IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

PUBLISHER DEFENDANTS' COMBINED BRIEF ON PUNITIVE DAMAGES (On Plaintiff's Motion For Leave To Amend Complaint and Publisher Defendants' Motion For Summary Judgment)

Pursuant to Florida Rules of Civil Procedure 1.190 and 1.510, and to Florida Statute § 768.72, Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants"), through the undersigned counsel, hereby submit this combined brief (a) in opposition to plaintiff's motion for leave to amend to assert a claim for punitive damages and (b) in support of their motion for summary judgment on punitive damages, on the grounds that the undisputed record confirms that plaintiff is not entitled to punitive damages as a matter of law.

PRELIMINARY STATEMENT

According to plaintiff Terry Gene Bollea, the celebrity better known as "Hulk Hogan" ("Hogan"), he is entitled to seek punitive damages because the Publisher Defendants posted the "Hulk Hogan sex tape" story supposedly knowing it was unlawful, and ostensibly with the sole purpose of making money. For him to do so, he is required, under black-letter Florida law, to submit facts that, if credited, would allow a jury to find "clear and convincing" evidence that

each of the Publisher Defendants had "actual knowledge" that their conduct was unlawful or that each acted with "conscious" disregard towards the plaintiff's life, safety or rights. Fla. Stat. § 768.72(2). Unfortunately for Hogan, the undisputed record evidence completely negates his version of events, confirming instead that the Publisher Defendants did not knowingly or consciously violate Hogan's rights, and that their purpose was and is to publish newsworthy content, not to generate revenue by purposefully harming him. Indeed, now that the exhaustive discovery in this case is concluded, the record confirms that:

(a) the Publisher Defendants believed that their commentary and the accompanying video excerpts (the "Publication") was newsworthy (a judgment also reached by a federal judge and three appellate court judges),

(b) the Publisher Defendants were in no way attempting to injure plaintiff by publishing the entire sex tape they received (editing from 30 minutes to less than two) or by selling or otherwise commercializing it,

(c) the Publisher Defendants (correctly) understood that whether something is newsworthy is dependent on the context and circumstances,

(d) as a result the Publisher Defendants routinely elect not to publish depictions of sex and/or nudity when their context makes plain that there is nothing newsworthy about them, as the many examples submitted by Hogan confirm, and

(e) the Publisher Defendants routinely criticize others for publishing depictions of sex and/or nudity that are not newsworthy, again establishing that they engage in principled editorial decision-making.

The law is clear that the plaintiff needs to make a showing, whether in seeking leave to amend or in trying to overcome summary judgment, that the defendants knew their conduct was unlawful

and proceeded anyway. But his voluminous exhibits sidestep this key legal issue. Rather than address the substantial and undisputed evidence on this question (all of which is uniquely unhelpful to his punitive damages claim), he instead attempts to divert the Court's attention with a series of *other* articles in *other* publications, deposition questioning about hypothetical *other* circumstances, and generalized statements by the Publisher Defendants expressing the unremarkable view that, in general, they seek to increase traffic and make money.

Here, we have two related – but analytically distinct – motions. First, Hogan seeks to amend his complaint, but he has not carried his heavy burden of submitting facts that would allow him to add a claim for punitive damages, nor has he explained under the applicable legal standard why he should be entitled to do so. Fla. R. Civ. P. 1.190(f). Second, even if the limited evidence Hogan has submitted were somehow deemed sufficient to *allege* a claim for punitive damages, the undisputed factual record, based on two years of discovery, confirms that the Publisher Defendants would be entitled to judgment as a matter of law on any such claim.[1] At the end of the day, Hogan's motion tells a good yarn – namely, that, in addition to compensating him, Gawker should be punished for lawlessly invading people's privacy or for knowing that the Publication was unlawful and publishing anyway, all to turn a profit. But the actual evidence – and it is the evidence that matters on both Hogan's and the Publisher Defendants' motions –

[1] Indeed, exhaustive discovery has been now been completed: the Publisher Defendants have produced more than 25,000 pages of documents in response to more than 400 document requests, they have provided excruciatingly detailed responses to multiple sets of interrogatories, they have answered scores of requests for admission, and have facilitated the depositions of numerous witnesses from Gawker – its CEO (defendant Nick Denton), its Chief Operating Officer (two full days), its Chief Revenue Officer, its Chief Strategy Officer, its Chief Technology Officer, its Vice President of Advertising Sales, and multiple editorial employees, including the author of the post at issue and then-editor of gawker.com (defendant A.J. Daulerio), the then-managing editor of gawker.com, and a later editor of gawker.com.

demonstrates the exact opposite. Under these circumstances, there is no basis to allow Hogan to amend, and there is certainly no basis to submit a claim for punitive damages to the jury.

UNDISPUTED MATERIAL FACTS

As set forth in the Publisher Defendants' Statement of Undisputed Material Facts on Punitive Damages" ("Punitive Damages SUMF"), and supporting Affidavit of Alia L. Smith, the following material facts are undisputed:

1. Gawker published the news report and commentary at issue in this action, accompanied by one minute and 41 seconds of heavily-edited excerpts from a full 30 minute video recording (the "Video Recording") of Hogan and Heather Clem conversing and engaging in sexual activity. Punitive Damages SUMF ¶¶ 5-21.

2. The Publisher Defendants played no role in creating the Video Recording. *Id.* ¶¶ 22-23.

3. The Publisher Defendants believed that the Publication addressed a matter of public concern. *Id.* ¶¶ 24-30.

4. After publication, the Publisher Defendants continued to believe that the Publication was newsworthy. *Id.* ¶¶ 31-34.

5. The Publisher Defendants believe that whether something is newsworthy depends on the context. *Id.* ¶¶ 35-43.

ARGUMENT

I. Limitations on Claims for Punitive Damages

A. Hogan's Motion for Leave to Amend

A party who wishes to amend his complaint to add a claim for punitive damages must "make a reasonable showing, by evidence in the record or [proffered] evidence" that he has a

"reasonable basis for recovery of such damages." Fla. R. Civ. P. 1.190(f). Recovery of such damages is permissible only where a plaintiff can show, through "clear and convincing evidence," that the defendant engaged in either "intentional misconduct" or "gross negligence." Fla. Stat. § 768.72(2). As defined by the statute:

> (a) "Intentional misconduct" means that the defendant had ***actual knowledge*** of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that ***knowledge***, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a ***conscious*** disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Id. (emphases added). In both cases, the standard requires actual subjective knowledge or awareness – "actual knowledge" under prong (a) and "conscious" disregard or indifference under prong (b) – that the conduct was unlawful.

Put differently, the plaintiff must provide clear and convincing admissible evidence that would establish that the defendant's conduct "was conceived in the spirit of mischief or criminal indifference to civil obligations." *Genesis Publ'ns, Inc. v. Goss*, 437 So. 2d 169, 170 (Fla. 3d DCA 1983) (quoting 17 Fla. Jur. 2d Damages § 120); *see also BDO Seidman, LLP v. Banco Espirito Santo Int'l*, 38 So. 3d 874, 876 (Fla. 3d DCA 2010) ("Punitive damages are a form of extraordinary relief for acts and omissions so egregious as to jeopardize not only the particular plaintiff in the lawsuit, but the public as a whole, such that a punishment – not merely compensation – must be imposed to prevent similar conduct in the future"); *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 610 (Fla. 1st DCA 2007) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."). The required "clear and convincing evidence" is "evidence

that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." *BDO Seidman*, 38 So. 3d at 877.

Because Section 768.72 creates a "substantive right to be free from punitive damages litigation" absent a sufficient showing, a motion to amend to add a punitive damages claim is not treated like an ordinary motion to amend. *See Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995); *Espirito Santo Bank v. Rego*, 990 So. 2d 1088, 1090 (Fla. 3d DCA 2007). Rather, the burden is much higher. As one court has explained:

> Punitive damage amendments are different than traditional amendments in that Section 768.72 has created a substantive legal right not to be subject to a punitive damage claim until the trial court rules that there is a reasonable evidentiary basis for punitive damages. Because this is a substantive right, the abuse of discretion standard, which requires all doubts to be resolved in favor of allowing amendments, is not appropriate for reviewing proposed punitive damages amendments.

Holmes v. Bridgestone/Firestone, Inc., 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005) (Pl. Mot. at 10); *see also Estate of Despain v. Avante Grp., Inc.*, 900 So. 2d 637, 644 (Fla. 5th DCA 2005) ("discretion is not the standard that should apply when determining whether record evidence or a proffer is sufficient") (Pl. Mot. at 10).

B. The Publisher Defendants' Motion for Summary Judgment

Moreover, even if this Court were to find that Hogan had somehow met the threshold requirements for *alleging* a punitive damages claim, the Court should still enter summary judgment because it is clear on the undisputed record that no claim for punitive damages exists as a matter of law. *See* Fla. R. Civ. P. 1.510 (summary judgment should be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law"); *Tiger Point*, 977 So. 2d at 610 (holding that trial court erred in failing to grant

summary judgment where "the record entitled [defendant] to judgment in its favor on the claim for punitive damages"); *Leli v. Cardillo, Keith & Bonaquist, P.A.*, 420 B.R. 568 (Bankr. M.D. Fla. 2009) (granting summary judgment on punitive damages claim, and noting that "the standard of proof . . . for punitive damages under Florida law is very high").

While plaintiff's motion for leave to amend and the Publisher Defendants' motion for summary judgment obviously address similar issues, as both deal with punitive damages, they are two distinct inquiries. For example, in *Tiger Point*, the defendant appealed both the order permitting the plaintiff to allege punitive damages *and* the separate order denying the defendant's motion for summary judgment. 977 So. 2d at 610. The Court distinguished between the two motions, finding that the trial court should have entered summary judgment in defendant's favor and holding that it need not address "Tiger Point's alternative argument that the trial court erred initially in allowing [plaintiff] to amend his complaint to state a claim for punitive damages." 977 So. 2d at 610 n.2. *See also Taylor v. Gunter Trucking Co., Inc.*, 520 So. 2d 624, 624 (Fla. 1st DCA 1988) (affirming summary judgment on punitive damages, finding that the record did not support sending claim to jury); *Curry v. Cape Canaveral Hosp.*, 426 So. 2d 64, 65 (Fla. 5th DCA 1983) (affirming summary judgment on punitive damages where "the record contains no basis to conclude [defendants] acted with malice, gross negligence or fraud").

II. Because the Publisher Defendants Believed the Publication was Newsworthy, They Did Not Act With the Required "Actual Knowledge" or "Conscious" Disregard.

In their separate summary judgment motion on the merits of Hogan's claims, the Publisher Defendants demonstrated that the Publication was newsworthy as that term is defined in the case law. Specifically, the post was published in the context of substantial prior public discussion and media coverage of Hogan's personal and romantic affairs, the graphic details of

his sex life, and the very sex tape at issue – including to a great extent by Hogan himself. *See also* Pl. Mot. at 15-16 (discussing reports by *TMZ* and TheDirty.com "[m]onths before Daulerio was approached about the video footage"); Pl. Ex. 17 (press releases from *TMZ* promoting their reports about the Hulk Hogan sex tape seven months before Publication at issue). We respectfully submit that this position is correct and should end this matter.

If, however, the Court reaches the question of punitive damages, the issue is a different one. It is not whether the Publisher Defendants violated plaintiff's rights – if it were, punitive damages would literally be available in every single tort case. *See Air Ambulance Professionals, Inc. v. Thin Air*, 809 So. 2d 28, 30 (Fla. 4th DCA 2002) (just because "record evidence may support an intentional tort," it does not "necessarily [support] an award of punitive damages").[2] Rather, the question is whether there is "clear and convincing evidence" that the Publisher Defendants engaged in conduct with "actual knowledge" that it was unlawful or with "conscious" disregard for plaintiff's rights. Fla. Stat. § 768.72. Hogan has not submitted evidence that meets this well-established standard, nor could he. The record evidence in this case establishes conclusively that the Publisher Defendants thought that their conduct was lawful because they genuinely believed that the subject of their report was newsworthy. That belief – even if it turns out to have been erroneous – bars the imposition of punitive damages. *See, e.g.*, *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1312 (M.D. Fla. 2010)

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[2] *See also James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 77-78 (Fla. 4th DCA 2010) ("while the evidence supported a finding of tortious interference, it did not rise to the requisite level of gross and flagrant behavior for an award of punitive damages"); *Genesis Publ'ns, Inc. v. Goss*, 437 So. 2d 169, 170-71 (Fla. 3d DCA 1983) (a plaintiff "must show more than an intent to commit a tort or violate a statute to justify punitive damages"); *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1001 (Fla. 4th DCA 2004) ("punitive damages are reserved for particular types of behavior which go beyond mere intentional acts").

(rejecting punitive damages claim where "there [was] no evidence that the defendants knowingly infringed the plaintiff's rights" and no evidence of "malicious intent").

As Florida courts have repeatedly explained, punitive damages typically arise where a defendant evinces a "reckless disregard of human life, or of the safety of persons exposed to its dangerous effects." *Air Ambulance Professionals, Inc.*, 809 So. 2d at 31; *James Crystal Licenses, LLC*, 43 So. 3d at 78 (punitive damages award not appropriate where harm "was economic, not physical," and where defendants' conduct "did not evince an indifference or reckless disregard of health or safety" or "involve repeated actions"); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (punitive damages available where "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions [as opposed to] an isolated incident; and the harm was the result of intentional malice, trickery, or deceit"). That sort of conduct is typically found where a manufacturer knowingly places a plaintiff's life or health at risk, such as in asbestos, tobacco or product liability cases.[3]

By contrast, a host of courts have concluded that punitive damages are not available in invasion-of-privacy and right-of-publicity suits – including in cases based on the allegedly unauthorized publication of images of a plaintiff, even nude images – where the defendants

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[3] *See, e.g.*, *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 488-89 (Fla. 1999) (punitive damages available where manufacturer knew of asbestos-containing product's "cancer-causing effect" but refused to discontinue product); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070 (Fla. 1st DCA 2010) (approving of punitive damages in tobacco litigation where manufacturer was, *inter alia*, "actively concealing [its] own research results revealing the harmful health effects of smoking cigarettes," and "purposefully misleading the public"); *Holmes*, 891 So. 2d at 1191-92 (plaintiff entitled to assert claim for punitive damages against tire manufacturer where it "knew about" tire defect, "but delayed warning the public in order to protect its own financial interests").

believed the subject was newsworthy or otherwise thought their conduct was lawful. *See, e.g.*, *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 428 (Fla. 5th DCA 1982) (overturning award of punitive damages based on invasion of privacy claim for publishing nearly nude photograph of private figure plaintiff, when photograph was newsworthy); *Genesis Publ'ns, Inc.*, 437 So. 2d at 170 (publishing nude photograph of plaintiff with belief that it was lawful did not support claim for punitive damages because "plaintiff must show more than an intent to commit a tort or violate a statute to justify punitive damages"); *Weinstein Design Grp., Inc.*, 884 So. 2d at 999-1001 (plaintiff not entitled to punitive damages based on unauthorized use of his photo where evidence reflected that defendant believed that use was proper); *Coton*, 740 F. Supp. 2d at 1312 (no punitive damages claim arising from tortious use of plaintiff's portrait on packaging of pornographic video where "there [was] no evidence that the defendants knowingly infringed the plaintiff's rights" and no evidence of "malicious intent"); *Thompson v. City of Jacksonville*, 130 So. 2d 105, 109 (Fla. 1st DCA 1961) (invasion of privacy claims involving intrusive search of plaintiff's premises insufficient to support claim for punitive damages); *Toffoloni v. LFP Publ'g Grp.*, 483 F. App'x 561 (11th Cir. 2012) (vacating award of punitive damages for publication of nude photographs of deceased model in *Hustler* magazine without authorization, even where, unlike here, photos were not newsworthy but defendants believed they were) ("*Toffoloni II*").[4]

[4] For these reasons, plaintiff's citation to *Sun Int'l Bah., Ltd. v. Wagner*, 758 So. 2d 1190, 1191 (Fla. 3d DCA 2000), for the proposition that "punitive damages" are always "appropriate in cases in which a defendant knows that it does not have consent to publish photographs" does not hold up. First, *Wagner* does not address newsworthiness at all because it involved only the purely commercial use of photographs of a private figure without authorization in a context that was not even arguably newsworthy. Second, in that case, unlike the numerous cases cited above in the text, the evidence reflected that the defendant *knew* that it was *not* authorized to use the photos – *i.e.*, had "actual knowledge" that its conduct was unlawful – and did so anyway. *Id.* at 1191-92.

The two opinions in *Toffoloni v. LFP Publishing Group*, decided by the Eleventh Circuit, illustrate this point. In *Toffoloni*, after a female wrestler and former model was murdered, *Hustler* magazine obtained and published 20-year-old nude photographs of her. In a 2009 opinion, the federal appeals court found that the photos did not involve a matter of public concern because they were unrelated to the subject of public interest, namely, her murder. Therefore, the plaintiff (the deceased's representative) was permitted to assert tort claims arising out of the publication. *See Toffoloni I*, 572 F.3d 1201, 1213 (11th Cir. 2009).[5] After a jury awarded more than $19 million in punitive damages, the appeals court then reversed and vacated the punitive damages award in its entirety. *See Toffoloni II*, 483 F. App'x 561 (11th Cir. 2012). It held that the publisher's *belief* that its publication was newsworthy, even though that belief had later been held to be wrong, precluded the imposition of punitive damages. *Id.*

Here, of course, the undisputed evidence reflects that the Publisher Defendants had a genuine belief in the Publication's newsworthiness. *See* Punitive Damages SUMF ¶¶ 24-30 (setting forth substantial undisputed testimony confirming that Gawker and its officers and employees uniformly believed, and continue to believe, that the Publication was newsworthy). It can hardly be said that this belief was unreasonable or evidence of an intent to violate Hogan's rights, given that:

(a) a federal district court judge repeatedly concluded, as had the Publisher Defendants, that the Publication involved a matter of public concern, *see Bollea v. Gawker Media,*

[5] The DCA distinguished the Publication at issue here, which it found to be newsworthy, from the facts of *Toffoloni*, finding that the "publication of nude photographs of a female professional wrestler taken twenty years prior," was "not protected speech because their publication was not related to the content of the reporting, namely, her murder." *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1202 (Fla. 2d DCA 2014) (distinguishing *Toffoloni I*, 572 F.3d at 1213).

LLC, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012); *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1328-29 (M.D. Fla. 2012);

(b) all three members of the Court of Appeal panel reached the same conclusion, ruling: "*It is clear that* as a result of the public controversy surrounding the affair and the Sex Tape, exacerbated in part by [plaintiff] himself, the report and the related video excerpts address matters of public concern," and therefore "it was within Gawker Media's editorial discretion to publish" them, *Bollea*, 129 So. 3d at 1201-02 (emphasis added); *see also id.* at 1202 ("the written report and video excerpts are linked to a matter of public concern"); *id.* at 1203 ("the speech in question here is indeed a matter of legitimate public concern"); and

(c) numerous courts around the country have reached the same conclusion in connection with similar publications despite their inclusion of sex or nudity, *see Bollea*, 129 So. 3d at 1201-02 (citing numerous cases in which publication of sexually explicit content was held *not* to be invasive of privacy).[6]

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[6] *See also, e.g.*, *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at *10 (C.D. Cal. Sept. 11, 1998) (granting summary judgment to publisher of news report about celebrity sex tape accompanied by brief excerpts, finding it was not actionable invasion of privacy); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309, at *5 (C.D. Cal. Mar. 19, 1997) (sexually explicit pictures of celebrity couple accompanying article were "newsworthy," particularly in light of plaintiffs' own statements in media extensively discussing "frequency of their sexual encounters and some of [their] sexual proclivities"); *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (affirming dismissal of invasion of privacy claims because broadcast of videotapes of priest's sexual activities with young men involved matter of public concern); *Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (even though videotape of alleged rape was "highly personal and intimate in nature," use of excerpts in news broadcast addressed matter of public concern and was protected by First Amendment as a matter of law); *Jones v. Turner*, 1995 WL 106111 (S.D.N.Y. Feb. 7, 1995) (*Penthouse* magazine's publication of nude photographs of Paula Jones were newsworthy because they involved a "sex scandal" and accompanied an article about her); *Bridges*, 423 So. 2d at 427-28 & n.3 (publishing photograph of plaintiff escaping kidnapper wearing only a dish towel was newsworthy story and non-actionable).

Under these circumstances, Hogan cannot, as a matter of law, establish – much less by the required clear and convincing evidence – that the Publisher Defendants published with "actual knowledge" that their conduct was unlawful or "conscious" disregard or indifference to plaintiff's rights as is required to establish a claim for punitive damages.

III. The Other "Evidence" Submitted by Plaintiff Does Not Support a Claim for Punitive Damages.

Hogan has offered precious few facts having to do with *this* Publication and none addressing the Publisher Defendants' genuine belief that the Publication was and is newsworthy. Instead, Hogan has submitted documents on all manner of *other* topics, including (a) whether Hogan consented to publication, which is irrelevant to whether something is newsworthy, (b) whether Gawker, like virtually all businesses and media companies, seeks to earn a profit and to do so in part by growing its audience, (c) Gawker's *criticism* of others for publishing sex and nudity in decidedly different contexts, and (d) a few other items published by Gawker.[7] As explained below, this other evidence, even if credited, is simply not pertinent to the inquiry at hand, which involves the Publisher Defendants' conduct *here*. Indeed, under settled U.S. Supreme Court precedent, to be entitled to punitive damages, a plaintiff must make his showing *with respect to the conduct at issue in the lawsuit. See State Farm*, 538 U.S. at 422-23 ("A

[7] Hogan misrepresents many of the facts he does cite. Pl. Mot. at 4-5, 7. For example, he claims that Gawker posted a link to a video of an ESPN reporter naked in her hotel room, when it did no such thing. He claims that one of Gawker's editorial employees thinks it is okay to post revenge porn or other similar footage, when she testified that, while it could conceivably be newsworthy, it was generally *not* okay. He suggests that Nick Denton admitted to "traffic whoring," when in fact he criticized the practice. And, he suggests that Denton excluded cell phone cameras from his wedding to protect his own privacy, when he made photos widely available for guests to post on their social media sites. With respect, part of the obligation to submit evidence at this stage requires that the plaintiff not mislead the Court in describing it.

defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business" generally).

A. A plaintiff's consent does not bear on newsworthiness, and cannot bear on defendants' belief as to newsworthiness.

First, Hogan argues that the "key issue in determining whether punitive damages are appropriate . . . is consent." Pl. Mot. at 11; *see also id.* at 6-7, 11-12, 15-18 (arguing that he is entitled to punitive damages because the Publisher Defendants did not obtain his consent). In Hogan's view, "punitive damages are appropriate in cases in which a defendant knows that it does not have consent to publish photographs." *Id.* at 11 (citing *Sun Int'l Bah., Ltd. v. Wagner*, 758 So. 2d 1190, 1191 (Fla. 3d DCA 2000)). He is simply wrong, and is conflating two different things.

It is hornbook First Amendment law that a journalist need not obtain consent from a news story's subject before publishing. Indeed, the First Amendment would be largely meaningless if journalists were required to give veto power to the subjects of their articles and photographs. *See, e.g., Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1261 (S.D. Fla. 2010) (news use of image does not need to be "authorized"); *Heath v. Playboy Enter., Inc.*, 732 F. Supp. 1145, 1150 (S.D. Fla. 1990) (where publisher uses photo or name in news context, "consent is irrelevant"); *Stafford v. Hayes*, 327 So. 2d 871 (Fla. 1st DCA 1976) (consent to use name or image unnecessary where plaintiff is an "actor in a newsworthy occurrence of public interest").

Indeed, in each of the cases in which a court determined that a publication of sex or nudity was newsworthy, the plaintiff had not consented to publication. *See, e.g., Bridges*, 423 So. 2d at 428 (news use of image of plaintiff partially nude, however "embarrassing or

distressful to the plaintiff," does not need to be authorized if newsworthy); *Michaels II*, 1998 WL 882848, at *10 (granting summary judgment to publisher of a news report about a celebrity sex tape accompanied by brief excerpts, even though celebrities depicted had vigorously objected to publication); *Lee*, 1997 WL 33384309, at *5 (sexually explicit pictures of celebrity couple accompanying article were "newsworthy" even though published without consent); *Cinel*, 15 F.3d at 1345-46 (videotapes of private figure priest's sexual activities with young men involved a matter of public concern even though published without his consent); *Anderson*, 499 F.3d at 1236 (even though videotape of alleged rape was "highly personal and intimate in nature," and published without victim's consent, use of excerpts in news broadcast addressed matter of public concern); *Jones*, 1995 WL 106111, at *21 (*Penthouse* magazine's publication of nude photographs of Paula Jones, published without her consent, was newsworthy and protected).[8]

B. Publishing for profit or to attract readers is not evidence of misconduct that can support an award of punitive damages.

Next, Hogan argues that the Publisher Defendants were motivated purely by profit rather than by the Publication's newsworthiness. *See, e.g.*, Pl. Mot. at 23 (Publisher Defendants'

[8] Without citing any case law, or explaining how all these courts reached a contrary result, Hogan suggests that the Publisher Defendants "were legally required" under 18 U.S.C. § 2257 "to obtain . . . consent before editing and posting the sexually explicit video on [their] website." Pl. Mot at 11. But that statute was passed to protect minors and requires various records to be maintained before young-looking actors can appear in pornographic filmed entertainment. *Id.* Given its express purpose, numerous federal courts of appeal have recognized that it could not constitutionally be applied to depictions of sex that involve individuals who are clearly of a mature age, as is the case of Mr. Bollea, who was in his fifties, and Ms. Clem, who was in her thirties. *See, e.g.*, *Free Speech Coal., Inc. v. Holder*, 677 F.3d 519, 537 (3d Cir. 2012) (applying statute to "performers that no reasonable person could conclude were minors" is likely unconstitutional); *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 340 (6th Cir. 2009) (en banc) (applying statute to depiction that "involves only the middle-aged and the elderly" would "run into serious First Amendment problems"); *Am. Library Ass'n v. Reno*, 33 F.3d 78, 90 (D.C. Cir. 1994) ("We agree with appellees' suggestion that certain applications of the record-keeping requirements may well exceed constitutional bounds, an illustrated sex manual for the elderly being an obvious example.").

motive was to "line their pockets"); *id*. at 26 (motive was to "make them all a lot of money"). Even assuming profit motive were a valid basis for a claim of punitive damages (which it is not – otherwise punitive damages could be asserted anytime a defendant is a for-profit company), Hogan cites virtually no record evidence either that the Publisher Defendants (a) disbelieved in the Publication's newsworthiness, *see* Part II *supra*, or (b) were driven to post this particular Publication because of the specific promise of a meaningful financial reward. Indeed, although plaintiff makes this "profit-motive" claim throughout his brief, he does not actually cite evidence to support it. *See* Pl. Mot. at 2 (stating "the video acted as an intentional viewer-generating vehicle for Gawker itself, so it could demonstrate its viewership growth to advertisers," without citation to record evidence); *id*. at 3 (stating that "it is undisputed that Gawker generates revenue and increases its value by drawing millions of viewers to its website, and that sex and nudity are among its preferred ways to lure viewers," without citation to record evidence); *id*. at 23 (stating the Publisher Defendants' motive was to "line their pockets" and that they posted the Publication "for the sake of greed," without citation to record evidence); *id*. at 26 (asserting that Publisher Defendants posted the Publication "because it would make them all a lot of money," without citation to record evidence).

Hogan's lack of citation is hardly surprising, given that the record evidence actually reflects a complete *lack* of profit motive in connection with this Publication. As is its policy for "not safe for work" content, Gawker displayed no advertising on the Publication. Punitive Damages SUMF at ¶¶ 17, 20. This means that someone reading the Publication or even seeing it on the homepage was not shown *any ads*, and Gawker therefore received *no revenue* directly from this Publication. *Id.* ¶ 17.

Literally the only "evidence" plaintiff cites on this point is a 2010 article which quotes Mr. Denton on the importance of unique visitors to a website. Pl. Mot. at 3; Hogan Ex. 6. His comments may evince a desire to attract unique visitors to Gawker Media generally, a desire shared by almost every publisher from *The Tampa Bay Times* to *The Los Angeles Times*, but that hardly suggests intentional misconduct with respect to *this Publication* – and is certainly not "clear and convincing" evidence of the type required to allow the issue of punitive damages to be inserted into the case, let alone presented to a jury. *See generally Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* [*Co. v. Sullivan*, 376 U.S. 254 (1964),] to *Hustler Magazine* [*Inc. v. Falwell*, 485 U.S. 46 (1988),] would be little more than empty vessels.").[9]

Hogan also suggests – again without citation – that "the lure of the video generated more than 5 million unique page views and exponentially increased traffic to Gawker's website." Pl. Mot. at 4. He does not submit any evidence that the video "exponentially increased traffic to the Gawker website" beyond the initial traffic to this post or that the increased traffic was in any way material to, and therefore motivated by, Gawker's bottom line. Indeed, the actual evidence shows that Publication represented approximately one-tenth of one-percent of the traffic to

[9] Hogan appears to cite as "evidence" Mr. Denton's definition of the term "traffic whoring." Pl. Mot. at 3; Hogan Ex. 2. Mr. Denton defined that term at his deposition at plaintiff's counsel's request; he never applied it to the Publication, and his testimony more generally eschewed the practice, comparing such posts to "empty calories." *See* Punitive Damages SUMF ¶ 38 & Ex. 5 (deposition testimony). Similarly, Hogan cites another article, claiming that "Denton recognizes that sex is the primary lynchpin of Gawker's business model, because it generates high page views with the 'flames that everyone so prizes.'" Pl. Mot. at 3. But, yet again, the cited article says no such thing; rather, it describes a 2010 memo by Mr. Denton praising popular stories involving things like "Gizmodo's first look [at] the new Microsoft tablet or io9's Avatar review." Hogan Ex. 6 at 1.

Gawker Media sites in 2012. *See* Punitive Damages SUMF at ¶ 19 (traffic to Publication represented .001 of the 7.2 billion page views to Gawker's websites during 2012). And, even if it had, increasing traffic while publishing an article believed to be lawful cannot as a matter of law serve as the basis for punitive damages.

C. That the Publisher Defendants declined to take down the Publication cannot support an award of punitive damages.

Hogan also contends that he is entitled to assert a claim for punitive damages because the Publisher Defendants declined to take down the Publication after plaintiff sent a cease-and-desist letter and declined to take down the story after this Court entered a temporary injunction. Pl. Mot. at 7, 12, 21-22. Significantly, Hogan's argument ignores the fact that the Court of Appeal "disapproved" of this Court's order declining to stay the injunction and then unanimously reversed, confirming that the Publisher Defendants did not act unlawfully in declining to take down the Story. *See* Ex. 16 (DCA order on stay); *Bollea*, 129 So. 3d at 1202 ("[T]he temporary injunction is invalid as an unconstitutional prior restraint under the First Amendment. As such, it was within Gawker Media's editorial discretion to publish the written report and video excerpts."). Simply put, if an appellate court rules that the Publisher Defendants were entitled to publish and to do so continuously, doing just that cannot be the basis for punitive damages.

D. Publishing *other* articles criticizing the publication of sex and nudity in *other* contexts is not, as a matter of law, evidence that the Publisher Defendants "knew" publishing *this* Publication was "wrong."

Hogan attempts to argue that the Publisher Defendants should be punished for their actions because they "knew" that their actions were "wrong." Pl. Mot. at 9, 12-13. Hogan bases this assertion on the fact that gawker.com and other Gawker Media websites published *other* articles advancing the view that publication of sexually explicit content in *different contexts* is

inappropriate, and in some instances, criticizing other publishers for publishing such content. Pl. Mot. at 5-6, 7-8, 12-13. According to Hogan, this shows that Gawker "knew better" and published anyway. *Id.* at 9, 12-13.

As an initial matter, if anything, the fact that Gawker has on occasion criticized the publication of different material depicting sex or nudity shows that its various writers and editors take a nuanced and thoughtful approach to what they publish and make individualized decisions about what is newsworthy and what is not. *See* Punitive Damages SUMF ¶¶ 35-43 (citing testimony about the importance of context). The notion that Hogan is entitled to pursue punitive damages because Gawker has expressed *opposition* to certain other publications of sex or nudity defies all sense of reason. He is essentially arguing that Gawker should be punished for its "good" behavior in criticizing those publications.

In any event, for Hogan's "Gawker-knew-better" theory to work, he would have to show that these other articles – which were not written by Mr. Daulerio or Mr. Denton, and most of which post-date the Publication – address "substantially similar" circumstances. *See, e.g.*, *Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 859 (Fla. 3d DCA 2007) ("[W]e are aware of no case which, absent a showing of substantial similarity, has allowed reference to 'other cases' simply because punitive damages were at issue."); *State Farm*, 538 U.S. at 424 (A defendant may not be punished "for any malfeasance." Rather, to be relevant to a punitive damages claim, plaintiffs must show that the defendant engaged in conduct that was "similar to that which harmed them."); *see also Godfrey v. Precision Airmotive Corp.*, 46 So. 3d 1020, 1022 (Fla. 5th DCA 2010) (burden on party relying on evidence to show "substantial similarity").

In other words, Hogan would have to show that Gawker engaged in *this* conduct while saying that effectively the *same* conduct was improper in other contexts. But even a cursory

review of the various articles Hogan submitted reveals they all involve vastly different circumstances. Virtually all of the pieces by Gawker's writers (and in some instances guest columnists who do not even arguably speak for Gawker, *see, e.g.*, Hogan Ex. 25) concern the publication of explicit images of *private* individuals who are not engaged in any newsworthy activity. *See* Hogan Ex. 15 (Gawker article criticizing *others* for posting *non-newsworthy* nude photos of *private* persons obtained from photosharing website); Hogan Ex. 22 (Gawker article condemning *different publisher* who was posting sexualized images of underage girls); Hogan Ex. 23 (Gawker article from 2014 denouncing "revenge porn," which typically involves posting of sexually explicit images of private figures for the purpose of humiliation and without any newsworthiness); Hogan Ex. 24 (article from Gawker Media's women's issues site, www.jezebel.com, excoriating Tumblr for refusing to take down *non-newsworthy* photos of *private figure* women in bathrooms that had been taken with a hidden camera).[10]

E. "Evidence" of other publications by the Publisher Defendants involving different circumstances is neither admissible nor relevant to a potential punitive damages claim.

Hogan also argues that he is entitled to punitive damages because on two other occasions – both occurring more than five years ago – Gawker supposedly published explicit images of celebrities without their consent. *See* Pl. Mot. at 4-5. But these other incidents (a) are mis-described by Hogan, (b) are wholly irrelevant to the issues in this case and therefore

[10] Hogan also suggests that Gawker "knew better," because Mr. Denton guards his own privacy. *See, e.g.*, Pl. Mot. at 14 & n.50 (newspaper report regarding "no phones" request at Denton's wedding (Hogan Ex. 30)). But, the actual evidence reflects that Mr. Denton simply wanted guests' to be present in the moment, and was not an effort to protect his privacy. Ex. 17 at 004 (explaining that he wanted guests' "full presence" at the wedding, but noting that "you'll get digital [photos] from the photographers which you can then filter and post to your heart's content"). Notably, Hogan relied on a newspaper article purporting to describe Denton's note to his guests, even though the actual note was produced in discovery and makes this clear.

inadmissible, and (c) do not constitute evidence of "intentional misconduct" or "gross negligence" in any event.

The United States Supreme Court has made clear that defendants should only be punished for "conduct directed toward" the plaintiff. *State Farm*, 538 U.S. at 420. It explained that "due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *Id.* at 423; *see also Ford Motor Co.*, 971 So. 2d at 859 (in case involving design defects causing SUVs to roll over, evidence of other rollovers not relevant to punitive damages). Here, these other alleged acts obviously are not directed toward Hogan, and consideration of these other alleged acts is improper.

In any case, even if it were proper to consider them, the "evidence" does not actually support Hogan's request for punitive damages. First, he claims that "Daulerio and Gawker provided a link to the uncensored video" of ESPN reporter Erin Andrews naked in a hotel room on Gawker's sport's site, Deadspin. Pl. Mot. at 4-5. This is wrong. Notably, Hogan provides ***no citation and no evidence*** for this assertion. That itself should end the matter, but the Publisher Defendants feel constrained to note that they did not publish or provide a link to the Erin Andrews video. As Mr. Daulerio testified, "I didn't actually post a link to the [Erin Andrews] video." Daulerio Dep. (Ex. 6) at 87:25 – 88:2; *see also* Ex. 20 (article at issue showing that Daulerio posted a non-working link to a site that had formerly hosted the video and noting in the article's original text that "the video's been removed"). Rather, one of Gawker's writers criticized Bill O'Reilly for including footage from the video on one of his broadcasts. Hogan Ex. 8. This is not conduct that supports an award of punitive damages.

Second, Hogan points to Gawker's publication of brief video footage of actors Eric Dane and Rebecca Gayheart conversing and on drugs, while naked, with a former teen model, Kari

Anne Peniche. Pl. Mot. at 5. While Gawker readily admits that not all footage depicting nudity is newsworthy, it believed *that* footage *was* newsworthy for several reasons, all of which were cited in the accompanying article, including that (a) Peniche had been publicly stripped of her Miss Teen USA crown after posing nude in *Playboy* magazine, (b) there had been prior media reports suggesting that Peniche was a "madam" running an "escort" service, (c) Ms. Gayheart had been the subject of then-recent news reports about photos of her in a hot tub with another woman, and (d) Ms. Gayheart was shown in those earlier photos holding a crack pipe. And as Hogan's own exhibits make clear, Dane and Gayheart (but not Peniche) sued Gawker for *copyright infringement* (not invasion of privacy or misappropriation of the right of publicity), and there was no adjudication. Hogan Exs. 12, 16; *see also Straub v. Village of Wellington,* 941 So.2d 1269 (Fla. 4th DCA 2006) ("[A] complaint is not admissible into evidence to prove or disprove a fact in issue. The rationale behind this rule is that the complaint is seen as merely a tentative outline of the pleader's positions."). Hogan makes no effort to explain how this six-year-old incident is evidence of knowing or conscious unlawful conduct here (including because Hogan's attempt to manufacture an analogous copyright infringement claim about the Publication at issue was rejected by the federal court, *see Bollea*, 913 F. Supp. 2d at 1328).

F. Hogan's "evidence" of defendants' alleged "indifference" to the harm he purportedly suffered addresses a different aspect of the test.

Finally, Hogan argues that he is entitled to seek punitive damages because the Publisher Defendants "did not care" about the harm that their conduct would cause him. Pl. Mot. at 22, 25. But, as explained above, to have a valid claim for punitive damages, a plaintiff must first offer evidence that the defendant had either "actual knowledge of the wrongfulness of the conduct" or "conscious" disregard or indifference the plaintiff's rights. Fla. Stat. § 768.72(2). Thus, Hogan

must show that the defendant *knowingly* or *consciously* violated his rights, separate and apart from whether the defendant knew that violation would cause harm. (Once that is done, *then* the question of whether the defendant knew or should have known that its conduct would cause harm arises.) For example, a journalist might have known that reporting on, say, John Edwards' extra-marital affair and out-of-wedlock child would "harm" Mr. Edwards (or the late Mrs. Edwards), but the reporter would still be fully within her rights to do so. Likewise, journalists were free to publish information about Bill Clinton's trysts with Monica Lewinsky, even though the reports were likely "hurtful" to them and their families. *See, e.g.*, Cook Dep. (Ex. 15) at 53:25 – 54:6 ("I'm sure it was hurtful to [then-Toronto mayor] Rob Ford when I published that he smokes crack. I'm sure it was hurtful to [football star] Manti Te'o when Deadspin published that he had concocted a fake girlfriend [and] that he established a huge elaborate tissue of lies about it."). A journalist would not be doing her job if she refrained from publishing information she believed to be newsworthy on the grounds that such information might hurt the feelings of the subject of her story.[11]

[11] Hogan relatedly argues that he is entitled to punitive damages because the Publication poked fun at him and because employees joked about it internally. Mot. at 17. But just as "'arguably inappropriate or controversial'" content may still be newsworthy, *Bollea*, 129 So. 3d at 1200 (quoting *Snyder v. Phelps*, 562 U.S. 443 (2011)), the fact that a topic is amusing to some likewise does not mean that is not newsworthy. Were it otherwise, late-night comics, editorial cartoonists, satirists and the like would be unprotected, *see, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (finding vulgar cartoon parodying the Rev. Jerry Falwell protected by First Amendment); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (protecting vulgar rap parody of song "Pretty Woman" and finding that whether "parody is in good taste or bad does not and should not matter"); *Lemerond v. Twentieth Century Fox Film Corp.*, 2008 WL 918579, at *3 (S.D.N.Y. Mar. 31, 2008) (*Borat* film was non-actionable because, although "the movie employs as its chief medium a brand of humor that appeals to the most childish and vulgar in its viewers," it "at its core . . . attempts an ironic commentary of 'modern' American culture" and is therefore newsworthy).

As Mr. Denton explained: "My job is to disseminate information and to manage an organization that disseminates information and that's our social function, to satisfy readers' interest, to inform and entertain them." Denton Dep. (Ex. 5) at 214:13-17. "We are journalists, that is our role in society." *Id.* at 215:16-17; *see also id.* at 216:13-16 ("I focus on our role as disseminators of information, our service to readers and to the cause of transparency in public life in America."); Carmichael Dep. (Ex. 4) at 60:21 – 61:3 (That some articles may be harmful to their subjects is "a risk that comes with a lot of work in journalism. You're not always writing glowing profiles of public figures and sometimes you have the risk of not making friends with the stories that you publish.").

If the law required journalists not to publish where a report might cause harm to the subject, and exposed them to the crushing financial liability of punitive damages if they published anyway, large swaths of journalism featured in newspapers, magazines, on television or the Internet, would be chilled. A journalist publishing a report and commentary about what he believes is a newsworthy topic – a belief ultimately shared by multiple judges in this and other analogous cases around the country – cannot be held liable for punitive damages on the basis that he knew that publishing might hurt the feelings of his subject.

CONCLUSION

At bottom, Hogan has fallen woefully short of demonstrating that he can present "clear and convincing" evidence that the Publisher Defendants either had "actual knowledge" that they were acting unlawfully or "conscious" disregard for plaintiff's rights. As such, Hogan cannot be permitted to amend his complaint to allege a claim for punitive damages. Moreover, because the undisputed factual record conclusively demonstrates that the Publisher Defendants believed that the Publication was lawful and newsworthy – a conclusion ultimately agreed with by multiple

jurists – they would be entitled to summary judgment on any claim for punitive damages that Hogan would otherwise be authorized to plead. Accordingly, for the foregoing reasons, the Publisher Defendants respectfully request that this Court deny plaintiff's motion for leave to amend to add a claim for punitive damages or, in the alternative, grant summary judgment to the Publisher Defendants on this issue.

Dated: May 8, 2015

Respectfully submitted,

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