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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Case No.: 12012447-CI-011

Plaintiff,

vs.

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

Defendants.
_____/

TERRY BOLLEA'S BENCH MEMORANDUM REGARDING MOTIONS FOR STAY PENDING APPEAL

Plaintiff, Terry Bollea known professionally as Hulk Hogan ("Mr. Bollea"), by counsel, provides the following bench memorandum regarding motions for stay pending appeal in connection with Gawker Defendants' May 25, 2016 request to this Court for a stay pending appeal and to address the amount of a supersedeas bond, which request has been set to be heard at a specially set hearing set on June 10, 2016, and states as follows:

Introduction

At the hearing held on May 25, 2016, Gawker Defendants requested that this Court consider their request for stay pending appeal and address the amount of a supersedeas bond at a hearing which this Court specially set for June 10, 2016 at 9:00 a.m. (*See* **Ex. A**; 5/25/16 Trans. pp. 189:4-13; 192:18-24; 193:20-194:14). Although Gawker Defendants have yet to file any legal memoranda associated with their pending request for a stay in this Court, and have yet to

post a bond, Mr. Bollea files this bench memorandum to inform the Court of certain important issues associated with a stay of execution and the posting of a supersedeas bond.[1]

A. Overview of Stay and Bond Requirements

An appellant can appeal a money judgment without posting a supersedeas bond, "*but he does so at the risk of having to pay the judgment before the appeal has been concluded.*" *Fitzgerald v. Addison*, 287 So. 2d 151, 152 (Fla. 2d DCA 1973) (emphasis added). Under Rule 9.310(a), *Fla. R. App. P.*, a party seeking a stay "shall file a motion in the lower tribunal." Stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both. Rule 9.310(b)(1) provides for an "automatic" stay for judgments **solely** for the payment of money, when a bond equal to the principal amount of the judgment plus twice the statutory rate of interest is posted. Under section 45.045, *Fla. Stat.*, the amount of a supersedeas bond necessary to obtain the "automatic" stay of execution is capped at $50 million **for each appellant**, as adjusted annually to reflect changes in the Consumer Price Index compiled by the U.S. Department of Labor. Pursuant to § 45.045(2), *Florida Statutes*, Gawker Defendants may seek a reduction in the amount of the bond required to obtain a stay.

Mr. Bollea notes that the final relief he seeks in this action is monetary and non-monetary (*i.e.,* permanent injunctive relief). Accordingly, the automatic stay associated with posting a supersedeas bond under § 9.310(b)(1), and consequently the cap set forth in under §45.045(1), should not apply. *Florida Coast Bank of Pompano Beach v. Mayes*, 433 So.2d 1033, 1034 (Fla. 4th DCA 1983) (money judgment exception applies only to judgments wherein the only relief granted is for the payment of money).

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[1] Mr. Bollea reserves the right to file a formal opposition to any filings by Gawker Defendants should they file papers seeking a stay of execution pending appeal and/or reduction of the bond.

"The guiding principle in setting a supersedeas bond is to protect the party in whose favor judgment was entered by assuring its payment in the event the judgment is affirmed on appeal." *Pabian v. Pabian*, 469 So.2d 189, 191 (Fla. 4th DCA 1985) (citing *Knipe v. Knipe*, 290 So.2d 271 (Fla. 2d DCA 1974)) (emphasis added). "To this end, the proper amount and conditions of the supersedeas bond are determined by the facts of the particular case." *Id.* (citing *Kahn v. American Surety Co. of New York*, 162 So. 335 (Fla. 1953). In ruling on a stay motion, the trial court should consider the likelihood of success on appeal and the potential harms involved in granting on denying a stay. *Sunbeam Television Corp. v. Clear Channel Metroplex, Inc.*, 117 So.3d 772 (Fla. 3d DCA 2012). Stay conditions should be tailored to protect the appellee while the appeal is pending. *Id.*; *Pabian*, 469 So.2d 189, 191; *Lawson v. County Board of Public Instruction*, 154 So. 170 (Fla. 1934). A party seeking a reduced bond must demonstrate "good cause." § 45.045, *Fla. Stat.* **Errors of law and financial condition are not "good cause."** *Allstate Ins. Co. v. Cruz*, 768 So.2d 1138, 1139 (Fla. 3d DCA 2000); *Platt v. Russek*, 921 So.2d 5 (Fla. 2d DCA 2004).

Because the primary principle governing the issuance of stays pending review is to protect the security interest of the judgment creditor, courts have extremely limited power to issue stays and reduce supersedeas bonds. The Third District, for example, holds that *no* stay of a money judgment can be obtained unless a bond or other security in the *full amount* required by rule 9.310(b)(1) is obtained. *See Palm Beach Heights Dev. & Sales Corp. v. Decillis*, 385 So. 2d 1170, 1171 (Fla. 3d DCA 1980) **("the trial court is not empowered to deprive [the judgment holder] of their right to execute on the judgment by ordering any lesser bond or otherwise setting less onerous conditions")**.

Protection of the judgment holder is also the paramount concern in the Second District. The Second District has approved stays on conditions other than a bond in the full amount required by rule 9.310(b)(1) when there is adequate protection for the judgment, such as an adequate cash deposit. But when, as here, no reasonable security has been provided to protect the judgment, the Second District will vacate a stay ordered by the trial court. *Platt*, 921 So. 2d 5, at 7-9.

In the Second District's *Platt* decision, a judgment debtor sought a stay of a money judgment pending appeal. The judgment debtor in *Platt* argued that because of his poor financial condition, he could "post only a token amount" for a bond and would be "substantially prejudiced" if the execution of the judgment were not stayed. *Id.* at 6-7. The trial court granted a stay without requiring a bond. The Second District reversed and vacated the stay. *Id.* at 7-9.

In reversing, the Second District noted that the judgment defendant's poor financial position actually militated *against* a stay: "We fail to see how he would be prejudiced by an outstanding judgment during the pendency of an appeal if he has no assets or income that could be reached by the judgment creditor." *Id.* at 8. At a minimum, the Second District noted, the trial court could not determine what adequate conditions were available to protect payment of the judgment until the court required the judgment debtor "to submit to a deposition in aid of execution and a production of financial records." *Id.* Notably, Gawker Defendants opposed providing this very discovery to Mr. Bollea at the May 25, 2016 hearing.

In *Platt*, the Second District also disapproved of *any* stay that would prevent the judgment holder from establishing priority liens: "Without a full bond, the trial court should not grant a stay that prevents a judgment holder from establishing liens against real or personal property or that prevents a judgment holder from obtaining priority over subsequent creditors."

Id. This is of paramount importance in the instance case, because Gawker Defendants have incurred and are incurring substantial debts, are facing other lawsuits, and have publicly discussed their inability to pay the judgment entered in this case. They also recently confirmed hiring a banker to entertain offers to buy the company.

Like the judgment defendant in *Platt*, Gawker Defendants may seek a full stay of execution based on a "token amount" of security with virtually no protection for Mr. Bollea for the damages Gawker Defendants caused. *Platt* rejects such a stay. The judgment in this case should not be stayed unless Gawker Defendants provide adequate security to protect the $140.1 million judgment for Mr. Bollea's injuries. A bond for the entire amount of the judgment plus two years interest should be required. If a reduced bond is permitted, it should not be less than the cap under § 45.045 for each appellant.

B. Gawker Defendants Do Not Have a Substantial Probability of Prevailing on Appeal

Gawker Defendants' recent motions for new trial, judgment notwithstanding the verdict, and relief based on "fraud on the Court," raised the issues that Gawker Defendants are likely to raise on appeal. None of them have merit. As set forth in Mr. Bollea's briefing on those issues, because the Sex Video posted by Gawker Defendants was not a matter of public concern, it is not protected by the First Amendment under established caselaw. Further, there were no significant erroneous evidentiary rulings that are likely to result in a reversal, and the damages awarded by the jury, as well as the injunction entered by the Court, were well supported by the facts and the law. Mr. Bollea refers the Court to the extensive briefing on Gawker Defendants' post-trial motions which examine these issues in detail.

C. Mr. Bollea Could Suffer Significant Potential Harm if Gawker Defendants Are Granted a Stay Without Adequately Securing the Judgment

The potential harm to Mr. Bollea if execution is stayed and Gawker Defendants are permitted to appeal without posting a bond or to post a reduced bond to stay execution is significant. The risk of dissipation or diversion of assets is a great concern to Mr. Bollea in this case—Nick Denton's largest asset consists of stock in GMGI (a Cayman Islands company). Recently, Denton also put his New York condo (his second largest asset) up for rent. Gawker has a history of sending profits overseas to its sister company, Kinja, as an alleged "royalty" payment used to shelter Gawker's profits. These facts are explained in greater detail in Mr. Bollea's Request for Ruling on Claim of Privilege Associated with Transfer Pricing Study.

In addition to this risk of dissipation or diversion, shortly before trial an "investor," Columbus Nova (formally, "US VC Partners LP"), was reported to have acquired a minority stake in GMGI. This financial arrangement may also impact Mr. Bollea's ability to collect on the judgment and the priority of his liens.

Moreover, and having apparently concluded the above-described acquisition by Columbus Nova, Gawker also entered negotiations with Univision over the potential acquisition of an interest in various of the properties owned by the company—a representative of the company confirmed to the New York post that it has been in "discussions" about the creation or licensing of "Spanish-language versions of lifestyle sites Gizmodo and Lifehacker," two websites that Gawker operates under license from Kinja. Gawker Defendants have been reported to be entertaining offers from other potential investors and for sales of the company as well.

The questionable circumstances surrounding Denton's GMGI ownership and transfers of shares to his family members also raises serious concerns. The secrecy surrounding and the timing of Gawker's corporate restructuring and the transfer of shares to Denton's family

members is troubling when considered within the context of Gawker's transfers of profits overseas to avoid U.S. taxes. Gawker concedes that it is using Kinja as a tax shelter. This relationship appears to have been orchestrated by John Duncan, a lawyer specializing in corporate governance and taxation, who also was involved in the creation of Gawker Media, Ltd.

Given all these facts, the only way that it can be assured that Mr. Bollea will be paid if he prevails on appeal is if Gawker Defendants are required to post a good and sufficient bond. As the caselaw makes clear, the central issue in any proceeding to stay a judgment is protecting the collectability of the judgment. Gawker Defendants cannot be allowed to dissipate or sell their assets or take other actions to frustrate Mr. Bollea's ability to collect during the pendency of an appeal. That is exactly the result that the statutory scheme is meant to prevent.

D. Plaintiff's Entitlement to Discovery Under Section 45.045, Florida Statutes

In the event this Court orders a reduced bond, Mr. Bollea should be entitled to discovery. When an appellant posts a supersedeas bond for an amount less than that which would be required for an automatic stay pursuant to Rule 9.310(b)(i), *Fla. R. App. P.* (the full amount of the judgment plus twice the statutory rate of interest), the appellee is entitled to engage in discovery to determine whether the appellant has dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so. *See* § 45.045(3), *Fla. Stat.*; *BDO Seidman, LLP v. Banco Espirito Santo Int., Ltd.*, 26 So.3d 1 (Fla. 3d DCA 2009).

Given the facts and events described above, Mr. Bollea should be permitted to obtain discovery from Gawker Defendants and following third-parties to uncover documents and information associated with Gawker Defendants' true financial condition:

1. Kinja
2. GMGI

3. Columbus Nova

4. Univision

5. Citrin Cooperman & Company, LLC (accountants)

6. Silicon Valley Bank (banking institution and lender)

7. Denton's Family Members and Family Trust

Relevance is the "polestar" in a discovery request. *2245 Venetian Court Building 4, Inc. v. Harrison*, 149 So.3d 1176, 1179 (Fla. 2d DCA 2014). In post-judgment discovery, the matters relevant for discovery are those that will enable the judgment creditor to collect the debt. *Id.* This means that the creditor has the right to discover any assets the debtor might have that could be subject to levy or execution to satisfy the judgment, or assets that the debtor might have recently transferred. *Id.*

A non-party may be subject to post-judgment discovery where the judgment creditor can provide a good reason and close link between the non-party and judgment debtor. *Id.* Judgment creditors are allowed broad discovery, even if the discovery concerns property jointly owned with others. *Id.* Discovery from third-party lenders is also proper when a proper predicate has been laid. *General Elec. Capital Corp. v. Nunziata*, 124 So.3d 940, 943 (Fla. 2d DCA 2013).

Here, there is "good reason and close link" between Gawker Defendants and the third-parties from which Mr. Bollea wishes to seek discovery, and a proper predicate has been laid to demonstrate why Mr. Bollea is entitled to discovery from them regarding Gawker Defendants' assets.

WHEREFORE, Mr. Bollea respectfully requests that this Court deny any further stay of execution upon the Final Judgment. Alternatively, Mr. Bollea requests Gawker Defendants be required to adequately bond or secure the judgment, and if a reduced bond is permitted, that the

Court impose appropriate conditions such as allowing Mr. Bollea to domesticate the judgment and perfect his judgment lien, conduct financial discovery, require regular financial reports from Gawker Defendants and order other conditions deemed appropriate to protect Mr. Bollea's rights and interests.

DATED: June 8, 2016.

/s/ Kenneth G. Turkel

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