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.
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**PLAINTIFF TERRY GENE BOLLEA'S OPPOSITION TO BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO, KFT'S MOTION TO DISMISS**

## I. INTRODUCTION

The motion to dismiss filed by Blogwire Hungary Szellemi Alkotast Hasznosito (now known as Kinja KFT; hereinafter "Kinja") puts the cart before the horse. Kinja is attempting to obtain a dismissal of the claims against it based on its bare assertion that it has no contacts with Florida and is not responsible for the conduct alleged in the Complaint. The Complaint clearly states a cause of action against Kinja, and Bollea is entitled to jurisdictional discovery to test the veracity of Kinja's claim that it has no contacts with the forum and there is no other basis for jurisdiction. Accordingly, the motion to dismiss should be denied.

Finally, even if Bollea's claims against Kinja are not adequately pleaded, Bollea should be granted leave to amend and to make a fuller statement of its claims against Kinja.

## II. BOLLEA'S CLAIMS AGAINST KINJA ARE ADEQUATELY ALLEGED.

A motion to dismiss may only be granted where the complaint cannot be construed to state **any** cause of action against a defendant. *Nicholson v. Kellin*, 481 So.2d 931, 936 (Fla. 5th DCA 1985). The pleadings are **liberally construed** and all allegations therein are **taken as true** and all inferences are made in the **plaintiff's favor**. *Wallace* v. Dean, 3 So.3d 1035, 1042-43 (Fla. 2009). "The court must confine itself strictly to the allegations within the four corners of the complaint." *Pizzi v. Central Bank & Trust Co.*, 250 So.2d 895, 897 (Fla. 1971) (internal quotation omitted). It is **reversible error** for the Court to consider **extrinsic evidence** in ruling on a motion to dismiss. *Pesut v. National Ass'n of Securities Dealers*, 687 So.2d 881, 882 (Fla. 2d DCA 1997) (reversing trial court dismissal order where trial court considered representation of defendant as to its conduct in deciding to dismiss).

Bollea has sufficiently alleged that Kinja is responsible for the tortious conduct alleged in the First Amended Complaint. Kinja concedes that Bollea alleges that Kinja, along with the other Gawker Media entities, is responsible for the publication of the Sex Tape. *First Amended Complaint*, ¶¶ 19-20, 28-29, 35. Specifically, Bollea alleged that Kinja "published at the Gawker Site the Video depicting Plaintiff having private consensual sexual relations… and the Narrative graphically describing the actions taking place in the Video in lurid detail", *id.* ¶ 28; that Bollea "made repeated demands to [Kinja]… to remove the Video from the Gawker Site" and that Kinja failed to do so, *id.*; that "the publishing of the Video and the Narrative by [Kinja was] outrageous and egregious", *id.* ¶ 29; and that if the Sex Tape and Sex Narrative continue to be "posted, published, distributed, disseminated and exploited by [Kinja]", Bollea will continue to suffer

severe emotional distress and damage, *id.* ¶ 35.

Bollea also alleged that Kinja owns the internet domain name where the Sex Tape and Sex Narrative were published. *First Amended Complaint* ¶ 18 ("At all relevant times, [Kinja] was and is a Hungarian off-shore company, and owns the Internet domain name GAWKER.COM."). Moreover, Bollea alleges that Kinja is responsible for the acts of the other defendants based on agency, instrumentality and similar legal theories. *First Amended Complaint* ¶ 24.

**Those allegations are sufficient to defeat a motion to dismiss.** Bollea has alleged that Kinja committed the tortious acts alleged in the Complaint, and that in the alternative it was legally responsible for those who did. Kinja is on full notice as to the nature of Bollea's claims.

Kinja's argument that Bollea has not sufficiently pleaded a veil piercing claim is without merit. The standards for pleading such claims are very liberal. "[I]n order 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." *Vantage View, Inc. v. Bali East Development Corp.*, 421 So.2d 728, 731 (Fla. 4th DCA 1982), *overruled on other grounds*, *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (Fla. 1984).

Kinja argues that *Vantage View*'s pleading standard was overruled in *Sykes*. However, this argument is patently false—*Sykes* expressly states that *Vantage View*'s **liberal pleading standard** remains in place and that only *Vantage View*'s holding regarding substantive law (not pleading) that the veil could be pierced in the absence of improper or inequitable conduct, was being overruled. "[The *Vantage View* court's] decision was correct because allegations of mere instrumentality and improper conduct clearly state a cause of action." *Sykes*, 450 So.2d at 1117. A leading Florida treatise confirms that *Sykes* did not disturb *Vantage View*'s pleading standard:

"Although *Vantage View* is no longer good law for other reasons [citing *Sykes*], the Supreme Court noted in the *Sykes* case that the *Vantage View* decision was nevertheless correct as to the elements of the cause of action 'because allegations of mere instrumentality and improper conduct clearly state a cause of action'." Bruce J. Berman, *Berman's Florida Civil Procedure*, Section 110.3[2][1] n. 38 at 134 (2013).[1]

*Vantage View* is specific and on point on what the pleading standard is in veil piercing lawsuits. The caselaw cited by Gawker Media involving the pleading of other sorts of claims is distinguishable. *Valdes v. GAB Robins North America, Inc.*, 924 So.2d 862, 867 (Fla. 3d DCA 2006), upholds a dismissal of a false imprisonment count which failed to allege how the defendant was responsible for the plaintiff's arrest; it does not affect the *Vantage View* standard for veil piercing claims. *Beckler v. Hoffman*, 550 So.2d 68, 70 (Fla. 5th DCA 1989), involved a claim for premises liability for rape, where the duty of care is set at gross negligence and thus the plaintiff must allege why specifically the landowner was responsible for preventing the rape. There is no heightened standard of proof for veil piercing claims. *Eagletech Communications, Inc. v. Bryn Mawr Investment Group, Inc.*, 79 So.3d 855, 863 (Fla. 4th DCA 2012), holds that a civil conspiracy count failed to state a cause of action when it did not allege the act that the defendants conspired to engage in. It does not speak to pleading standards for veil piercing claims (controlled by *Vantage View*) and in any event, the First Amended Complaint is clear that the act that the defendants are responsible for is the publication of the Sex Tape and Sex Narrative on the Gawker website.

The discussion of pleading standards in *Continental Baking Co. v. Vincent*, 634 So.2d

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[1] Even if Kinja were correct that Bollea has not sufficiently stated a veil piercing claim, the First Amended Complaint nonetheless alleges that Kinja is directly responsible for the publication of the Sex Tape. Accordingly, it still states a cause of action against Kinja.

242, 244 (Fla. 5th DCA 1994), stating how Florida pleading standards differ from federal standards, is dicta. The court did not evaluate the sufficiency of the motion to dismiss in that case and was merely commenting on proceedings that had occurred in the trial court. In any event, the claims asserted in *Vincent* had nothing to do with piercing the corporate veil.

*Lawrie v. Ginn Cos.*, 2010 WL 3746725 (M.D. Fla. Sep. 21, 2010), is a federal case interpreting the pleading standard in Fed. R. Civ. P. 8 (which is inapplicable to Florida pleading standards as noted in *Vincent*, a case relied on by Kinja). *Lawrie* involved a claim under RICO and for civil conspiracy; it does not supplant *Vantage View* as the pleading standard for veil piercing claims in Florida.

*Dr. Navarro's Vein Centre v. Miller*, 22 So.3d 776, 778 (Fla. 4th DCA 2009), involved a medical malpractice claim where there are pre-suit screening requirements, Fla. Stat. § 766.106(2), that do not exist for veil piercing claims.

## III. THE CLAIMS AGAINST KINJA MAY NOT BE DISMISSED FOR LACK OF PERSONAL JURISDICTION UNTIL JURISDICTIONAL DISCOVERY IS CONDUCTED.

Kinja also argues that Bollea has failed to allege facts sufficient to establish personal jurisdiction over Kinja. However, Kinja concedes (as it must) that where the corporate veil may be properly pierced and a foreign corporation is liable for the acts of its subsidiary, the veil may also be pierced with respect to jurisdictional issues.

Because Kinja has submitted evidence on the issue of whether it is subject to the personal jurisdiction of this Court, Bollea is entitled to jurisdictional discovery on these issues. *Gleneagle Ship Management Co. v. Leondakos*, 602 So.2d 1282, 1284 (Fla. 1992) ("There can be no doubt that this Court has the judicial power to hear and determine questions involving its jurisdiction

either of the person or of the subject matter nor that, in order to resolve fact issues on which jurisdiction depends, the ordinary process of the court is available to cause evidence bearing on the fact in issue to be produced."). Kinja did not answer the First Amended Complaint and immediately moved to dismiss; there has thus been no opportunity to take jurisdictional discovery of any kind. While discovery has occurred with respect to Gawker Media, LLC, Bollea is entitled to investigate the facts asserted by Kinja before any decision is made dismissing Kinja from the case.[2]

Importantly, Kinja, like its parent company Gawker Media Group, Inc., waited until **after** the New York depositions to file this motion, thereby depriving Bollea of any opportunity to cross-examine Scott Kidder, who appeared as Gawker Media LLC's corporate designee witness, or any other witnesses, regarding Kidder's claims in his affidavit. This obvious procedural unfairness precludes Kinja from prevailing on its jurisdictional objection until discovery on the specifics of the objection takes place.

*McFadden Ford, Inc.v. Mancuso ex rel. Mancuso*, 766 So.2d 241, 242 (Fla. 4th DCA

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[2] Kinja attempts to rely on Gawker Media, LLC's responses to discovery to establish that Kinja is separate. Of course, Kinja cannot contend that it is completely separate, on the one hand, while also contending that discovery responses served by that supposedly separate party, Gawker Media, LLC, conclusively establish the lack of jurisdiction over Kinja. As Kinja contends it is a separate entity, Bollea is entitled to obtain jurisdictional discovery from the supposedly separate Kinja rather than being bound by whatever Gawker Media, LLC says.

Kinja contends that the licensing of trademarks does not justify veil piercing. However, this is not a basis for denying jurisdictional discovery. First, Kinja likely does much more than simply license trademarks. It owns the URL address gawker.com which hosted the Sex Tape and Sex Narrative, and Kinja is controlled by the same individuals as Gawker Media, LLC. Second, just because Kinja licenses trademarks does not mean that the transactions were arms length. For instance, abnormally high license fees could evidence a scheme to defraud creditors which can serve as a basis to pierce the corporate veil. *Cf. North American Clearing, Inc. v. Brokerage Computer Systems, Inc.*, 666 F. Supp. 2d 1299, 1308 (M.D. Fla. 2009) (holding that while merely directing a subsidiary or sister company to enter into contracts was insufficient to pierce the corporate veil, the veil may be pierced under Florida law if the plaintiff shows that the defendant entered into a software license that left it unable to pay the plaintiff's claim).

2000), cited by Kinja, permitted **18 months** of jurisdictional discovery before allowing a dismissal.[3]

Bollea is entitled to take jurisdictional discovery before any dismissal may occur based on Kinja's claim of lack of personal jurisdiction. The motion should be denied.

## IV. IF THE COURT FINDS THAT THE CLAIMS AGAINST KINJA ARE INSUFFICIENTLY PLEADED, BOLLEA SHOULD BE GRANTED LEAVE TO AMEND.

Leave to amend should be liberally granted when a party's pleading is insufficient. Denial of leave to amend is an abuse of discretion unless the moving party shows there is no possibility of amending the pleading to state of cause of action, typically because there is no legal theory to support the claim or the party has had several chances to amend. "[T]he trial court is required to exercise the utmost liberality by giving the pleading party every opportunity to correct the defects in the challenged pleading, by dismissing it without prejudice and with leave to amend, provided that the pleading party requests leave to amend." Bruce J. Berman, *Berman's Florida Civil Procedure*, ¶ 1404.4[2][e] at 180 (2013). "Dismissal without leave to amend a petition at least one time has been held to be an abuse of discretion, particularly where it is not clear the complaint could not be made more definite and certain." *Orbe v. Orbe*, 651 So.2d 1295, 1298 (Fla. 5th DCA 1995).

Here, the First Amended Complaint was the first pleading that named Kinja as a defendant. Bollea should have the opportunity to plead additional allegations supporting his cause of action if the Court determines he has not made a sufficient pleading.

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[3] Kinja concedes that the dismissal for lack of personal jurisdiction in *Blumberg v. Steve Weiss & Co.*, 922 So.2d 361, 363-64 (Fla. 3d DCA 2006), occurred after discovery.

## V. CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied. Jurisdictional discovery regarding Kinja's contacts with the forum and Bollea's veil piercing claim should proceed. Alternatively, if the motion is granted, Bollea should be granted 30 days leave to amend his Complaint.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service mail this 6th day of January, 2014 to the following:

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