

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, *et al.*,

Defendants.

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**GAWKER’S OPPOSITION TO PLAINTIFF’S MOTION TO “CLARIFY” THIS  
COURT’S DECEMBER 17, 2014 ORDER AND MOTION FOR PROTECTIVE ORDER**

Gawker Media, LLC (“Gawker”) respectfully submits this Opposition to plaintiff’s motion to “clarify” this Court’s December 17, 2014 order and, pursuant to Florida Rule of Civil Procedure 1.280(c), moves for a protective order. Plaintiff claims he wants the Court to “clarify” its prior order, but that order was clear on its face and followed by Gawker. In fact, plaintiff wants to reverse that order, and then to expand it dramatically so that he can take extensive and intrusive discovery from a uninvolved third party in New York, directly interfering with Gawker’s business in the process.

Plaintiff has issued a far-reaching subpoena for both documents and deposition testimony to Young American Capital, LLC (“YAC”), even though YAC has no connection to the events underlying this action. YAC is a debt advisor based in Mamaroneck, New York that Gawker is working with in 2015 in an effort to obtain a loan. The New York subpoena issued to YAC far exceeds this Court’s prior ruling, which limited discovery from Gawker to what was necessary to confirm the accuracy of the financials Gawker had previously produced. Specifically, that order limited discovery about debt offerings to documents “sufficient to show” financial

representations to its lender(s) for 2011, 2012 and 2013 – information which Gawker has already supplied. Moreover, in an obvious attempt to interfere with Gawker’s ability to secure financing, plaintiff threatened YAC with sanctions and raised the specter of punitive damages, even though there is no such claim in the case.

Given all this, both YAC and Gawker moved the New York court (where the subpoena was issued) to quash the subpoena and for a protective order. That motion is fully briefed and awaiting decision. Plaintiff has now also brought the matter to this Court, which, although it does not ultimately decide New York subpoena questions, exercises initial control over the discovery plaintiff may seek in connection with this action. As explained below, Gawker has produced the financials reviewed and/or audited by Gawker’s outside CPAs and supplied to Gawker’s bank for 2011, 2012 and 2013. YAC has repeatedly offered to confirm that any financials it received for those years were the same as those already supplied by Gawker, but plaintiff has refused, instead insisting that he is entitled to wide ranging additional discovery and a four-hour deposition.

In his motion, plaintiff does not supply any of the New York motion papers. *See Exs. A-H.* He also does not supply his threat to seek sanctions against YAC, which he refused to submit to the New York Court and which he marked “confidential.”<sup>1</sup> And, perhaps most significantly, he does not address – in his papers filed in either court – the extensive additional discovery he now seeks from a 2015 debt advisor, including (a) “all documents” and “communications” regarding Gawker’s efforts to obtain financing; (b) “all communications” between YAC and various Gawker executives on any subject; (c) “all documents” concerning

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<sup>1</sup> Although correspondence between plaintiff and a non-party is not the type of thing that was intended to be designated as “confidential” under the protective order in this case, Gawker has nevertheless respected the designation and not attached the email here. Gawker will, however, be prepared to make it available to the Court at the hearing on this matter.

“communications between [YAC] and any and all third parties . . . relating to any attempt by [Gawker] to secure debt or equity financing”; and (d) Gawker’s bank and tax records. Such discovery far exceeds both the Court’s initial order and plaintiff’s expressed purpose for needing discovery related to debt offerings – namely, an attempt to verify the accuracy of the financial discovery previously produced by Gawker. That ruling was correct and, in any event, plaintiff should not be permitted to use the discovery process to harass an uninvolved third party. This Court should rule that the plaintiff is not entitled to the requested discovery (other than the confirming affidavit offered by YAC) and should direct plaintiff to withdraw his subpoena.

### **BACKGROUND**

#### **A. Financial Discovery and the Court’s Order Regarding Representations to Lenders.**

During the life of this case, Gawker has provided extensive discovery to plaintiff about its finances. In addition to the full-day corporate deposition of its Chief Operating Officer, who is principally responsible for the company’s financial matters, Gawker has produced nearly four years’ worth of: its income statements, its balance sheets, its monthly revenue statements for the company as a whole, its monthly revenue statements for each of its eight websites, and every order for advertising placed by an advertiser (indeed, just the advertising orders resulted in a production of approximately 10,000 pages).<sup>2</sup>

Nevertheless, in Fall 2014, plaintiff served Gawker with a request for production seeking “*All documents and communications* that relate to any proposed equity, debt or other security offering by [Gawker] during the period January 1, 2011, through the present.” Second RFP

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<sup>2</sup> Plaintiff was also provided with financials for Kinja, prepared by Kinja’s outside accountants in Hungarian, which were then translated into English.

No. 116.<sup>3</sup> The reason plaintiff articulated for seeking this discovery was that he needed to verify the accuracy of the substantial financial discovery already produced by Gawker. Specifically, plaintiff and his counsel claimed that they wanted “to compare the finances in [Gawker’s] representations to third parties with their finances represented to us.” *See* Ex. J (excerpts from Dec. 17, 2014 Hrg. Tr.) at 99:9-14.

In response, Gawker argued that plaintiff could still accomplish that purpose with a far narrower request than one seeking *all* documents and *all* communications for a *four year* period. This Court agreed and limited the request in two ways. First, instead of “all documents and communications,” Gawker would only be required to produce “documents sufficient to show the financial representations of the Defendant” to lenders (Gawker is 100% wholly owned and therefore there are no equity or security offerings). *Id.* at 102:9-13; Ex. K (Dec. 17, 2014 Order). Second, the Court limited the request to the years 2011, 2012 and 2013 – the three year period surrounding the post at issue, published in October 2012. *Id.* Gawker fully complied with that order. In addition to the prior financials it had previously produced, described above, Gawker produced financials that had been reviewed and/or audited by its outside accountants for 2011, 2012 and 2013 and that had then been provided to its bank. *See* Ex. N (cover letters to financial statements from CPAs); Ex. F (Reply Aff. of Alia L. Smith, dated March 2, 2015, and submitted

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<sup>3</sup> Plaintiff had previously served a Request for Production No. 116 on a different subject. To avoid confusion, the parties and the Court have referred to this new request as “Second Request for Production No. 116.” Plaintiff made his request seeking documents and communications related to equity, debt and security offerings even though this Court had previously sustained Gawker’s objections to an earlier request seeking “documents that relate to the identity of the owners of Gawker or any affiliated company.” *See* Ex. I (Feb. 26, 2014 Order ¶ 4 (sustaining objections to RFP No. 30)).

to Court in Westchester County, NY) at ¶ 3; Ex. H (Affidavit of Scott Kidder dated March 2, 2015, and submitted to court in Westchester County, NY) at ¶¶ 2-3.<sup>4</sup>

Plaintiff has, without any support, accused Gawker and its counsel of making misrepresentations to this Court in advocating for the three-year period (2011, 2012 and 2013). Mot. at 2. Relatedly, he complains that Gawker is narrowly reading the Court's order to avoid producing representations about those three years that were made at a later date. He is simply incorrect on both points. Indeed, even though Gawker's 2013 audited financials were not completed until September 2014 (the CPAs' cover letter found at the first page of the audited financials is dated September 29, 2014, *see* Ex. F), they were nevertheless produced to plaintiff as directed because they relate to 2013. Moreover, Gawker has not provided 2014 reviewed or audited financials to either its existing bank or to YAC because they have not been completed yet, and certainly would not have been completed at the time of the prior hearing on December 17, 2014. Plaintiff's contention that Gawker artificially limited the period to avoid producing documents that do not exist makes no sense.

#### **B. The Subpoena to YAC**

Despite having received these financial representations, plaintiff nevertheless issued a New York subpoena on or about February 4, 2015 to YAC, a licensed broker-dealer engaged to assist with a proposed debt offering for 2015. Ex. L. But plaintiff's subpoena to YAC is far broader than anything that might be necessary to "confirm" what Gawker had produced regarding the period 2011-2013 – even assuming that such additional confirmation from a third party is proper or needed given that the financials provided had been reviewed and audited by a

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<sup>4</sup> Because the financial statements themselves have been marked "confidential," Gawker does not attach them here. But counsel will make them available to the Court at the hearing on this matter.

prominent outside CPA firm. *See* Mot. at 2 (purpose of subpoena to YAC is to see if Gawker is making “materially different representations” to lenders than it has made to plaintiff in discovery); Ex. J at 99:9-14 (plaintiff claiming that “we want to be able to compare the finances in [Gawker’s] representations to third parties with their finances represented to us.”). Plaintiff’s subpoena to YAC seeks 18 separate categories of documents and deposition testimony from YAC on six separate topics. For example, for the period of January 1, 2012 to the present, the subpoena’s document requests seek:

- Σ “All documents” and “communications” concerning “any attempt by” Gawker, GMGI or Kinja (referred to collectively as the “Gawker Entities”) “to obtain financing,” including “debt or equity financing” (Req. Nos. 2, 8);
- Σ “All documents that refer or relate to [Gawker’s sister company] Kinja” (Req. No. 3);
- Σ “All tax returns . . . filed by any and all Gawker Entities” (Req. No. 4);
- Σ “All documents that constitute or contain any financial statements . . . of any and all Gawker Entities” (Req. No. 5);
- Σ “All bank statements of any and all Gawker Entities” (Req. No. 6);
- Σ All agreements containing “deal terms” between YAC and the Gawker Entities and any communications relating to efforts by “any and all of the Gawker Entities to obtain debt or equity financing” (Req. Nos. 7-9);
- Σ All communications between YAC and various Gawker executives on any subject (Req. Nos. 10-13);
- Σ All documents referring or relating to various transactions or so-called “transfer pricing studies” involving “any of the Gawker Entities” (Req. Nos. 14-15); and

∑ “All documents” concerning “communications between [YAC] and any and all third parties, including . . . lending institutions and financial companies, relating to any attempt by any and all Gawker Entities to secure debt or equity financing” (Req. No. 16).

Ex. L. Similarly, the subpoena demands that a corporate designee from YAC prepare for and appear for deposition on a number of wide-ranging topics, including testimony concerning:

∑ “the financial condition and financial information of Gawker and each of its affiliated companies, including without limitation their income, expenses, profits, losses, assets, liabilities and tax payments” (Dep. Topic No. 1);

∑ “attempts by any and all Gawker Entities to secure financing,” any “proposed or completed transaction” involving “debt and/or equity financing,” and any communications concerning any such proposed or completed transaction, including to “lending institutions and financial companies, and any members of the print or electronic news media” (Dep. Topic Nos. 2, 4 & 5);

∑ any movement of money or assets by any of the Gawker Entities (Dep. Topic No. 3);  
and

∑ all the documents requested in the Subpoena (Dep. Topic No. 6).

Ex. L.

In response to the New York subpoena, both YAC and Gawker filed motions in the Supreme Court for Westchester County, New York seeking to quash the subpoena and requesting the issuance of a protective order. Between them, they explained that (a) this Court had significantly limited discovery related to “debt offerings,” and plaintiff’s subpoena to YAC far exceeded those limits, (b) Gawker had fully complied with the discovery the Court did order

by producing the financial statements that had been reviewed and audited by its outside CPAs and then supplied to its lender, and (c) the only conceivable reason for subpoenaing YAC for such an extensive amount of information was to harass Gawker and its potential debt issuers and/or otherwise interfere with Gawker's efforts to secure debt financing. The briefing on Gawker's and YAC's motions is attached hereto as Ex. A (Gawker's memorandum of law in support of motion to quash and for protective order); Ex. B (Aff. of Alia L. Smith, without exhibits); Ex. C (YAC's affirmation in support of motion, without exhibits); Ex. D (Bollea's opposition to motion, plus Aff. of Charles Harder without exhibits); Ex. E (Gawker's reply); Ex. F (Reply Aff. of Alia L. Smith, without exhibits); Ex. G (YAC's reply).

At a March 6, 2015 hearing in New York on Gawker's and YAC's motions before a court attorney, counsel for YAC explained that she was willing to confirm whether the financial representations to Gawker's existing lender produced in discovery matched any financial representations made to YAC for the years 2011, 2012 and 2013. Following that hearing, YAC's counsel then sent a letter to the parties here, reiterating her offer to have YAC confirm, by affidavit, whether the audited financials Gawker provided to plaintiff were the same as those it provided to YAC. She further proposed that, if they were not the same, Gawker be asked about the discrepancy in the first instance and then, if necessary, YAC could sit for a limited deposition about those discrepancies. Ex. M (correspondence from D. Lesser to S. Berlin and C. Harder, dated March 13, 2015).

Evincing the true purpose behind plaintiff's subpoena to YAC, plaintiff refused this offer. Instead, plaintiff continues to seek far more extensive information from YAC and now seeks to have this Court significantly expand its December 17, 2014 order to hold (among other things) that "the documents and testimony requested in the YAC subpoena are within the permissible



scope of discovery.” Mot. at 3. But the subpoena to YAC seeks an incredibly wide range of documents (“all documents and communications”) that go well beyond the limited question of whether Gawker is making “materially different representations” to plaintiff and its lenders and in fact requests all sorts of details about a proposed debt offering not at issue in this case, one occurring nearly three years after the relevant events – if plaintiff’s efforts do not tank it. The Court should not allow plaintiff to burden a third party in that way and should instead implement the reasonable approach proposed by counsel for YAC.

### ARGUMENT

#### **A. Plaintiff’s Subpoena to YAC is Unnecessary and Seeks Discovery That Is Far Broader Than Anything Contemplated by This Court.**

Plaintiff argues that he is entitled to take discovery from YAC so he can determine whether “Gawker is making materially different representations about the state of its finances in 2011 through 2013” to potential lenders. Mot. at 2; *see also* Ex. J at 99:9-14 (plaintiff claiming that “we want to be able to compare the finances in [Gawker’s] representations to third parties with their finances represented to us.”); Ex. D (plaintiff’s opposition to motions in NY) at 3 (claiming that he “merely seeks discovery of Gawker’s historic financial data”). But this argument is both improper and misleading. It is improper because *Gawker has already responded* to plaintiff’s discovery request, as limited by this Court, seeking documents “sufficient to show” the representations made to its lender for the period 2011 through 2013. Specifically, it produced financial statements prepared by its outside accountants and submitted in connection with obtaining a loan and line of credit. Ex. N (cover letters to financial statements). A request to Gawker’s broker-dealer for that same information is patently improper, cumulative, and, as discussed below, harassing.

More importantly, the argument is misleading because plaintiff does not, in fact, seek simply to compare the information Gawker provided to YAC to that which it produced to plaintiff. If he did, he would have accepted YAC's offer of a confirming affidavit, and, significantly, he would not have asked YAC for, among other things, "all documents" and "communications" regarding Gawker's efforts to obtain financing (Req. Nos. 2, 8), "all ... agreements" containing "deal terms" between YAC and Gawker (Req. No. 7), "all communications" between YAC and various Gawker executives on any subject (Req. Nos. 10-13), and "all documents" concerning "communications between [YAC] and any and all third parties, including . . . lending institutions and financial companies, relating to any attempt by any and all Gawker Entities to secure debt or equity financing" (Req. No. 16). Even a cursory review of plaintiff's subpoena to YAC (which seeks financial data *through the present*, not just through 2013) makes clear that plaintiff is not seeking limited financial data for a limited time period (2011-2013), but rather is pursuing broad discovery that includes every detail of every communication that Gawker and YAC had between themselves and with potential debt issuers concerning a potential debt offering that will not occur until approximately three years after publication of the post at issue.<sup>5</sup> Such expansive discovery (on top of what has already been produced) is incredibly intrusive and is utterly irrelevant to any issue in this case, as this Court recognized when limiting the additional financial discovery plaintiff could take against Gawker to documents "sufficient to show" its financial representations for a limited period.

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<sup>5</sup> Plaintiff spends much of his brief arguing about whether this Court's December 17, 2014 Order was meant to apply to representations made *in* 2011, 2012 and 2013 or to representations made *about its finances* as they existed in 2011, 2012, and 2013, regardless of when they were made. This is a red herring. As explained above, Gawker has not withheld documents reflecting financial representations on the grounds that they were *about* 2013 but were not made until 2014. In fact, Gawker produced its audited financials for the year 2013, even though they were not completed or submitted to Gawker's lender until well into 2014.

**B. Plaintiff's Subpoena to YAC Seeks to Improperly Interfere With Gawker's Business Relationships.**

The Court's order contemplated discovery from *Gawker*, not from third parties. Even if the order could somehow be interpreted to authorize discovery from a third-party, plaintiff issued a subpoena far broader than anything authorized by the Court. The subpoena sought detailed information and testimony about prospective lenders and all communications with them. Plaintiff's first communication with YAC after the subpoena was to threaten it with sanctions and to go on at some length about the huge damages he is seeking, including punitive damages which are not part of this case. Taken in combination, this conduct is not for any legitimate purpose in discovery in this action. Rather, he is simply trying to spook potential lenders and otherwise interfere with and undermine Gawker's efforts to secure debt financing. *See* Ex. M (correspondence from counsel for YAC, noting that releasing the information sought by the subpoena "would be a serious intrusion into YAC's and Gawker's businesses and would potentially be destructive to YAC's efforts to obtain debt financing for Gawker"). Trying to pressure an opponent by interfering with unrelated financial transactions is a manifestly improper use of the discovery process.<sup>6</sup>

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<sup>6</sup> Bollea devotes roughly a third of his brief to arguing that the Court should reverse and dramatically expand its order because he has been cooperative in discovery and Gawker has not, contending that discovery has been a "one-way street." Mot. at 5. This is both irrelevant and incorrect. In fact, plaintiff has resisted substantial discovery sought from both him and from third parties, refusing to provide any answer to more than half of the written discovery requests served on him and filing objections to more than half the document subpoenas Gawker noticed its intent to serve (he circumvented that procedure in issuing the subpoena to YAC by also seeking a deposition). And, he has repeatedly sought appellate review of discovery orders (Gawker has never done so), effectively delaying discovery from months while those appeals were adjudicated. While, to be sure, Gawker has objected to certain aspects of the incredibly far-reaching discovery plaintiff has sought, the Gawker defendants have responded to more than 400 written discovery requests, Gawker has produced 25,000 pages of documents, and it has voluntarily arranged for plaintiff to take the depositions of eight of its senior executives and staff, including its Chief Executive Officer, Chief Operating Officer, Chief Technology Officer, Chief

Not only does the subpoena seek to interfere with Gawker's legitimate business operations, but it is likewise harassing to YAC. It puts YAC in the untenable position of being forced to provide documents and testimony not about itself, but about one of its clients, based on sensitive and confidential information that client (Gawker) has provided. Obviously, it would be harmful to YAC's business if potential clients believed that, by hiring YAC, their financial information and confidential dealings could be easily obtained in lawsuit having nothing to do with the debt offering for which YAC was hired to assist. *See Ex. M* (correspondence from YAC's counsel) ("It would also be detrimental to YAC's business if it were to be routinely subpoenaed in matters such as this one, especially given the sensitive nature of the client information it possesses and the risk to YAC's efforts to raise money in the face of disclosure of such information. Here, the subpoena at issue is so far reaching and broad, these risks are only compounded.").

At bottom, the parties agree that the Court's order permits Bollea to obtain documents sufficient to show representations to lenders for 2011, 2012 and 2013. YAC's counsel has offered to confirm whether any financials it has received from Gawker match the financials reviewed and audited by Gawker's outside CPAs, provided to Gawker's bank, and already produced to plaintiff. Plaintiff's refusal to accept that offer – and his insistence that YAC produce all manner of other documents and sit for a four hour deposition – is telling. The Court should uphold its original order and should implement the sensible proposal offered by YAC's counsel.

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Revenue Officer, Chief Strategy Officer, Vice President of Advertising Sales, and both the Editor and Managing Editor of Gawker.com at the time the post was published. At the end of the day, plaintiff cannot justify the expansive discovery he seeks from YAC based on some generalized and unfounded allegation that discovery has been a one way street.

## CONCLUSION

For the foregoing reasons, Gawker respectfully requests that plaintiff's motion be denied in its entirety and that a protective order issue providing that, if YAC's counsel provides the confirming affidavit offered, plaintiff withdraw the subpoena to YAC.

Dated: March 17, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Rachel E. Fugate

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

601 South Boulevard

P.O. Box 2602 (33601)

Tampa, FL 33606

Telephone: (813) 984-3060

Facsimile: (813) 984-3070

[gthomas@tlolawfirm.com](mailto:gthomas@tlolawfirm.com)

[rfugate@tlolawfirm.com](mailto:rfugate@tlolawfirm.com)

Seth D. Berlin

Pro Hac Vice Number: 103440

Michael D. Sullivan

Pro Hac Vice Number: 53347

Michael Berry

Pro Hac Vice Number: 108191

Alia L. Smith

Pro Hac Vice Number: 104249

Paul J. Safier

Pro Hac Vice Number: 103437

LEVINE SULLIVAN KOCH & SCHULZ, LLP

1899 L Street, NW, Suite 200

Washington, DC 20036

Telephone: (202) 508-1122

Facsimile: (202) 861-9888

[sberlin@lskslaw.com](mailto:sberlin@lskslaw.com)

[msullivan@lskslaw.com](mailto:msullivan@lskslaw.com)

[mberry@lskslaw.com](mailto:mberry@lskslaw.com)

[asmith@lskslaw.com](mailto:asmith@lskslaw.com)

[psafier@lskslaw.com](mailto:psafier@lskslaw.com)

*Counsel for Gawker Media, LLC*

**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 via the Florida Courts' E-Filing Portal upon the following counsel of record:

Kenneth G. Turkel, Esq.  
[kturkel@BajoCuva.com](mailto:kturkel@BajoCuva.com)  
Shane B. Vogt, , Esq.  
[shane.vogt@BajoCuva.com](mailto:shane.vogt@BajoCuva.com)  
Bajo Cuva Cohen & Turkel, P.A.  
100 N. Tampa Street, Suite 1900  
Tampa, FL 33602  
Tel: (813) 443-2199  
Fax: (813) 443-2193

David Houston, Esq.  
Law Office of David Houston  
[dhouston@houstonatlaw.com](mailto:dhouston@houstonatlaw.com)  
432 Court Street  
Reno, NV 89501  
Tel: (775) 786-4188

Charles J. Harder, Esq.  
[charder@HMAfirm.com](mailto:charder@HMAfirm.com)  
Douglas E. Mirell, Esq.  
[dmirell@HMAfirm.com](mailto:dmirell@HMAfirm.com)  
Sarah E. Luppen  
[sluppen@HMAfirm.com](mailto:sluppen@HMAfirm.com)  
Harder Mirell & Abrams LLP  
1925 Century Park East, Suite 800  
Los Angeles, CA 90067  
Tel: (424) 203-1600  
Fax: (424) 203-1601

*Attorneys for Plaintiff*

Barry A. Cohen, Esq.  
[bcohen@tampalawfirm.com](mailto:bcohen@tampalawfirm.com)  
Michael W. Gaines, Esq.  
[mgaines@tampalawfirm.com](mailto:mgaines@tampalawfirm.com)  
Barry A. Cohen Law Group  
201 East Kennedy Boulevard, Suite 1000  
Tampa, FL 33602  
Tel: (813) 225-1655  
Fax: (813) 225-1921

*Attorneys for Defendant Heather Clem*

/s/ Rachel E. Fugate  
Attorney