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.

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

Defendants.

Case No.: 12012447-CI-011

REPLY IN SUPPORT OF MOTION TO DISMISS DEFENDANT BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO, KFT

Blogwire Hungary Szellemi Alkotast Hasznosito, KFT (now known as Kinja, KFT) ("Kinja") by and through its undersigned counsel, specially appears and respectfully submits the following brief reply in support of its motion to dismiss.

Plaintiff Terry Gene Bollea's opposition to Kinja's motion to dismiss is an exercise in misdirection. Plaintiff fails to address Kinja's showing that Plaintiff (1) failed to allege any facts indicating that Kinja published the article at issue in this litigation, and (2) failed to allege any facts indicating that the actual publisher, Gawker Media, LLC ("Gawker"), a distinct business entity with its own operations, offices, employees and substantial revenues, is a mere instrumentality of Kinja, let alone that Kinja established or is using Gawker for an improper purpose such as avoiding creditors. Even putting aside plaintiff's pleading failures, each of which is fatal to his complaint, plaintiff already has taken searching discovery including the deposition of Scott Kidder, Kinja's Managing Director, whose testimony (and affidavit) confirmed that there is absolutely no basis for personal jurisdiction over Kinja. Rather than

addressing these key points, plaintiff attempts to divert the court's attention to outdated legal standards and misstatements of the record. The court should reject plaintiff's attempt to obscure the fact that Kinja is not a proper defendant and should grant Kinja's motion to dismiss.

1. **The inadequacy of plaintiff's allegations.** Plaintiff continues to misrepresent the pleading requirements for piercing the corporate veil. Plaintiff contends that under *Vantage View, Inc. v. Bali East Development Corp.*, 421 So. 2d 728 (Fla. 4th DCA 1982), "to state a cause of action against a parent corporation for the acts of its subsidiary, it is sufficient to allege the latter to be the alter ego or agent of the parent." Opp. at 3 (quoting *Vantage View*, 421 So.2d at 733). But as Gawker Media Group, Inc. demonstrated in its Reply in Support of its Motion to Dismiss, the Florida Supreme Court **overruled** *Vantage View* on **precisely** this issue and articulated the necessary elements of a veil-piercing claim. In *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984), the Supreme Court rejected the standard articulated in *Vantage View* that, to state a claim against a corporation based on the actions of its subsidiary or affiliate, requires alleging only that the latter is acting as an alter ego or agent of the former. *Id.* at 1117; *see also Steinhardt v. Banks*, 511 So. 2d 336, 338 (Fla. 4th DCA 1987) (explaining that "[t]he *Sykes* court **expressly rejected** the alter ego or instrumentality test which this court had applied for piercing the corporate veil in *Vantage View*") (emphasis added).[1] Instead, under *Sykes*, piercing the corporate veil – to hold one company liable for the conduct of another – requires showing that the entity actually engaged in the conduct was both (a) a mere instrumentality of the other entity and (b) was formed for an improper purpose, such as avoiding creditors. *Sykes*, 450 So. 2d at 1121.

2. Plaintiff's continued statement that *Sykes* adopted "*Vantage View's* liberal pleading standard," Opp. at 3 (emphasis omitted), is just flat out wrong and contradicted by the

[1] *Steinhardt* is nowhere addressed in plaintiff's Opposition.

plain text of *Sykes*. The court in *Sykes* approved of the **outcome** in *Vantage View* ***not*** because the latter case applied the proper pleading standard (which *Sykes* clearly held it did not) but because, in any event, the complaint at issue there included *both* "allegations of mere instrumentality *and* improper conduct." *Sykes*, 450 So. 2d at 1117 (emphasis in original). The single authority plaintiff cites offers him no support at all. That treatise recognizes, as it must, that after *Sykes*, a plaintiff must allege *both* "mere instrumentality *and* improper conduct" to state a cause of action for veil-piercing under Florida law. Bruce J. Berman, 4 Fla. Practice, Civil Procedure, R. 1.110 , ¶ 110.3 n.38 (2013) (emphasis added). Indeed, plaintiff's opposition recognizes that this is the applicable standard as set forth in *Sykes*. *See* Opp. at 3 ("allegations of mere instrumentality" and of "improper conduct" are required) (quoting *Sykes*, 450 So. 2d at 1117).

3. Plaintiff has plainly not met this standard. As set forth in Kinja's opening motion papers, plaintiff has not alleged that Gawker Media, LLC is an instrumentality of Kinja, nor has he asserted *any* improper conduct on Kinja's part in establishing or improperly using Gawker Media, LLC, a sister subsidiary of the same corporate parent, and the company whose conduct actually is at issue in this action. Mot. at 10-12. Plaintiff should not be permitted to get around that failure, which is utterly fatal to his claims, by relying on a legal standard that has not been good law for nearly thirty years.

4. As Kinja demonstrated in its opening papers, the fact that Kinja owns the domain name Gawker.com and licenses trademarks to Gawker Media LLC, does not alter their status as legally distinct entities. *Id.* at 11. Moreover, plaintiff's speculation (in a footnote) about the nature of transactions between Gawker and Kinja, *see* Opp. at 2 & 6 n.2, does not cure his complaint's patent pleading failures, *see* Mot. at 11-12.

5. Finally, plaintiff is simply incorrect in asserting that he has adequately pleaded that Kinja is directly liable for the conduct alleged, and so need not rely on a theory of piercing

the corporate veil. *See* Opp. at 2. As set forth in Kinja's opening papers, plaintiff has not attributed any conduct to Kinja at all, other than licensing a domain name – conduct which is not in any way tortious. Rather, plaintiff's Amended Complaint simply lumps all the different Gawker businesses together as one entity – "Gawker Media" – and then attributes all the allegedly tortious conduct to that fictitious entity. *See* Am. Compl. ¶¶ 19-20; Mot. at 2-4, 8. Fundamental principles of business law do not permit such an egregious disregard for the corporate form. *See Sykes*, 450 So. 2d at 1120 (explaining that "every corporation is organized as a business organization to create a legal entity that can do business in its own right" as distinguished from its owners, and that disregarding such a rule would "completely destroy the corporate entity as a method of doing business") (quoting *Advertects, Inc. v. Sawyer Indus., Inc.*, 84 So. 2d 21, 23-24 (Fla. 1955)).

6. **No need for jurisdictional discovery**. As demonstrated in Kinja's opening brief, Plaintiff has already taken substantial discovery directly addressing the corporate structures of Kinja and Gawker Media, LLC, and there is no basis for authorizing plaintiff to take still more jurisdictional discovery. Indeed, Plaintiff is simply misrepresenting the facts in asserting that he has had "no opportunity to take jurisdictional discovery of any kind." Opp. at 6. Plaintiff has deposed multiple Gawker witnesses, including Scott Kidder, Managing Director of Kinja, who gave detailed testimony regarding the relationships between the various Gawker entities, and in particular concerning Kinja. *See* Mot. Ex. A. Moreover, Gawker Media, LLC, the proper defendant in this case, provided verified interrogatory responses to plaintiff in which it set forth the role of each Gawker entity, including Kinja.[2] *See* Mot. Ex. D.

[2] The court should reject plaintiff's suggestion that discovery provided by Gawker Media, LLC is somehow inadequate. *See* Opp. at 6 n.2. The legal issue before the court is whether Gawker Media, LLC is an instrumentality of Kinja and whether Gawker Media, LLC was established for an improper purpose, *e.g.*, avoiding creditors. As a result, discovery from Gawker Media, LLC in fact is directly on point, and

7. Plaintiff's implication that he was somehow sandbagged because Kinja filed its motion to dismiss after plaintiff deposed Gawker's witnesses likewise severely distorts the facts. Plaintiff was aware, well in advance of those depositions, that Kinja planned to move to dismiss on the ground that it cannot be liable for the conduct of another subsidiary of its corporate parent. As set forth in the exhibits attached to Kinja's opening motion, counsel for the Gawker Defendants has made clear, for over a year, that none of the Gawker entities, other than Gawker Media, LLC, is a proper party in this case. *See* Mot. Exs. B & C (email correspondence from counsel for the Gawker Defendants to counsel for plaintiff). Indeed, while this dispute was in federal court, the Gawker Defendants filed a motion to dismiss, which sought dismissal of all of the Gawker entities other than Gawker Media, LLC, on the same grounds asserted now. Kinja had not yet been served and so did not join the motion, but Gawker noted that "the same arguments in favor of dismissal . . . would apply to [Kinja] as well." *See* Motion to Dismiss, Dec. 7, 2012, at 1 n.1 (relevant excerpts attached hereto as Exhibit 1).

8. Moreover, not only was plaintiff on notice of the dismissal grounds Kinja asserts prior to deposing Gawker's witnesses, but his counsel in fact used those depositions to question witnesses about Kinja and the nature of its relationship with Gawker Media, LLC. During the deposition of Scott Kidder, Gawker Media, LLC's corporate designee and a director of Kinja, counsel for plaintiff questioned Mr. Kidder about Kinja, including about "the relationship between Kinja KFT and Gawker Media, LLC," – the precise issue upon which plaintiff seeks additional discovery. Kidder. Tr. 47:19-20 (relevant pages attached hereto as Exhibit 2). In response to that line of questioning, Mr. Kidder explained that Kinja is an "intellectual property

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separate discovery from Kinja is unnecessary. Moreover, Gawker Media, LLC provided complete, accurate, and sworn information about other corporate entities to which it is related in an effort to cooperate with plaintiff and in the hopes that doing so would avoid this wholly unnecessary motion practice. Requiring Kinja separately to provide the same information would elevate form over substance and would punish Gawker for being cooperative.

holding and technology development company" that "owns trademarks an domain names for all of the sites that Gawker Media, LLC . . . operates." *Id.* at 47:17-18, 49:6-8. Later in the deposition, Mr. Kidder confirmed that Kinja "does not . . . hold the copyright to any content that has appeared on any Gawker Media websites." *Id.* at 220:21-25. In short, there is simply no basis for further discovery where the relevant facts are clear: Kinja did not publish the Gawker Story and there are no grounds for piercing the corporate veil separating (by two steps) Kinja from Gawker Media, LLC (the actual publisher).

9. **Amendment would be futile.** Finally, the court should deny plaintiff leave to amend, since amendment would be futile. *See Greene v. Well Care HMO, Inc.*, 778 So. 2d 1037, 1041 (Fla. 4th DCA 2001) (a court may deny leave to amend where "amendment would be futile"). Indeed, plaintiff concedes that this court may properly deny leave when "there is no possibility of amending the pleading to state [a] cause of action." Opp. at 7. In light of the substantial discovery already provided to plaintiff about Kinja, plaintiff could not in good faith allege (a) that Kinja itself engaged in tortious conduct in connection with the Gawker Story, (b) that it was established for an improper purpose and that Gawker Media, LLC is a mere instrumentality such that it can be held responsible for acts by Gawker Media, LLC, or (c) that there is any basis to establish jurisdiction over Kinja in Florida. Accordingly, amendment would be futile, and a complete waste of the court's and the parties' resources given that plaintiff is actively litigating his claims against Gawker Media, LLC.

10. For these reasons, and the reasons set forth in Kinja's opening motion papers, Kinja respectfully requests that the Court grant its motion and dismiss plaintiff's claims against it with prejudice.

Dated: January 13, 2014

Respectfully submitted,
THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January 2014, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

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