 (excerpt from Pretrial Order of Feb. 18, 2015at ¶ 10).

The pretrial order also provides that if a party fails to comply with the expert disclosure requirements, the party's expert would be precluded from testifying at trial. *See id.* ("Expert witnesses who are not listed as described in paragraphs 7 through 9 may provide testimony only upon stipulation of all parties or as allowed by order of the Court at or before the pre-trial conference.").

With the trial date set, the discovery deadline looming, and plaintiff still failing to explain the basis for his damages calculations, defendant Denton served another set of damages interrogatories, again asking for plaintiff to explain how he calculates his damages. Plaintiff objected to these requests and stated that a "more complete response . . . will be the subject of

expert discovery" and "will be provided . . . in accordance with the order setting forth expert discovery deadlines." Ex. 9 (Plaintiff's Responses to Denton's Third Set of Interrogatories Nos. 18-21).

When defendants moved to compel a response to these interrogatories, plaintiff reiterated that the damages theories and calculation would be provided when he made his expert disclosures. At the hearing on defendants' motion, plaintiff's counsel explained that "we're spit-balling at this point in terms of how damages are calculated in a case like this." Ex. 10 at 43:4-6 (excerpt of transcript from Feb. 13, 2015 hearing[1]). Nevertheless, he made clear that plaintiff's disclosures on damages would be made soon, saying "21 days [from now] is my deadline, and I have been planning on that." *Id.* at 33:18-19.

Based on these representations, the Special Discovery Magistrate denied defendants' motion to compel and admonished plaintiff to comply with the expert disclosure deadline. *See id.* at 44:12-21 ("It's got to be frustrating for the defense to have to deal with this complete issue of how they're going to calculate damages from the plaintiff's perspective. . . . Gawker has got to be able to defend this case, so I think the defendant is entitled to get as much information as to how the plaintiff is going to calculate the damages.").

IV. Plaintiff Fails To Meet The Expert Discovery Deadline He Requested.

On March 6, plaintiff disclosed the identity of three damages experts, including Professor Leslie John. *See* Ex. 11 (Plaintiff's Expert Designations). Although plaintiff's expert designations explained the general subject matter of Professor John's testimony, it did not provide any information about the substance of her facts or opinions, the grounds for her

[1] The entire transcript of this heading was erroneously marked as "confidential." Only a portion of the hearing transcript involving specific information previously designated as confidential should have been marked "confidential." With this Opposition, defendants have filed only pages from the transcript that do not involve confidential information.

opinions, or the documents on which she relied for her opinions. Instead, plaintiff stated that Professor John had not finished her work, including "a survey she will conduct." *Id.* at 3. Plaintiff recognized the obvious deficiency in his disclosure and thus stated that "[u]pon completion of Professor John's research and investigation, Plaintiff will supplement this disclosure with Professor John's opinions and findings, the basis therefor, and the documents and resources on which she relied." *Id.*

ARGUMENT

Plaintiff moves for an extension of time to disclose the substance of the facts and opinions about which Professor John will testify, the grounds for those opinions, and the documents on which she has relied. Yet, he offers no reason for his failure to provide this information by the deadline he requested. This failure is striking in light of the certainty with which plaintiff claimed to be entitled to $100 million in October 2012, his stated commitment to comply with all pretrial deadlines in December 2014, and his renewed commitment to meet the expert disclosure deadline just last month.

The Court told plaintiff to disclose information about how he calculates his damages more than a year-and-a-half ago. Yet, rather than using that time to retain experts and prepare their reports for disclosure, plaintiff apparently has just been "spit-balling" about ideas for how he might gin up the $100 million in damages he claimed when filing suit in October 2012. There simply is no excuse for plaintiff's foot-dragging. Plaintiff's failure to meet his disclosure requirement is no one's fault but his own. He should be held to the deadlines he advocated.

Plaintiff's only argument for allowing him to miss his deadline is his contention that defendants will not suffer any prejudice. But, it does not matter that defendants "were aware of

'the existence of the witness'" by the disclosure deadline. Mot. at 4.[2] They do not know anything about Professor John's opinions or the basis of those opinions, which are the sole reasons she is being called to testify. And, merely granting defendants three additional weeks to disclose a rebuttal expert and take Professor John's deposition would not cure any prejudice. During the proposed three-week period (i.e., from Saturday, March 28 through Friday, April 17), the parties already have scheduled four depositions in three different states (with the possibility of additional depositions in other states of witnesses already identified and the depositions of any rebuttal experts that are disclosed on March 27). Defendants also must respond to written discovery served by plaintiff. Plus, defendants' summary judgment motion is due on April 20, just a week after the regular expert discovery deadline expires.

In light of the compressed pretrial schedule, allowing belated expert disclosures would disrupt the "orderly and efficient trial" of this case. *Binger v. King Pest Control*, 401 So.2d 1310, 1314 (Fla. 1981) (cited in Mot. at 3-4).[3] After all, as the parties brief summary judgment, they also will need to be preparing for trial, with *Daubert* motions due May 18, witness and

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[2] Plaintiff attempts to excuse his failure to comply with the expert disclosure deadline by suggesting that Professor John might actually be a "a 'rebuttal' expert because Defendants disclosed an expert to testify as to the 'value' of the subject video." Mot. at 4 n.3. Yet, defendants' witness is an expert in the valuation of celebrity sex tapes, which appears to be beyond the scope of Professor John's expertise and testimony, which plaintiff has described as relating to "the value of the loss of privacy to a person similarly situated to Hulk Hogan who has a secretly-filmed tape of him naked and having sex released on the Internet without his consent." Ex. 11 at 3 (Pl.'s Expert Designations).

[3] In *Binger v. King Pest Control*, 401 So.2d 1310, 1314 (Fla. 1981) (cited in Mot. at 3-4), the Supreme Court recognized that some "local pretrial practices . . . expressly prevent[] the testimony of any witness not identified within a certain period of time" and made clear that presiding trial judges retain the discretion in interpreting and applying those practices. Under the unique circumstances of this case, and plaintiff's oft-repeated position about his desire for a trial to be scheduled as soon as possible, the Court is well within its discretion to deny his request. Plaintiff will suffer no prejudice, for he has identified other damages experts and is not foreclosed from seeking damages for any of his claims.

exhibit lists due June 8, deposition designations due the same day, and motions *in limine* due June 12. This very tight schedule – which plaintiff advocated – is precisely the reason that the request for an extension should be denied. As defendants' counsel explained in response to plaintiff's motion for that schedule: "the problem is with the July schedule, there's no room for things to go sideways. If things don't break right, we have a potential problem." Ex. 7 at 112:17-20 (excerpt from transcript of Dec. 17, 2014 hearing). In response, plaintiff's counsel told the Court that "if you've got a trial date and a judge that's going to stick to it, that tends to make everybody stick to their better behavior to get it done." *Id.* at 124:3-6. The Court should hold plaintiff to his word.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny plaintiff's request for an extension.

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of March 2015, I caused a true and correct copy of the foregoing to be served by email upon the following counsel of record:

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