IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

PUBLISHER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 21 TO EXCLUDE TESTIMONY OF GAWKER WITNESSES ON ISSUES ABOUT WHICH THEY LACK PERSONAL KNOWLEDGE

Plaintiff has moved for an order prohibiting the Publisher Defendants from eliciting testimony from their witnesses "concerning facts of which they have no personal knowledge." This is precisely the type of objection that should be resolved on a case-by-case basis at trial; it is not something that should be decided through a motion *in limine* seeking a blanket prohibition of testimony. *See, e.g.*, *Stewart v. Hooters of Am., Inc.*, 2007 WL 1752838, at *1 (M.D. Fla. June 18, 2007) (Motion *in limine* proper "only if the evidence is clearly inadmissible for any purpose." Otherwise, "evidentiary rulings must be deferred until trial to allow questions of foundation, relevancy and prejudice to be resolved in context."). Indeed, in the very case that plaintiff cites for the notion that "personal knowledge" is required, the court considered the challenged testimony *during the trial*, not in the context of a motion *in limine*. *See Roseman v. Town Square Ass'n, Inc.*, 810 So. 2d 516, 521 (Fla. 4th DCA 2001) (cited in Pl.'s MIL at 1). This Court should decline to limit the testimony of the Publisher Defendants' fact witnesses before trial has even begun.

More importantly, however, the Court should deny plaintiff's motion because it is completely off-base. Plaintiff claims that the witnesses at issue lack "personal knowledge" because they did not know how to answer his questions about whether they had "knowledge . . . that is relevant" to the lawsuit. *See, e.g.,* Pl.'s MIL Ex. A at 144:17-19; Pl.'s MIL Ex. C at 103:12-15. Such questions call for *legal* conclusions about what is relevant, and are utterly improper. *See, e.g.*, Pl.'s MIL Ex. A at 144:20-24 (objecting to question); Pl.'s MIL Ex. C at 103:2-6, 17 (same). Plaintiff's argument is nothing more than a sleight of hand because the witnesses did in fact testify, based on personal knowledge, about the facts and circumstances relevant to this case, including facts addressing the very issues on which plaintiff claims they lack personal knowledge. Taking each of the witnesses briefly in turn:

Andrew Gorenstein

Plaintiff claims that Andrew Gorenstein, Gawker's President of Advertising and Partnerships, "testified that he has no personal knowledge relevant to Mr. Bollea's claims, Gawker's defenses in this case, or any revenue Gawker made related to the" video excerpts at issue in this case. Pl.'s MIL at 2. That is a mischaracterization of his testimony in two key respects. First, the testimony cited by plaintiff is limited to Mr. Gorenstein's response to four questions asking him "what knowledge do you have that is relevant to the Terry Bollea versus Gawker Media lawsuit?" Pl.'s MIL Ex. A at 144:17-19; *see also id.* at 145:2-5, 11-13, 16-21 (asking if Mr. Gorenstein had "relevant" information relating to plaintiff's "claims," Gawker's "defenses," or "the monetary value that Gawker may have received"). Properly, counsel for the Publisher Defendants objected on the grounds that this line of questioning called for a *legal conclusion* about the "relevance" of certain information that the witness, a non-lawyer advertising executive, would not be able to answer. *Id.* at 144:20-24, 145:14, 145:22. Moreover,

Mr. Gorenstein did *not* testify that he lacked personal knowledge, only that he did not "know" whether he had information that would be deemed to be legally relevant. *Id.* at 144:25, 145:15, 23.

Second, Mr. Gorenstein testified at length from his personal knowledge about *facts* that directly address these subjects, including plaintiff's claims for revenues purportedly derived from the video excerpts at issue, without the added layer of being asked to determine whether they were legally relevant. For example, he testified about "NSFW" content and its effect on Gawker's business. *See* Ex. 1 (additional excerpts from the deposition transcript of A. Gorenstein, attached hereto) at 135:20 – 138:24. He testified about how Gawker's advertising business works. *E.g.*, *id.* at 41:20 – 44:20, 62:2 – 69:8. And he testified about how the company has grown over time and its key performance indicators. *E.g.*, *id.* at 26:24 – 29:14, 89:12-24. Mr. Gorenstein has been Gawker's head of advertising for a number of years, including in October 2012, when the post at issue was published. He is certainly competent to testify, among other things, about Gawker's advertising practices, how its revenue is derived, and whether revenue was derived from the video excerpts at issue.

Michael Kuntz

Plaintiff alleges that Michael Kuntz, Gawker's Vice President of Advertising Sales, "testified that he has no personal knowledge of Gawker's advertising during the relevant time of the Sex Video (October 2012 to April 2013), Gawker's policy on advertising with regard to 'Not Safe For Work' content during the relevant time, how much money Gawker made during the relevant time, any revenue Gawker made related to the Sex Video, or even how Gawker tracked revenue related to the Sex Video." Pl.'s MIL at 2. Again, this is a complete mischaracterization of Mr. Kuntz's testimony:

- He testified specifically that, from performing his duties, he had acquired knowledge of Gawker's advertising practices in 2012 and 2013. Pl.'s MIL Ex. B at 34:8 – 35:11, 89:2-7. And certainly, Mr. Kuntz, as the Vice President of Ad Sales, can testify about current advertising practices, particularly to the extent that they have not changed substantially over time. *See generally John Deere Co. v. Thomas*, 522 So. 2d 926, 929 (Fla. 2d DCA 1988) (witness in "general managerial position" qualified to offer testimony about business transaction, even if he was not directly involved in all aspects of it, unless his "understanding of the transaction appeared inaccurate or inadequate following cross examination").
- He testified that Gawker's current policy on "NSFW" content is that "we do not serve advertising next to" content that is "not safe for work." Pl.'s MIL Ex. B at 128:6-9. Given that the undisputed evidence in the case is that this policy has not changed, Mr. Kuntz is certainly competent to explain it. See Ex. 2 (excerpts from first deposition of S. Kidder taken Oct. 1, 2013) at 175:12-15 (acknowledging Gawker's longstanding policy not to serve ads against "NSFW" content); Ex. 1 at 135:20 – 138:24 (same).
- With respect to Gawker's "revenue," Mr. Kuntz testified competently, based on personal knowledge and experience, in answer to plaintiff's question: "If five million people go to the Gawker website today," to view the Hulk Hogan post, "do you have any understanding of what sort of revenue Gawk[er] media would stand to make?" Pl.'s MIL Ex. B at 130:17 – 133:24 (responding that Gawker's revenue would be "pretty close" to "zero").[1]

[1] Plaintiff also specifically asserts that Mr. Kuntz lacks personal knowledge about "how Gawker tracked revenue related to the Sex Video." Pl.'s MIL at 2. This statement is based on the utterly false premise that Gawker in fact "tracked revenue related to the Sex Video." As

As the Vice President of Advertising Sales, Mr. Kuntz is obviously qualified to explain the advertising practices of the company, and how those practices bear on the issues relevant to this lawsuit.

Erin Pettigrew

Plaintiff's objections to Ms. Pettigrew's testimony fail for the same reasons as do his objections to Mr. Gorenstein's because they are based on her response to improper questions that call for legal conclusions. *See* Pl.'s MIL Ex. C at 103:12 – 104:4 ("Do you have any personal knowledge that would be *relevant* to Terry Bollea/Hulk Hogan's claims in the lawsuit against Gawker Media?" and "Do you have any personal knowledge that is *relevant* to Gawker Media's defenses?") (emphasis added); *see also id.* at 103:2-6, 16-17, 25 (memorializing counsel's objections to same because they call for a legal conclusion). Ms. Pettigrew has worked at Gawker since 2005 and has significant managerial experience on the business and advertising side of the company. But she is not a lawyer and should not be expected to know what is "relevant" to the case or to Gawker's legal and factual "defenses." Her response to plaintiff's improper questions, *see id.* at 103:18-20, 104:2-4 ("I'm unfamiliar with the [legal] claims"; "I'm not familiar with the defenses"), should not preclude her from explaining Gawker's business to the jury.

Plaintiff also asserts that Ms. Pettigrew should not be allowed to testify about Gawker's advertising or its "not safe for work content," ostensibly because her work focused on other issues during the relevant time period. Pl.'s MIL at 2. But Ms. Pettigrew in fact testified that

---

every witness who has been asked about this has testified, and as Gawker's documents make clear, *it did not*. Moreover, what Mr. Kuntz *actually* testified was not that he lacked personal knowledge, but, rather that he does not know "how we would *be able to track that*." Pl.'s MIL Ex. B at 133:23-25. He certainly has more than sufficient personal knowledge to be able to so testify.

she did have some involvement with the advertising department during the relevant time period. Pl.'s MIL Ex. C at 70:11-13; *see also* Ex. 3 (additional excerpts from deposition transcript of E. Pettigrew) at 55:23 – 56:25 (also discussing advertising); 70:24 – 72:5 (same). And she likewise testified that she was "familiar with the concept of not safe for work content," even though making decisions about what qualified as "NSFW" content was not part of her job "today." Pl.'s MIL Ex. C at 98:21-23, 100:16-19. There is no basis to prematurely limit her testimony on these, or any other, topics.

Scott Kidder

Finally, plaintiff asserts that Gawker's Chief Operating Officer (and its corporate representative) should not be allowed to testify about "Gawker's damages theories." Pl.'s MIL at 3. As an initial matter, it is not incumbent upon the *defendants* to have damages theories in a case. That is the plaintiff's job. To the extent that plaintiff's motion seeks to prevent Gawker from offering facts to rebut *his* damages theories, it should be rejected outright. Like the questions posed to the other witnesses about whether they had information "relevant" to the case, the questions put to Mr. Kidder – about Gawker's "position" on "damages" – improperly called for legal conclusions. They were also improper for the additional reason that they were outside the scope of topics included on the corporate deposition notice and about which plaintiff asked Mr. Kidder, as the corporate representative, to prepare. And, in any event, a court may not "assume[] that [the corporate representative's] trial testimony will match his . . . deposition testimony." *Indus. Eng'g & Dev., Inc. v. Static Control Components, Inc.*, 2014 WL 4983912, at *3 (M.D. Fla. Oct. 6, 2014). Rather, the court should wait until trial to "rule on issues regarding the foundation for admitting" the testimony of a corporate representative. *Id.*

Even putting all this aside, it is simply not true that Mr. Kidder – who has now sat for *three* depositions on behalf of Gawker – lacks personal knowledge concerning plaintiff's alleged damages, including whether and to what extent, if any, Gawker derived "benefit" from the challenged publication. Mr. Kidder, in fact, answered, plaintiff's questions about his alleged "damages," despite the fact that they were objectionable, in portions of the transcript conveniently omitted in plaintiff's exhibit. *See, e.g.*, Ex. 4 (excerpts of Apr. 14, 2015 deposition of S. Kidder, attached hereto) at 176:25 – 177:4 ("to the extent that there is a benefit" to Gawker from publishing the post and video at issue, "I think it is negligible"); *see also id.* at 167:23 – 168:7 (testifying about fact that post at issue "did not have advertising," "commerce," or "affiliate marketing"); *id.* at 175:17-20 ("we publish thousands and thousands of items a month, and it is very difficult in the aggregate to narrow [any benefit] down to a single post"). He also testified about this topic during his first deposition in this case and in verified responses to interrogatories. *See, e.g.*, Ex. 2 at 107:16 (Gawker received "no direct revenue" from publication at issue); *id.* at 109:3-6 (post was not licensed to any other website); Ex. 5 (excerpts from Gawker's Resp. to Pl.'s First Set of Interrog.'s) at 7 ("Gawker did not post any advertising on the Webpage, and thus did not receive any revenue in connection with advertising on the Webpage.").

Mr. Kidder is the company's Chief Operating Officer, the executive who is charge of the company's finances, and indisputably the person most knowledgeable about them. Precluding, wholesale, testimony from him on facts that would tend to rebut plaintiff's alleged damages would surely be reversible error.

CONCLUSION

For all of the foregoing reasons, plaintiff's Motion in Limine No. 21 should be denied in full. To the extent that questions arise about the personal knowledge of any particular witness, those questions should be addressed at trial.

June 26, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*

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
Tel: (813) 984-3060; Fax: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael 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
Tel: (202) 508-1122; Fax: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 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
Shane B. Vogt, Esq.
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
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Sarah Luppen, Esq.
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
Michael W. Gaines
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

Gregg D. Thomas
Attorney