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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. 12012447 CI-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'S RESPONSE TO DEFENDANT A.J. DAULERIO'S MOTION TO DISMISS

Plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan" ("Mr. Bollea" or the "Plaintiff"), hereby responds to the Motion of Defendant A.J. Daulerio to Dismiss Plaintiff's First Amended Complaint (the "FAC") for Failure to State a Claim, served on April 29, 2013, and respectfully requests that the Motion be denied.[1]

INTRODUCTION

On April 25, 2013, this Court entered an Order granting Mr. Bollea's temporary injunction motion "for the reasons stated on the record at the hearing held on April 24, 2013." 4/25/13 Order. At the April 24 hearing, the Court held, on the record, "that plaintiff will suffer

[1] This Response uses the defined terms Gawker Media, Sex Tape, Sex Narrative, and Gawker.com as those terms are defined in Mr. Bollea's Motion for Temporary Injunction filed on April 19, 2013.

irreparable harm. There is no adequate remedy of law, **the likelihood of success on the merits**, and that public interest will definitely be served by granting this public and temporary injunction." Hearing Tr. 32:15–19 (emphasis added). Less than one week after this Court found that Mr. Bollea was likely to succeed on the merits of his claims, Defendant A.J. Daulerio filed a three-paragraph motion to dismiss, which "expressly adopts and incorporates" the motion to dismiss filed by Gawker Media when the case was removed to federal court (the "Federal Motion"), and which provides no explanation or argument for why Mr. Daulerio is differently situated from Gawker Media with respect to the merits of the claims against him.

Mr. Daulerio is a central figure in this case: (i) he was Editor-in-Chief of Gawker.com at the time the Sex Tape and Sex Narrative were posted; (ii) he authored the Sex Narrative; (iii) he presumably wrote the headline: "Even For A Minute Watching Hulk Hogan Have Sex In A Canopy Bed Is Not Safe For Work But Watch It Anyway;" and, (iv) as Editor in Chief at the time, Mr. Daulerio likely was involved in acquiring the full-length video, editing it, adding English subtitles to it, and ultimately posting the Sex Tape in violation of Florida's criminal laws. Mr. Daulerio's motion to dismiss should be denied for at least the following reasons:

First, Fla. R. Civ. Proc. 1.100(b) requires that all motions "state with particularity the grounds therefor." Mr. Daulerio's motion to dismiss fails to satisfy this basic requirement. Mr. Daulerio simply purports to incorporate by reference a motion filed by a different litigant (Gawker Media) in a different court (federal district court). This is a clear violation of Rule 1.100(b) and is a gross inconvenience to the Court, which must sort through the Federal Motion to find the arguments that might apply to Mr. Daulerio. The motion should be denied on this ground alone.

Second, to the extent the Court considers the arguments in the Federal Motion, they also

fail. The First Amendment's protections do not extend to voyeurs who broadcast their illegally obtained hidden camera recordings of people engaging in sexual intercourse in a private bedroom, or people naked in any other private place such as a changing stall, doctor's office, toilet, and other places where a person has a reasonable expectation of privacy.

Third, Mr. Bollea's allegations supporting his cause of action for publication of private facts are sufficient to withstand a motion to dismiss. Illegally obtained images of Mr. Bollea engaging in sexual intercourse in a private bedroom are private facts. The posting of those images without Mr. Bollea's authorization to do so constitutes a publication of private facts. The publication was offensive and not a matter of legitimate public concern.

Fourth, Mr. Bollea's allegations supporting his cause of action for invasion of privacy by intrusion upon seclusion are sufficient to withstand a motion to dismiss. Electronic intrusions are sufficient to give rise to a cause of action for intrusion upon seclusion, and the Federal Motion cites no case law to the contrary.

Fifth, Mr. Bollea's allegations supporting his cause of action for violation of Florida common law right of publicity are sufficient to withstand a motion to dismiss. As Mr. Bollea alleges, "massive numbers of individuals were drawn to [Gawker.com], for which the Gawker Defendants have reaped tremendous revenues and profits . . . [and which] are a direct result of the tremendous fame and goodwill of Plaintiff." FAC ¶ 30. In this case, it was Mr. Daulerio's story and the accompanying video that brought those visitors to the website.

Sixth, Mr. Bollea's allegations supporting his causes of action for infliction of emotional distress are sufficient to withstand a motion to dismiss. Gawker Media's unauthorized distribution of a Sex Tape to millions of people over the Internet is outrageous conduct of the sort that rises to the level of supporting an action for intentional infliction of emotional distress.

See, e.g., Kastritis v. City of Daytona Beach Shores, 835 F. Supp. 2d 1200, 1226 (M.D. Fla. 2011). Mr. Daulerio wrote the Sex Narrative that was posted alongside the Sex Tape, which itself contains outrageous content that invades Mr. Bollea's privacy.

In addition, Florida's "impact rule" only applies to bar plaintiffs from seeking **damages** for emotional distress in negligence actions. *See R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360 (Fla. 1995). The "impact rule" does not bar **injunctive** relief, which is the remedy that Mr. Bollea seeks from this cause of action.

Seventh, Mr. Bollea's allegations supporting his cause of action for violation of Florida's two-party consent wiretapping statute are sufficient to withstand a motion to dismiss. Gawker Media's good faith defense (incorporated by reference by Mr. Daulerio) cannot be considered at the motion to dismiss stage because it is outside the scope of the pleadings and depends on evidence of Gawker's intent.[2]

STATEMENT OF FACTS

Mr. Bollea is a famous professional wrestler and celebrity. FAC ¶¶ 1, 25. He is a resident of Pinellas County, Florida. FAC ¶ 10. Sometime in 2006, Mr. Bollea had a sexual encounter with Heather Clem in a private bedroom. FAC ¶ 1. This encounter was secretly recorded without his knowledge or consent. FAC ¶¶ 1–2, 26. Mr. Bollea believed the encounter was private and would not be viewed by any other persons. FAC ¶¶ 2, 26. Had Mr. Bollea known the encounter would be recorded, he would not have consented. FAC ¶ 26.

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2 Once that evidence is submitted, Mr. Bollea will submit, among other things, the cease and desist letter and follow up email from Mr. Bollea's counsel, sent immediately after the Sex Tape was posted, advising that Mr. Bollea was not aware that he was being recorded and of the criminal laws that prohibit both the recording and the publishing of the Sex Tape. The Gawker Defendants ignored that notice and continued to publish the Sex Tape in violation of the law and Mr. Bollea's rights.

On or about October 4, 2012, Gawker Media posted the Sex Tape: 101 seconds of footage taken from a longer video of Mr. Bollea and Heather Clem having sex. FAC ¶¶ 1, 27–28. The Sex Tape shows Mr. Bollea fully naked and engaging in sexual intercourse. FAC ¶¶ 1, 27. The Sex Tape was not blocked, blurred, or obscured in any way. FAC ¶ 27. The Sex Tape includes subtitles of the dialogue between Mr. Bollea and Heather Clem. FAC ¶ 27. Gawker Media also posted the Sex Narrative, which describes the sexual activity on the full-length recording in graphic detail. FAC ¶¶ 1, 27–28. The Sex Narrative was written by A.J. Daulerio, who was the Editor-in-Chief of Gawker.com at that time. FAC ¶¶ 22, 28. As Editor-In-Chief, Mr. Daulerio presumably was personally involved in every aspect of the Sex Tape, from acquisition of the full-length recording, to editing it, adding subtitles, and posting it at Gawker.com.

At no time did Mr. Bollea ever authorize or consent to the recording or dissemination of the Sex Tape or the creation or disclosure to the public of the Sex Narrative. FAC ¶ 29. Mr. Bollea made numerous and repeated demands that the Sex Tape and Sex Narrative be removed from Gawker.com, and the Gawker Defendants refused to do so. FAC ¶ 28.[3]

[3] As discussed herein, the Court's consideration on this motion is limited to facts in Mr. Bollea's Complaint and in judicially noticeable materials. The Federal Motion asserts a number of facts that do not appear in the Complaint and are not subject to judicial notice: (1) the claim that "Bubba the Love Sponge" encourages his wife and Mr. Bollea to have sex in the video (it is irrelevant and the voice on the Sex Tape is not authenticated); (2) Mr. Bollea's alleged "admission" that he had no idea who the woman in the sex tape was (this is from an interview that has not been authenticated, is not judicially noticeable, and is hearsay); and (3) Mr. Bollea's alleged discussions of infidelity in his book (the book has not been authenticated, is not judicially noticeable, and is not relevant anyway). These facts should be disregarded by the Court.

The Federal Motion also seemingly implies that Mr. Bollea is somehow waiving his privacy rights by including the web page containing the Sex Tape and Sex Narrative in court filings. This is absurd. Referring to invasive material in the course of suing for invasion of privacy is not a waiver of one's privacy rights—it is a necessity borne out of the defendants' tortious conduct.

Gawker Media posted the Sex Tape and Mr. Daulerio wrote the accompanying Sex Narrative—despite having no authorization to do so—for the purpose of selling advertisements and attracting new viewers to Gawker.com and the many other similar websites owned by the Gawker Defendants. FAC ¶ 1. The posting of the Sex Tape and Sex Narrative was successful in that regard. FAC ¶ 30. As a result of the increased traffic, the Gawker Defendants generated tremendous advertising revenues and reaped huge profits. *Id.*

As a result of the broadcast of the Sex Tape and the dissemination of the Sex Narrative, Mr. Bollea suffered, and continues to suffer on a daily basis, extreme embarrassment, discomfort, shame, stress, distress, and devastation. FAC ¶ 31. Mr. Bollea's goodwill, commercial value, and brand are also substantially harmed by Mr. Daulerio's and Gawker Media's actions. FAC ¶¶ 31–33.

ARGUMENT

I. The Federal District Court's Preliminary Injunction Rulings Have No Collateral Estoppel Effect

As an initial matter, it is well-established in Florida that the factual and legal rulings in temporary injunction proceedings are not rulings on the merits and do not bind the Court in future proceedings. *Ladner v. Plaza del Prado Condominium Ass'n*, 423 So.2d 927, 929 (Fla. 3d DCA 1982). Accordingly, and contrary to the defendants' urgings otherwise, the findings and conclusions of the U.S. District Court in ruling on Mr. Bollea's motions for a preliminary injunction are not binding on this Court.

More fundamentally, the federal court's findings simply are not relevant to the motion here. Unlike a preliminary injunction motion, which considers the plaintiff's likelihood of success, "[a] motion to dismiss tests whether the plaintiff has stated a cause of action." *Crocker*

v. Marks, 856 So.2d 1123, 1123 (Fla. 4th DCA 2003). A complaint need only contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. Proc. 1.110(b)(2). "When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Crocker*, 856 So.2d at 1123. "It is error for the trial court to rely 'upon matters raised in the motion, but not contained within the four corners of the complaint.'" *Locker v. United Pharmaceutical Group, Inc.*, 46 So.3d 1126, 1128 (Fla. 1st DCA 2010) (quoting *Chatham Manufacturing Corp. v. Cates*, 969 So.2d 515, 516 (Fla. 1st DCA 2007)).

II. The First Amendment's Protections Do Not Extend to Mr. Daulerio's Conduct In This Case

A. The First Amendment Does Not Protect the Publication of an Illegally and Clandestinely Recorded Sex Tape

The First Amendment does not extend to grant a publisher *carte blanche* to intentionally publish the most invasive possible material where the public has no legitimate need to see it and its publication is not necessary to report the news. In *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (hereinafter "*Michaels I*"), for example, the Court enjoined the broadcast of a celebrity sex tape of Pamela Anderson and rock star Brett Michaels, holding:

> It is also clear that Michaels has a privacy interest in his sex life. While Michaels's voluntary assumption of fame as a rock star throws open his private life to some extent, even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives. *See Virgil,* 527 F.2d at 1131 ("[A]ccepting that it is, as matter of law, in the public interest to know about some area of activity, it does not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity."); Restatement 2d Torts § 652D cmt. h.

> The Court notes that the private matter at issue here is not the fact that Lee and Michaels were romantically involved. Because they sought fame, Lee and Michaels must tolerate some public exposure of the fact of their involvement. *See Eastwood,* 198 Cal.Rptr. at 351. The fact recorded on the Tape, however, is not that Lee and Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.

Michaels I, 5 F. Supp. 2d at 840.

The First Amendment's protection for journalists is important, but it is not without limitations. Mr. Daulerio's attempt to cloak himself in the First Amendment here—where, with only the thinnest veneer of "news" coverage, he and Gawker Media published a surreptitious, illegal, uncensored recording of sexual activity, and a graphic description of the private encounter, that was unnecessary to the reporting of the underlying celebrity gossip story—is inappropriate. The First Amendment's protections do not extend that far, and, accordingly, the Federal Motion's efforts to stretch the case law to support its arguments ultimately fail.

The United States Supreme Court has already addressed this issue and declined to extend the legal principles that privilege the broadcast of illegally made recordings by journalists to the reporting of gossip. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) ("We need not decide whether [the First Amendment] interest is strong enough to justify the application of [the Wiretap Act] to disclosures of . . . domestic gossip or other areas of purely private concern."). In addition, in that case, two justices approvingly cited *Michaels I*, the Pamela Anderson sex tape case, as an example of the media broadcasting "truly private matters" and there being no First Amendment protection for the broadcast. *Id.* at 540 (Breyer, J., concurring). Three other justices dissented and would have held that the broadcast of illegally recorded materials receives no First Amendment protection, even those relating to matters of public concern. *Id.* at 541 (Rehnquist, C.J., dissenting). Thus, a majority of five justices would have held that broadcasting

an illegally recorded celebrity sex tape (or indeed, any illegal recording for the purpose of reporting gossip) receives no protection under the First Amendment.[4]

i. The Sex Tape and Sex Narrative are not matters of legitimate public concern.

The Federal Motion misapplies First Amendment principles that protect expression on matters of legitimate public concern in an attempt to cloak the Sex Tape and Sex Narrative with First Amendment protection. The attempt fails.

In *City of San Diego v. Roe*, 543 U.S. 77 (2004), the Supreme Court held that the content of a sex tape is not a matter of public concern. In that case, the Court denied First Amendment protection to video broadcasts of a police officer masturbating on the ground that the broadcasts were not matters of public concern. *Id.* at 84. In *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. 1996), a newspaper published photos of a mother speaking to her dying son, a homicide victim, as well as her last words to him. The Court held that such facts stated a claim for invasion of privacy: public disclosure of private facts. "A jury could find that a reasonable member of the public has no concern with the statements a grieving mother makes to her dead son, or with what he looked like lying dead in the hospital, even though he died as the result of a gang shooting." *Id.* at 256. *Green* is directly analogous to this case—the fact that there is an underlying news story (Chicago's gang homicide problem; Mr. Bollea having an extramarital affair) does not justify publishing or broadcasting purely sensationalistic and invasive content (a mother's last words to her son; Mr. Bollea in the nude with an erection and having sexual

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[4] There is no doubt that the audio and visual recording of Mr. Bollea using a hidden camera and without Mr. Bollea's consent was illegal under Florida law. *See* Mr. Bollea's Motion for Temporary Injunction filed April 19, 2013 at pp. 18–20 (discussing violations of both Florida video voyeurism statute and Florida two-party consent eavesdropping statute).

intercourse).

In *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998), the California Supreme Court struck a balance between protection of privacy and First Amendment concerns, holding that a television producer defendant was not entitled to summary judgment on an intrusion upon seclusion claim based on the recording and broadcast of conversations between accident victims and emergency workers on a helicopter transporting them to a hospital. However, the Court also addressed the public disclosure tort. "[T]he analysis of newsworthiness does involve courts to some degree in a normative assessment of the 'social value' of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest." *Id.* at 483–84 (emphasis in original).

The *Shulman* holding is a direct rejection of the Federal Motion's argument that because members of the public may be "interested" in seeing the Sex Tape, their broadcast is of "legitimate public interest." Not so. *Shulman* is persuasive authority that certain material does not satisfy the legitimate public interest test even though members of the public may be interested in viewing it. *See also Bonome v. Kaysen*, Case No. 032767, 2004 WL 1194731, at *5 (Mass. Super. March 3, 2004) (holding that biography that disclosed aspects of author's relationship with her boyfriend was not tortious, but stating that publications that were "morbid and sensational" and "pr[ied] into [the plaintiff's] private life for its own sake" would not be matters of legitimate public concern and would be actionable).

ii. The Sex Tape and Sex Narrative are not necessary to the reporting of an otherwise "newsworthy" topic.

In 2009, the Eleventh Circuit held that private nude photographs of a celebrity are not newsworthy even if they accompany a biographical article that is newsworthy, and reversed the

trial court's dismissal of a complaint for invasion of privacy based on a pornographic magazine's publication of such photographs. *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009) (hereinafter *Toffoloni I*). The Court said that if it accepted the defendant's argument, "LFP would be free to publish any nude photographs of almost anyone without permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.'" *Id.* at 1212. This is exactly what the Defendants, including Mr. Daulerio, claim here, and this claim should similarly be rejected.

The Federal Motion's attempt to distinguish *Toffoloni I* is unsuccessful. To the extent the Federal Motion contends that Mr. Daulerio and Gawker Media were reporting on the fact that there is a recording of Mr. Bollea committing adultery, it was not necessary to show the invasive footage on the Sex Tape to support its story. The footage could have been omitted and Defendants still could report the full story wihtout invading Mr. Bollea's privacy. Likewise, nudity and sex acts could have been blocked or obscured. Relatedly, the Sex Narrative was not an account of how Mr. Bollea was recorded committing adultery; instead, it was a play-by-play account of the full recording complete with graphic descriptions of Mr. Bollea's sexual conduct and genitals. Mr. Daulerio and Gawker Media were not reporting on celebrity adultery when they broadcast the Sex Tape and published the Sex Narrative; they were reporting on how Mr. Bollea looked with his clothes off, and his specific sexual proclivities, none of which were matters of legitimate public concern.

In *Michaels v. Internet Entertainment Group*, No. CV 98-05831998, 1998 WL 882848 (C.D. Cal. Sep. 11, 1998) (hereinafter "*Michaels II*"), the Court held that a television program's broadcast of eight two- to five-second excerpts from a celebrity sex tape, which were blurred and distorted and "revealed little in the way of nudity or explicit sexual acts," *id.* at *10, was a matter

of legitimate public concern and protected by the First Amendment. *Michaels II*, when contrasted with *Michaels I* (a decision in the same case by the same judge), shows that if a journalist feels a need to show "proof" of a sex tape's existence, it is possible to do so without invading anyone's privacy by sanitizing the tape and showing just enough to disclose its nature. Mr. Daulerio and Gawker Media deliberately did not do that because the entire point of their post was to bring traffic to Gawker.com, and it was only by showing the privacy-invasive "Not Safe For Work" footage that they could do this.

B. The Cases Cited in the Federal Motion Do Not Establish that Broadcasting an Illegally Recorded Clandestine Sex Tape is Constitutionally Protected

The cases cited in the Federal Motion do not establish that Mr. Daulerio's and the Gawker Defendants' conduct is protected by the First Amendment. The cases that have upheld First Amendment protection for public disclosure of intimate images have either involved material that was necessary to tell the story, accidentally depicted, or had already been exposed to public view. Further, while the publication of illegal recordings has been permitted in cases involving journalists reporting official misconduct, the broadcast of an illegal recording of the sexual activity of a celebrity purely for the purpose of titillating the audience **has never been held to be protected under the First Amendment.**

In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Supreme Court held that anti-gay picketing on public sidewalks adjacent to a military funeral is constitutionally protected. Yet *Snyder* has little to say about the facts of this case—the Court expressly declined to decide whether an "internet posting" that was made by the same defendants was also protected speech. *Snyder*, 131 S. Ct. at 1214 n.1; *see also id.*, 131 S. Ct. at 1221 (Breyer, J., concurring) ("The opinion does not examine in depth the effect of television broadcasting. Nor does it say anything

about Internet postings."); *id.* (Breyer, J., concurring) ("As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict."). The Court also characterized its holding as "narrow." *Id.* at 1220.

Additionally, *Snyder* turns on the Court's finding that social commentary about homosexuality, no matter how vulgar or inappropriate, is a matter of public concern: "Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." *Id.* at 1215. "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import." *Id.* at 1217. Nowhere does *Snyder* suggest that broadcasting an invasive, illegally recorded, explicit sex tape that contains no social commentary on any issue whatsoever receives the same First Amendment protection as the funeral picketers' social commentary about homosexuality.[5]

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[5] The Federal Motion also argues that *Snyder*'s discussion of the outrageousness requirement of the petitioner's intentional infliction of emotional distress claims and its discussion of offensiveness show that the Court intended to protect the defendants' speech here. This is a misinterpretation of those portions of the *Snyder* opinion. *Snyder* holds that liability turns on whether the speech is of public concern, and cites with approval cases such as *San Diego v. Roe*, 543 U.S. 77, and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), where speech on matters of no legitimate public concern was found not protected. Thus, *Snyder* cannot be read to condemn any analysis of the "outrageousness" or "offensiveness" of unprotected speech (*i.e.*, speech on matters of no legitimate public concern) for purposes of tort liability.

The case of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), involved a fictitious interview within a parody advertisement in a magazine that asserted in jest that Falwell lost his virginity to his mother in an outhouse. The First Amendment barred liability because the advertisement's factual claims could not be taken seriously. *Id.* at 57. Here, in contrast, the Sex Tape is not fictitious or a parody but rather a real "Peeping Tom"-style recording of Mr. Bollea's private sexual encounter made without his knowledge, in violation of Florida's criminal statutes and civil tort laws. Moreover, in *Falwell*, the Court expressly held that its holding applied to "publications such as the one here." *Id.* at 56.[6]

The Supreme Court in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), held that the "actual malice" standard applies to "false light" invasion of privacy claims by public figures, where the gravamen of the claim is that the defendant misled the public regarding the plaintiff. *Hill*'s discussion of the difficulties in drawing lines between information and entertainment, *id.* at 388, does not apply to the facts of this case because explicit illegal footage of a celebrity having sex has no legitimate informational value at all, unlike the "true crime" play and accompanying news article in *Hill*. *Hill* even clarified that "[t]his limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Id.* at 383 n.7 (internal quotation omitted).

The case of *Cape Publications, Inc. v. Hitchner*, 549 So.2d 1374 (Fla. 1989), is also distinguishable. There, a newspaper disclosed confidential information about a child abuse

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[6] The "actual malice" standard originated in defamation law and applied in *Falwell* has no application to either Mr. Bollea's privacy claims (which apply the "legitimate public concern" test, discussed above) or Mr. Bollea's right of publicity claim. *Falwell*, 485 U.S. at 52; *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574 (1977).

investigation, including the child's identity. Unlike visual images and audio recordings of the genitals of a celebrity and of a celebrity having sex, the physical abuse of a child is a matter of public concern.

The *Anonsen v. Donahue*, 857 S.W.2d 700, 703–04 (Tex. App. 1993) case, relied on in the Federal Motion for the proposition that matters of public concern extend beyond "hard" news, is distinguishable. *Anonsen* involved a woman who wrote a book that revealed her husband had raped and impregnated their daughter. The daughter sued a television show that did a segment on the book for invasion of privacy. Fundamentally, *Anonsen* involved the print medium and the discussion therein was not nearly as detailed, explicit, or invasive as the Sex Tape and Sex Narrative.

In *Tyne v. Time Warner Entertainment Co.*, 901 So.2d 802, 810 (Fla. 2005), the Court held that making a motion picture about someone's life was not a "commercial use" of a person's name or likeness for purposes of the right to publicity due to First Amendment concerns. *Tyne* is distinguishable—it does not involve the broadcast of a celebrity sex tape but rather a literary work that contains social commentary. *Tyne* limits the commercial purpose prong of the right to publicity to "the unauthorized use of a name to directly promote the product or service of the publisher." *Id.* at 806. Thus, using a person's name or likeness in a literary work is not a direct promotion—the purpose of the use is to further the story. The Sex Tape is not a literary work; it is just a clandestine recording of a private sexual encounter, and the Sex Narrative is simply a recounting of the private sexual encounter that was recorded. The purpose of the Gawker.com post was to bring traffic to the site and make money at the expense of Mr. Bollea's privacy,

reputation, and peace of mind.[7]

III. Mr. Bollea's Allegations Supporting His Public Disclosure Of Private Facts Claim Are Sufficient To Withstand A Motion To Dismiss

To show tortious public disclosure of private facts, Mr. Bollea must establish (1) a publication; (2) of private facts; (3) that are offensive; and (4) that are not of legitimate public concern. *Hitchner*, 549 So.2d at 1377.

A. Mr. Daulerio and Gawker Media Published Private Facts About Mr. Bollea

The posting of images of Mr. Bollea fully nude and having sexual intercourse is a publication of what can only be described as the most private facts about Mr. Bollea. *Michaels I*, 5 F. Supp. at 840 (holding distribution of sex tape is a publication of private facts: "Here, distribution of the Tape on the Internet would constitute public disclosure. The content of the Tape—Michaels and Lee engaged in sexual relations—constitutes a set of private facts whose disclosure would be objectionable to a reasonable person."); *accord* Restatement (Second) of Torts § 652D comment (b) illustration 6 (1977) (illustration of tortious invasion of privacy involving magazine buying photo of man in hotel room in compromising position with mistress and publishing it); *id.* comment (b) (discussing public disclosure tort: sexual relations "are

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[7] *Lee v. Penthouse International, Ltd.*, No. CV96-7069SVW (JGX), 1997 WL 33384309 (C.D. Cal. March 19, 1997), cited with approval at another point in the Federal Motion, supports this point and rejects the Federal Motion's narrow construction of the commercial purpose test. "[Defendants'] claim that only photographs used in conjunction with advertising are actionable overstates the law.... They appear to define advertising narrowly as an endorsement of a particular product. Instead, the proper analysis involves two questions: (1) Did Defendants exploit Plaintiffs' names and images in order to gain a commercial advantage? (2) Did Defendants use Plaintiffs' names and images in conjunction with a 'newsworthy' story?" *Id.* at *2.

Gawker Defendants admittedly used Mr. Bollea's Sex Tape to gain a commercial advantage—advertising revenues through page views. As discussed herein, the contents of the Sex Tape and Sex Narrative are not newsworthy and are unnecessary to report the underlying story about Mr. Bollea having an affair and the existence of the clandestine recording.

normally entirely private matters"); *Lewis v. LeGrow*, 670 N.W.2d 675, 685 (Mich. App. 2003) (bedroom where plaintiff was secretly recorded having sex is a private place from which the general public is excluded). The Sex Narrative similarly discloses a plethora of private facts about Mr. Bollea, such as his sexual positions and what his genitals look like.

The Federal Motion argues, based on materials completely outside the scope of the pleadings and judicially noticeable materials, that Mr. Bollea allegedly had discussed an alleged different affair in the past and that other outlets supposedly had reported that Mr. Bollea had an affair with Heather Clem. This argument is not cognizable on a motion to dismiss, as these facts do not appear on the face of the FAC. In any event, the private facts that were disclosed and which form the basis of Mr. Bollea's suit—the contents of the Sex Tape and the Sex Narrative—did not appear either in Mr. Bollea's book or in the earlier news reports cited by the Federal Motion.

The two cases relied on in the Federal Motion are inapposite. In *Heath v. Playboy Enterprises, Inc.*, 732 F. Supp. 1145 (S.D. Fla. 1990), a clothed photo of the mistress of a celebrity and their love child was lawfully taken **in a public place**. *Id.* at 1148. Nothing in *Heath* suggests that a celebrity who talks about his love life waives his right to object to the broadcast of a sex tape.[8] In *Lee*, Penthouse re-published nude photos of Pamela Anderson and Tommy Lee that had already appeared in other magazines. 1997 WL 33384309 at *6. The allegations of the FAC here do not state that anyone broadcast the Sex Tape before Gawker.com

[8] The statement in *Heath* that "the judgment of what is newsworthy is primarily a function of the publisher, not the courts," 732 F. Supp. at 1149 n. 9, cited by the Federal Motion, was in response to an argument made by Heath that the photograph published by Playboy was untimely and thus no longer newsworthy. The Court also noted "[t]he relevance of newsworthiness to an invasion of privacy claim is generally an issue of content rather than timeliness." *Id.* The Court did not hold that there could never be a situation where a court held the content of an alleged news report not to be newsworthy.

did; therefore, *Lee* does not apply here.

B. The Publication was Offensive to a Reasonable Person

It should be beyond doubt that the publication of a clandestinely recorded sex tape, as well as a graphic narrative of its contents, would be offensive to a reasonable person. Mr. Daulerio and Gawker Media enabled anyone in the world with Internet access to view nude images of Mr. Bollea engaged in sexual intercourse. Very explicit footage was deliberately selected, and no attempt was made to block, blur, or obscure the images. *Michaels I*, 5 F. Supp. 2d at 840 (public disclosure of video recording of private sexual relations "would be objectionable to a reasonable person") & 841 ("the Court determines that the plaintiffs are likely to convince the finder of fact that sexual relations are among the most private of private affairs, and that a video recording of two individuals engaged in such relations represents the deepest possible intrusion into such affairs").

C. The Publication Was Not on a Matter of Legitimate Public Concern

The Federal Motion's citation to *Hitchner* to support its argument that the public concern is "so broad as to nearly swallow the tort," 549 So.2d at 1377, is undermined by Florida's other case law.

First, there is a fundamental—and judicially recognized—difference between the *fact of* an act and the *act itself*. Mr. Bollea will assume, for the sake of this motion only, that merely engaging in truthful gossip about celebrities, including that they had an extramarital affair, is a matter of legitimate public concern. However, the broadcast of a surreptitious, illegal recording of two people engaging in private, consensual sexual intercourse and of a fully nude man sexually aroused, as well as the graphic play-by-play narrative description of that encounter, including positions, and what one participant's genitals look like, are not matters of legitimate

public concern. No state or federal court in America has ever held that these are matters of legitimate public concern, nor has any court even come close.

In *Doe v. Univision Television Group, Inc.*, 717 So.2d 63 (Fla. 3d DCA 1998), the plaintiff was a woman whose cosmetic surgery procedure was botched. As part of an exposé on botched cosmetic surgery, the defendant television station disclosed her identity. The Court reversed a summary judgment for the television station, holding that the plaintiff had a triable claim for public disclosure of private facts. "[W]hile the topic of the broadcast was of legitimate public concern, plaintiff's identity was not." *Id.* at 65. *Doe* is directly analogous to the case at bar—whether Mr. Bollea had an affair may have been a matter of legitimate public concern, but the explicit images on the Sex Tape and described in the Sex Narrative are not.

Second, legitimate public concern is not synonymous with prurient curiosity. In *Harms v. Miami Daily News, Inc.*, 127 So.2d 715 (Fla. 3d DCA 1961), the defendant newspaper published an article stating that plaintiff had a "sexy telephone voice." The Court held that this was not a matter of legitimate public concern and that plaintiff had stated a cause of action for public disclosure of private facts. Importantly, the Court held that "the phrase 'public or general interest,' in this connection, does not mean mere curiosity." *Id.* at 717. This holding is significant. As in *Harms*, the broadcast of the Sex Tape and Sex Narrative was directed toward the "mere curiosity" of viewers—and did not serve the public or general interest. *See also Michaels I*, 5 F. Supp. 2d at 840, 841 ("It is difficult if not impossible to articulate a social value that will be advanced by dissemination of the [Pamela Anderson and Brett Michaels sex tape].").

Third, an involuntary disclosure of something private does not waive one's privacy protections. In *Daily Times Democrat v. Graham*, 276 Ala. 380 (Ala. 1964), the plaintiff was photographed with her skirt blown up as she left the Fun House at the county fair, and the photo

was published on the front page of the newspaper. The Alabama Supreme Court affirmed a judgment in plaintiff's favor on a claim of public disclosure of private facts. The Court held that where the plaintiff involuntarily discloses something private, the plaintiff does not lose the protection of the invasion of privacy tort. *Id.* at 383–84. Here, Mr. Bollea was involuntarily recorded having sex; he should not, and does not, lose his privacy protections as a result.

Finally, the other cases cited by the Federal Motion are inapposite:

(i) *Woodward v. Sunbeam Television Corp.*, 616 So.2d 501, 503 (Fla. 3d DCA 1993), involves a woman who sued for invasion of privacy because a story revealed she changed her name in a divorce, which was a public record.

(ii) *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. App. 1983), cited by the Federal Motion for the proposition that the romantic lives of celebrities are matters of public concern, involves news reporting by the National Enquirer relating to a celebrity love triangle but nothing in *Eastwood* suggests that actually broadcasting a celebrity having sex is a matter of public concern.

(iii) *Jones v. Turner*, No. 94 Civ. 8603 (PKL), 1995 WL 106111 at *21 (S.D.N.Y. Feb. 7, 1995), involved Penthouse Magazine's publication of "semi-nude" photographs of Paula Jones, who accused Bill Clinton of sexual harassment. The Court held that the news story published by Penthouse was a matter of public interest and that the photographs had a relationship to the news story. *Id.* at *21. Notably, Penthouse argued that the photographs proved Paula Jones was dishonest because she had allegedly denied posing for them. *Id.* at *6. Obviously, Jones' credibility was an issue of public concern given that she had filed suit against the President.

(iv) *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA 1982), involved a kidnaping victim who was photographed clad in a dish towel in public view. The photograph "revealed little more than could be seen had appellee been wearing a bikini and somewhat less than some bathing suits on the beaches." *Id.* at 427. The photograph was published as part of a news story on the kidnaping and "there were more revealing photographs taken which were not published." *Id.* The court held the photograph was a matter of legitimate public concern. *Bridges* is distinguishable from the case at bar: (1) the photograph was not explicit; (2) the defendant specifically avoided using any explicit footage (even though more explicit photographs were taken), because, unlike Gawker Media and Mr. Daulerio the publication was trying to report the news rather than generate the maximum amount of readership and advertising revenue; (3) the photograph was taken in a public place; and (4) the photograph was legitimately used to illustrate an article about a separate newsworthy event, the plaintiff's kidnaping.

(v) *Konikoff v. Prudential Insurance Co.*, 234 F.3d 92 (2d Cir. 2000), is a defamation case. The dictum cited in the Federal Motion about the legitimate public concern test nowhere states that journalists be given absolute deference. The Federal Motion attempts to change a rule of prudent deference into an abdication. If there is any set of facts that is a "clear abuse," *id.* at 102 n.9, it is

the broadcast of illegally recorded footage of a person nude and having sexual intercourse.

(vi) The Restatement (Second) of Torts § 652D does not support the Federal Motion's arguments either. While comment g, cited by the Federal Motion, states that matters of public concern go beyond "hard" news, Illustration 6 to comment b of the same section indicates that publishing photos of a couple engaging in adulterous sex is nonetheless an actionable invasion of privacy. Restatement (Second) of Torts § 652D cmt. b Illus. 6.[9]

IV. Mr. Bollea's Allegations Supporting His Intrusion Upon Seclusion Claim Are Sufficient To Withstand A Motion To Dismiss

Intentional intrusion into the solitude of another is a tort under Florida law. *Purrelli v. State Farm Fire & Casualty Co.*, 698 So.2d 618, 620 (Fla. 2d DCA 1997). A physical trespass is not required. *Id.* Here, Gawker Defendants, including Mr. Daulerio, intruded into Mr. Bollea's seclusion by acquiring, viewing, editing, subtitling, and publishing the recording of his private sexual activity, and authoring and publishing the Sex Narrative describing the graphic details of that recording.

The Federal Motion argues that Mr. Bollea fails to allege a physical or electronic intrusion. However, no case cited by the Federal Motion holds that broadcasting an illegal and surreptitious video does not constitute an electronic intrusion. *Allstate Insurance Co. v. Ginsberg*, 863 So.2d 156 (Fla. 2003), holds that intrusion refers to "a 'place' in which there is a reasonable expectation of privacy and is not referring to a body part," *id.* at 162, and thus holds that plaintiff's allegations of unwanted sexual touching did not raise triable issues of fact as to

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9 Illustration 6 involves a hardware merchant, a private figure. Yet it is clear that the authors of the Restatement believed that even celebrities have privacy rights. The very next comment to Section 652D confirms this. "[T]he home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen. The extent of the authority to make public private facts is not, however, unlimited. There may be some **intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself.**" Restatement (Second) of Torts § 652D comment h (emphasis added). Read in context, it is clear that the principles set forth in the Restatement do not support the Federal Motion's contention that the broadcast of footage of a celebrity engaged in sexual intercourse is news of legitimate public concern.

the tort of intrusion. The other case relied on in the Federal Motion, *Spilfogel v. Fox Broadcasting Co.*, 433 Fed. Appx. 724, 726–27 (11th Cir. 2011), holds that the recording of a citizen's encounter with a police officer on a public street is not an intrusion because there is no intrusion into a place where there is a reasonable expectation of privacy. Unlike these cases, Mr. Bollea alleges an intrusion into the **private place** where he was engaged in sexual intercourse with his companion.

V. Mr. Bollea's Allegations Supporting His Right Of Publicity Claim Are Sufficient To Withstand A Motion To Dismiss

To prevail on his right of publicity claim, Mr. Bollea must show that Mr. Daulerio used his name or likeness for commercial, trade, or advertising purposes without Mr. Bollea's consent to do so. Fla Stat. § 540.08(1); *Loft v. Fuller*, 408 So. 2d 619, 623–24 (Fla. 4th DCA 1981).

There is no dispute that Mr. Daulerio used Mr. Bollea's name and likeness without his consent. The Federal Motion argues that Mr. Bollea's name and likeness were not used for a commercial benefit, *i.e.*, "to directly promote the product or service of the publisher." *Loft*, 408 So.2d at 623–24. Mr. Bollea's allegations say otherwise. As Mr. Bollea alleges, "massive numbers of individuals were drawn to [Gawker.com], for which the Gawker Defendants have reaped tremendous revenues and profits . . . [and which] are a direct result of the tremendous fame and goodwill of Plaintiff." FAC ¶ 30. Indeed, the commercial purpose can be inferred from the decision to include explicit footage of Mr. Bollea nude and engaging in sexual intercourse in the Sex Tape, the headline that the content was "Not Safe For Work," and the admission in the first paragraph of the post, "we watch this footage because it's something **we're not supposed to see . . . .**" If the intention was purely journalistic, the explicit content could have been omitted or censored. Gawker Defendants would not describe it as "something we're

not supposed to see" and "Not Safe For Work," as opposed to a legitimate news story. *See Gritzke v. M.R.A. Holding LLC*, No. 4:01CV495-RH, 2002 WL 32107540 (N.D. Fla. March 15, 2002) (declining to dismiss complaint where plaintiff's image was used on "Girls Gone Wild" promotional materials without her consent).[10]

In *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), the only right of publicity case ever considered by the U.S. Supreme Court, the Court held that a television news station's broadcast of only 15 seconds of the plaintiff's 30 minute human cannonball act performed at a state fair constituted a violation of the plaintiff's right of publicity, holding: "The rationale for protecting the right of publicity is the straight-forward one of preventing unjust enrichment by the theft of good will. No social service is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay." *Id.* at 576. The parallels to the instant case are instructive. Gawker Defendants sought to commercially exploit Mr. Bollea's fame by posting 101 seconds of a 30 minute sex tape so that Gawker Defendants might reap tremendous financial rewards from doing so, at Mr. Bollea's expense. If Mr. Bollea were to have agreed to allow such footage to be shown to the public, the

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[10] In any event, the issue of whether Mr. Daulerio's purpose was commercial is a factual issue that will require discovery, and therefore it is not appropriate to resolve this issue on a motion to dismiss.

The Federal Motion argues that Florida's common law and statutory publicity claims are identical, citing *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006), and *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1260 (S.D. Fla. 2010). However, this is not correct with respect to the commercial purpose requirement. *See Tyne v. Time Warner Entertainment Co.*, 901 So.2d 802, 810 (2005) (excluding from commercial purpose requirement of Fla. Stat. § 540.08 publications which do not directly promote a product or service, but stating the decision "does not foreclose any viable claim that appellants may have... under the common law"). *See Esch v. Universal Pictures Co.*, No. 6:09-cv-02258-JEO, slip op. at 8 n.7 (stating that holding of *Tyne* was specifically limited to Florida statutory right to publicity). *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002), also cited by the Federal Motion, predates the Florida Supreme Court's ruling in *Tyne*, and *Lane*'s holding that Florida's statutory and common law rights to publicity are coextensive may no longer be valid.

required fee would have been exorbitant. *See also* Restatement (Second) of Torts, Section 652C: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

The Federal Motion's cited authorities are easily distinguished. In *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, a television program used photographs from plaintiff's book about the Castro regime in Cuba. There, the plaintiff made no allegations that defendants were using illegally obtained private footage of the plaintiff's most intimate moments to generate advertising revenue for their television program. In *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002), the plaintiff voluntarily flashed a cameraman whose footage was then utilized in a Girls Gone Wild video. The Court held that a "truthful and accurate depiction of Lane voluntarily exposing her breasts to a camera" was not actionable. *Id.* at 1215. In the case at bar, Mr. Bollea's likeness was appropriated entirely without his consent—there was nothing voluntary about it—and it was used for the purpose of generating traffic for Gawker.com.

The *Epic Metals Corp. v. CONDEC, Inc.*, 867 F. Supp. 1009 (M.D. Fla. 1994), case actually supports Mr. Bollea's position. It holds that a product brochure that used a photo of one of the counterclaimants was not a violation of the right to publicity because the focus of the brochure was on the product, not the counterclaimant's image. *Id.* at 1016 ("The intended focus of the photograph was on the deck material, not defendant Souliere."). Further, the counterclaimant in *Epic Metals* was never identified in the brochure. *Id.* at 1017 ("Defendant is required to prove that he has been publicly identified as a prerequisite to recovery on his invasion of privacy counterclaims."). In direct contrast, everything that Gawker.com published or broadcast regarding the Sex Tape and Sex Narrative focused on Mr. Bollea, not on some separate

product.

In *National Football League v. The Alley, Inc.*, 624 F. Supp. 6 (S.D. Fla. 1983), the Court held that a bar's interception of satellite feeds of football games violated the statute barring interception of radio communications, but did not violate the right of publicity of the players depicted. The case contains very little reasoning on the publicity claims and is distinguishable in that the players had contractually consented to be depicted in the broadcasts. *Id.* at 10. The *Loft v. Fuller*, 408 So.2d 619 (Fla. 4th DCA 1981), case holds that the use of the plaintiff's name or likeness as part of a literary work is not a violation of the right of publicity. However, Gawker Defendants', including Mr. Daulerio's, usage of Mr. Bollea's name and likeness is not part of a creative and transformative literary work; rather, they broadcast an illegal Sex Tape of him and described the sex acts in the illegal recording.

VI. Mr. Bollea's Allegations Supporting His Infliction of Emotional Distress Claims Are Sufficient To Withstand A Motion To Dismiss

"In order to state a cause of action for intentional infliction of emotional distress, the plaintiff must demonstrate that: 1) the defendant acted recklessly or intentionally; 2) the defendant's conduct was extreme and outrageous; 3) the defendant's conduct caused the plaintiff's emotional distress; and 4) plaintiff's emotional distress was severe." *Johnson v. Thigpen*, 788 So.2d 410, 412 (Fla.1st DCA 2001). Each of these elements is easily met.

First, Mr. Bollea alleges that Gawker Media and Mr. Daulerio acted intentionally. *See, e.g.* FAC ¶ 1 ("Gawker Defendants posted the Video and Narrative for the public to view, for the purpose of obtaining tremendous financial benefit for themselves"); ¶ 5 (referencing the "refusal to remove the Video and Narrative when Plaintiff repeatedly requested and demanded its removal from the Gawker Site"); ¶ 27 ("The footage was not blocked, blurred or obscured in any

way by the Gawker Defendants, who created the edited 'highlight reel' and also added English subtitles to the Video to ensure that viewers did not miss a word of their private encounter."); ¶ 28 ("Defendant Bennert, with the help or under the direction of defendants Denton and Daulerio, edited the secretly-filmed recording into the Video without Plaintiff's knowledge or consent."); *id.* ("Plaintiff made numerous and repeated demands to the Gawker Defendants, including directly to defendant Denton, to remove the Video from the Gawker Site. However, the Gawker Defendants failed and refused to do so."). Accordingly, *Lockhart v. Steiner Management Services, LLC*, No. 10-24665-CIV, 2011 WL 1743766 (S.D. Fla. May 6, 2011), cited in the Federal Motion, has no applicability here. There, the Court held that the plaintiff's general allegation that the alleged conduct was intended to cause severe emotional distress was insufficient, but granted leave to amend the complaint to make more specific allegations. *Id.* at *3. As cited above, Mr. Bollea makes such specific allegations.

The Federal Motion next argues that Mr. Bollea does not sufficiently allege outrageous conduct. As an initial matter, the Federal Motion ignores that, at the pleadings stage, the Court must accept Mr. Bollea's allegations as true. *Gallogly v. Rodriguez*, 970 So.2d 470, 472 (Fla.2d DCA 2007) (complaint that alleged police officers ran a drug and prostitution ring out of plaintiff's business adequately pleaded outrageous conduct even though the Court was skeptical of the veracity of the allegations). The standard is whether the alleged "conduct, if proven, goes beyond the bounds of decency and would cause the average member of the community to exclaim, 'outrageous.'" *Id.* at 473. Mr. Bollea's allegations meet this standard. "[A] reasonable fact finder could conclude that invading someone's bodily privacy, in a public setting, in the presence of members of the opposite sex, without legal justification, is outrageous." *Kastritis*, 835 F. Supp. 2d at 1226 (conducting strip search of exotic dancers in public place). Mr. Bollea

submits that the facts here are even more egregious than those in *Kastritis*, where the injury was contained to one isolated event. Here, Mr. Bollea's injury is ongoing—the Sex Tape and Sex Narrative continued to be distributed and viewed by millions of total strangers.

Moreover, "[t]he viability of a claim for intentional infliction of emotional distress is highly fact-dependent and turns on the sum of the allegations in the specific case at bar." *Johnson v. Thigpen*, 788 So. 2d 410, 413 (Fla. 1st DCA 2001) (citing *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1537 (S.D. Fla. 1993)). "[W]here significant facts are disputed, or where differing inferences could reasonably be derived from undisputed facts, the question of outrageousness is for the **jury to decide**." *Williams v. City of Minneola*, 575 So. 2d 683, 692 (Fla. 5th DCA 1991) (reversing summary judgment on emotional distress claim based on disclosure by police officers of photographs and videotape of an autopsy and holding this raised jury questions as to scienter and outrageousness) (emphasis added). Based on the facts alleged, Mr. Bollea should—at minimum—be allowed to engage in discovery to learn the full extent of Mr. Daulerio's outrageous conduct before that conduct is measured by the Court as a matter of law.[11]

The Federal Motion argues that *Toffoloni v. LFP Publishing Group, LLC*, 483 Fed. Appx. 561 (11th Cir. 2012) (hereinafter "*Toffoloni II*"), an unpublished opinion reversing the punitive damages award in the *Toffoloni I* case involving the nude photographs in Hustler magazine, supports the claim that the defendants' conduct was not outrageous. Yet *Toffoloni II* solely

[11] The Federal Motion misconstrues Mr. Bollea's argument with respect to his requests that Gawker.com take down the Sex Tape, claiming that this would expose any publisher to liability for intentional infliction of emotional distress because these takedown requests are so common. However, the Federal Motion ignores that when content is actually protected by the First Amendment (unlike the content here), publishers may ignore takedown requests. Here, because posting explicit portions of an illegally recorded sex tape falls outside of First Amendment protection and clearly is outrageous and likely to cause emotional distress, Gawker Defendants'

concerns punitive damages, and under the applicable Georgia law (not Florida law), the scienter requirement is "premeditation or knowledge and consciousness of the appropriation and its continuation," *id.* at 562, which must be proven by clear and convincing evidence, *id.* at 564. The "outrageousness" element of intentional infliction of emotional distress does not require a showing of premeditation or any similar intent.

Moreover, *Toffoloni II* was a review of a punitive damages award after judgment, where the Court had a full factual record when ruling that Hustler Magazine, while liable for publishing the photographs, had a mistaken but reasonable belief that it had the right to publish the photographs. *Id.* at 564. Here, Gawker Defendants, including Mr. Daulerio, did not have grounds for such a reasonable belief, but if they wish to make the argument that they did, the time for that argument to be presented and determined is at trial when all of the evidence is aired; not in a motion to dismiss.

In addition, the Federal Motion's argument that Mr. Bollea has not sufficiently pleaded his damages is without merit. Emotional distress damages need not be pleaded in any detail—a statement that the conduct alleged caused distress is sufficient. *Dominguez v. Equitable Life Assurance Society*, 438 So.2d 58, 61–62 (Fla.3d DCA 1983) (pleading that stated that the defendant's actions "did in fact cause severe and extreme emotional distress to the Plaintiff" held to state a cause of action for intentional infliction of emotional distress). Mr. Bollea's pleading that the broadcast of an illegally recorded, clandestine sex tape emotionally distressed him is certainly more than plausible on its face; nothing more is required.

Finally, Mr. Bollea's allegations supporting his negligent infliction of emotional distress claim are sufficient to withstand a motion to dismiss. Florida's "impact rule" provides that

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disregard of Mr. Bollea's cease and desist demands is probative of malicious intent.

"before a plaintiff can recover **damages** for emotional distress caused by the negligence of another, the emotional distress must flow from physical injuries the plaintiff sustained in an impact." *Southern Baptist Hospital v. Welker*, 908 So.2d 317, 320 (Fla. 2005) (emphasis added). This rule has no application to **injunctive relief**, the remedy sought by Mr. Bollea here. Thus, the negligent infliction of emotional distress claim should not be dismissed.

VII. Mr. Bollea's Allegations Supporting His Claim For Violation of Florida's Two-Party Consent Wiretapping Statute Are Sufficient To Withstand A Motion To Dismiss

The Federal Motion does not argue that Mr. Bollea has not pleaded the elements of this claim. The Federal Motion's First Amendment argument is answered above—the cases permitting the broadcast or publication of illegally wiretapped conversations all involved news on matters of important public affairs. This legal rule is based on a careful balancing of interests—it is necessary to permit the broadcast of illegal recordings, even though it might incentivize violations of wiretapping laws, because such a rule is necessary to ensure that the press has the freedom to report on important news stories. There is no basis for extending this rule to illegally recorded sex tapes broadcast solely for the titillation of an audience and resulting advertising revenues. The illegal footage of Mr. Bollea engaged in private, consensual sex does not equate to the Watergate tapes, and it would be a perversion of the First Amendment to incentivize clandestine "Peeping Tom" recordings by according them the same protections as legitimate news content.

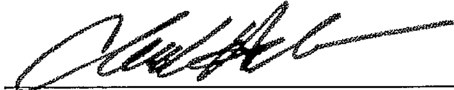
The Federal Motion also argues that Gawker Defendants are entitled to a statutory defense based on the good faith determination that "Florida or federal law . . . permitted the conduct complained of." Fla. Stat. § 934.10(2)(c). This issue is not cognizable on a motion to

dismiss because Mr. Daulerio's beliefs regarding the content of Florida or federal law have not been pleaded by Mr. Bollea. In any event, the case law confirms this is an issue of fact that cannot be resolved at this stage of the proceedings. *See Wood v. State*, 654 So.2d 218, 220 (Fla. 1st DCA 1995) ("[W]e consider it to be a jury determination whether the defendant acted in good-faith reliance on a good-faith determination.").

CONCLUSION

For the foregoing reasons, the plaintiff Terry Gene Bollea respectfully requests that A.J. Daulerio's Motion to Dismiss be denied in its entirety. If the Court finds that any portion of the motion should be granted, Mr. Bollea respectfully seeks leave to amend his First Amended Complaint to correct any deficiencies pursuant to Fla. R. Civ. Proc. 1.190(a). *See Brumer v. HCA Health Services*, 662 So.2d 1385, 1386 (Fla. 4th DCA 1995) (unless the record shows that a party "could not amend his [or her] complaint to state a cause of action," it is error to deny leave to amend).

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail and U.S. First Class Mail this 10th day of May, 2013 to the following:

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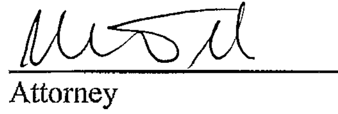

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