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.: 12012447-CI-011

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

Defendants.
_____/

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ADDITIONAL FINANCIAL WORTH DISCOVERY

Defendants Gawker Media, LLC ("Gawker"), Nick Denton and A.J. Daulerio have provided plaintiff with substantial detailed documentation of their financial worth.[1] In addition,

[1] This includes: Gawker's income statements for every year since 2011, plus for the period January through April 2015; Gawker's balance sheets for every year since 2011, plus for the period January through April 2015; Gawker's statements of cash flow for every year since 2011, plus for the period January through April 2015; Gawker's statement of accounts receivable; all of Gawker's federal tax returns since 2011; all of Nick Denton's federal tax returns since 2011; all available W2 forms for Denton since 2011; lengthy valuation reports (each running to more than 70 pages) of Gawker Media Group, Inc. ("GMGI"), from 2012, 2013, and 2014, by The Brenner Group, an independent third party, each including more than a dozen exhibits containing detailed financial information considered by the Brenner Group in completing its valuation; financial statements of GMGI, audited and/or reviewed by CPA firm of Citrin Cooperman for 2011, 2012, 2013, and 2014; the most recent capitalization table showing ownership interests in GMGI; Gawker's leases for its former and current office spaces; a 2013 independent appraisal of Denton's Manhattan condominium, showing its value; a recent mortgage statement for Denton's condominium showing the amount still owed; recent bank statements for each of the Gawker Defendants' current accounts, plus end-of-year account statements for each year available back to 2011; stock certificates showing various investments; bank statements showing payments between Gawker and Kinja, KFT; Gawker's operating agreement; Gawker's promissory notes and loan statement; compliance certificates submitted by Gawker to Silicon Valley Bank ("SVB") in connection with Gawker's loan; the most recent amendment to the loan and security agreement with SVB; Memorandum and Articles of Association for GMGI; various agreements between Kinja and Gawker, including their Intercompany Services Agreement, their License Agreement, and their Development Agreement; the 2009 GMGI stock plan, along with a stock-related board resolution and meeting minutes; and a "pitch book" containing significant financial data.

they answered comprehensive financial worth interrogatories, submitted financial worth affidavits, and answered a wide array of questions during half-day depositions focusing solely on their financial worth. And, even before the Court permitted plaintiff's punitive damages claim and authorized related discovery on financial worth, the financial state of Gawker had been the focus of substantial discovery and depositions in the case.

Plaintiff has already twice asked this Court to compel more financial worth information (first at the hearing on May 29, 2015, and again at the hearing on June 29, 2015). In light of the substantial discovery already provided, the Court largely denied both motions. Now, plaintiff has filed yet another motion seeking still more information. His latest motion, however, does not seek documents that provide any additional information about Gawker or Denton's financial worth. First, plaintiff seeks a report prepared nearly four years ago by Gawker's tax attorneys offering legal advice. It does not add anything to the substantial information already provided about Gawker's value and is clearly protected by the attorney-client privilege. Second, plaintiff seeks documents relating to a trust that does not involve either Gawker or Denton. Denton did not establish the trust, was not the grantor of the shares in the trust (his father was), is not the beneficiary of the trust (his niece and nephews are), and is not the trustee (his sister is). The trust documents would not add anything to the parties' understanding of Denton's financial worth, and neither Denton nor Gawker possess or has any legal right to obtain those documents.

Plaintiff's motion should be denied, and his request for additional depositions (what would be Gawker's fourth and Denton's third) and for sanctions should be rejected out of hand.

ARGUMENT

A. The Economic Analysis Report Is Protected By The Attorney-Client Privilege.

Plaintiff argues that he is entitled to obtain an analysis prepared for Gawker in 2011 – almost a year before the publication at issue in this case – by the law firm Mayer Brown, LLP. *See* Mot. at 4-6. Although Bollea inexplicably has chosen to call this analysis "The Transfer Pricing Study" and claims he was misled because Gawker referred to it as an "Economic Analysis," *id.* at 2, 4, the report prepared by Mayer Brown is titled "Economic Analysis of Royalty Payments Between Gawker Media LLC and Blogwire Hungary KFT," as reflected in one of the exhibits submitted by plaintiff. *See* Conf. Harder Aff., Ex. A. The Mayer Brown Report contains legal advice about the legal effects of royalty rates Gawker pays to license intellectual property from its sister company, Kinja, KFT. Gawker has withheld this document on grounds of attorney-client privilege ever since plaintiff first requested it more than a year-and-a-half ago. Now, plaintiff belatedly claims that Gawker should be ordered to produce it, but the arguments he offers misstate both the facts and the law.

First, plaintiff argues that Mayer Brown's Report is a "valuation of intellectual property," which is not subject to the attorney-client privilege. Mot. at 3, 5. To make this argument, plaintiff speculates that Gawker is "cloaking non-legal advice . . . by routing it through a law firm," and that Mayer Brown's retention was a "'ghost hiring' for no other purpose than to [enable Gawker to] create a phony privilege claim." *Id.* at 5-6. This outrageous contention – that a major law firm conspired with Gawker to concoct a privilege claim – has no foundation whatsoever. In fact, plaintiff's own motion attaches another document that explains the nature of Mayer Brown's analysis, stating that Mayer Brown "analysed the appropriate arms' length pricing for the royalty payable by [Gawker] to [Kinja] with respect to" intellectual property

associated with Gawker's brand. *See* Conf. Harder Aff., Ex. A, at 1 (Gawker 28910_C) (providing additional information about Mayer Brown's analysis and the nature of its Report, including that it was based on recognizing the "importance of maintaining an arms' length relationship and pricing the royalty hereunder in accordance with arms' length terms"). While Gawker will not waive the privilege by revealing the substance of Mayer Brown's advice, it will state for the record that the analysis (a) was prepared in December 2011 by Mayer Brown attorney Charles S. Triplett (who had previously served as an attorney in the IRS's Office of Chief Counsel), and (b) provided Gawker with legal advice under Section 482 of the Internal Revenue Code and regulations interpreting that section, which govern an appropriate arm's length standard for transactions and allocations between companies that are owned by a common parent corporation. Such advice falls squarely within the attorney-client privilege. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984) ("Tax advice rendered by an attorney is legal advice within the ambit of the privilege."); *New Phoenix Sunrise Corp. v. C.I.R.*, 408 F. App'x 908, 919 (6th Cir. 2010) (advice provided by outside counsel on tax issues is privileged); *Ross v. UKI Ltd.*, 2004 WL 67221 (S.D.N.Y. Jan. 15, 2004) (same); *U.S. v. Chevron Texaco Corp.*, 241 F. Supp. 2d [redacted] (N.D. Cal. [redacted]) (same); *see also Chevron Texaco Corp.*, 241 F. Supp. 2d at [redacted] ("Communications between a client and its outside counsel are presumed to be made for the purpose of obtaining legal advice.").[2]

[2] The two cases cited by plaintiff are inapposite. One, *Skorman v. Hovnanian of Florida, Inc.*, 382 So. 2d 1376 (Fla. 4th DCA 1980) (cited in Mot. at 5), stands for the unremarkable and irrelevant proposition that business advice is not subject to the attorney-client privilege. The other, *In re Asousa P'ship*, 2005 WL 3299823 (Bankr. E.D. Pa. Nov. 17, 2005) (cited in Mot. at 5), held that an appraisal done by a valuation company (not a law firm) was not privileged simply because the party's outside counsel was copied on its transmittal. *Id.* at *10-11. Here, the Report was prepared by attorneys at Mayer Brown for the purpose of providing legal advice. No other party was involved in the creation of the document, and Mayer Brown was not a "conduit" of any kind. *Id.* at *4.

Second, plaintiff claims that he needs Mayer Brown's Economic Analysis Report "to determine how the fee Gawker is paying Kinja is calculated." Mot. at 2. This claim also is not correct. Plaintiff *already knows how the fee Gawker is paying Kinja is calculated and how much money is being paid* because the formula is set out in the licensing agreement attached to plaintiff's motion. *See* Conf. Harder Aff., Ex. A at Article VI (GAWKER 28912_C). In addition, Gawker has produced reams of documents detailing the *actual dollar amounts* it has paid to Kinja since 2011, including its balance sheets and bank records reflecting each of those individual transactions. Plaintiff does not need to invade the privilege of the Mayer Brown Report to understand the amounts that Gawker pays to Kinja, even assuming that plaintiff needs that information at all to assess Gawker's overall financial worth.

Finally, plaintiff misstates the record when he claims that Gawker somehow misled him about the existence of Mayer Brown's Report. The existence of this Report was not a "recent revelation." Mot. at 3; *see also* Mot. at 2 (falsely stating that Report was not "revealed" until July 2015). Gawker disclosed the Mayer Brown Report more than 18 months ago – in *March 2014* – when it listed the document on its privilege log. *See* Mot., Ex. 6. That log stated explicitly that Gawker had withheld as privileged a document titled "Economic Analysis" written by "Mayer Brown LLP" and dated "12/11/2011." *Id.*

Gawker's corporate representative, Scott Kidder, also referenced the Report in April 2015 at the second of his three depositions. While maintaining the substance of the Report as privileged, Kidder specifically and repeatedly referenced it in his testimony. When asked about the people involved in deciding "the terms of the fee for the royalty agreement between Gawker Media and Kinja," Kidder explained that "Mayer Brown" was "hired" to prepare "a study to make sure that there were terms appropriate for an arm's length transaction." Ex. 1 (Kidder

Dep.) at 144:10-17. Kidder further testified that Mayer Brown offered legal advice about "what is an appropriate arrangement." *Id.* at 145:2-10.

Plaintiff was not misled about the Report. He simply chose not to inquire further about it on either of these occasions. His belated effort to compel the Report's production now – and then to conduct a fourth deposition of Gawker as a result – should be rejected. The Report is both privileged and has no bearing on plaintiff's ability to assess Gawker's financial worth.

B. Denton Does Not Have Possession, Custody or Control of the Trust Documents, and They Are Unnecessary In Any Event.

Plaintiff next argues that the Court should compel Gawker and Denton to produce certain trust documents that do not involve either of them and that are not under their control. The trust was established by Denton's father, who created the trust for the benefit of his grandchildren (Denton's niece and nephews) and named Denton's sister as the trustee. Denton is not involved in the trust at all. *See* Ex. 2 (Affidavit of Nick Denton, attesting that he is "not a trustee or beneficiary of the trust" and "do[es] not control it"); *see also* Conf. Harder Aff., Ex. B at 153:20-22, 154:6-7 (Denton testifying about trustee and beneficiaries). Simply stated, Denton was not the grantor/creator of the trust (his father was), he is not a beneficiary of the trust (his nieces and nephews are), and he is not the trustee (his sister is).[3] Given these undisputed (and indisputable) facts, plaintiff's argument for seeking to compel the trust documents misses the mark. His motion should be denied for at least two reasons.

[3] Plaintiff misstates the record by claiming that Denton "transferred [the shares] into the trust." Mot. at 7. Denton never testified that he established the trust or transferred the shares into the trust – in fact, plaintiff's counsel never asked those questions. Moreover, during the deposition, Denton's counsel objected to plaintiff's counsel's use of the term "grantor" in her questions, expressing his concern that Denton might "get tripped up on the meaning of that legal term." Conf. Harder Aff., Ex. B at 152:20 – 153:3.

First, the trust documents plaintiff seeks are not within Denton's possession, custody, or control. It is uncontested that Denton does not possess or have custody of the trust documents. As Denton has attested under oath, "I do not have the documents memorializing the trust." Ex. 2; *see, e.g.*, Discovery, Civ. Prac. FL-CLE, § 16.67 ("it is clear that a party may not be required to produce matters the party does not have") (citing *Fritz v. Norflor Constr. Co.*, 386 So. 2d 899 (Fla. 5th DCA 1980)). This is consistent with the brief exchange between the Court and Denton's counsel at a prior hearing, in which the Court expressed its view that "[s]omewhere along the way, he would have a record if it's his," and Denton's counsel explained that "It's not his. That's what I'm saying." Ex. 3 (June 29, 2015 Hrg. Tr.) at 135:19-22; *see also id.* at 135:16-18 ("MR. BERLIN: Well, I don't know that he has any documents to give, Your Honor, because he's not the trustee; he's not the beneficiary.").[4]

Denton also does not have control over the documents. The Florida Supreme Court has interpreted "control" to mean that a party has "the *authority* to gain access to the records." *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1388 (Fla. 1994) (emphasis added); *see also* Discovery, Civ. Prac. FL-CLE, § 16.67 ("The concept of 'control' has generally been held to mean the legal right to obtain the requested documents."). Likewise, the Eleventh Circuit has explained that "[c]ontrol is defined not only as possession, but as the *legal right* to obtain the documents requested upon demand." *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (emphasis added); *accord Fin. Bus. Equip. Solutions, Inc. v. Quality Data Sys., Inc.*, 2008 WL

[4] In that same vein, while the Court granted plaintiff's motion to compel plaintiff's requests related to trust documents, those requests were limited to any trust in which Denton "personally" was the "grantor, settlor, trustee, beneficiary or in which [he has] or had any interest," Ex. 4 at 13 (Financial Worth RFP to Denton No. 42), or "any . . . trusts in which YOU have an interest," *id.* at 11 (Financial Worth RFP to Denton No. 33). Plaintiff's contention that these requests extend to trusts in which Denton is uninvolved, or that Denton should be sanctioned for not producing documents he does not have, is not well taken.

4663277, at *2 n.5 (S.D. Fla. Oct. 21, 2008).[5] Here, plaintiff has made no factual or legal showing that Denton has a "legal right" to obtain records concerning a trust for which he was not the grantor and of which he is neither the trustee nor the beneficiary. While the law requires a party to produce documents maintained by his agents (such as, for example, his attorney or his publicist), plaintiff has cited *no case* suggesting that a party has the legal authority to demand that his relatives give him *their* documents.

Instead, plaintiff claims that Denton has the "practical ability to obtain the materials sought on demand," and therefore he must do so. Mot. 7-8 (quoting *Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011)). Plaintiff's claim is based on a mischaracterization of both the law – the cited case deals with entities within a corporate family – and Denton's deposition testimony. Denton never said that he could obtain the trust documents. Rather, as the deposition excerpts attached to plaintiff's motion plainly show, when asked "when the trust was created" and when his "family actually acquired the shares" in the trust, Denton explained that he thought he could "get that information." Conf. Harder Aff., Ex. B at 158:7-15. Plaintiff never asked whether, and Denton certainly never testified that, he could or would obtain the trust documents. In any event, "the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite." *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993).

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[5] "When construing Florida Rules of Civil Procedure, Florida courts may look to federal case law construing similar or identical Federal Rules of Civil Procedure, such as this case where Florida Rule of Civil Procedure 1.350(a) is similar to Federal Rule of Civil Procedure 34(a)." *Saewitz v. Saewitz*, 79 So. 3d 831, 834 n.3 (Fla. 3d DCA 2012) (citing *Ferrigno v. Yoder*, 495 So. 2d 886, 887-88 (Fla. 2d DCA 1986)).

Finally, trust documents in which Denton is not involved would not shed any additional light on his financial worth. Plaintiff claims that the trust documents are necessary to establish that Denton's own shares of GMGI are worth more if has "a controlling interest" in GMGI. Mot. at 7. Although the Gawker Defendants believe that it makes no sense to argue that Denton is worth more because of assets held by family members, plaintiff remains free to make this argument at trial. The point of that argument is that those family members (his niece and nephews) also own shares of the company, but that fact is both undisputed and already the subject of sworn deposition testimony and substantial other evidence. As a result, the actual trust documents, which Denton does not have, are entirely unnecessary for plaintiff to be able to make his argument.

C. Plaintiff's Request for Additional Depositions Is Baseless.

In addition to seeking more documents, plaintiff also asks the Court to require Gawker and Denton to appear for more depositions – a third deposition of Denton, and a fourth deposition of Scott Kidder, Gawker's corporate representative. But the Court, on June 29, 2015, *rejected* plaintiff's earlier request for this same relief. Ex. 3 (June 29, 2015 Hrg. Tr.) at 139:16 (THE COURT: "We're done with depositions."). Nothing has changed. Gawker and Denton have already provided extensive testimony and documents about their financial worth at multiple depositions, and further depositions are neither necessary nor justified.

Plaintiff also argues that he should get additional depositions because Gawker produced certain documents after the financial worth depositions. Putting aside the fact that this argument was already rejected by this Court on June 29, his argument ignores the facts that plaintiff waited until just before the discovery cut off to seek punitive damages and to ask for financial worth discovery, and that the Gawker Defendants facilitated that discovery even before the punitive

damages motion was adjudicated. Moreover, both the Mayer Brown study and the trust involving Denton's extended family were well known to plaintiff long before the financial worth depositions were conducted. Plaintiff should not be able to sit on his hands, have the Court deny an earlier request for additional depositions, and then be able to move once again for the same, already-rejected relief.

D. Plaintiff's Request for Fees/Sanctions Is Frivolous.

Plaintiff argues that the Gawker Defendants should be subject to sanctions because they are "obstructing discovery" by (1) having "buried" the Mayer Brown Economic Analysis Report, even though Gawker listed it on its privilege log and it was the subject of deposition testimony by its corporate designee, and (2) failing to produce trust documents that Denton does not have. Mot. at 8. For the reasons stated above, these arguments are baseless as a matter of fact and law. As a result, and as more generally explained in the Gawker Defendants' Opposition to Plaintiffs Motion for Attorneys' Fees and Costs in connection with 15 prior discovery motions, plaintiff's fee request is without merit.

CONCLUSION

For the foregoing reasons, plaintiff's motion should be denied in its entirety.

Dated: November 12, 2015

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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