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

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

REPLY IN SUPPORT OF PLAINTIFF TERRY GENE BOLLEA'S MOTION FOR SETTING OF TRIAL DATE AND FOR SEVERANCE OF CLAIMS AGAINST KINJA, KFT

I. INTRODUCTION

As of the date of the hearing on this motion, Mr. Bollea's claims against Gawker will have been pending for **two years and one week** exactly.[1] Fact discovery has been ongoing for almost a year-and-a-half: since May 2013. Gawker, Nick Denton, and A.J. Daulerio served answers to the First Amended Complaint in May 2014—five months ago. Heather Clem's motion to dismiss will be heard concurrently with this motion, meaning she either will be

[1] Mr. Bollea's claims against the Gawker defendants were initially filed in federal court the same day that he initiated his action in this Court: October 15, 2012. Gawker's attempt to argue against the two year marker is in direct conflict with its counsel's characterization of the pendency of this case in its recently-filed Reply brief in support of Kinja's appeal. *See* Ex. A (Kinja KFT's 10/17/14 Reply Brief, p. 19: asking the DCA to dismiss Kinja KFT "after more than two years of litigation [and] copious discovery").

dismissed or ordered to answer the First Amended Complaint by a certain date in the near future. Once Heather Clem answers, the case will be "at issue" as to all defendants with one exception: Kinja KFT (the current name of defendant Blogwire Hungary, which Gawker inexplicably refers to by its old name, rather than the name it has been using extensively in public for more than a year, including in the upper right corner of the Gawker.com homepage). Kinja's objections to jurisdictional discovery were rejected by this Court, and Kinja's two motions to dismiss both were rejected as well, one without prejudice as to personal jurisdiction and the other on First Amendment grounds. Kinja has appealed the denial of its motion to dismiss regarding personal jurisdiction despite the fact that the order was not final (and thus not appealable on an interlocutory basis) and permitted Mr. Bollea to take jurisdictional discovery prior to a final hearing on the personal jurisdiction issues.

The Gawker defendants have shown, time and again, during the two years of this lawsuit, that they will say and do anything to prevent this case from proceeding to trial. They have served any and all forms of discovery, upon parties and nonparties alike, no matter how peripheral, ancillary or outright irrelevant to the case; they have taken any and all issues to the court of appeal on an interlocutory basis (even when the rules do not allow interlocutory appeals under those circumstances); and employed all other measures available for the purpose of causing perpetual delay of the trial of this matter. For the reasons discussed herein, and in the underlying motion, the Gawker defendants should not be permitted to continue this game. Two years is long enough for the parties to wait for a trial date. A trial date of June 1, 2015 is reasonable, and would provide the parties with a total of more than two years of discovery (aided by a respected and experienced Special Discovery Magistrate), as well as a total of two years and eight months of litigation, during which time defendants will have had more than

sufficient opportunity to conduct full and complete discovery of all relevant issues, bring all justified motions, and undertake all other forms of reasonable litigation, within that lengthy period of time. Notwithstanding Gawker's contentions to the contrary, this is a relatively simple case: Gawker obtained and edited an illegal video depicting Mr. Bollea naked and having sex in a private bedroom, posted it to the Internet, refused to remove it when Mr. Bollea repeatedly demanded removal, and Gawker profited handsomely from the 5+ million people who flocked to its website to watch it throughout that six-month period. The issues are relatively straightforward, not complex, and there is no reason why a case like this should require even two years, let alone two years and eight months, to be resolved. The only reason why the case has gone on this long is because Gawker defendants have employed every means available to cause and perpetuate delay. Its bad faith litigation tactics in this regard should be curbed, and should come to an end now.

If the parties and Court are forced to wait for the Second DCA's decision on Kinja KFT's appeal, before even setting the matter for trial, the case will drag on potentially another two years, or more. Briefing closed on the appeal last Friday, October 17. Kinja KFT concurrently filed an Extraordinary Motion for Oral Argument. Ex. B. It could take six months to a year for the Second DCA to issue a decision. If the appeal is denied (as it should be), then jurisdictional discovery will finally commence, discovery motions likely will be filed and Kinja KFT eventually (and presumably) will file yet another motion to dismiss, and any adverse outcome to Kinja KFT presumably will, again improperly, be appealed for yet another year or more.

Mr. Bollea's claims need to proceed to a trial on the merits. Waiting two more years, or more, on top of the past two years, is unacceptable and highly prejudicial. Mr. Bollea thus brings this motion to sever Kinja KFT, so that he may expeditiously and efficiently seek justice,

and present his claims to a jury of his peers during a two-week jury trial commencing June 1, 2015.

Gawker's and Kinja's strategy is clear: to use the appeal on the personal jurisdiction issues as a means to delay the trial as to Gawker for as long as possible. They should not be permitted to continuously delay the trial. The old adage "justice delayed is justice denied," applies. Mr. Bollea's motion should be granted, for at least the following reasons:

First, in Florida, cases are set for trial when the case is "at issue," not when the defendant decides it is ready to proceed. Florida courts routinely reject arguments (such as those made by Gawker and Kinja) that a case should not be set for trial because it is "complicated" or there is still some outstanding discovery that needs to be taken.

Second, it is appropriate and within this Court's jurisdiction to sever Kinja KFT. The jurisdictional rule cited by Gawker applies **only** to orders of the trial court that interfere with an appellate court's jurisdiction. (Gawker's and Kinja's claim that **any** action of this Court would so interfere is based on a quotation from a Florida practice treatise that is taken **out of context** and is **not** an accurate statement of the law or the views of the treatise's author.) Whether Kinja's claims are severed for a later trial has **no effect whatsoever** on Kinja's appeal. Thus, the pending appeal of Kinja does not deprive this Court of jurisdiction to sever the claims against Kinja.

Third, the claims against Kinja should be severed. Kinja's liability derives from Gawker's actions, and Gawker offers no persuasive argument why the claims cannot be tried separately. In fact, severing Kinja will conserve judicial and party resources, because the trial against Gawker could potentially resolve the claims against Kinja, and thus end the lengthy Kinja appellate process.

Fourth, a June 1, 2015 trial date is reasonable and appropriate, especially given that:

(a) discovery has been ongoing (and active) since May of last year;

(b) the persons with first-hand knowledge of the central facts of this case (with only one exception) have already been deposed;

(c) the outstanding non-party discovery sought by Gawker seeks information that is ancillary to the main issues in this case; and

(d) any disputes regarding Gawker's subpoenas for the peripheral information will be resolved by the Special Discovery Magistrate at a hearing on Monday, October 20.

II. THIS COURT SHOULD SET THE CASE FOR TRIAL

Florida law provides that a case should be set for trial when the case is "at issue." Fla. R. Civ. P. 1.440. "An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading." *Id.* Thus, once the Court resolves Heather Clem's motion to dismiss, the case should be set for trial.

Gawker's complaints about the supposed need for further discovery, two years into the case, are irrelevant to a Court's decision to set a case for trial. In fact, according to the DCA, it is reversible error to take that issue into account. In *Garcia v. Lincare*, 906 So.2d 1268 (Fla. 5th DCA 2005), the Court of Appeal granted a writ of mandamus where a trial court did not set a trial date because discovery supposedly needed to be concluded: "On each occasion, the trial court sustained the objections, concluding that it would not set the case for trial until discovery had been completed. We think the trial court's conclusion misapprehends the applicable rule. **Procedural readiness for trial differs from actual readiness for trial**." *Id.* at 1268 (emphasis added). The Court of Appeal held that there was a "mandatory duty" to set the case for trial.

Id.; *accord Rollie ex rel. Dabrio v. Birken*, 994 So.2d 1129, 1130 (Fla. 3d DCA 2008). Gawker's arguments are based on discovery that Gawker still has not served, two years into the case, and/or discovery that Gawker unreasonably delayed in serving for the first 18 months of the case. Gawker cannot unreasonably delay in serving discovery, and then seek to benefit by that delay by attempting to delay (perpetually) the trial date.

III. THE CLAIMS AGAINST KINJA SHOULD BE SEVERED

A. This Court Has Jurisdiction to Sever Kinja KFT

Gawker and Kinja argue that this Court has no jurisdiction to sever the claims against Kinja, based on the fact that a **totally unrelated** appeal on an issue of personal jurisdiction is pending. Gawker and Kinja offer no explanation as to how a severance order could affect Kinja's appeal in any way—it could not.

Under Florida law, the Court has jurisdiction to sever Kinja. "[A] trial court is divested of jurisdiction upon notice of an appeal **except** with regard to those matters which do not interfere with the power and authority of the appellate court or with the rights of a party to the appeal which are under consideration by the appellate court." *Palma Sola Harbour Condominium, Inc. v. Huber*, 374 So.2d 1135, 1138 (Fla. 2d DCA 1979) (emphasis added). "[A] notice of appeal **does not** divest a trial court of jurisdiction to do things which do not interfere with the power of the appellate court or the rights of a party which are under consideration by the appellate court." *Winter & Cummings v. Len-Hal Realty, Inc.*, 679 So.2d 1224, 1224 (Fla. 4th DCA 1996) (emphasis added). Because severance of Kinja will not interfere with the Court of Appeal or with Kinja's rights in that appeal, it is not outside this Court's jurisdiction to sever.

The case of *Spencer v. DiGiacomo*, 56 So.2d 92, 94 (Fla. 4th DCA 2011), illustrates the proper analysis here. In *Spencer*, the issue was whether the trial court had jurisdiction to issue a satisfaction of judgment when an appeal on an issue of prejudgment interest was pending. Contrary to Gawker's and Kinja's argument, the court **did not** simply make a *per se* holding that the trial court acted in excess of jurisdiction. Rather, the court carefully analyzed if the issuance of the satisfaction would interfere with the appellate proceeding; and only after concluding that it would, it held that the trial court had exceeded its jurisdiction.

Gawker's opposition takes a quote from a Florida practice treatise **completely out of context** to argue that there isn't **anything** that this Court could order with respect to Kinja that would not be jurisdictionally barred by the appeal. (The argument is patently ridiculous—under Gawker's theory, the Court would not even have jurisdiction to grant Kinja additional time to file an opposition in response to Mr. Bollea's severance motion). The treatise does **not** support Gawker's argument, stating instead: "Nearly any action in the trial court during the pendency of the appeal could be characterized as an interference with the appellate court's jurisdiction. For example, a defendant who has appealed a nonfinal order determining the existence of personal jurisdiction is not required to give a deposition during the pendency of the appeal because the very question on the appeal is whether the trial court has the right to proceed with the exercise of jurisdiction over that defendant." 2 Philip J. Padovano, *Florida Practice: Appellate Practice* § 24:6 (2014).

In other words, consistent with Florida law, trial court rulings that **interfere** with appellate jurisdiction are impermissible, but trial court rulings that **do not** interfere are acceptable and appropriate. Gawker and Kinja offer no argument as to how a ruling severing Kinja possibly would interfere with the Court of Appeal's jurisdiction. The issues before the

Court of Appeal will proceed in exactly the same way whether Kinja is severed for later trial or not. This is in stark contrast to the issue identified by Judge Padovano—a deposition which the party would have the right to avoid if personal jurisdiction is lacking.

Many cases **expressly refute** Gawker's and Kinja's position regarding Judge Padovano's treatise. For instance, courts retain jurisdiction to enforce judgments despite pending appeals, because enforcement does not interfere with the appeal. *Mann-Stack v. Homeside Lending, Inc.*, 982 So.2d 72, 74 (Fla. 2d DCA 2008). Similarly, an appeal from a convict's sentence does not deprive the trial court of jurisdiction to hear motions for post-conviction relief with respect to other aspects of the proceeding. *Cross v. State*, 930 So.2d 863, 864 (Fla. 2d DCA 2006). Likewise, a trial court can award attorney's fees while an appeal is pending on the merits. *Schultz v. Schickedanz*, 884 So.2d 422, 424 (Fla. 4th DCA 2004). Trial courts also have the power to change the nature of a judgment lien and apply it to an appeal bond. *Winter & Cummings v. Len-Hal Realty, Inc.*, 679 So.2d 1224, 1224 (Fla. 4th DCA 1996).

Thus, Gawker defendants' position is completely meritless—this Court **does** have the power to sever Kinja, notwithstanding an appeal that would not be affected by the severance.

B. This Court Should Exercise Its Discretion to Sever

Gawker's argument that the issues of Gawker's and Kinja's cases are "intertwined" and thus severance is inappropriate is without merit. The issue is not **whether** the two cases are connected; the issue is **how**. In this case, (1) the resolution of the Gawker trial could also resolve Kinja's liability, and (2) there is no possibility of inconsistent verdicts, because Gawker and Kinja are under unitary control and have the same counsel.

Gawker argues that Florida has a preference for a single trial, but the case law makes clear that the decision to sever is well within the trial court's discretion. *Yost v. American Nat'l*

Bank, [redacted] So.2d [redacted], [redacted] (Fla. 1st DCA 1990) (holding that "a severance for separate trial is within the discretion of the trial court"); *Roberts v. Keystone Trucking Co.*, 259 So.2d 171, 174 (Fla. 4th DCA 1972) (holding that "the trial court has broad discretion in the interest of effective judicial administration . . . ."). Severance is appropriate when a single trial can "cause inconvenience." *Yost*, 570 So.2d at 352.

Gawker's argument that cases cannot be severed where there is any relationship between the claims also is without support. Florida courts have approved the severance of related claims. *Utica Mutual Ins. Co. v. Clonts*, 248 So.2d 511, 514 (Fla. 2d DCA 1971) (holding trial court abused its discretion in failing to sever insurance claims from the main action). In Florida, the issue with severance comes when the claims are inextricably intertwined, not simply related. Here, Kinja's liability is **derivative** of Gawker's; it is not intertwined with it. Moreover, the two entities are represented by the same counsel, and there is no danger of prejudice to either of them.

The cases cited by Gawker and Kinja therefore are distinguishable. None of them involves a situation where one of the parties has appealed on the basis of lack of jurisdiction. It is worth noting that Kinja's and Gawker's supposed objection to the claims being tried separately is **completely** inconsistent with Kinja's jurisdictional appeal, which **seeks to dismiss Kinja** and to force Mr. Bollea to bring his claims against Kinja **separately**, in another jurisdiction. Thus, Gawker and Kinja want to have their cake and eat it too.

Severance will ensure that Mr. Bollea's claims are expeditiously and efficiently brought to trial, while also potentially conserving judicial resources. If Kinja is not severed, Gawker and Kinja will have succeeded in holding the case hostage and delaying a trial on the merits indefinitely.

IV. A JUNE 2015 TRIAL DATE IS REASONBLE

This case has been pending since October 15, 2012—more than two years. Gawker's argument that it is unreasonable to require a trial date nearly three years after the filing date is unfounded:

1. Even if the "commencement date" is taken as March 2013, when the case was remanded back to this Court, which would still mean that a June 2015 trial date would be more than two years after the claims against Gawker entered this litigation, which is plenty of time to prepare a case for trial.
2. There is no basis for construing the "commencement date" of this litigation as when the motion to dismiss was granted. During the time the motion to dismiss was pending, the parties took extensive discovery, deposed all key witnesses (except one), and engaged in a tremendous amount of motion practice. Gawker does not, and cannot, deny this.
3. While some important discovery is still pending, Gawker offers no evidence as to why it cannot be completed prior to June 1, 2015. Mr. Bollea is willing to cooperate fully with defendants to complete all legitimate discovery expeditiously, and has been willing to do so for the past two years.
4. Gawker's recitation of the facts relating to discovery disputes is extremely dishonest and inaccurate. The only aspects of those discovery disputes that are relevant here are: (1) all are set for hearing on October 20 and soon will be resolved, and (2) they have nothing to do with the central issue of this case—Gawker's conduct, whether it invaded Mr. Bollea's rights, whether Gawker had a First Amendment right to do it,

and Mr. Bollea's damages. Those issues have been extensively discovered; much of the remaining discovery is peripheral or outright irrelevant.

V. CONCLUSION

For the foregoing reasons and those stated in the moving papers, once Heather Clem's motion to dismiss is disposed of, this Court should sever Kinja and set a two week jury trial to commence June 1, 2015.

DATED: October 20, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 20th day of October, 2014 to the following:

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