Filing # 37267329 E-Filed 02/01/2016 04:41:51 PM

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. 7:
COMMENTARY ABOUT THIS LITIGATION

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio hereby move *in limine* to preclude plaintiff Terry Bollea, professionally known as "Hulk Hogan," from introducing as evidence – or seeking testimony about – news articles and social media posts featuring commentary about this litigation. As explained below, such materials are inadmissible because (a) they are nothing but pretrial publicity, from which the jury should be shielded; (b) they are irrelevant, highly prejudicial, and likely to confuse the jury; and (c) many of the articles or social media posts at issue constitute hearsay.[1]

I. The Exhibits At Issue

Plaintiff's Fourth Supplemental Exhibit List, filed January 29, 2015, seeks to offer into evidence numerous press reports and social media posts, most authored by non-parties to this case, that offer commentary about this litigation. These exhibits include: newspaper articles that

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[1] Many of the proposed exhibits addressed in this motion are inadmissible on other grounds, *e.g.*, because they constitute statements by Gawker employees who are neither parties, nor witnesses, because they describe subsequent remedial measures undertaken by Defendants, or because they constitute hearsay statements and non-expert opinions about the conduct of Defendants. Those grounds are addressed in other motions *in limine* being filed by Defendants.

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speculate on the facts and evidence that may be presented at trial; commentary about the merits of the Court's rulings and the legal positions of the parties; social media posts by members of the public and the parties to this case expressing opinions about the case, the parties, and the law, including offering predictions and speculation about what the jury may do; and articles profiling the parties, their lawyers, and potential witnesses. For example, one exhibit is a *USA Today* opinion piece that is highly critical of Gawker, in which the columnist speculates that the company "might lose at trial," while Bollea's suit "will likely be defeated on constitutional grounds" on appeal. Pl.'s Trial Ex. 381 (included within Ex. A). Another includes the views of ABC News legal analyst Dan Abrams, who expressed his view that Gawker has a "very strong [First Amendment] argument" and is likely to "end up winning" the case. Pl.'s Trial Ex. 385 (included within Ex. A).

In particular, Bollea seeks to admit, *inter alia*:

- Plaintiff's trial exhibit 367-68, 381-86 (collected together as Exhibit A), which are news reports and opinion pieces about the anticipated July 2015 trial in this case, including speculation about each side's likelihood of success;

- Plaintiff's trial exhibit 374 (attached as Exhibit B), which is a tweet from Nick Denton approvingly quoting legal commentary about the case to the effect that readers should be able to decide what they find newsworthy;

- Plaintiff's trial exhibit 387 (attached as Exhibit C), which is a tweet from A.J. Daulerio about the upcoming trial of this case;

- Plaintiff's trial exhibits 388-400 (collected together as Exhibit D), which are tweets about this litigation from present and former Gawker employees who are not parties and will not be witnesses at trial;

- Plaintiff's trial exhibits 445-47 (attached, respectively, as Exhibits E, F and G), which are (1) a satirical animation about this lawsuit (Ex. G), (2) a screen shot from the YouTube.com page hosting that animation (Ex. F), and (3) a tweet from Denton linking to the animation (Ex. E);

- Plaintiff's trial exhibits 450-51 (collected together as Exhibit H), which are (1) a *Buzzfeed.com* article describing Kevin Blatt's views that a "Hulk Hogan" sex tape would

have no commercial value, and (b) a tweet from Denton approvingly linking to the article;

- Plaintiff's trial exhibit 452 (attached as Exhibit I), which is a *Buzzfeed.com* article about Denton in which Defendants' trial prospects are addressed;
- Plaintiff's trial exhibit 463 and 473 (collected together as Exhibit J), which are (a) a *New York Post* article about this litigation (Ex. 463), and an article about Denton's reaction to that article (Ex. 473);
- Plaintiff's trial exhibits 464, 471, 483, and 487 (collected together as Exhibit K), which are articles speculating about Gawker's prospects at trial and on appeal and the litigation's potential effects on the company;
- Plaintiff's trial exhibits 466 and 481 (collected together as Exhibit L), which are news articles describing various challenges facing Gawker, including this litigation;
- Plaintiff's trial exhibit 482 (attached as Exhibit M), which is a tweet from a media reporter at *CapitalNewYork.com*, speculating that an alleged statement by Denton might adversely affect Defendants at trial; and
- Plaintiff's trial exhibits 585 and 586 (attached, respectively, as Exhibit N and O), which are (1) an article about a podcast featuring interviews with a reporter at *Vice.com* and an editor of Gawker about this case, and (2) the podcast interviews themselves.

Each of these exhibits features commentary about this lawsuit, including about the merits of the parties' position, Defendants' likelihood of prevailing at trial and on appeal, and/or the impact that a substantial adverse verdict could have on Gawker as a business. Based on Bollea's identification of these documents as trial exhibits, it appears that he also intends to question defense witnesses about the contentions made in these commentaries.

II. These Exhibits Constitute Pretrial Publicity, From Which The Jury Should Be Shielded.

Each of the proposed exhibits described above should be excluded for a very basic reason – each constitutes pretrial publicity of the sort that jurors must be shielded from, rather than asked to review as evidence. Florida's courts go to considerable effort to limit the effect of pretrial publicity on proceedings. Among other things, they conduct voir dire to identify those jurors who have become prejudiced through exposure to pretrial publicity about the case or the

parties. And, courts routinely admonish jurors to avoid news reports about ongoing trials, as the standard jury instructions plainly direct jurors:

> Do not read, listen to, or watch any news accounts of this trial. . . . In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Fla. Jury Instructions, § 700 Closing Instructions; *see also, e.g.*, *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla. 1978) (jurors who have been exposed to pretrial publicity "must put these matters out of their minds and try the case solely upon the evidence presented in the courtroom").

In recent hearings, plaintiff has repeatedly expressed his concern about the effect of pretrial publicity, and, in response, the Court has scheduled a careful jury selection process for just this purpose. The steps taken by the Court are designed to protect the impartiality of the jury and to ensure that it decides the case based on the evidence presented, rather than permitting it to be biased through exposure to media reports containing speculation, opinion, and prognostication about the evidence and the outcome. These measures, and the other measures that the Court will take during trial, would be utterly pointless if press coverage and social media commentary about this case were admitted as evidence. Yet, that is what Bollea apparently seeks to do. That effort should be rejected.

III. <u>Commentary About The Case Is Irrelevant And Highly Prejudicial.</u>

The commentary about this case that Bollea seeks to admit as evidence should also be excluded on the grounds that such materials are irrelevant and highly prejudicial. *See* Fla. Stat. § 90.403. Commentary about who should win this case, or predictions about who will win it in the end, have literally *zero* probative value for a jury tasked with making up its own mind about

the evidence in this case. This Court recognized this basic principle earlier in the case in excluding Bollea's proposed expert Leslie John, whose expert opinion was based on soliciting opinions from survey respondents about the appropriate level of compensation for injuries of the kind Bollea allegedly suffered. *See* Ex. P (July 1, 2015 Hrg. Tr.) at 88:12 – 90:9 (excluding John's testimony on ground that "a survey that asks, how much money do you think this case is worth" is not the "kind of evidence [that] should come in"). This is true even where the commentary about this litigation is coming from people connected to Gawker. Their statements speculating about the company's prospects for winning at trial or on appeal, and the litigation's effect on Gawker as a business have nothing to do with the jury's own assessment of what the evidence shows. Indeed, such statements and commentary would simply confuse the jury and might prejudice Defendants by somehow making it appear – incorrectly – that they lack faith in the jury or in the merits of their defenses. This evidence is therefore wholly improper.

IV. **Most Of The Trial Commentary Bollea Seeks To Admit Is Inadmissible Hearsay.**

Finally, the exhibits concerning pretrial publicity should be excluded on hearsay grounds. With the exception of the tweets from Denton or Daulerio (plaintiff's trial exhibits 374, 387 and 451), all of the commentary Bollea seeks to admit consists of articles or social media postings by non-parties and people who will not be witnesses at trial. As such, that commentary is inadmissible hearsay, not falling within any exception. *See State v. Freber*, 366 So. 2d 426, 427-28 (Fla. 1978); *see also* Defs.' Mot. *in Limine* No. 4 at (explaining that plaintiff's trial exhibits 388-400, which are collected together as Exhibit D, are not party statements for purposes of the hearsay rules). This applies even to those articles that purport to convey statements by Denton. *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"). Accordingly, the trial commentary exhibits should be excluded on this ground as well.

CONCLUSION

Defendants respectfully request that this Court grant the motion *in limine* and enter an order excluding all evidence consisting of, and all testimony about, commentary about this litigation, including plaintiff's trial exhibits 367, 368, 374, 381-400, 445-47, 450-52, 463-64, 466, 471, 473, 481-83, 487, 585-86.

February 1, 2016

Respectfully submitted,

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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:

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