EXHIBIT A

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 **MEMORANDUM OF LAW IN SUPPORT OF PETITION AND MOTION TO QUASH AND/OR FOR A PROTECTIVE ORDER**

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

PRELIMINARY STATEMENT

Gawker is being sued in Florida by Bollea, the international wrestler and celebrity better known as "Hulk Hogan" ("Hogan"), about a story it published on-line in 2012, claiming that story invaded his privacy. More than two years later, in late 2014, Gawker engaged YAC as a debt advisor for a debt offering in 2015. Even though that debt offering has nothing to do with the story at issue, Hogan has now issued a subpoena in New York to YAC for a host of financial information and information about prospective debt issuers. Not only is such discovery improper on its face, but the precise discovery was sought directly from Gawker in the Florida action and ruled out of bounds by the Florida court, a fact which Hogan's counsel conceded when Gawker asked him to withdraw the subpoena. Hogan nevertheless is attempting to circumvent the

Florida court's rulings by issuing a subpoena in New York without any supervision by either the Florida court or a New York court, and to impose a substantial burden on a non-party in the process. Indeed, Hogan has threatened YAC with sanctions if it objects, and he has contended that he will be entitled to tens of millions of dollars in punitive damages, even though there is no basis to claim punitive damages in the Florida case. All of this is clearly being done not for any legitimate purpose of discovery, but to spook Gawker's debt advisor and prospective debt issuers in the hopes that they will decline to do further business with Gawker. The combination of issuing an out-of-state subpoena for discovery expressly barred by the Florida court, threatening a nonparty with sanctions, and making unsupported claims about punitive damages – all in an attempt to interfere with an unrelated business relationship entered into well after any of the events at issue – warrants the issuance of a protective order and an order quashing the subpoena.

FACTUAL BACKGROUND

A. The Underlying Florida Litigation

The underlying litigation, *Bollea v. Clem*, No. 12012447-CI-011 (Fla. 6th Jud. Cir.) (the "Florida Litigation"), involves claims for invasion of privacy and violation of publicity rights brought by Hogan against Gawker Media, LLC, the publisher of www.gawker.com, a news and entertainment website, and others. Pet. ¶ 9.

The lawsuit arises out of an article, published by Gawker in October 2012, reporting and commenting on a pre-existing controversy about a sexual liaison between Hogan and a woman later identified to be Heather Clem (the "Gawker Story"). *Id.* At the time of the tryst, Heather Clem was married to Hogan's best friend, radio shock-jock Bubba The Love Sponge Clem (yes, that is his legal name); Clem consented to, and indeed encouraged, his wife to have sex with

Hogan. *Id.* Together with the Gawker Story, Gawker published very brief excerpts of the videotape of Hogan's tryst with Mrs. Clem (the "Excerpts"). *Id.*

In the context of Hogan's motion for preliminary injunctive relief, a Florida appellate court unanimously held that that the publication of the Gawker Story and Excerpts were newsworthy and therefore fully protected by the First Amendment. *See id.* ¶ 10; *see also Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. 2d DCA 2014). In an earlier action challenging the same post in federal court, the presiding judge repeatedly reached the same conclusion. *See Bollea v. Gawker Media, LLC*, 2012 WL 5509624 (M.D. Fla. Nov. 14, 2012); *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

B. Plaintiff's Damages Theory, His Claims Against Gawker's Affiliates, and the Florida Court's Limits on Financial Discovery

In the Florida Litigation, Hogan sued not only Gawker, but five other affiliated companies, four of which were dismissed, and a fifth, a software company based in Budapest, Hungary, is challenging the exercise of personal jurisdiction over it in Florida. Pet. ¶ 11. In particular, as is relevant to the discovery sought from YAC, Hogan sued Gawker's parent company, a Cayman Islands company called Gawker Media Group, Inc. ("GMGI"), and the Hungarian software company, Kinja, KFT ("Kinja"), formerly known as Blogwire Hungary Szellemi Alkotást Hasznosító, KFT – which is also owned by GMGI. *Id.*[1]

In the Florida action, Hogan has served the various Gawker-affiliated defendants with more than 400 written discovery requests. *Id.* ¶ 12. He has taken or will within the next couple of weeks take the depositions of eight Gawker executives and employees, including the editor-in-chief of Gawker.com and author the post, as well as Gawker's Chief Executive Officer, Chief

[1] The initials "KFT" in both names stand for "Korlátolt Felelõsségû Társaság," which is the Hungarian equivalent of a limited liability corporation.

Operating Officer, Chief Revenue Officer, Chief Strategy Officer and Vice President of Advertising Sales. *Id.* Some of the discovery has been what one might expect (such as discovery about the post at issue or damages allegedly flowing therefrom), while other requests have gone far afield (for example, Gawker's CEO Nick Denton was asked – and responded to – a series of written discovery requests about his recent wedding and honeymoon). *Id.* Substantial aspects of this discovery have focused on plaintiff's claims for compensatory damages, and Gawker has, without objection, produced multiple years' worth of its income statements, balance sheets and monthly revenue reports, as well as copies of every advertising order it received for a multi-year period. *Id.* ¶ 13.

Given the breadth of the discovery Hogan sought from Gawker and its co-defendants, the Florida Court has repeatedly imposed significant limitations on that discovery, including what financial discovery both sides are allowed to take. *Id.* ¶ 14. As is relevant here, Hogan sought from Gawker "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." *Id.* ¶ 14; Affirmation of Alia L. Smith, Esq. ("Smith Aff."), Ex. E (Second RFP No. 116).[2] After a lengthy hearing, the Court limited discovery on this topic to "documents sufficient to show representations" to lenders from "2011, 2012 [and] 2013." Pet. ¶ 14; Smith Aff., Ex. D (Dec. 17, 2014 Order) at 2.[3] Hogan had justified this request by claiming that he needed to verify the accuracy of the voluminous financial information previously produced by Gawker, and in response Gawker provided financials that had been reviewed and/or audited by its outside accountants, and then provided to its lender, for 2011, 2012, and 2013 – thus, fully complying

[2] Hogan had previously served a different request for production, also numbered 116, which is why this request is referred to as his "Second" Request for Production No. 116.

[3] Gawker is privately held and has no equity or security offerings to the public, so the Court's ruling focused on debt offerings and lenders.

with that order. Pet. ¶ 14. The Court's order was expressly limited to that period, which Hogan has *conceded* in a pre-motion exchange of correspondence. *Id.*; Smith Aff. ¶¶ 10-11.[4] Moreover, the Court imposed significant additional limitations on other financial discovery. Pet. ¶ 15.[5] Hogan's efforts to end-run the Florida court's numerous discovery rulings by subpoenaing YAC – including especially the ruling directly addressing debt, equity and security offerings – is improper.

C. Young America Capital, LLC

Young America Capital is a broker-dealer, based in Mamaroneck, that Gawker engaged in late 2014, more than two years after the post at issue in the Florida case, to assist it with the issuance of debt in 2015. Pet. ¶ 16. YAC concededly has no connection whatsoever to the allegedly tortious activity giving rise to the Florida case. *Id.*

---

[4] Hogan's counsel labeled that correspondence "Confidential." Although he gave no indication of the reason for that designation, he may have been attempting to invoke the provisions of an Agreed Protective Order governing discovery in the Florida Action. While it is unclear how the terms of that stipulated order would apply to a meet and confer letter in connection with this New York proceeding, Gawker has, in an abundance of caution, not included a copy with this filing. If Hogan consents, Gawker would be pleased to provide a copy to the Court.

[5] For example, the Court (a) dismissed GMGI and denied Hogan discovery concerning it as a result, *see* Smith Aff. Ex. C (May 14, 2014 Order); (b) imposed substantial limits on discovery that could be taken concerning Kinja, *see* Smith Aff. Ex. B (Feb. 26, 2014 Order) ¶¶ 9, 13 (sustaining Gawker's objections to Hogan's RFP Nos. 91, 104) & Ex. D (Dec. 17, 2014 Order) at 4-5; (c) rejected Hogan's requests for documents that show "all revenues received by Gawker . . . and/or the basis for its receipt of such revenues," *see* Smith Aff., Ex. B (Feb. 26, 2014 Order) ¶ 12 (sustaining Gawker's objection to Hogan's RFP No. 99); (d) rejected Hogan's request for documents "that relate to the identity of the owners of Gawker or any affiliated company," *id.* ¶ 4 (sustaining Gawker's objection to RFP No. 30); (e) rejected Hogan's request for production of various confidential agreements, *see* Smith Aff., Ex. D (Dec. 17, 2014 Order) at 3 (sustaining in pertinent part Gawker's objection to RFP No. 126); and (f) rejected Hogan's request for production of documents reflecting payments to third parties unrelated to the post at issue (of the type that would appear on the bank records and other financial documents he now seeks), *see* Smith Aff., Ex. B (Feb. 26, 2014 Order) ¶ 2 (sustaining Gawker's objections to Interrogatory No. 13).

D. The Subpoena to YAC

On or about February 4, 2015, Hogan served a subpoena on YAC (the "Subpoena"). Pet. ¶ 17; Smith Aff., Ex. A. The Subpoena requires YAC to produce documents responsive to 18 separate requests and to appear at a deposition to testify on a number of enumerated topics on February 20, 2015. In violation of Florida practice, Hogan did not seek Gawker's consent beforehand to schedule a deposition on that date.

Apart from a general request for "All DOCUMENTS that REFER or RELATE TO the LAWSUIT," documents which Hogan cannot reasonably contend he needs to obtain from non-party YAC, the Subpoena does not seek any information about the Gawker Story or the Excerpts. Instead, the Subpoena seeks wide-ranging document discovery about the finances of Gawker, as well as GMGI and Kinja, despite the various orders limiting such discovery, including in the precise context of discovery related to debt offerings. *See* Smith Aff., Ex. A at 6-8 (Subpoena Requests Nos. 1-18); *id.* at 9 (Deposition Topics Nos. 1-6). For example, for the period of January 1, 2012 to the present, it seeks:

- "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);
- "All documents that refer or relate to Kinja" (Req. No. 3);
- "All tax returns . . . filed by any and all Gawker Entities" (Req. No. 4);
- "All documents that constitute or contain any financial statements . . . of any and all Gawker Entities" (Req. No. 5);
- "All bank statements of any and all Gawker Entities" (Req. No. 6);

- 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);
- All communications between YAC and various Gawker executives on any subject (Req. Nos. 10-13);
- 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);

Smith Aff., Ex. A. 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).

Smith Aff., Ex. A. Despite the limitations on the time period imposed by the Florida court, or the fact that YAC was not engaged until late 2014 for work in 2015, none of the Deposition Topics contains any limitation on the time period whatsoever. *Id.*

E. Hogan's Refusal to Withdraw or Modify the Subpoena and His Threat of Sanctions

On February 10, 2015, Gawker wrote to Hogan, asking that he withdraw the Subpoena on the grounds that (a) YAC had nothing to do with the case, (b) the requests in the Subpoena exceeded the limits placed on discovery by the Florida court, including especially those relating to discovery concerning "debt, equity and security offerings," and (c) it was improper to subpoena documents from an out-of-state non-party when they should, if discoverable, be obtained directly from Gawker, an actual party to the lawsuit. Pet. ¶ 19; Smith Aff., Ex. F. On February 12, 2015, counsel for YAC likewise sent a letter to Hogan objecting to the subpoena for the same reasons. *Id.*, Ex. G.

In a lengthy email dated February 11, 2015, Hogan refused to withdraw the Subpoena, and instead his counsel threatened YAC – an disinterested non-party – with sanctions. Smith Aff. ¶ 10. Hogan's counsel also asserted unfounded claims that Gawker would be liable for punitive damages in the Florida action, even though (a) such claims cannot, in fact, be asserted in that action, and (b) he made no mention of punitive damages in seeking discovery from the Florida court about debt offerings (or for that matter on any other topic). *Id.*

Gawker's counsel responded to these various unfounded claims in a letter dated February 12, 2015. Smith Aff., Ex. H. In particular, that correspondence noted that Hogan had conceded

that the discovery allowed by the Florida court on this topic was limited to 2011, 2012 and 2013, and explained that, if Hogan disagreed with that ruling, the proper course was to seek reconsideration of that ruling in Florida, not to issue a subpoena in New York for discovery that exceeds what the Florida court allowed. *Id.* In response, Hogan's counsel has refused to withdraw or modify the Subpoena. Pet. ¶ 22; Smith Aff. ¶ 11.

It is clear that Hogan (a) issued the Subpoena, in clear violation of a discovery limitation imposed by the Florida court, (b) threatened sanctions, and (c) raised the specter of punitive damages without any foundation, all for the improper purpose of making Gawker's debt advisor and potential issuers of debt skittish. Gawker believes that is a clear abuse of the discovery process, and therefore now brings this proceeding to seek the issuance of a protective order and the quashing of the Subpoena.

ARGUMENT

A court may enter a protective order and/or quash a subpoena to a non-party where the subpoena imposes "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts," *see* CPLR 3103(a), or otherwise seeks information that is irrelevant, *see* CPLR 3101(a).[6] Here, the Subpoena to YAC is improper for a number of reasons:

First, none of the information sought via the Subpoena relates in any way to the Gawker Story or the Excerpts. Indeed, YAC, a company which provides financial services, was not even

[6] Although the Subpoena is directed to YAC, Gawker has standing to challenge it and to seek a protective order, given that Gawker is a defendant in the underlying case and it is Gawker's financial information and communications on its behalf with prospective debt issuers that is being sought. *See* CPLR 3103(a) ("any person . . . about whom discovery is sought" may move for a protective order); *In re Out-of-State subpoenas issued by N.Y. Counsel for State of Cal. Franchise Tax Bd.*, 33 Misc. 3d 500, 508-09 (Sup. Ct. Westchester Cnty. 2011) (party to underlying proceeding with proprietary interest in information sought has standing to challenge non-party subpoena), *aff'd sub nom. Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186 (2d Dep't 2013).

engaged by Gawker until late 2014, more than two years after the Gawker Story was published. YAC therefore obviously has no relevant information concerning any liability issue in the Florida case.

Second, the Subpoena is likewise not a proper inquiry into the question of damages, as the Florida court has already held. *See* Pet. ¶ 25; Smith Aff., Exs. B (Feb. 26, 2014 Order), C (May 14, 2014 Order) & D (Dec. 17, 2014 Order). While the Florida court has imposed numerous limitations on general financial discovery related to Gawker, even more stringent limitations on discovery related to Kinja, and has denied discovery related to GMGI, it has also ruled decisively on the precise issue here. In its December 17, 2014 Order, the Florida court specifically limited the discovery Hogan would be permitted to take concerning debt offerings (which is YAC's sole relation to this case) to documents "sufficient to show" the representations made by Gawker concerning debt, equity, and security offerings and limited the period of the response to the years 2011, 2012, and 2013 (the year of the post, one year prior and one year following). Hogan now seeks to end-run that ruling with a subpoena – which by virtue of the interstate subpoena rules has not been reviewed by a court in either Florida or New York – that exceeds the scope of the discovery allowed by the Florida court as detailed above.[7] This is improper. It would be fundamentally unfair and improper if Hogan were permitted to obtain through a New York court materials that the Florida court already held he was specifically not entitled to have.

---

[7] Hogan served the Subpoena via the Uniform Interstate Depositions and Discovery Act, CPLR § 3119, meaning that he simply issued it without any court oversight. As a result, the court in Florida handling this case had no opportunity to review it beforehand. Had the Subpoena been for documents only, Hogan would have been required to submit to the Florida court a "notice of intent" to serve it, and Gawker would have had a chance to object to it there. *See* Fla. R. Civ. P. 1.351. In such circumstances, New York courts have recognized that a subpoena is not entitled to any particular deference precisely because it was not reviewed by a judge in the originating forum.

Third, even if the Florida court had not already specifically ruled this information out-of-bounds, the Subpoena is so overbroad and intrusive on its face that it should be quashed, and a protective order entered, as a matter of New York law. *See, e.g.*, *Katz v. Castlepoint Ins. Co.*, 212 A.D.3d 948 (2d Dep't 2014) (noting that "tax returns generally are not discoverable," and denying discovery of tax returns and other "financial records"); *In re App. of Dier*, 297 A.D.2d 577, 578 (1st Dep't 2002) (quashing portion of out-of-state non-party subpoena that was "overbroad, burdensome and oppressive, seeking material well beyond the legitimate scope of [issuer's] need" in the underlying litigation).

Fourth, it is improper (and unnecessary) to impose a substantial burden on a non-party like YAC for significant numbers of documents and deposition testimony when that same information, if otherwise discoverable, may be obtained directly from the defendant. That is especially true here, where Gawker has in fact produced substantial information about its finances in the Florida Litigation, including: multiple years' worth of its income statements and balance sheets; statements of monthly revenue for each of the eight websites published by Gawker as well as for the company as a whole; financial statements reviewed and/or audited by outside accountants; records of all transactions between Gawker and Kinja for a multi-year period; and every advertising order placed on Gawker's eight websites for a multi-year period. In addition, Gawker either has produced or is shortly making available for deposition its Chief Executive Officer, Chief Operating Officer, Chief Revenue Officer, Chief Strategy Officer, and Vice President of Advertising Sales.[8] Smith Aff. ¶ 4. Even if there were not a dispositive ruling

[8] In addition, Hogan can hardly argue that testimony and documents from YAC are relevant to his claims when he did not even include YAC as a potential deponent (or provider of documents) in the joint proposed discovery plan the parties submitted to the Florida court. Hogan included, for example, the Gawker executives noted above, but made no mention of any need for discovery from YAC. Smith Aff. ¶ 7.

in Florida on this very discovery, Hogan should not be permitted to burden an out-of-state non-party for duplicative information, which can be obtained from Gawker and its executives directly. *See, e.g., Palermo Mason Const., Inc. v. Aark Holding Corp.*, 300 A.D.2d 460, 461 (2d Dep't 2002) (no entitlement to discovery where party had already "obtained disclosure of relevant documents"); *Abreu v. Deb-bie Realty Associates, LLC*, 44 A.D.3d 415, 415 (1st Dep't 2007) (no entitlement to deposition where witness did not possess relevant information "in addition to that already given"); *Boutique Fabrice, Inc. v. Bergdorf Goodman, Inc.*, 129 A.D.2d 529, 530 (1st Dep't 1987) (subpoena to company's CEO quashed where relevant information could be obtained through depositions of employees who, unlike CEO, had actual connection to matter at issue).

Fifth and finally, the Subpoena is harassing to both Gawker and to YAC. It is harassing to Gawker because it forces Gawker to litigate in New York a question that was already decided in the underlying litigation in Florida – specifically, the limited scope of financial discovery related to debt offerings. It is also harassing because even though Hogan could obtain the information directly from Gawker (if discovery of it is otherwise proper), he instead is deliberately interfering with Gawker's business relationships with YAC and others. Indeed, he has asked YAC to turn over and testify about not only all of Gawker's financial data and all of YAC's communications with Gawker (among other things), but also all the documents and communications between YAC and third parties, such as investors or lenders. Presumably, Hogan wants that information so that he may, in turn, subpoena those investors or lenders in an effort to somehow scare them off from investing in or lending to Gawker. Trying to pressure an opponent by interfering with unrelated financial transactions is a manifestly improper use of the

discovery process, and is exactly the type of abuse that warrants the issuance of a protective order.

The Subpoena is likewise harassing to YAC because it puts YAC in the untenable position of being forced to respond to a subpoena 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 detrimental to YAC's business if potential clients believed that, by hiring YAC, their financial information and confidential dealings could be easily obtained through an attorney-issued subpoena in an out-of-state lawsuit having nothing to do with the debt offering for which YAC was hired to assist.

Indeed, it bears emphasis that the underlying litigation does not revolve around any financial transactions Gawker has engaged in or around any debt offering it may now be in the process of making, in 2015, with the assistance of YAC. It is a claim for invasion of privacy and violation of the right of publicity stemming from a story that was published in 2012. The information that Hogan seeks from YAC here is so far beyond the scope of any information that is even arguably relevant to Hogan's damages that it can only reasonably be viewed as an attempt to harass Gawker and YAC. Again, this is precisely the kind of circumstance where a protective order should issue. *See, e.g., Seaman v. Wyckoff Heights Medical Center, Inc.*, 25 A.D.3d 598, 599 (2d Dep't 2006) ("When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper."); *Byck v. Byck*, 294 A.D.2d 456, 457 (2d Dep't 2002) (protective order would be entered where discovery requests were designed to "harass," especially given that the requesting party "has received substantial discovery").

CONCLUSION

For the foregoing reasons, the Court should grant the Petition and direct the relief requested therein.

Dated: February 13, 2015

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: /s/ Alia L. Smith
Seth D. Berlin
Alia L. Smith

321 West 44th Street, Suite 1000
New York, New York 10036
(212) 850-6100
(212) 850-6299 (Fax)
sberlin@lskslaw.com
asmith@lskslaw.com

Counsel for Petitioner Gawker Media, LLC