EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In re SUBPOENA to YOUNG AMERICA CAPITAL, LLC	:	
GAWKER MEDIA, LLC	:	Index No. 52004/2015
Petitioner,	:	
-against-	:	**REPLY IN SUPPORT OF PETITION AND MOTION TO QUASH AND/OR FOR A PROTECTIVE ORDER**
TERRY GENE BOLLEA, professionally known as HULK HOGAN,	:	
Respondent.	:	

Petitioner Gawker Media, LLC ("Gawker"), by and through its attorneys Levine Sullivan Koch & Schulz, LLP, submits this reply memorandum in support of its petition and motion for a protective order and/or to quash a non-party subpoena issued by Respondent ("Hogan") to Young America Capital, LLC ("YAC"), in connection with underlying litigation in Florida.

By issuing the Subpoena and opposing Gawker's and YAC's motions to quash and for a protective order, Hogan is asking this Court to enforce a subpoena for information that was expressly held to be non-discoverable by the presiding Florida court, from a witness that was not included in the discovery plan approved in that court. Enforcing such a subpoena would be fundamentally unfair to Gawker (indeed, Gawker has already been forced to litigate a motion in this Court on an issue that was already adjudicated in Florida), it would significantly interfere with Gawker's business relationships, and it would violate all notions of comity among state courts. The Subpoena should be quashed and a protective order entered.

REPLY ARGUMENT

In his Opposition, Hogan makes several key concessions that are dispositive of this motion. First, he repeatedly concedes that the Florida court limited discovery related to "lenders and/or financiers" to the years 2011, 2012 and 2013. *See, e.g.*, Opp. at 2 ("a major focus of discovery has been Gawker's revenues and profits in 2012 and 2013, as well as the year of 2011 . . . to provide a basis for comparison"); *id.* (the Florida "Court recently expressly ruled that Gawker's representations . . . with lenders and/or financiers regarding Gawker's 2011, 2012 and 2013 finances **are discoverable**") (emphasis in original); *id.* at 4 (Florida court limited discovery to "representations that [Gawker] made to its actual and prospective lenders and financiers regarding Gawker's 2011, 2012 and 2013 financial information").[1]

Second, he does not deny that Gawker *in fact* produced documents responsive to that limited request, including its reviewed and/or audited financial statements for the years 2011, 2012, and 2013, which it had submitted to its bank in connection with obtaining a routine business loan and line of credit.[2]

Third, and perhaps most significantly, Hogan concedes that the YAC debt offering is for 2015, and that "[t]he YAC financing was not specifically identified in the Court's order in the

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[1] Hogan misstates and expands the holding of the Florida court in one respect by asserting that it included all "statements" to and "communications" with lenders and/or financiers. Opp. at 2, 4. The order was limited to "documents sufficient to show financial representations," and did not extend to all "statements" or all "communications," much less to the broad range of information requested in his subpoena to YAC. *See* Smith Aff., Ex. D. That narrow ruling also did not authorize him to seek from a third party what the Florida court denied him the ability to obtain directly from Gawker.

[2] Hogan tries to question the legitimacy of the financial statements Gawker produced by stating they were "unaudited." Opp. at 5. He is incorrect. Gawker produced the financials for 2011 through 2013 that had been provided to its lender. Pet. ¶ 14; Affidavit of Scott Kidder ("Kidder Aff.") ¶¶ 2-3; Reply Affirmation of Alia L. Smith ("Smith Reply Aff.") ¶ 3. Those financials were reviewed (2011 and 2012) and audited (2013) by Citrin Cooperman, Certified Public Accountants. *See* Smith Reply Aff., Ex. 1 (accountants' cover letters to 2011, 2012 and 2013 financials produced to Hogan in the Florida Litigation).

Florida Action." Opp. at 5; *see also id.* (claiming entitlement to YAC discovery "[e]ven if Gawker's representations to YAC are not specifically encompassed with the Florida court's order"). *See also* Smith Aff., Ex. D (Dec. 17, 2014 order limiting discovery regarding equity, debt or security offerings to documents that are "sufficient to show financial representations" and expressly providing "Time period limited to: 2011, 2012, 2013"). Despite these concessions, Hogan nevertheless claims that "the information sought from YAC still is discoverable." Opp. at 5. His arguments are without any merit.

First, Hogan argues that testimony and documents from YAC are "relevant" to his damages claims, and that therefore, under *Kapon v. Koch*, 23 N.Y.3d 32 (2014), they must be provided. Opp. at 6-7. He argues that the wide-ranging discovery he seeks from YAC is relevant, while Gawker strongly disagrees. But that question has already been resolved in the main Florida action, and this Court need not decide it anew.[3] On the precise issue of discovery related to equity, debt and security offerings, and representations to lenders and/or financiers, the

[3] Despite the fact that the question of relevance and discoverability has already been decided by the Florida court, Gawker feels constrained to correct Hogan's assertions to this Court about the relevance of discovery sought from YAC. In the Florida court, he argued that he needed representations to lenders and/or financiers to verify the financial information Gawker produced in discovery. In this Court, he now advances different reasons for supposedly needing this information. First, he says he needs to explore Gawker's revenues and profits from the post at issue, even though there were none (Gawker, which does not charge readers for access, earns money from advertising, and it displayed no ads on this article, which in any event accounted for only .07% of Gawker's total traffic for 2012). Kidder Aff. ¶ 4. Second, he claims statements in the press by Gawker's CEO about its revenues, Harder Aff., Ex. 2, do not match financial information provided by Gawker in the Florida action, Opp. at 5, but he fails to advise the Court that the news article commented on 2014 finances, while the latter addresses 2012 and 2013, so of course they do not match. Third, he says he needs to review transactions with a Hungarian affiliate called Kinja, KFT, even though documentation for all such transactions for the relevant period has already been produced. Smith Aff. ¶ 2. Finally, he claims financial discovery from Gawker's debt advisor is necessary for punitive damages, even there is no claim for punitive damages in this action, nor could there be. Smith Aff., Ex. A.

Florida court has spoken, limiting discoverable information to documents "sufficient to show" the financial representations it made to them for 2011 through 2013.

Thus, anything else – including all of the wide-ranging discovery from YAC related to a 2015 debt offering – is by definition "utterly irrelevant," and cannot uncover any "legitimate" information. *See Kapon*, 12 N.Y.3d at 34 (subpoena may be quashed where it seeks information that is "'utterly irrelevant' to the action" or where it is clear that it will not "uncover anything legitimate") (internal quotation marks and citations omitted). Notably, *Kapon* did not involve a circumstance in which the underlying court had already held the requested discovery to be improper. It is inconceivable that the New York Court of Appeals would approve of a New York trial court, which lacks familiarity with the underlying case, requiring the production of information that the actual court overseeing the litigation had already disallowed. Accordingly, Hogan's claim that "Gawker and YAC . . . do not meet their burden of showing that such documents and information are irrelevant or otherwise non-discoverable," Opp. at 7, is patently wrong. The Florida court's order (Smith Aff., Ex. D) holds *precisely* that the information sought here is non-discoverable. If Hogan is unhappy with that ruling, he should seek reconsideration (or appellate review) in Florida. He should not be permitted to perform an end-run around the Florida court's ruling by seeking the information instead in New York.[4]

Second, Hogan argues that the authority cited by Gawker in its opening papers should not be credited because some of it pre-dates *Kapon*, 23 N.Y.3d 32. *See* Opp. at 8-9. But the *Kapon*

[4] Hogan appears to contend that the Florida court's order should be interpreted to apply to documents sufficient to show representations *about* 2011, 2012 and 2013, rather than representations made *during* those years, even though the order on its face states "Time Period Limited to: 2011, 2012, 2013." Smith Aff., Ex. D. That argument should likewise be directed in the first instance to the Florida court. Moreover, even if the order were interpreted in that fashion, that information has already been produced. *See* Kidder Aff. ¶¶ 2-3 (confirming under oath that, for the 2011-2013 period, Gawker provided to YAC its audited 2013 financials, the exact same document provided to Gawker's bank and already produced to Hogan).

court addressed only the standards that apply when a party seeks to quash a subpoena on grounds of irrelevance. *Kapon* does not apply where, as here, the challenging parties claim that a protective order should issue on the grounds that the subpoena (a) seeks to circumvent a contrary ruling in the underlying court, and (b) is otherwise burdensome, harassing, and improper. *See Kapon*, 23 N.Y.3d at 34-40 (discussing relevance only and not other bases for quashing a subpoena or obtaining a protective order); CPLR § 3103(a) (protective orders may issue "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts"). Thus, the cases quashing and/or issuing protective orders against unreasonable subpoenas cited by Gawker in its opening brief, both pre- and post-*Kapon*, remain good law. *See* Mem. at 11-13. *See also, e.g.*, *Diaz v. City of N.Y.*, 117 A.D.3d 777, 778 (2d Dep't 2014) (post *Kapon* authority prohibiting discovery that was "overbroad and burdensome"). There can be no legitimate question that this Court retains the power and discretion under the CPLR to issue a protective order and quash a subpoena that seeks information that the court actually overseeing the matter has already held to be improper and that was issued in a transparent attempt to interfere with the opposing party's business. *See* Mem. at 12-13.

Indeed, the other authorities cited by Hogan, Opp. at 9, all involve situations, unlike here, where there has been no prior adjudication that the discovery sought is out-of-bounds and where it is of obvious relevance. *See, e.g.*, *Menkes v. Beth Abraham Health Servs.*, 120 A.D.3d 408, 409 (1st Dep't 2014) (refusing to quash subpoena issued to COO of defendant for testimony about events occurring during her tenure; *see* 2012 WL 10891080 (Dec. 17, 2012) (IAS court decision reciting dates of tenure and challenged conduct)); *Peters v. Peters*, 118 A.D.3d 593, 594 (1st Dep't 2014) (in dispute over sale of ship, enforcing third party subpoena to managing agent of ship and counsel in transaction because they were directly involved and therefore discovery

was "material and necessary"); *Nacos v. Nacos*, 124 A.D.3d 462 (1st Dep't 2015) (upholding subpoena to brother and father of woman involved in matrimonial proceeding, because they had first-hand knowledge and requested documents were directly relevant). *See also Kapon*, 23 N.Y.3d at 34 (upholding subpoena to wine auctioneer in case involved alleged sale of counterfeit bottles of wine through that very auctioneer). Where, as here, the underlying court has decided that the requested discovery is not to be had, however, the subpoena should be quashed.

Finally, Hogan argues that Gawker's and YAC's motions should be denied because communications with lenders, investors, and the like are not privileged, Opp. at 2-3, ignoring the broad protections for unnecessary discovery of sensitive financial information. Indeed, Gawker demonstrated that it is entitled to a protective order because of the harassing and burdensome nature of the requests, *see* Mem. at 11-13 (citing cases granting protective orders or quashing subpoenas where discovery sought was burdensome and harassing), and because, as discussed above, the presiding court already held the information non-discoverable.

Hogan claims that he "merely seeks discovery of Gawker's historic financial data," Opp. at 3, but the document requests and deposition topics contained in the Subpoena are far broader. He has requested, for example, "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, perhaps most troublingly, "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). *See* Smith Aff., Ex. A; *see also* Mem. at 6-8. Taken together, it is clear that Hogan is, among other things, seeking to determine the identities

of Gawker's potential debt issuers and the details of any such transactions. This is particularly problematic here because the Florida court separately limited discovery into the identities of Gawker's actual shareholders, *see* Smith Aff., Ex. B at ¶ 4; Mem. at 5 n.5, and lenders and potential lenders are far more attenuated.

Given that Hogan's requests are for much more than "historic financial data," and that Gawker has in fact already provided Hogan with its "historic financial data," *see* Smith Aff. ¶ 3 & Ex. 1, it is apparent that Hogan has subpoenaed YAC solely for improper purposes – *e.g.*, so he can subpoena Gawker's potential debt issuers and/or otherwise interfere with Gawker's efforts to secure debt financing. Indeed, while he disavows any improper purpose, he makes no representation that he will not issue subpoenas to those potential lenders. Nor has he addressed his counsel's February 12, 2014 email to counsel for YAC threatening sanctions and raising the specter of punitive damages. *See* Pet. at 5 n.1; Mem. at 5 n.4. He designated that communication as "Confidential," *id.*, and has neither supplied a copy to the Court nor authorized Gawker or YAC to share it with the Court themselves. This is both understandable, given its contents, and telling as to his motives for pursuing this broad subpoena so aggressively.[5]

Hogan's improper motive becomes especially clear when the narrow basis he articulated for seeking "debt or equity" discovery in the first place is contrasted with the extraordinarily

[5] Hogan suggests that Gawker's concerns can be allayed by producing the requested information pursuant to the confidentiality order in place in the Florida litigation. Not so. While that order might prevent Hogan from publicizing the documents produced, it would not prohibit him from subpoenaing Gawker's potential debt issuers or otherwise interfering with Gawker's planned debt offering. Moreover, certain of the representations Hogan makes about Gawker's financial performance in 2012 and 2013, Opp. at 5, are based on financial documents that were designated as "Confidential" under that protective order. Smith Reply Aff. ¶ 5. Hogan nevertheless disregarded that designation and included that information in a public court filing in this Court, raising serious questions about the efficacy of the confidentiality order to protect Gawker's financial information.

broad document discovery and testimony sought from YAC. At the hearing on this matter in the Florida court, counsel for Hogan asserted that he needed to verify that the financial data produced in the litigation mirrored the representations Gawker made to financial institutions and investors. *See* Smith Reply Aff., Ex. 2 (excerpts from Dec. 17, 2014 hearing transcript) at 99:9-14 (Counsel for Hogan: "[W]e're asking for financial documents that Gawker Media is sending to third parties making representations regarding their finances, and we want to be able to compare the finances in their representations to third parties with their finances represented to us.").

But Gawker has since provided the representations it made to its lender (in the form of the reviewed and audited financial statements it submitted to that lender, *see* note 2 *supra*), and Hogan has not suggested either to Gawker or to the Florida court that those financial statements are inconsistent with the other financial data that Gawker provided to him in discovery. They are not. And, if Hogan contended otherwise, the proper course is to address that with the Florida court, rather than to ask this Court to contravene the Florida court's order. Until he does so, the Florida court has spoken: the discovery sought here falls clearly outside the scope of permissible discovery. Hogan should not be permitted to use an out-of-state subpoena to circumvent the Florida court or to harass Gawker, its outside debt advisor, and potential debt issuers in the process.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Gawker's and YAC's opening papers, and any reply papers submitted by YAC, the Court should grant the Petition and direct the relief requested therein.

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