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, *et al.*,

Defendants.
_____/

GAWKER DEFENDANTS' REPLY
IN SUPPORT OF MOTION TO DISMISS

Defendants Gawker Media, LLC ("Gawker"), A.J. Daulerio, Nick Denton, and Blogwire Hungary Szellemi Alkotast Hasznosito, KFT now known as Kinja, KFT (collectively the "Gawker Defendants"), through their undersigned counsel, hereby submit the following reply in support of their motions to dismiss:

1. In light of the Second District Court of Appeal's January 17, 2014 decision, this is now a very simple motion. Plaintiff's briefing in opposition to the motion to dismiss contended that the Gawker Story and Excerpts (a) fall outside of the protections of the First Amendment, (b) did not involve a matter of public concern, (c) were commercial uses, and (d) their publication could be punished because the underlying sex tape had been illegally recorded. In controlling precedent, the District Court has since rejected each of those contentions as a matter of law. *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. 2d DCA 2014) (the "DCA Ruling") (attached hereto as Exhibit A).

2. Specifically, applying a *de novo* standard of review, *id.* at 1200, the District Court made the following threshold legal determinations:

(a) **Public Concern:** "the report and the related video excerpts address a matter of public concern," *Bollea*, 129 So. 3d at 1200-01; *see also id.* at 1203 ("the speech in question here is indeed a matter of legitimate public concern"); *id.* at 1201 ("the mere fact that the publication contains arguably inappropriate and otherwise sexually explicit content does not remove it from the realm of legitimate public interest").

(b) **First Amendment Protection:** "Speech on matters of public concern . . . is at the heart of the First Amendment's protection." *Id.* at 1200 (quoting *Snyder v. Phelps*, 131 S. Ct. 1207). As a result, "the publication of a news report and brief excerpts" of a sex tape is "not an invasion of privacy and [is] protected speech," 129 So. 3d at 1202 (citing with approval *Michaels v. Internet Entm't Grp.*, 1998 WL 882848, at *7, *10 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*")).

(c) **Not Commercial:** The Gawker Story and Excerpts were not "commercial in nature" because, even though Gawker "is likely to profit indirectly from publishing the report with video excerpts to the extent that it increases traffic to [Gawker's] website," Gawker "has not attempted to sell the Sex Tape or any of the material creating the instant controversy," *Bollea*, 129 So. 3d at 1202 & n.6.

(d) **Unlawful Recording Does Not Affect First Amendment Right to Publish:** Where, as here, "a publisher lawfully obtains the information in question, the speech is protected by the First Amendment provided it is a matter of public concern, even if the source recorded it unlawfully." *Id.* at 1203 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 535

(2001)). "As the speech in question here is indeed a matter of legitimate public concern, the holding in *Bartnicki* applies." *Id.*

Because the DCA Ruling is, like any other published appellate decision, controlling precedent as to these legal issues, plaintiff cannot state a claim against the Gawker Defendants as a matter of law. *See Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008) ("the opinion of a district court is binding on all trial courts in the state").[1]

3. It has long been the law in Florida that, where a lawsuit challenges acts of publication, "pretrial dispositions are 'especially appropriate' because of the chilling effect these cases have on freedom of speech." *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 4th 1997); *see also Karp v. Miami Herald Publ'g Co.*, 359 So. 2d 580, 581 (Fla. 3d DCA 1978) (same). This principle applies with full force here, as the legal conclusions reached by the District Court foreclose any possibility that plaintiff has stated, or could state, viable causes of

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[1] Florida courts routinely rely on legal conclusions set forth in appellate decisions reviewing grants or denials of temporary injunctions. *See, e.g.*, *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 649 (Fla. 2010) (relying, in an appeal from final judgment, on *Sancho v. Smith*, 830 So. 2d 856 (Fla. 1st DCA 2002), a temporary injunction decision, for proper interpretation of statute); *Ostrow v. Imler*, 27 So. 3d 237, 239 (Fla. 4th DCA 2010) (relying, in permanent injunction context, on interpretation of statute by *Gasilovsky v. Ben-Shimol*, 979 So. 2d 1179 (Fla. 3d 2008), a temporary injunction decision); *Zurich Am. Ins. Co. v. Ainsworth*, 18 So. 3d 9, 11 (Fla. 3d DCA 2009) (citing to *Envtl. Servs. Inc. v. Carter*, 9 So. 3d 1258 (Fla. 5th DCA 2009), a temporary injunction decision, for principles of contract interpretation in reviewing summary judgment ruling); *Maxson v. Dep't of Children & Families*, 869 So. 2d 653, 655 (Fla. 4th DCA 2004) (citing to *Daniel v. Fla. State Turnpike Auth.*, 213 So. 2d 585 (Fla. 1968), a temporary injunction decision, for administrative law principle giving deference to agency); *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So. 2d 565, 568 (Fla. 1st DCA 1994) (relying, in appeal from grant of summary judgment, on *T.J.R. Holding Co. v. Alachua Cnty.*, 617 So. 2d 798 (Fla. 1st DCA 1993), a temporary injunction decision, for rule that expert testimony is improper in interpreting non-technical language in ordinance); *see also Fla. Carry, Inc. v. Univ. of N. Fla.*, --- So. 3d ---, 2013 WL 6480789 (Fla. 1st DCA Dec. 10, 2013) (simultaneously addressing trial court's denial of plaintiff's temporary injunction motion and order granting defendant's motion to dismiss where legal issues underlying both decisions were identical).

action against the Gawker Defendants arising out of the Gawker Story or Excerpts, as explained in the paragraphs that follow.

4. **Publication of Private Facts (Third Cause of Action):** One of the required elements for stating a claim for publication of private facts is the publication of private facts that are not of "legitimate concern to the public." *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (citing Restatement (Second) of Torts § 652D); *see also* Opp. to Gawker Mot. at 8 & Opp. to Daulerio Mot. at 16 (agreeing that this is a required element of the tort). In light of the DCA Ruling, plaintiff cannot state a claim as to this element. As noted above, the District Court unequivocally held that the Gawker Story and Excerpts address "matters of public concern." *Bollea*, 129 So. 3d at 1201, 1202, 1203. That alone forecloses plaintiff's claim for publication of private facts as a matter of law.[2] Accordingly, plaintiff's claim for publication of private facts should be dismissed.

5. **Intrusion Upon Seclusion (Fourth Cause of Action):** The DCA Ruling likewise forecloses any possibility that plaintiff has stated, or can state, a viable claim for intrusion upon seclusion. The Florida Supreme Court has defined that tort as conduct actually

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[2] In his opposition papers, plaintiff argued that the Gawker Story and Excerpts did not address matters of public concern, arguments which, in fairness, he advanced prior to the DCA Ruling. For instance, plaintiff argued that "private sexual relations" are generally not a matter of public concern. Opp. to Gawker Mot. at 10. But this argument was considered and decisively rejected by the District Court, which not only held that the Gawker Story and Excerpts *do* address matters of public concern, despite their sexual content, but, in so doing, emphasized that "the mere fact that the publication contains arguably inappropriate and otherwise sexually explicit content does not remove it from the realm of legitimate public interest." *Bollea*, 129 So. 3d at 1201 (citing cases). The same goes for plaintiff's argument that, even if the *fact* of plaintiff's affair with his best friend's wife was a matter of legitimate public interest, the video excerpts depicting that affair were not. *See* Opp. to Gawker Mot. at 11-12; Opp. to Daulerio Mot. at 18-19. The District Court explicitly held that the video excerpts were an integral part of the publication, and, as such, also address a matter of public concern. *See Bollea*, 129 So. 3d at 1201, 1202; *see also id.* at 1201 (citing and quoting from *Michaels II*, 1998 WL 882848, at *9 ("fact that the Tape depicts sex acts is clearly part of the story" and therefore newsworthy)).

consisting of "physically or electronically intruding into one's private quarters," and not the act of publication. *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 158 (Fla. 2003). Indeed, plaintiff concedes that the tort of "[i]intrusion . . . does not involve speech or other expression." Opp. to Gawker Mot. at 6 n.3. As the District Court explained, although Gawker published the Gawker Story and the Excerpts, there is no allegation in this case that Gawker was "responsible for the creation of the sex tape," which is the only physical or electronic intrusion alleged. *Bollea*, 129 So. 3d at 1203. Accordingly, plaintiff has failed to state a claim for intrusion upon seclusion.

6. In his opposition papers, plaintiff relies on *Purrelli v. State Farm Fire & Casualty Co.*, 698 So. 2d 618 (Fla. 2d DCA 1997), to argue that a physical or electronic trespass is not required for an intrusion upon seclusion claim. Opp. to Daulerio Mot. at 21; *see also* Opp. to Gawker Mot. at 13-14 (citing Restatement (Second) of Torts § 652B). But *Purrelli* does not control. That District Court case, which includes only a passing reference to intrusion upon seclusion, preceded the *Ginsberg* decision, in which the Florida Supreme Court clearly stated that the tort requires a physical or electronic trespass. *See Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1308 n.2 (M.D. Fla. 2010) (recognizing that *Ginsburg*, not *Purrelli*, controls on the question of the elements of the intrusion upon seclusion). Thus, even accepting the dubious proposition that *Purrelli*'s passing reference to the intrusion tort was intended to decisively state its elements, *Purrelli* is no longer good law in light of *Ginsberg*. Because, as recognized by the District Court, plaintiff has not alleged that Gawker, or any of the other Gawker Defendants, physically or electronically intruded into any private quarters in connection with the "creation of the sex tape," this claim must be dismissed as well for failure to state a claim.

7. **Common Law Right of Publicity (Fifth Cause of Action):** The DCA Ruling also forecloses any possibility that plaintiff can state a right of publicity claim. Plaintiff

acknowledges that, to prevail on this claim, he must show that that his name or likeness was used for a specifically "commercial" purpose. Opp. to Daulerio Mot. at 22. Florida courts interpreting the statutory right of publicity under Fla. Stat. § 540.08 have made clear that this requirement is not satisfied simply by alleging that the plaintiff's name or likeness was used in a for-profit publication, such as a book or magazine offered for sale or a website that sells advertising. *See, e.g.*, *Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. 4th DCA 1981) ("While we agree that at least one of the purposes of the author and publisher in releasing the publication in question was to make money through sales of copies of the book and that such a publication is commercial in that sense, this in no way distinguishes this book from almost all other books, magazines or newspapers, and does not amount to the kind of commercial exploitation prohibited by the statute."). Rather, to state a claim – including a "commercial" purpose in the relevant sense – a plaintiff must allege that his name or likeness was used to "*directly* promote a product or service." *Tyne v. Time Warner Enter. Co.*, 901 So. 2d 802, 810 (Fla. 2005) (emphasis added) (use of name and likeness to promote film "The Perfect Storm" was not commercial use for right of publicity claim); *see also Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1258 (S.D. Fla. 2010) ("use of one's name, likeness, portrait or photograph, whether in a news report, television show, play, novel, or the like is not actionable unless the individual's name or likeness is used to directly promote a commercial product or service, *separate and apart* from the publication [at issue]") (emphasis in original).[3]

[3] Plaintiff suggests that what counts as "commercial" for purposes of a common law right of publicity claim may be more expansive than it is for a statutory publicity claim of the kind analyzed in *Tyne* and *Loft*. *See* Opp. to Daulerio Mot. at 23 n.10. But plaintiff does not say what exactly this more expansive common law standard is, or why it is that he can meet it. In fact, as Gawker pointed out in its opening motion papers, courts have repeatedly held that the common law right of publicity is identical in substance to the statutory right of publicity, *see* Gawker Mot. at 16 (citing cases), and plaintiff himself cites both to the statute and to a case interpreting it in

8. As the District Court concluded, while Gawker was "likely to profit indirectly from publishing the report with video excerpts to the extent that it increases traffic to Gawker Media's website," that is distinct "from selling the Sex Tape purely for commercial purposes." *Bollea*, 129 So. 3d at 1202 & n.6. In other words, the District Court confirmed that plaintiff's name or likeness was not used to promote a product or service other than the publication in which his name or likeness appeared. Accordingly, because plaintiff's name or likeness was not used for a commercial purpose, his right of publicity claim fails as a matter of law.

9. **Intentional and Negligent Infliction of Emotional Distress (Sixth and Seventh Causes of Action):** The DCA Ruling also confirms that plaintiff cannot state a claim for intentional or negligent infliction of emotional distress. In *Snyder v. Phelps*, --- U.S. ---, 131 S. Ct. 1207 (2011), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), both of which were relied upon in the DCA Ruling, 129 So. 3d at 1200, 1201, the United States Supreme Court imposed strict limitations, on First Amendment grounds, on claims involving speech alleged to cause emotional distress, holding that such claims cannot be based on speech addressing a matter of public concern. *See Snyder*, 131 S. Ct. at 1215 ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case [picketing at a funeral] turns largely on whether that speech is of public or private concern . . . ."). Plaintiff, in fact, concedes that this is the relevant legal standard. *See* Opp. to Daulerio Mot. at 13 n.5 ("*Snyder* holds that liability turns on whether the speech is of public concern").

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reciting the elements of his publicity claim, *see* Opp. to Daulerio Mot. at 22 (citing Fla. Stat. § 540.08(1) and *Loft*, 408 So. 2d at 623-24). Moreover, Florida courts have explained that the "commercial" purpose requirement under Fla. Stat. § 540.08 must mean more than the mere use of a name or likeness in a for-profit publication; otherwise there would be "a substantial confrontation between this statute and the first amendment." *Loft*, 408 So. 2d at 622-23; *see also Tyne*, 901 So. 2d at 810 (raising similar constitutional concerns). The same constitutional limitations necessarily apply to common law publicity claims.

10. Applying this standard, plaintiff cannot state claims for infliction of emotional distress because, as the District Court repeatedly held, the speech at issue involved a matter of public concern. *See Bollea*, 129 So. 3d at 1201, 1202, 1203. Indeed, in so concluding, the District Court repeatedly relied on the analysis in *Snyder* and *Falwell*, and, in particular, on the high court's admonition that "[t]he arguably inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." *Bollea*, 129 So. 3d at 1200 (citing *Snyder*, 131 S. Ct. at 1216); *see also id.* at 1201 (same). Accordingly, under *Snyder*, *Falwell*, and the DCA Ruling, plaintiff cannot state a viable claim for infliction of emotional distress, and his claims must be dismissed.[4]

11. **Florida Statute § 934.10 (Eighth Cause of Action):** The DCA Ruling also forecloses any possibility that plaintiff could state a claim under the Florida Wiretap Act. As the District Court confirmed, plaintiff has not alleged that Gawker, or any of the Gawker Defendants, played a role in recording the sex tape or that they otherwise illegally obtained it. *Bollea*, 129 So. 3d at 1203; *see also* Gawker Mot. at 3, 21 (same). Accordingly, any wiretap claim against the Gawker Defendants must be for allegedly illegally *disseminating* the contents of the sex tape that plaintiff contends was illegally recorded by others.

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[4] Plaintiff's claim for negligent infliction of emotional distress fails to state a claim for the independent reason that he has not alleged any physical injuries. *See Zell v. Meek*, 665 So. 2d 1048, 1054 (Fla. 1995) ("physical injury" is an essential element of the cause of action). While plaintiff acknowledges that the "impact rule" applies to his claim, he contends that the rule only bars a claim for damages, not for injunctive relief. *See* Opp. to Daulerio Mot. at 29-29; Opp. to Gawker Mot. at 8 (same). That is simply wrong. An allegation of physical injury is necessary to state a claim for negligent infliction of emotional distress. *See, e.g., R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 364 (Fla. 1995) (affirming dismissal of negligent infliction of emotional distress claim where no physical injuries were pleaded, but permitting leave to replead to add such allegations). Obviously, where no cause of action is stated, no injunctive relief can issue. *See Smith v. Bateman Graham, P.A.*, 680 So. 2d 497, 499 (Fla. 1st DCA 1996) (court could not issue injunction where plaintiff did not allege a valid cause of action).

12. But the District Court explicitly ruled out any such claim. Relying on the *Bartnicki* decision, the court squarely rejected plaintiff's claim that the First Amendment did not protect the speech at issue because of the allegedly illegal nature of the original recording. The District Court explained that, under *Bartnicki*, "if a publisher lawfully obtains the information in question, the speech is protected by the First Amendment provided it is a matter of public concern, *even if the source recorded it unlawfully*." *Bollea*, 129 So. 2d at 1203 (citing *Bartnicki*, 532 U.S. at 535) (emphasis added). The court then held that, "[a]s the speech in question here is indeed a matter of legitimate public concern, the holding in *Bartnicki* applies." *Id.* The various attempts plaintiff makes in his opposition to distinguish this case from *Bartnicki*, *see* Opp. to Gawker Mot. at 8 n.5; Opp. to Daulerio Mot. at 8-9, are all unsustainable in light of the DCA Ruling. Because the District Court has held that *Bartnicki* applies to this case, plaintiff cannot constitutionally state a Wiretap Act claim against the Gawker Defendants as a matter of law.

13. **Amendment Would be Futile:** Finally, the Court should deny plaintiff leave to amend. It is well established that a court may deny leave to amend where amendment "would be futile." *Tuten v. Fariborzian*, 84 So. 3d 1063, 1069 (Fla. 1st DCA 2012) (affirming dismissal with prejudice where prior precedent ruled out plaintiff's legal theory and there were thus no "possible amendments to the complaint that would not be futile"); *see also Fla. Nat. Org. for Women, Inc. v. State of Fla.*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) (same). Here, the legal conclusions already reached about this case by the District Court foreclose any possibility that plaintiff might state a claim against the Gawker Defendants arising out of the publication of the Gawker Story and Excerpts, no matter how artfully pleaded. Accordingly, amendment would be futile.

CONCLUSION

For the foregoing reasons, as well as those stated in the Gawker Defendants' opening motion papers, the claims asserted against the Gawker Defendants should be dismissed with prejudice.

Dated: April 9, 2014

Respectfully submitted,
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I HEREBY CERTIFY that on this 9th day of April 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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