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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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio, pursuant to Fla. R. App. P. 9.310(a), hereby move for a stay of execution of judgment pending appeal.

INTRODUCTION

This case has undoubtedly been contentious, but during one of the many pre-trial hearings in this matter this Court took a step back and offered some observations about which both parties could surely agree:

> It's an interesting case. It poses very interesting, very serious constitutional law issues, which I find to be challenging . . . when the appellate court sends me instruction, I take them to heart . . . . I think it's just part of the system that we live in, and I am grateful that we do have the system. I think it's a wonderful system; it's the best in the world.

Ex. 1 (Oct. 1, 2015 Hrg. Tr.) at 28:4-16. The Court's remarks articulated the basic notion of procedural fairness that is at the heart of our judicial system. Particularly in a case like this one that presents serious questions of First Amendment law, it is especially important to ensure that the system works and those questions are reviewed by the appellate courts.

Plaintiff, however, demands that the trial court effectively cut off that review process now, at the point where he stands as the winner. Thus, Plaintiff demands that the Court permit

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him to begin immediately executing on the monetary portion of the judgment, unless Defendants post a bond in the amount necessary to obtain an automatic stay, which Plaintiff contends is at least $150 million in total. *See* Pl.'s Motion for Leave to Conduct Expedited Post-Trial Financial Worth Discovery at 4. But Plaintiff knows full well that Defendants do not have $50 million each, nor is there any bond company in the world that would provide them a bond in that amount – or, as explained below, for any meaningful amount given the present financial circumstances of each Defendant.

Moreover, it has recently become unambiguously clear that permanently driving Gawker out of business is exactly what Plaintiff set out to accomplish in this lawsuit. On May 25, Peter Thiel, a Silicon Valley billionaire with longstanding and unrelated grievances against Gawker and Mr. Denton, gave a lengthy interview to *The New York Times* in which he admitted that he has secretly funded this, and other, lawsuits against Gawker to (as the *Times* reports) "try to put the media company out of business." Ex. 2 (May 25, 2016 *New York Times* article); *see also* Ex. 3 (June 7, 2016 article in *Forbes* providing additional details of Mr. Thiel's elaborate efforts to bring down Gawker and Mr. Denton); Ex. 4 (June 8, 2016 *Politico* article detailing effects on Gawker's business by Mr. Thiel's orchestrated campaign).

Unfortunately, Mr. Thiel's unprecedented crusade to secretly fund litigation to destroy a media company has already had a deleterious effect on Gawker's finances. As the affidavits Gawker is submitting demonstrate, in large part due to large legal fees, Gawker already faces challenges to its ability to operate with positive cash flow. Plaintiff is asking this Court to enter judgment in a manner that would (a) guarantee an immediate and final blow to Gawker, and (b) would also force the two individual defendants to seek bankruptcy protection – in so doing

effectively denying them the ability to seek meaningful review of the "very serious constitutional law issues" this Court recognizes that the judgment raises.

But nothing in Florida law requires that result. To the contrary, that is not the way a fair system is supposed to work, and so Florida law expressly grants this Court the authority to ensure that each Defendant gets a fair shot at appellate review of these important issues, under conditions appropriate to the case. As a result, Defendants respectfully request that the Court exercise its authority to stay execution of the judgment pending appeal, under the conditions discussed below. Those conditions would provide Plaintiff with substantial security, but still afford Defendants the opportunity to have a fair shot at an appeal before each of them would independently face financial ruin.

ARGUMENT

I. THIS COURT HAS THE AUTHORITY TO ISSUE A STAY OF EXECUTION WITH OR WITHOUT A SUPERSEDEAS BOND.

The judgment entered by this Court included both injunctive relief and money damages. Florida law is clear that when the same judgment includes both monetary and non-monetary relief, the supersedeas bond requirements for automatically staying the execution of a purely monetary judgment set forth in Fla. R. App. P. 9.310(b)(1) do not apply. *Florida Coast Bank of Pompano Beach v. Mayes*, 433 So. 2d 1033, 1034 (Fla. 4th DCA 1983). Rather, in such circumstances, stays of execution pending appeal are governed solely by Fla. R. App. P. 9.310(a). *Id.* ("When monetary and other relief are granted in the same judgment or order, then the Rule 9.310(b)(1) exception does not apply and the parties must proceed in accord with the provisions of Rule 9.310(a)."); *see also* 2 Fla. Prac., Appellate Practice § 11:2 (2015 ed.) ("If the judgment grants any other form of relief in addition to ordering the payment of money, the trial court may exercise its discretion [under Rule 9.310(a)] to grant or deny a stay.").

Rule 9.310(a) provides that "a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both." Thus, trial courts have "discretion under Rule 9.310(a) as to the nature and extent of security to be posted for a stay." *Zuckerman v. Hofrichter & Quiat, P.A.*, 622 So. 2d 1, 2 (Fla. 3d DCA 1993); *see also Wilson v. Woodward*, 602 So. 2d 545, 546 (Fla. 2d DCA 1991) ("When the court on remand exercised its discretion under subdivision (a) of rule 9.310, it was not bound to apply the formula provided in subdivision (b) for the automatic stay of money judgments."); *Lopez-Cantera v. Lopez-Cantera*, 578 So. 2d 726, 726 (Fla. 3d DCA 1991) ("Upon motion for stay pending review pursuant to Florida Rule of Appellate Procedure 9.310(a), the trial court has discretion to grant, modify or deny such relief.").[1] In other words, when presented with a motion to stay execution of judgment under Rule 9.310(a), a trial court faces two questions: (1) should it enter a stay, and (2) under what conditions?

In Plaintiff's bench memorandum submitted on June 8, 2016, he concedes that Rule 9.310(a) governs this motion, because the Court's judgment is for both money damages and injunctive relief. He further concedes that Rule 9.301(b)'s provisions governing automatic stays

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[1] Notably, the Second District Court of Appeal has made clear that, even where a judgment is only for money damages, trial courts also retain discretion to enter stays based upon conditions other than a supersedeas bond in the amount required for an automatic stay. In particular, the appeals court has interpreted Rule 9.310(b)(1) to mean that a trial court may stay execution without requiring a bond at all, or by setting that bond at an amount it deems reasonable under the circumstances. *See Platt v. Russek*, 921 So. 2d 5, 7-8 (Fla. 2d DCA 2004); *see also Waller v. DSA Grp., Inc.*, 606 So. 2d 1234, 1235 (Fla. 2d DCA 1992) ("a trial court has authority upon motion of a party to enter a stay order upon conditions other than a bond"). The Legislature has also now expressly granted trial courts the same discretion. *See* Fla. Stat. § 45.045(2) ("The court, in the interest of justice and for good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond.").

of money-only judgments do not apply. Pl. Mem. at 2 ("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.").

Yet the rest of his bench memorandum proceeds to only cite case law concerning the very rule and statute he concedes do not apply, Pl. Mem. at 2-5, asserting that, under those other provisions, "courts have extremely limited power to issue stays and reduce supersedeas bonds." *Id.* at 3. That assertion is inaccurate even with respect to those provisions. Most notably, § 45.045(2) which was enacted in 2006 and thus post-dates all the case law Plaintiff cites, expressly provides that "The court, in the interest of justice and for good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond." But none of that matters here, where it is clear that Rule 9.310(a) grants the court discretion to fashion a stay based on any conditions that it deems reasonable under the circumstances.

II. A STAY WOULD NOT BE EFFECTIVE UNLESS IT IS CONDITIONED UPON FINANCIAL REQUIREMENTS, IF ANY, THAT ARE REASONABLE UNDER THE CIRCUMSTANCES.

As noted above, Plaintiff demands that the Court apply the formula for automatic stays of money-only judgments provided by Rule 9.310(b), or alternatively § 45.045, even though he concedes they do not apply. *See Zuckerman*, 622 So. 2d at 2 (noting that the trial court can determine "the nature and extent of security to be posted for a stay"). If Rule 9.310(b)(1) were applied, Defendants would have to collectively file a supersedeas bond in an amount equal to the amount of the judgment plus twice the rate of statutory interest. In this case, that would require a bond in the amount of the $140.1 million judgment, plus almost ten percent more.[2]

[2] An interest rate of twice the current annual judgment interest rate of 4.78% is applied. *See* http://www.myfloridacfo.com/Division/AA/Vendors/default.htm. Fla. R. App. P.

But as explained below, Defendants do not have the means to post a bond for that amount, nor for $50 million per appellant. As a result, if this Court were to condition a stay on Defendants' posting such a bond, no Defendant would be able to obtain the stay. And if Plaintiff were subsequently to proceed to attempt to execute on the judgment in the absence of a stay, each one of the Defendants would face immediate financial ruin, and all of them would have no option but to file for bankruptcy protection. In sum, setting a prohibitively high bond amount would have the same effect as denying a stay outright: in either event, each one of the Defendants would be financially destroyed before an appellate court ever has the opportunity to review the judgment entered in this case. *Cf. Gay v. Chandra*, 682 F.3d 590, 595 (7th Cir. 2012) ("The parties here agree that [plaintiff] is indigent and could not post a $1,000 bond. The bond requirement thus did nothing to ensure that the defendants would recoup their costs if they prevailed. All it ensured was the end of [plaintiff]'s suit."). It is difficult to imagine how that would benefit Plaintiff, since it would ensure there would be nothing for him to collect.

A stay would only be effective, therefore, if it is granted without bond or conditioned on posting security that is reasonable under the circumstances. Rule 9.310(a) empowers this Court to take either of those steps. *See Platt*, 921 So. 2d at 7-8; *Waller*, 606 So. 2d at 1235.

A. Gawker's Financial Ability to Provide Security

As set forth in the Affidavits of Heather Dietrick and David Carr, which are being provided to the Court, Gawker has no ability to post a meaningful bond at this point.

9.310(b)(1) states that "[m]ultiple parties having common liability may file a single bond satisfying the above criteria." Alternatively, Plaintiffs point to Fla. Stat. § 45.045(1), which also only applies to automatic stays sought pursuant to Rule 9.310(b)(1), and therefore does not apply here. For judgments for money only, that statute provides that an automatic stay of execution pending appeal may be obtained by posting an amount that "may not exceed $50 million for each appellant," as adjusted.

Specifically, after the jury verdict in this case, Gawker engaged a leading brokerage firm to contact numerous bond companies, none of which will provide a bond for $50 million to a company in Gawker's financial position. Moreover, in order to obtain a bond in any amount, Gawker would need to attempt to provide a letter of credit for the amount of the bond.[3]

Next, in order to analyze Gawker's ability to obtain a letter of credit or to post cash in order to obtain a bond, Gawker has conducted an analysis of the company's assets and cash available. Gawker risks experiencing cash flow issues, even without this judgment, due to the high litigation costs imposed by Mr. Thiel's lawsuits, as well as the need to hire professionals to evaluate the Company's options in anticipation of this judgment being entered. So the company simply does not have free cash flow to post a meaningful cash bond at this time.

Second, even excluding amounts that Gawker owes to Kinja, KFT, Gawker's present liabilities exceed its present assets. The sum of its cash and current receivables is about $17 million as of May 31, 2016. It has no material tangible assets. Its principal liabilities, consisting of a private equity fund loan and two bank loans and/or letters of credit, all with varying terms and conditions, total approximately $27 million.

Finally, those loans are secured by Gawker's cash and receivables such that those security interests establish priority over unsecured creditors (including Plaintiff). Moreover, those loans contain covenants by which Gawker would be in default if the ratio of its assets to liabilities falls too low. In effect, even putting aside its perilous financial circumstances, Gawker would not be permitted to use even the small amount of cash it has to fund a letter of credit to

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[3] All of the bond companies indicated that they would typically require a letter of credit from a company in Gawker's financial condition. A couple of them indicated a willingness to consider cash in lieu of a letter of credit. As discussed below, Gawker's present circumstances prevent it from obtaining a letter of credit or pledging any material amount of cash to obtain a bond.

obtain a bond without being forced into bankruptcy by virtue of having defaulted on its obligations to its secured creditors.

B. <u>Denton's Financial Ability to Provide Security</u>

Similarly, Nick Denton is unable to obtain a bond. As Mr. Denton has previously disclosed in this case, other than his condominium (which secures a mortgage with approximately $2 million still owed), a modest retirement account and modest bank accounts, his primary asset is the shares he owns in Gawker Media Group, Inc. ("GMGI"). *Id.* at. Ex. 5 (Trial Tr.) at 3891:21-25, 3892:10-18. Denton Aff. ¶ 2. (In the wake of the verdict in this case, he has placed his condo up for rent. *Id.* ¶ 6.) Mr. Denton is prepared, on behalf of all three Defendants, to pledge *all* of those shares as security for any judgment that Plaintiff might ultimately obtain in this case following appeal.

GMGI is a privately-held company, so its shares are not valued on the open market. Determining its value, therefore, is not a precise exercise. Nevertheless, throughout the course of this litigation, Plaintiff has, through his expert witnesses, attempted to calculate the value of GMGI and of gawker.com. Specifically, in connection with the punitive damages phase of the case, Plaintiff elicited an expert report from James Donohue, a Certified Public Accountant and Certified Valuation Analyst. Ex. 6 (Excerpts from the Expert Report of James J. Donohue and Appendix thereto). Mr. Donohue concluded that, as of November 30, 2015, GMGI was worth "at least $276 million." *Id.* at 20. According to Mr. Donohue's calculations, Mr. Denton's shares, therefore, are worth at least $81.475 million.[4]

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[4] For purposes of the punitive damages phase of trial only, the parties had stipulated that Mr. Denton's shares of GMGI were worth $117 million. Ex. 5 (Trial Tr.) at 3891:21 – 3892:9. This is because, at the time of Mr. Donohue's valuation, Mr. Denton owned 42.6% of GMGI stock (and 42.6% of $276 million is $117 million). *See* Ex. 6 at 21 (Donohue Report). Since that time, however, GMGI acquired an investor, and now Mr. Denton's portion of the company is 29.52%. 29.52% of $276 million is $81.475 million.

While Defendants disputed that valuation and doubt that it is accurate, for purposes of punitive damages only they agreed to stipulate to it as the basis for Mr. Denton's net worth. Thus, using Plaintiff's version of the facts, Mr. Denton is prepared to provide security that Plaintiff's expert valued at $81 million.[5] Regardless of the actual valuation, this is essentially all of Mr. Denton's net worth, and is what Plaintiff could recover were he to execute. In these circumstances, the Court should exercise its discretion to accept Mr. Denton's shares as security in exchange for staying execution of the judgment against Defendants pending their appeal.[6]

C. Daulerio's Financial Ability to Post a Bond

Finally, no one is this case has ever disputed that Mr. Daulerio lacks any financial means. His current assets total $13,000 in a bank account, and he has about $27,000 in student loan debt. *See* Ex. 5(Trial Tr.) at 3892:19-21. Daulerio Aff.

III. A STAY IS REQUIRED BECAUSE EACH DEFENDANT HAS A FEDERAL AND STATE CONSTITUTIONAL RIGHT TO APPELLATE REVIEW OF THIS JUDGMENT WITHOUT RISK OF FINANCIAL RUIN.

In the circumstances of this case, a stay is *required* because pursuant to both the federal and Florida Constitutions, each Defendant has a right to obtain appellate review of this judgment without risking financial ruin to do so. There are three independent sources of that constitutional

[5] To the extent that GMGI may be worth less than that today because of the pressures applied by Mr. Thiel in this and other cases, that would simply prove the point that those efforts are largely responsible for the financial circumstances presented in this motion.

[6] Plaintiff also requests discovery if the Court permits reduced and/or alternative security. As Defendants noted in papers filed before the last hearing, they do not disagree that it would be within the Court's discretion to grant Plaintiff reasonable discovery in those circumstances. The disputes between the parties are therefore likely to focus on the scope, rather than the existence of discovery. Given that plaintiff has not sought to meet and confer on this topic, Defendants respectfully suggest that the best course would be for the parties to first determine where there is agreement regarding discovery, and then present to the Court only those issues which may be in dispute.

right: the First Amendment, the federal Due Process Clause, and two provisions of the Florida Constitution that guarantee access to appellate courts.

A. <u>The First Amendment Provides A Right To Meaningful Appellate Review</u>

While the United States Constitution does not automatically guarantee a right to appeal in all cases, *see, e.g.*, *United States v. MacCollom*, 426 U.S. 317, 323 (1976), it does guarantee that right in cases "raising First Amendment issues." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 284-86 (1964)). Specifically, the First Amendment provides a right to independent appellate review of any trial court verdict that rejects a claim or defense based on the First Amendment. Moreover, in First Amendment cases a defendant has a right to *de novo* appellate review of both the law and the facts. *Id.; see also Miami Herald Publ'g Co. v. Ane*, 458 So. 2d 239, 242 (Fla. 1984) (citing *Bose* in support of the court's "[h]aving independently examined the whole record").

While the First Amendment's independent appellate review requirement was originally developed in defamation cases, the Supreme Court has since made clear that independent appellate review applies to all cases involving First Amendment issues, including specifically a jury's determination that a defendant's speech constituted an invasion of privacy and the intentional infliction of emotional distress. *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (applying independent appellate review and concluding that "the First Amendment bars [plaintiff] from recovery for intentional infliction of emotional distress or intrusion upon seclusion"). *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) ("our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court"). Thus, Defendants have a First Amendment right to

independent appellate review of the jury's verdict in this case. That alone distinguishes this case from all the Florida cases concerning stays of execution cited by Plaintiff, none of which involved claims for which there was a right to independent appellate review.

As multiple courts have recognized, that right would be infringed if the opposing party could immediately render an appellant financially destitute by executing on the judgment during the pendency of an appeal. Indeed, even before the Supreme Court formally announced the rule requiring independent appellate review, the Fifth Circuit had concluded that the First Amendment does not tolerate that scenario. *See Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979) (affirming an injunction that barred plaintiffs from executing on a state court judgment pending appeal). In *Henry*, a state trial court entered a judgment of $1.25 million against the NAACP and other defendants for organizing boycotts and protests of merchants engaging in discriminatory activities, and allegedly enforcing that boycott through threats. *Id.* at 295. The state court denied the defendants' motion for stay without bond or for a reduced bond pending appeal. *Id.* The NAACP then sought relief in federal district court.

The federal district court concluded that the refusal to issue a stay violated the First Amendment, because it found that obtaining the requisite supersedeas bond would "curtail practically all of [NAACP's] usual functions during the pendency of appeal," and therefore "seriously impair [defendants'] rights to free speech and association" due to the lack of funds. *Henry v. First Nat'l Bank of Clarksdale*, 424 F. Supp. 633, 638-39 (N.D. Miss. 1976). The Fifth Circuit affirmed that decision, explaining that it was impermissible for a state court system to operate a regime in which "appellate review of the damage award may only be had by the posting of a supersedeas bond which would effectively bankrupt the NAACP." 595 F.2d at 299-300. *See also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 22 ( ) (Brennan, J., concurring)

(citing *Henry* for the proposition that supersedeas bond requirements that "would make state appellate review of First Amendment claims so difficult to obtain" by causing bankruptcy can justify federal court intervention) (internal quotation marks omitted).[7]

Other courts have likewise recognized the necessity of eliminating, or sharply reducing, bond requirements in hard-fought cases that raise significant First Amendment issues. Most notably, that is what happened in *Snyder v. Phelps*, the very case which makes clear that Defendants have a right to independent appellate review of the judgment here, and which the District Court of Appeal has already cited extensively in this case. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1200-01 (Fla. 2d DCA 2014). In *Snyder*, the jury awarded plaintiff $10.9 million in compensatory and punitive damages for invasion of privacy and intentional infliction of emotional distress against the Westboro Baptist Church and several of its principals for picketing the funeral of the plaintiff's son. The trial judge remitted that verdict to $5 million. *See Snyder v. Phelps*, 533 F. Supp. 2d 567, 597-98 (D. Md. 2008). Although the local rules set the standard supersedeas bond amount at 120 percent of the judgment, *id.* at 596, the district court allowed the Church and its leader to post an interest in property alone as security (much like Mr. Denton proposes here), and ordered the remaining two defendants to post sharply reduced cash bonds. *See Snyder v. Phelps*, 580 F.3d 206, 216 n.6 (4th Cir. 2009).[8] The Fourth Circuit subsequently held that defendants' speech was constitutionally protected, and discharged the bonds, *id.* at 226, and the Supreme Court affirmed that result. *Snyder v. Phelps*, 562 U.S. 443

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[7] The appeal of the underlying judgment then proceeded, and the U.S. Supreme Court ultimately held unanimously that on its merits the state court judgment against the NAACP was barred by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

[8] Specifically, defendant Phelps was required to post a property bond, defendant Phelps-Roper was required to post a $125,000 cash bond, and defendant Phelps-Davis was required to post a $100,000 cash bond. *See* Dkt. No. 270-71, *Snyder v. Phelps*, No. CIV.A. ████ (D. Md. Apr. 4, 2008).

(2011). Indeed, Plaintiff has asserted that *Snyder* "illustrates the proper procedure" for cases where defendants have a right to independent appellate review of a jury verdict. *See* Pl.'s Combined Opp. to Defs.' Post-Trial Motions at 13.

Similarly, in *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313 (S.D.N.Y. 1986), a jury awarded plaintiff $1.6 million in punitive damages on his libel claim. The court "stayed [execution] to permit the defendants to pursue post trial and appellate remedies upon the posting of a bond in the reduced amount of $400,000," because "[a]ccording to the defendants, a greater bond would have destroyed their ability to continue operations." *Id.* at 316. The Second Circuit later reversed the underlying judgment on the grounds that it violated the First Amendment. *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986).

The above cases recognize that permitting a judgment creditor to execute upon a trial court judgment that would have the effect of forcing a publisher or advocacy organization to cease or substantially curtail its normal operations would effectively restrain the publisher's speech without the opportunity to first seek meaningful appellate review. Here, it may prove to be the case Gawker's business may already have been irreparably injured. But that provides no reason to guarantee that outcome through execution on the judgment, nor to ensure the same result for the remaining individual defendants. In the analogous area of prior restraints, it is well settled that "[i]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay." *Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *see also Neb. Press Ass'n v. Stuart*, 423 U.S. 1319, 1324-25 (1975) (Blackmun, J., in chambers).

Similar considerations are presented here, especially in light of the recent revelation that this lawsuit was part of an orchestrated plan designed to force Gawker to cease its publishing

operations, and to necessarily subject Mr. Denton and Mr. Daulerio to the same financial ruin. If the right to independent review means anything, it means that Defendants at least have a right to obtain appellate review of their First Amendment defenses before a critic's campaign to drive them out of business by means of the tort system is guaranteed to succeed.

In short, this Court cannot, consistent with the First Amendment, impose a bond requirement that would ensure that each Defendant would be destroyed financially before they have an opportunity to exercise their right to seek independent appellate review of the judgment. For this reason alone, this Court should stay execution of the judgment pending appeal or, in the alternative, require Defendants to post alternative security as proposed herein.

B. Federal Due Process Also Requires a Meaningful Opportunity to Appeal

Though the federal Constitution does not contain a generalized right to appeal, the U.S. Supreme Court has concluded that, once a state affirmatively chooses to provide a right of appeal, it is a violation of due process for a defendant not to have "a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). As a result, multiple federal courts have concluded that bond requirements that are set so high that they would effectively represent an "impermissible barrier to appeal" violate an appellant's due process rights, unless they are relaxed to avoid that result. *See, e.g.*, *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

As the Second Circuit explained in concluding that it violated due process to impose a bond to cover the full value of an $11 billion judgment against a major oil company:

> [D]ue process requires that, once the state has created a right of appeal, it must offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. A state would deny a defendant such a fair opportunity if it reduced the appeal to a meaningless ritual by denying him the means effectively to press his appellate arguments. It is self-evident that an appeal would be futile if, by the

> time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness.

Texaco Inc. v. Pennzoil Co., 784 F.2d ████, ████ (2d Cir. 1986) (citations omitted), *reversed on jurisdictional grounds*, 481 U.S. 1 (1987). The court found that the defendant Texaco did not have assets sufficient to post the bond required under state law, nor could it borrow sufficient funds to do so. *Pennzoil*, 784 F.2d at 1138. Similarly, the lien set under state law would "seriously impair its ability to carry on its business with the result that it would probably be forced into bankruptcy or liquidation." *Id.* Thus, the court held that enforcing the state's lien and bond requirements "lacks any rational basis, since it would destroy [defendant] and render its right to appeal in Texas an exercise in futility. This would at least amount to a deprivation of its property in violation of its right to due process under the Constitution." *Id.* at 1145.[9] Other courts have reached the same conclusion. *See, e.g.*, *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 874 (10th Cir. 1986) (where full bond for judgment of $2.1 million would force appellant into bankruptcy, it was proper to reduce the required security to $500,000); *HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 513 (E.D. Pa. 1995) (granting stay of execution where supersedeas bond would result in appellant's bankruptcy).

If one of the world's largest, publicly-held corporations at the time, Texaco, enjoyed that due process right, then surely a far smaller, privately-held company like Gawker does, as do individuals like Mr. Denton and Mr. Daulerio. So for this reason as well, Florida law may not be applied to provide a right for Defendants to appeal, but then render that right merely theoretical

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[9] The Supreme Court subsequently reversed the Second Circuit's decision not on the merits, but rather on the grounds that federal courts should have abstained at least until Texaco made its due process and other arguments to the Texas state courts, which it had not done. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (████). In this case, Defendants are properly raising all of their arguments in this Court in the first instance.

by effectively depriving them of the practical opportunity to do so by imposing ruinous bond requirements to avoid the execution of a ruinous judgment.

C. <u>The Florida Constitution Guarantees Defendants a Meaningful Right to Appeal</u>

Finally, this Court need not even reach any federal constitutional issue, because whatever due process right the federal constitution guarantees in these circumstances, the Florida Constitution provides broader rights. *See Pennzoil*, 487 U.S. at 11-12 (holding that a federal court should have abstained from enjoining Texas's bond requirement, because the Texas Constitution's Open Courts provision may provide broader rights than the federal due process clause); *Henderson v. Crosby*, 883 So. 2d 847, 851 (Fla. 4th DCA 2004) (holding that "article I, section 21, of the Florida Constitution affords [the appellants] more rights than does that implied from the federal constitution"). Unlike the federal Constitution, the Florida Constitution unambiguously grants all litigants a right to appeal all final trial court orders, regardless of the circumstances. *Amendments to the Fla. R. App. P.*, 696 So. 2d 1103, 1104 (Fla. 1996) ("we construe the language of article V, section 4(b) as a constitutional protection of the right to appeal"); *T.A. Enters. v. Olarte, Inc.*, 931 So. 2d 1016, 1018 (Fla. 4th DCA 2006) ("the Florida Constitution grants a constitutional right to appeal 'as a matter of right, from final judgments or orders of trial courts'") (citation omitted); *Bain v. State*, 730 So. 2d 296, 298-99 (Fla. 2d DCA 1999) ("there is a Florida constitutional right to appeal all final orders").

The right to appeal is guaranteed by both article V, section 4(b) and the open courts provision of Article I, section 21 of the Declaration of Rights. *Id.* The "open courts" provision operates as a "constitutional limitation on the legislature's power to limit the right to appeal." *T.A. Enters.*, 931 So. 2d at 1018. Florida law therefore provides that "the legislature may implement this constitutional right and place reasonable conditions upon it *so long as they do not*

thwart the litigants' legitimate appellate rights." *Amendments to the Fla. R. App. P.*, 696 So. 2d at 1104-05 (emphasis added). Indeed, just recently the Florida Supreme Court emphasized that:

> Appeals to . . . the District Courts of Appeal are constitutionally guaranteed rights in this State. This being true, it is fundamental that statutes or rules regulating the exercise of such rights should be liberally construed in favor of the appealing party and in the interest of manifest justice.

McFadden v. State, 177 So. 3d 562, 566 (Fla. 2015) (citation omitted). Therefore, "[a] statutory condition that thwarts the litigants' legitimate appellate rights under Article V, section 4(b)(2) also violates the access-to-courts provision." *T.A. Enters.*, 931 So. 2d at 1018 (citation omitted). "[T]o find a violation of the right of access, it is not necessary for [a] statute to produce a procedural hurdle which is absolutely impossible to surmount, only one which is significantly difficult." *Id.* (citation omitted).

Applying these principles, this Court must in turn apply Rule 9.310 in a manner that is "liberally construed in favor of" Defendants. *McFadden*, 177 So. 3d at 566. Consistent with this authority, Florida courts have held that various bond requirements could not constitutionally be applied to a particular case where a party lacked the means to pay the bond. In *Sittig v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 567 So. 2d 486, 487 (Fla. 1st DCA 1990), *aff'd sub nom. Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992), the First District held that a statute requiring a medical employee to post a bond covering the employer's attorneys' fees, as a condition of challenging the imposition of discipline, could not be permissibly applied. It concluded that "[t]he bond requirement clearly cannot withstand constitutional scrutiny where it effectively operates to preclude the appellant from exercising her constitutional right of access solely because of her financial inability to post the requisite bond." *Id.* Moreover, long before it was clear that there was a state constitutional right to appeal, the Florida Supreme Court held that a requirement to post a bond to take an appeal from a municipal to a circuit court was

constitutional, only because it did not "place an unreasonable or prohibitive burden on one seeking review by the circuit court." *Austin v. Town of Oviedo*, 92 So. 2d 648, 650 (Fla. 1957). Here, setting too high a bond amount would place an unreasonable and prohibitive burden on Defendants.

In short, it would violate the Florida Constitution to apply Rule 9.310 in any manner that would effectively guarantee that all three of the Defendants would be ruined financially prior to any of them obtaining a decision on the merits of their appeal in this case. Therefore, this Court should grant a stay of execution, or in the alternative require Defendants to post alternative security.

IV. THE INTERESTS OF JUSTICE AND GOOD CAUSE ALSO WEIGH IN FAVOR OF A STAY.

Even if each Defendant did not have a federal and state constitutional right to obtain review of the judgment before it is permitted to impose financial ruin, there would be good cause for staying the execution of the judgment, and/or requiring reduced security in the circumstances of this case. To determine whether to issue a stay to maintain the status quo during an appellate proceeding pursuant to Fla. R. App. P. 9.310, Florida courts have traditionally considered: "[1] the moving party's likelihood of success on the merits, and [2] the likelihood of harm should a stay not be granted." *Sepich v. Papadoulos*, 145 So. 3d 156, 157 n.6 (Fla. 3d DCA 2014), *citing State ex. rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980). Both factors weigh heavily in favor of staying execution of judgment pending appeal in this case.

A. <u>There is a Substantial Likelihood of Total or Partial Success on the Merits</u>

The reasons why Defendants are likely to succeed on the merits of their appeal have been exhaustively addressed in their post-trial motions, and there is little to be served by repeating those points here. Rather, what is particularly relevant here is that there can be no serious

dispute that there has already been an unusually long history of appellate review of the court's rulings in this case, and Defendants have so far prevailed on almost every occasion in which the appeals court has reached the merits. Most importantly, in the context of reviewing this Court's prior granting of injunctive relief, the Second District has already weighed in on dispositive questions that, if it applies the same reasoning to the review of the judgment, would require reversal. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1201 (Fla. 2d DCA 2014) ("the report and the related video excerpts address matters of public concern"); *id.* at 1202 (same); *id.* at 1203 (same); *id.* at 1202 n.6 (holding that increasing traffic to Gawker websites is not a "commercial purpose" triggering the application of Florida misappropriation law).

Moreover, the District Court of Appeal has repeatedly issued stays pending the outcome of appellate review in this case, which further suggests that this is the type of dispute in which a stay pending appeal is warranted. *See, e.g.*, Ex. 7 (May 15, 2013 Order in No. 2D13-1951 staying injunction pending review and reciting that "[t]he trial court's order denying [the] stay is disapproved"); *Gawker Media, LLC v. Bollea*, 129 So. 3d at 1199 ("this court stayed the order granting the motion for temporary injunction pending the resolution of this appeal"); Ex. 8 (May 23, 2014 Order in No. 2D14-1079 granting Bollea's request for stay of order directing FBI authorizations pending writ review); Ex. 9 (Nov. 10, 2015 Order in No. 2D15-4565 staying provisions of order restricting disclosure of FOIA records to Gawker's counsel and confiscating audio files pending adjudication of writ petition); Ex.10 (Dec. 10, 2015 Order in No. 2D15-5035 granting stay of order authorizing extensive discovery into alleged leak pending adjudication of writ petition).

This extensive history of prior appellate review, as well as stays pending that review, suggests both that the merits of the judgment are sufficiently unclear and that a stay of execution

is warranted without actual, or at least without oppressive, encumbrance on Defendants. That was the conclusion another court reached when faced with an analogous situation involving prior appellate review. *See RLS Assocs., LLC v. United Bank of Kuwait PLC*, 464 F. Supp. 2d 206 (S.D.N.Y. 2006). There, prior to trial, defendant asked the court to order plaintiff to file a bond securing costs and attorneys' fees, as the court was applying UK law allowing such a recovery. The court initially set the bond at nearly half a million dollars, but the plaintiff demonstrated that such a large amount would make it impossible for it to continue litigating.

In weighing the issue, the court emphasized that it had previously granted summary judgment in favor of defendant, but that the appellate court had reversed. As the court wrote:

> It is one thing to require full costs [as] security for a defendant from a plaintiff whose implausible and farfetched claim is nonetheless immune from dismissal or summary disposition and must be tried. It is quite another to require such security from a plaintiff whose claim has already been significantly tested in the appellate fire, particularly where a compelled posting of full security risks denying the plaintiff its day in court.

Id. at 224-25. The court therefore reduced the bond to $75,000 based on the party's prior success at the appellate level in the same litigation. *Id.*

Here too, while the parties and the Court may disagree about whether the District Court of Appeal's rulings at the temporary injunction phase of this case are dispositive, there can be no serious question that important and potentially dispositive issues in this case have "already been significantly tested in the appellate fire," and, as a result, it is clear that Defendants' position on the merits is hardly "implausible and farfetched." *Id.*

Moreover, the wholly unprecedented magnitude of the judgment here also strongly weighs in favor of a stay and points to a likelihood of at least partial success on the merits. The $140.1 million jury award in this case is roughly eight times the total amount ever even initially awarded by a Florida jury against a media defendant for an allegedly tortious publication – and

that judgment was promptly reversed on appeal. *See Gannett Co. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA 2006) (reversing judgment for $18.3 million in total compensatory damages for false light invasion of privacy against the *Pensacola News-Journal*), *aff'd on other grounds*, 994 So. 2d 1048 (Fla. 2008) The jury's decision to award $115 million in compensatory damages alone is, to Defendants' knowledge, about twelve times the largest compensatory damages award in American history arising from a media publication that has ever survived post-trial motions and appeal.[10]

Indeed, neither Plaintiff nor the Court has disputed that the magnitude of the judgment here is wholly unprecedented in legal history. In fact, Plaintiff argued, and the Court agreed, that, despite the unprecedented magnitude of the jury's verdict, judgment should be entered for the full amount because "none of those [prior] cases were like this case." Ex. 11 (May 25, 2016 Hrg. Tr.) at 134:17-18. Yet now Plaintiff argues that for purposes of posting a supersedeas bond, this case should be treated like any other garden-variety judgment. But surely fairness dictates that the uniqueness of this case cuts both ways. If this case presents such unique questions that would justify entering a judgment of unprecedented magnitude in Plaintiff's favor, then surely it should likewise be treated differently for purposes of an appellate bond, to afford Defendants' the fair opportunity to test the legal merit of unprecedented judgment.

In *Pennzoil*, the Second Circuit explained that its decision to impose a stay rested in part on "the extraordinary circumstances of this case, which are unlikely ever again to recur," first and foremost of which was "a private civil money judgment in an amount unprecedented in the annals of legal history." *Pennzoil*, 784 F.2d at 1157. Similar extraordinary circumstances – an

[10] And even that verdict, for $9.5 million in a defamation case in Buffalo, New York, was primarily (in the amount of $6 million) for injuries to reputation, which Plaintiff acknowledged he did not suffer at all here. *See Prozeralik v. Capital Cities Commc'ns, Inc.*, 635 N.Y.S.2d 913 (N.Y. App. Div. 4th Dep't 1995).

unprecedented money judgment in a case raising significant First Amendment issues – are present here as well, and weigh in favor of a stay without bond, or with reasonable alternative security, to ensure that Defendants are able to mount such an appeal in the first place.

B. Defendants and Many Other Non-Parties Will Unquestionably Be Harmed If a Stay Is Not Granted

The circumstances of this case also present certain – not merely likely – "harm should a stay not be granted." *Sepich*, 145 So. 3d 156, 157 n.6. An important consideration in applying this factor is whether the harm is "irremediable." *McCord*, 380 So. 2d at 1039. Here, the failure to grant a stay would cause irreparable harm to Defendants, numerous third parties, and even the public at large.

First, as set forth above, if Plaintiff is permitted to execute on the enormous judgment in this case, all three of the Defendants would be left immediately insolvent, including each of the two individual Defendants regardless of Gawker's fate all apart from executing on the judgment against it. As other courts have recognized, that would amount to irreparable injury. In *Miami Int'l Realty Co.*, 807 F.2d at 874, for instance, the Tenth Circuit affirmed the district court's order granting a stay without a full bond where defendant "did not have sufficient assets to post a supersedeas bond" because "execution of the judgment would cause him irreparable harm and place him in insolvency." Likewise, in *HCB Contractors*, 168 F.R.D. 508, the court granted defendants' motion to stay without requiring supersedeas bond, reasoning that:

> [a]llowing [plaintiff] to proceed with the execution process at this time beyond the steps necessary to obtain and perfect their liens on the [defendants'] real and personal property interest in the elements, would likely prompt foreclosures by the lienholders, create confusion in the bidding process, and move the debtor into bankruptcy. Clearly, if the appellate court overturns the judgments against the [defendants], the harm that would result from the completed execution process would be irreparable.

Id. at 513. Moreover, any effect on Gawker's publishing operations, even for a short period of time, would constitute irreparable harm as a matter of law. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Second, other parties and persons would suffer serious and irreparable harm. Each of the Defendants have other creditors whose interests would be impacted if they were financially ruined during the appellate process. The Seventh Circuit faced such a situation in *Olympia Equip. Leasing Co. v. W. Union Tel. Co.,* 786 F.2d 794 (7th Cir. 1986). Plaintiffs there obtained a $36 million judgment against defendant, which was unable to post a standard supersedeas bond and was granted a stay under alternate arrangements, such as a reduced pledge of cash and other collateral. The appellate court noted that the district court "had to balance the interest of [plaintiff] as a judgment creditor against the interest of the other creditors of [defendant] who might be harmed if [plaintiff] were allowed to execute its judgment or tie up more of the defendant's assets." *Id.* at 798. Judge Posner further explained:

> A judgment creditor is a bona fide creditor, but the court that issues the judgment is not required to ignore the interests of other creditors when deciding how much security to make the defendant post as a condition of being allowed to stave off execution of the judgment pending appeal. . . . If the judgment is reversed, the claim is invalidated *ab initio*. Of course other creditors' claims may be contingent too; nevertheless it would be a painful irony for us to impair and perhaps even destroy the other creditors' claims merely to remove every element of hazard from a claim that may not survive the process of appeal.

Id.

Finally, staying execution of judgment pending appeal would also be in the public interest. Permitting a single trial verdict to financially ruin a national media company would chill all manner of small and medium-sized media organizations, and individual journalists, who would now have good reason to fear that they, too, could be financially destroyed by a runaway

verdict over a single controversial story. *See New York Times Co. v. Sullivan*, 376 U.S. at 278 ("Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."). Even if it were to prove to be the case that Mr. Thiel's crusade succeeds anyway with respect to Gawker, the public's interest in preventing such losses of First Amendment rights, and maintaining access to information from a broad and diverse array of sources, far outweighs whatever comparatively minor potential injury to Plaintiff's personal financial interests could come from his being unable to execute on the judgment prior to the appellate court's independent evaluation of the verdict.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court stay execution of judgment pending appeal, or set alternative security for a stay as proposed herein.

Dated: June 9, 2016

Respectfully submitted,

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