EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

IN RE SUBPOENA TO YOUNG AMERICA CAPITAL, LLC

GAWKER MEDIA, LLC

Petitioner,

- against -

TERRY GENE BOLLEA, professionally known as Hulk Hogan

Respondent.

Index No. 52004/2015

RESPONDENT'S OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES RE: PETITIONER GAWKER MEDIA, LLC'S PETITION AND ORDER TO SHOW CAUSE AND YOUNG AMERICA CAPITAL, LLC'S AND GAWKER MEDIA, LLC'S MOTIONS TO QUASH AND FOR PROTECTIVE ORDER

I. INTRODUCTION

This special proceeding arises out of a civil action brought in Florida state court (the "Florida Action") by Terry Bollea, professionally known as Hulk Hogan, for invasion of privacy and related torts against Petitioner Gawker Media, LLC ("Gawker"), among other defendants, based on Gawker's October 2012 posting of a clandestinely-recorded video of Mr. Bollea fully naked and engaged in private consensual sexual relations in a private bedroom (the "Sex Video"), at Gawker's celebrity tabloid website: gawker.com.

Notwithstanding the fact that 5 million Internet users went to Gawker.com to read about and watch the Sex Video, and Gawker admits that its revenues are based on web traffic, Gawker contends in the Florida Action that it earned no revenues and no profits in connection with its publication of the Sex Video for a period of approximately six months: October 2012 through

April 2013. Mr. Bollea strenuously disagrees with Gawker's contention, and a major focus of discovery has been Gawker's revenues and profits in 2012 and 2013, as well as the year of 2011, before Gawker ran the Sex Video, to provide a basis for comparison of Gawker's revenues and profits when it did run the video. Judge Campbell in the Florida Action has **granted** Mr. Bollea's motions to compel Gawker to comply with damages discovery as to all of these years, including Gawker's representations to and communications with its potential and actual lenders and/or financiers regarding Gawker's financial information during these relevant years.

Under the liberal standards for third party discovery under New York law, Mr. Bollea is entitled to this discovery, and receive it directly from the lender/financier itself: YAC.

Gawker's and YAC's arguments to the contrary are without merit. First, the New York courts have specifically rejected the arguments made by Gawker and YAC, holding both that neither a protective order nor a motion to quash may be granted when a third party subpoena meets a threshold of minimal relevance, and that third party discovery is not barred even if the discovery is theoretically available from Gawker.

Second, the trial court in the Florida Action has **not** ruled Mr. Bollea's discovery off limits, but just the opposite: that Court recently expressly ruled that Gawker's representations to and communications with lenders and/or financiers regarding Gawker's 2011, 2012 and 2013 finances **are discoverable**. Because the transaction involving YAC became publicly known **after** the aforementioned issue had been litigated in Florida, it was not expressly mentioned in the Florida court's order. However, it is relevant and discoverable for the same reasons.

Third, whether or not Gawker provided information to YAC "in confidence," Gawker and YAC have identified no evidentiary privilege that would prohibit the disclosure of communications between a business and a potential or actual financier—particularly in this case,

where an extensive Court Protective Order is in place to prevent information designated as "Confidential" from being used for any purpose other than the litigation, and prohibits its public dissemination.

Fourth, Mr. Bollea's purpose in serving these requests is bona fide. He is not attempting to interfere with Gawker's efforts to obtain financing, but merely seeks discovery of Gawker's historic financial data that may not have been shared with Mr. Bollea (either at all or in the same format or with the same degree of candor) in the Florida Action. The existing Protective Order in the Florida Action allows Gawker to designate documents as "Confidential." Surely, corporate financiers understand that there is a possibility that information could be sought from them by means of a civil subpoena, and it is fanciful to conclude that this possibility would "chill" companies from either seeking or offering financing.

The trial date in the Florida Action is set for July 6, 2015, and the fact discovery cutoff is April 10, 2015. Gawker's motion is calculated to prevent Mr. Bollea from being able to complete fact discovery, and delay the production of documents and information needed in upcoming depositions, and prevent a deposition of YAC, based on legal contentions that have been *decisively rejected* by the New York Court of Appeals. Mr. Bollea respectfully requests that this Court expedite consideration of this matter and deny the relief sought by Gawker and YAC.

II. STATEMENT OF FACTS

Mr. Bollea brought the underlying Florida Action for invasion of privacy and related torts based on Gawker's publication of the Sex Video – an explicit "highlight reel" edited and compiled by Gawker from a secret "hidden camera" recording, made without Mr. Bollea's

knowledge or consent, of a consensual sexual encounter involving Mr. Bollea in a private bedroom. More than five million unique visitors accessed the web page that featured the Sex Video, and most of them watched it.[1]

As part of the Florida Action, Mr. Bollea has been permitted to take discovery of Gawker's financial information and activities, to establish how publishing the Sex Video brought traffic and associated revenues to Gawker's website, thereby financially benefitting Gawker. This information is crucial to Mr. Bollea's damages calculations.

In 2014, Mr. Bollea served discovery seeking information that Gawker provided to actual or prospective lenders and/or financiers regarding Gawker's financial information and condition. Such information could include how the Sex Video benefitted Gawker, or even admissions by Gawker as to the benefit that it obtained from publishing the Sex Video.

Gawker refused to produce responsive documents, thereby forcing Mr. Bollea to move to compel. In December 2014, the trial court in the Florida Action ordered Gawker to produce the statements and representations that it made to its actual and prospective lenders and financiers regarding Gawker's 2011, 2012 and 2013 financial information. *See* accompanying Affirmation of Charles J. Harder, Exh. 1.

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[1] Gawker attempts to imply that Mr. Bollea's claims have no merit by pointing to the Florida Court of Appeal's reversal of a temporary injunction granted in Mr. Bollea's favor. However, that interlocutory ruling was **not made on the merits** and occurred early in the case, before any discovery had occurred. Importantly, Gawker fails to inform this Court that Gawker later asked the Florida Court of Appeal to dismiss Mr. Bollea's claims on the basis of the earlier temporary injunction appeal ruling, and the Florida Court of Appeal refused to do so. The Florida Action therefore is proceeding to trial on July 6, 2015 (with a fact discovery cutoff of April 10, 2015). This confirms that Gawker is completely incorrect when it implies that Florida appellate court's ruling on the temporary injunction supposedly was a dispositive determination on the merits – it certainly was not. Moreover, the parties have been engaged in aggressive discovery for more than a year, and it is continuing, and the Florida appellate court's ruling has had no impact whatsoever on discovery – contrary to Gawker's false or misleading implication.

After the Court's order was entered, news reports were published in early 2015, based on an interview with Gawker's CEO, Nick Denton, indicating that Gawker had commenced seeking millions of dollars in debt financing through the deponent, YAC. (*Id.*, Exh. 2) The YAC financing was not specifically identified in the Court's order in the Florida Action, because the news report that first publicized the YAC-Gawker transaction was published **shortly after** the Court Order was issued, and thus Mr. Bollea (or the Court) was not yet aware of the YAC-Gawker transaction. Even if Gawker's representations to YAC are not specifically encompassed within the Florida Court's order, the information sought from YAC still is discoverable because it is directly relevant to damages issues, as well as reasonably calculated to lead to admissible evidence in the Florida Action, on the issue of Gawker's profits and the benefit it gained from publishing the Sex Video.

Additionally, Gawker is taking the position in discovery in the Florida Action that it **operated at a loss** during 2012 and 2013, the years when the Sex Video was posted on gawker.com, yet Mr. Denton's interview with the financial press (Harder Affidavit, Ex. 2) indicates that the company has attained significant profits in recent years, and has a net worth today of $250 million. Gawker has produced **un**audited financial statements in discovery, and Mr. Bollea has the right to test their credibility against what Gawker has expressly told its financiers about its finances in recent years (which representations presumably are accurate).

There are additional reasons why the discovery at issue is relevant: (1) there are alter ego claims in the Florida Action against Gawker's Hungarian sister company Kinja, KFT (in the Florida Action, Mr. Bollea has been permitted to ask Gawker about its transactions with Kinja, KFT and its movement of money offshore, and information that Gawker has supplied to YAC relating to these issues is highly relevant); and (2) Mr. Bollea seeks punitive damages against

Gawker in the Florida Action, because Gawker was expressly told that the Sex Video was illegally created, distributed and published, in violation of Florida criminal and civil laws, including video voyeurism and wire tapping, but yet Gawker continued to published the Sex Video notwithstanding these express warnings and demands for its removal; Gawker's financial condition therefore is relevant for punitive damages as well.

Accordingly, Mr. Bollea is entitled to take the discovery at issue herein, and the efforts by Gawker and YAC to block this legitimate discovery should be rejected.

III. GAWKER'S AND YAC'S MOTIONS TO QUASH SHOULD BE DENIED

The New York Court of Appeals recently made clear the broad scope of permissible third party discovery under New York law. In *Kapon v. Koch*, 23 N.Y.3d 32 (2014), the Court of Appeals confronted the very issue that Gawker and YAC raise—the contention that courts should impose some sort of special burden on parties in out-of-state cases who serve discovery subpoenas on New York residents. The *Kapon* court **rejected** that contention. In *Kapon*, a party to a pending California action served a third party subpoena in New York. The New York Court imposed **one** procedural requirement—that the subpoena or notice contain a short statement of the circumstances or reasons that justify the subpoena. Mr. Bollea's subpoena **complies** with this requirement.

So long as that requirement is satisfied (a requirement which the *Kapon* Court described as "minimal", *id.* at 39[2]), New York courts are to grant a motion to quash **only** when it is "inevitable or obvious" that the discovery will be "futil[e]." *Id.* at 38. Thus, Gawker and YAC

[2] YAC argues that this minimal requirement has not been met. *Lesser Affirmation* ¶ 11. In fact, the subpoena states that the testimony is sought because of its material importance to the issues in the case. The detailed recitation of the facts and issues of the Florida Action herein establishes that the subpoena does indeed seek information of material importance to the issues in that case.

must show that the information sought in the subpoena is not relevant **at all** to the prosecution or defense of the Florida Action. *Id.* at 38. Gawker and YAC bear, but cannot meet, this heavy burden of proof in this proceeding. *Id.* at 39.

Moreover, the *Kapon* Court specifically **rejected** the argument that Gawker and YAC make in their motions that the party propounding the discovery must seek the information from the parties to the case rather than going to third parties. The *Kapon* Court held that there is "**no requirement** that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source." *Id.* at 38 (emphasis added).

Gawker's and YAC's motions to quash therefore are meritless under controlling recent New York Court of Appeals precedent. Gawker and YAC cannot show that it will be "futile" to take discovery of Gawker's representations to and communications with YAC with respect to Gawker's finances. Gawker and YAC further cannot show, and do not meet their burden of showing, that such documents and information are irrelevant or otherwise non-discoverable. On the contrary, the trial court in the Florida Action has already ruled that such information and documents ***are* discoverable**. Moreover, the argument that Mr. Bollea supposedly must seek this information only from Gawker, and not from YAC, has been expressly rejected by the New York Court of Appeals. (*Id.*)

The remainder of Gawker's and YAC's arguments are equally without merit. Gawker and YAC argue that disclosure of communications between lender and borrower supposedly would "chill" businesses from seeking or providing financing. However, Gawker and YAC have identified no recognized legal privilege for communications between a corporation and any potential financier.

Finally, there is no basis for Gawker's and YAC's accusation that the discovery seeks to deter Gawker from obtaining financing, or to chill YAC from providing such financing to Gawker. A Protective Order is in place in the Florida Action, and both Gawker and YAC are free to designate documents and information produced by YAC as "Confidential," thus precluding their disclosure outside the context of this litigation. Presumably, financiers such as YAC (like any business) understand that they will sometimes come into possession of documents that are relevant to a civil lawsuit, and Gawker and YAC offer no evidence that Gawker or YAC has lost any business opportunity as a result of this subpoena.

IV. GAWKER'S AND YAC'S MOTIONS FOR A PROTECTIVE ORDER SHOULD BE DENIED.

Gawker's and YAC's motions for a protective order also are barred by the Court of Appeals decision in *Kapon*.

In *Kapon*, the petitioner not only sought an order quashing the subpoena, but also sought a protective order in the New York Supreme Court precluding enforcement of the California subpoena. 23 N.Y.3d. at 35. Nonetheless, the Court of Appeals held the subpoena was enforceable because (1) the minimal requirement that it imposed – a description of the justification for the subpoena – was met, and (2) the petitioner failed to show that the subpoena did not seek any relevant information. *Id.* at 38-39. The official commentary to CPLR 3103 states that *Kapon* settles this matter—that though a protective order may still be sought if the petitioner wishes to somehow limit the discovery, it cannot be utilized to circumvent *Kapon* by seeking to deny the discovery altogether. Patrick M. Connors, Supplementary Practice Commentaries, CPLR § 3103 (2014) ("We mention the *Kapon* decision again here because there might be situations in which a court should deny a motion to quash under CPLR 2304 because

the materials sought from the nonparty are relevant, yet still grant relief under CPLR 3103(a). This might be appropriate in situations in which a nonparty seeks an order qualifying or conditioning the use of a disclosure device, **rather than an order denying the disclosure in its entirety**.") (Emphasis added).

In *Nacos v. Marcos*, 124 A.D.3d 462 (1st Dep't 2015), the Court applied the *Kapon* doctrine to **both** a motion to quash **and** for a protective order challenging a third party subpoena, and held that where the minimal standard of notice and relevance was met, all relief sought by the petitioner would be denied.

The Appellate Divisions in New York are **enforcing the new *Kapon* standard** and are **reversing** trial court rulings that grant motions to prevent third party discovery under the older, **now rejected standard urged by Gawker and YAC**. *See, e.g.*, *Menkes v. Beth Abraham Health Services*, 120 A.D.3d 408 (1st Dep't 2014) (reversing order quashing third party deposition subpoena and applying *Kapon* minimal relevance standard); *Peters v. Peters*, 118 A.D.3d 593 (1st Dep't 2014) (reversing order quashing subpoena issued to law firms representing opposing party in litigation).

Gawker and YAC cannot obtain a protective order to bar discovery that meets the minimal relevance threshold of *Kapon*. Gawker's and YAC's motions are based on authorities that were rejected by the Court of Appeals in favor of a more liberal standard and are no longer applicable. Notably, almost all of the cases cited by Gawker and YAC decided **prior to *Kapon***. The only 2014 case cited by Gawker, *Katz v. Castlepoint Insurance Co.*, 121 A.D.3d 948 (2d Dep't 2014), held that tax returns are not discoverable in **first party** discovery. *Katz* is distinguishable because the tax returns sought in that case had been kept private and had not been turned over to any third party, and thus were subject to a much stronger privacy objection. Here,

the only tax returns that fall within the subpoena to YAC are tax returns that **Gawker has already voluntarily provided to a third party (YAC) rather than keeping private**. Thus, Katz does not apply to prevent production of any tax returns that Gawker voluntarily supplied to YAC.

Accordingly, Gawker and YAC are entitled to no relief under their motions for protective order.[3]

V. CONCLUSION

For the foregoing reasons, Gawker's and YAC's request for relief on its Petition should be **denied** in its entirety, the Order to Show Cause should be discharged, and this Court should order YAC to comply with the subpoena in its entirety.

DATED: February 24, 2015

By: _____

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[3] The discovery in the underlying Florida Action is governed by a protective order already in place, under which Gawker can designate testimony and documents as confidential. Thus, there is already a procedure to ensure that any business concerns raised by Gawker respecting the disclosure of any assertedly confidential information can be addressed.

SUPREME COURT OF THE STATE OF NEW YORK
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Petitioner,

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Index No. 52004/2015

AFFIRMATION OF CHARLES J. HARDER IN SUPPORT OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES RE: PETITIONER GAWKER MEDIA, LLC'S PETITION AND ORDER TO SHOW CAUSE AND YOUNG AMERICA CAPITAL, LLC'S AND GAWKER MEDIA, LLC'S MOTIONS TO QUASH AND FOR PROTECTIVE ORDER

CHARLES J. HARDER, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the following as true and correct under the penalties of perjury as prescribed by the C.P.L.R.:

1. I am an attorney at law, duly authorized to appear before all courts of the State of California, among other courts, an active member of the New York Bar, and a partner of the law firm of Harder Mirell & Abrams LLP, lead litigation counsel for Terry Gene Bollea, professionally known as Hulk Hogan, in the underlying lawsuit styled *Bollea v. Clem, Gawker Media LLC* et. al., pending in the Florida state court.

2. On December 17, 2014, Hon. Pamela Campbell, the trial judge in the Florida action, issued an order requiring Gawker to provide information regarding financial

representations that it made to lenders and financiers. A true copy of that order is attached hereto as **Exhibit 1**.

3. My office learned of Gawker Media's transaction with Young America Capital in late January 2015, when it was publicized in the business press. Attached hereto as **Exhibit 2** is a true copy of an article by Allyson Shontell of *Business Insider* entitled "Gawker Media Generated $45 Million In Net Revenue Last Year And It's Raising A $15 Million Round Of Debt", dated January 28, 2015. The article, which states that it is based on an interview with Gawker Media's CEO, Nick Denton, also can be found at *http://www.businessinsider.com/gawker-media-raising-money-2015-1* .

DATED: February 24, 2015
Los Angeles, California

CHARLES J. HARDER