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; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY BOLLEA'S MOTION TO COMPEL COMPLETE PRODUCTION OF DOCUMENTS IN RESPONSE TO FINANCIAL WORTH DISCOVERY AND RECONSIDERATION OF RULING REGARDING ADDITIONAL FINANCIAL WORTH DEPOSITIONS; REQUEST FOR SANCTIONS

Plaintiff, Terry Bollea, professionally known as Hulk Hogan ("Mr. Bollea"), pursuant to Fla. R. Civ. P. 1.380, moves to compel Defendants to comply with the Court's July 20, 2015 Order Regarding Plaintiff's Motion to Compel Further Financial Worth Discovery and Depositions, and for Sanctions for failure to comply with said order, and for reconsideration of the Court's June 29, 2015 ruling regarding additional financial worth depositions. The grounds upon which this motion is based and the reasons it should be granted are as follows:

I. INTRODUCTION

On or about April 8, 2015, Terry Bollea filed a motion to add a claim for punitive damages entitling him, upon success of the motion, to financial worth discovery of the

Defendants. Aware of this, on April 22, 2015, Gawker proposed a streamlined discovery process to which the Court agreed. Ex. 1.[1] On May 29, 2015, this Court granted Terry Bollea's motion to add a claim for punitive damages and denied the motion of Gawker Media, LLC ("Gawker") and the two individual defendants (collectively "Gawker Defendants") for summary judgment on that claim. Ex. 2. Accordingly, the Court also granted Mr. Bollea's request for discovery of Gawker Defendants' respective net worths. Ex. 3. After Gawker Defendants failed to produce relevant and responsive documents, Mr. Bollea moved to compel, and the motion was granted in part on July 20, 2015, with Gawker Defendants ordered to produce additional documents. Ex. 4; Ex. 5. Gawker Defendants, as they have so many times during this litigation, have again obstructed legitimate discovery and failed to produce responsive documents required under the Court's July 20, 2015 order. The omitted items include the following:

The Transfer Pricing Study. The Court ordered Gawker Defendants to produce the governing documents and intercompany agreements between Gawker, Kinja and Gawker Media Group, Inc. When the Gawker Defendants produced a licensing agreement, it revealed that the fee used to transfer all of Gawker's profits to Kinja is calculated pursuant to a transfer pricing study. Gawker Defendants refuse to produce this economic analysis / transfer pricing study that they performed to determine the license fee that Gawker pays to Kinja, the Hungarian sister company which purports to own the intellectual property utilized by Gawker to generate its millions of dollars in annual profits. Pursuant to its license, Gawker pays millions of dollars to Kinja every year, which substantially affects its net worth. Thus, Mr. Bollea is entitled to determine how the fee Gawker is paying Kinja is calculated and whether it actually corresponds to their actual value or is a sham to reduce Gawker's net worth.

[1] Unless otherwise noted, exhibits are to the concurrently filed Affidavit of Charles J. Harder.

The recent revelation that this transfer pricing study exists should result in sanctions. This study was requested over and over again in discovery, and Gawker Defendants deliberately concealed it. A 2014 discovery request specifically requested transfer pricing studies, and Gawker responded that **no non-privileged documents exist**. Gawker Defendants purposely mischaracterized the document on their privilege log, claiming it was lawyer-client privileged, by describing it generically as "economic analysis," **not** a "transfer pricing study." Ex. 6. Such gamesmanship should not be permitted and should be severely sanctioned.

In response to the net worth discovery, and after several letters back and forth, Gawker Defendants still maintain the transfer pricing study is protected by the lawyer-client privilege. Ex. 7. It is not. The document apparently was transmitted by or contains the name of a law firm (Mayer Brown). However, it is black-letter law that the lawyer-client privilege extends **only** to communications for the purpose of rendering **legal advice**, and that simply putting a lawyer's name on an "economic analysis" of the valuation of intellectual property does **not** render the communication privileged. The transfer pricing study cannot be routed through a law firm so as to create a bogus claim of privilege; law firms do not value intellectual property assets, and even if Mayer Brown did value one for a client, the valuation itself would not be privileged because it is not legal advice. The Court should order production and sanction Gawker Defendants.

The Trust Documents. In the July 20, 2015 Order, the Court directed Nick Denton ("Denton") and Gawker to produce his irrevocable family trust documents. Ex. 5. This trust purportedly owns a significant percentage of the stock of Gawker Media Group, Inc. ("GMGI"). The Court ordered production of these documents for a very simple reason—Denton owns a plurality of shares in GMGI which, when added to the shares of GMGI, constitutes a majority. Denton thus controls the company, and shares that control the company are more valuable

(known as the "control premium").

Denton and Gawker refuse to produce the trust documents, claiming that they don't possess them. Ex. 7. Florida law is clear that "custody, control or possession" includes "not only… possession, but… the legal right to obtain the documents requested upon demand." *Saewitz v. Saewitz*, 79 So.3d 831, 834 (Fla. 3d DCA 2012). Gawker and Denton have the legal right to obtain a copy of the trust documents, but refuse to do so. Both Mr. Denton and Gawker can straightforwardly obtain them from their lawyers or from the trust (Denton's family members).Denton has provided no evidence that he has even tried, let alone cannot obtain, the documents at his direction if he wished to. The idea that the CEO and plurality shareholder of a company cannot obtain information about his own family's trust which owns other shares of the company is not worthy of belief, and constitutes the latest attempt by Gawker Defendants to hide the truth in this litigation. Gawker Defendants should be compelled to produce the documents.

Sanctions. Gawker Defendants have now forced Mr. Bollea to bring two motions to compel relating to net worth discovery which should have been turned over months ago, and are asserting transparently meritless objections. Gawker Defendants should be required to pay Judge Case's fees for this motion and to pay Mr. Bollea's attorney's fees in the amount of $11,485.

II. THE TRANSFER PRICING STUDY SHOULD BE PRODUCED.

It is undisputed that Kinja, KFT, a Hungarian sister corporation to Gawker Media, LLC and subsidiary of Gawker Media Group, Inc., licenses intellectual property rights to Gawker Media, LLC and is paid millions of dollars per year for those rights. If these rights are priced based on their actual value, similar to an arms-length transaction with any IP licensor, that would be one thing, but if they are overpriced, as Mr. Bollea strongly suspects, this scheme would permit Gawker Media, LLC to artificially reduce its net worth.

The Gawker-Kinja license agreement expressly states that the license fee is based on a transfer pricing study contained in a document bearing the name of the Mayer Brown law firm. Ex. A Conf. Aff. C. Harder. Mr. Bollea previously requested this study, and Gawker Media, LLC responded that **no non-privileged documents exist**. As part of a large privilege log that they produced, Gawker Defendants listed the document, but misleadingly described it as an "economic analysis" in order to conceal it and prevent its discovery. Ex. 6.

After several meet and confer letters, Gawker Defendants expressly stated that they were claiming that the transfer pricing study--the valuation of the intellectual property rights that Gawker Media, LLC licenses from Kinja, KFT and pays millions of dollars for--is protected by the lawyer-client privilege. Ex. 7.

Gawker Defendants' position is completely contrary to Florida law. Florida law provides that a precondition to the assertion of the lawyer-client privilege is the **provision of legal advice**, a doctrine that is specifically conceived to **prevent** what Gawker Defendants are doing here: cloaking non-legal advice in the privilege by routing it through a law firm. "[W]here a lawyer is engaged to **advise a person as to business matters** as opposed to legal matters, or when he is employed to act simply as an agent to perform some non-legal activity for a client the authorities uniformly hold there is no privilege." *Skorman v. Hovnanian*, 382 So.2d 1376, 1378 (Fla. 4th DCA 1980) (emphasis added).

A persuasive federal case holds that **this rule applies to law firms providing asset valuations**. *In re Asousa Partnership*, 2005 WL 3299823 (E.D. Pa. Nov. 17), involved a discovery request for e-mails concerning an appraisal of a company's assets. The appraisal was routed through a law firm to create a privilege claim. The Court rejected the privilege claim: "Even assuming communications from Liegel fall within any attorney-client privilege between H

& W and Smithfield, the subject of these e-mails is an appraisal of Pennexx assets by Valuation Research. While Liegel states that H & W is the 'party engaging [Valuation Research's] services,' other e-mails make it abundantly clear that this was a 'ghost-hiring' on Smithfield's behalf to create the appearance of attorney-client privilege over the appraisal, as was H & W's subsequent receipt and 'laying of hands' upon the report…. Liegel's communication with H & W is not for the purpose of Smithfield securing legal advice/services, and the privilege does not attach."

Asousa Partnership is directly on point here. Mayer Brown is a major law firm and is in the business of providing legal advice, not asset valuations. In addition, even if it did provide an asset valuation, it would not be protected by the lawyer-client privilege because it would not constitute legal advice. It is clear that having the transfer pricing analysis "originate" from Mayer Brown was a "ghost hiring" for no other purpose than to create a phony privilege claim.

Gawker Defendants should therefore be compelled to produce all transfer pricing studies.

III. THE TRUST DOCUMENTS SHOULD BE PRODUCED.

On July 20, 2015, the Court ordered Gawker Defendants to produce documents responsive to Mr. Bollea's request for discovery of "Denton's irrevocable family trust documents". Ex. 5. The request on which the Court entered its order compelling production read as follows: "Mr. Bollea is entitled to documents sufficient to show the ownership interests and voting rights of the trust that owns certain shares of GMGI, as well as the consideration paid for such shares, the date of creation of the trust, and the date that the shares of GMGI were deposited into the trust. These documents are necessary to value Denton's ownership interest in GMGI." Ex. 4.

Importantly, the shares in the trust were **originally owned by Mr. Denton** and were

transferred by him into the trust, which ostensibly benefits his own close family members. Ex. B Conf. Aff. C. Harder (Denton Tr.) ("Q. And were you the grantor of those shares. A. They were originally my shares, yes." (*id.* at 152:14-17); "Q. Who were the beneficiaries of the trust. A. My niece and two nephews." (*id.* at 153:20-22); "Q. Who is the trustee. A. My sister." (*id.*at 154:6-7)). While Denton denies having any control over the trust, he could not recall any instance of his sister voting the trust's shares. (*Id.* at 155:23-156:8.)

Further, despite Denton's denials of control, at least two media articles profiling him, written by reporters who interviewed him for the articles, have quoted or paraphrased him as saying that he has majority ownership and control of Gawker through his shares and the shares controlled by the family trust. Ex. 8 (Lloyd Grove, *The Gospel According to Nick Denton- What Next for the Gawker Founder*, The Daily Beast (Dec. 14, 2014): "Personally and through a family trust, Denton says he owns 68 percent of his privately-held, Cayman Islands-registered company."); Ex. 9 (Allyson Shontell, *Gawker Media Generated $45 Million in Net Revenue Last Year And It's Raising a $15 Million Round of Debt*, Business Insider (Jan. 28, 2015): "Through a family trust, Denton owns 68% of the company. He says insiders own 90% of Gawker Media."). Mr. Denton claimed in his deposition that he was misquoted by these two separate reporters in these two separate publications. This claim is not worthy of belief—it is clear that Denton was telling reporters he had a controlling interest in the company because the family trust is just a mechanism by which he does, indeed, hold such control.

Gawker Defendants have flatly disobeyed this Court's order, asserting that neither Denton nor Gawker Media, LLC has "control" over trust documents. This argument is based on an overly-narrow conception of "control." Whether documents are within a party's control "is broadly construed" and includes whether the party has the "right, authority, or practical ability to

obtain the materials sought on demand." Saewitz, 79 So.3d at 834; *see also Costa v. Kerzner Intern. Resorts, Inc.*, 277 F.R.D. 468, 470–71 (S.D. Fla. 2011).

Gawker Defendants have provided no evidence whatsoever that Denton or Gawker lack the practical ability to obtain Denton's family trust documents on demand. In fact, Mr. Denton **admitted** at his deposition that he could obtain information about the trust. ("Q.... Because I don't have an understanding of when the trust was created or when the... family actually acquired ownership in the shares through the trust..., we don't have that information. You have access to that information; is that correct? A. **I can get that information, yes.**") (Ex. B Conf. Aff. C. Harder (Denton Tr. at 158:7-15), emphasis added).

There is no doubt that the family trust documents are of crucial relevance to the issue of Denton's net worth. Denton owns a plurality of the shares in GMGI; if his shares are added to those purportedly owned by his family, he owns a majority. Thus, the trust documents will show whether Denton truly controls those shares and whether his GMGI shares are subject to a control premium and thus worth more.

IV. A MONETARY SANCTION SHOULD ALSO BE ASSESSED AGAINST GAWKER DEFENDANTS.

Gawker Defendants are simply obstructing discovery. First, they buried the transfer pricing study with a misleading designation in a lengthy privilege log. Now, they have made clear that they are claiming that a study valuing intellectual property assets was somehow "legal advice" because it was routed through a law office. Further, Gawker Defendants are claiming that Gawker and Denton cannot obtain trust documents that **they were already ordered to produce** and can clearly obtain if they wished to. Accordingly, Gawker Defendants are engaged in a transparent effort to prevent legitimate discovery, and as a result, Mr. Bollea has once again been forced to file a motion to obtain discovery that should have already been produced, in order

to defeat meritless make-work objections. This is the continuation of a three year long pattern and practice of obstruction of legitimate discovery by Gawker Defendnats. Mr. Bollea therefore respectfully requests that Gawker Defendants be required to bear the fees of the Special Discovery Magistrate in this matter, and that Gawker Defendants pay a monetary sanction of $11,485 to Mr. Bollea to reimburse Mr. Bollea for attorney's fees which would never have been incurred but for Gawker Defendants' obstruction.

V. ADDITIONAL NET WORTH DEPOSITIONS

On June 29, 2015, the Court denied Mr. Bollea's request to conduct follow-up financial worth depositions. At that time, the parties were a few days away from commencing the trial – which appeared to be the reason for the Court's denial of this request.

Now that the trial has been continued, this timing factor is no longer a concern. Mr. Bollea discovered a number of significant facts through the discovery ordered on July 20, 2015, and should be permitted brief additional examinations of Gawker Defendants to address these newly discovered facts, as well as obtain updated financial worth information from defendants. Gawker Defendants produced some of the most significant documents regarding net worth **after** their depositions. Mr. Bollea should be permitted an opportunity to follow-up on these developments.

VI. CONCLUSION

For the foregoing reasons, the Special Discovery Magistrate should recommend that Gawker Defendants be ordered to produce all transfer pricing studies relating to the rights fees paid to Kinja, KFT for intellectual property licenses, and documents sufficient to show the ownership interests and voting rights of Denton's family trust, as well as the consideration paid for shares in GMGI, the date of creation of the trust, and the date that the shares were deposited

into the trust. Gawker Defendants should further be sanctioned in the amount of $11,485 and required to bear the costs of the Special Discovery Magistrate in hearing and determining this motion. Finally, Mr. Bollea should be permitted to conduct follow-up depositions of Gawker Media, LLC and Nick Denton, questioning them about any documents produced after the previous depositions, and any related matters.

Dated: October 9, 2015

Respectfully submitted,

/s/ Kenneth G. Turkel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 9th day of October, 2015 to the following:

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