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

GAWKER MEDIA, LLC, *et al.*,

Defendants.
_____/

DEFENDANTS' MOTION *IN LIMINE* NO. 4:
STATEMENTS BY NON-WITNESS EMPLOYEES

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (collectively, "Defendants") hereby move *in limine* to preclude Plaintiff Terry Bollea, professionally known as "Hulk Hogan," from introducing evidence of statements made by present or former Gawker employees who will not be witnesses in the case.

These statements, which consist of the *opinions* and observations of present and former employees about this litigation and the publication that gave rise to it, are inadmissible for at least two reasons. First, to the extent that Bollea intends to introduce these statements to establish the *truth* of some matter – such as Gawker's state of mind with respect to this litigation and the publication that gave rise to it – they are inadmissible hearsay. Second, to the extent that Bollea intends to introduce these statements for a non-hearsay purpose – such as to show that these persons, affiliated with Gawker in some way, made statements about the publication at issue and this litigation – the statements are irrelevant and prejudicial.

I. The Exhibits At Issue

Since Bollea filed his initial trial exhibit list on June 8, 2015, he has added a number of exhibits that contain statements made by present or former Gawker employees who are not

defendants in this case and have not been identified by either party as trial witnesses. For example, Bollea has added the following trial exhibits:

- Plaintiff's trial exhibits 388-89 (collected together in Exhibit A), which consist of tweets from Adrian Chen, a former writer at Gawker, joking about the upcoming trial in this case and the possibility that it might "destroy[]" Gawker.

- Plaintiff's trial exhibits 390-400 (collected together in Exhibit B), which consist of tweets by then-writers/editors of Gawker (specifically, Leah Finnegan and Max Read, who are no longer with Gawker, and Tom Scocca, who still writes for Gawker), in which the authors of the tweets offer strident defenses of Gawker in response to criticism of the publication at issue in this lawsuit.

- Plaintiff's trial exhibit 482 (attached as Exhibit C), which is a tweet by Leah Finnegan, at the time a writer and editor for Gawker, that was retweeted by Peter Sterne, a reporter for *Capital New York*.

- Plaintiff's trial exhibits 585-586 (attached, respectively, as Exhibit D and E), which are (1) an article (Ex. D) about a podcast interview that Tommy Craggs, then the editor of gawker.com, did about this lawsuit and the publication that gave rise to it, and (2) the podcast interview itself (Ex. E). In both, Craggs is unapologetic in his defense of Gawker and the publication giving rise to this lawsuit.

II. The Statements Are Hearsay.

At the motion *in limine* hearing held in this matter on July 1, 2015, counsel for Bollea took the position that statements made by Gawker employees are party statements, properly attributed to Gawker itself, under Fla. Stat. 90.803(18)(d). *See* Ex. F (July 1, 2015 Hrg. Tr.) at 271:11-20. That is not a correct statement of the law as a general matter, and it is certainly not correct for the newly identified exhibits.

Section 90.803(18)(d) provides that a statement is a party admission, which can be "offered against a party," if it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship." Under this rule, a statement by an employee of a party is admissible to establish the truth of some matter if "the matter is within the scope of" the employee's employment.

Chaney v. Winn Dixie Stores, Inc., 605 So. 2d 527, 529 (2d DCA 1992). In other words, an employee's statement is only admissible as a statement of the employer "if the employee makes a statement *concerning a matter which is connected with a duty within the scope of the employee's agency* or employment." C. Erhardt, Florida Evidence § 803.18d (2015 ed.) (emphasis added). Thus, for example, in *Scholz v. RDV Sports, Inc.*, 710 So. 2d 618, 627-28 (Fla. 5th DCA 1998), the court held that an out-of-court statement by one employee as to the reasons why the plaintiff was fired was admissible, because that employee's job included responsibility over employment decisions, while an out-of-court statement from a different employee about that same matter was not admissible, because the second employee did not play any role in employment decisions. Moreover, as with all exceptions to the hearsay rule, the party seeking to admit the evidence has "the burden of supplying a proper predicate to admit this evidence under an exception to the rule against hearsay." *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

Under this analysis, the statements of current and former Gawker employees contained in Plaintiff's trial exhibits are not admissible as the statements of Gawker. Adrian Chen (the author of the tweets collected in Exhibit A) was not even an employee of Gawker when he made the statements. And it was not part of the employment responsibilities of Leah Finnegan, Max Read, Tom Scocca, or Tommy Craggs (the authors of the tweets and statements collected in Exhibits B, C, D and E) to express the official opinions of Gawker in their personal twitter accounts or elsewhere. (Gawker has its own twitter account: https://twitter.com/Gawker.) In addition, while the Finnegan tweet that Plaintiff has identified as Trial Exhibit 482 (Ex. C) appears to refer to a purported statement by Nick Denton, who is a party, that does not cure the hearsay problem, since Finnegan will not be testifying as to what Denton allegedly said. *See, e.g.*, *Dollar v. State*,

685 So. 2d 901, 902-03 (Fla. 5th DCA 1996) (newspaper article quoting defendant was inadmissible hearsay because "the reporter did not testify at trial as to what the defendant said to him."). At bottom, none of these or other exhibits reflect statements of a party.

III. The Employee Statements Are Irrelevant And Highly Prejudicial.

Even if these exhibits were not hearsay, they still would be inadmissible because they are irrelevant and highly prejudicial. Section 90.403 of the Florida Evidence Code provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Fla. Stat. § 90.403. The *opinions* of individuals affiliated with Gawker have literally no probative value for any issue in this case. Permitting Bollea to present those irrelevant opinions would be highly prejudicial, since his only goal in doing so would be to tarnish Gawker in the jury's eyes by suggesting that its employees are callous and flippant about this lawsuit and the events giving rise to it. Such "guilt-by-association" tactics are expressly forbidden by the rules, and Bollea should not be permitted to engage in them.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an order precluding Bollea from offering into evidence statements by Gawker employees who are neither parties, nor witness, including Plaintiff's trial exhibits 388-400, 482, and 585-586.

February 1, 2016

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

Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2016, 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:

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

Attorneys for Plaintiff

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Attorney for Plaintiff

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hklaw.com

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hklaw.com

Attorneys for Intervenors First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, and The Associated Press

Charles J. Harder, Esq.
charder@HMAfirm.com
Jennifer McGrath, Esq.
jmcgrath@hmafirm.com
Harder Mirell & Abrams LLP
132 S. Rodeo Drive, Suite 301
Beverly Hills, CA 90212
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amnestee@aol.com
asteele@rahdertlaw.com
ncampbell@rahdertlaw.com

Attorney for Intervenor Times Publ'g Co.

/s/ Gregg D. Thomas
Attorney