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.
_____/

DEFENDANT GAWKER MEDIA, LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendant Gawker Media, LLC ("Gawker") respectfully submits this memorandum in opposition to Plaintiff's Motion for a Temporary Injunction.[1]

As an initial matter, before seeking temporary injunctive relief against Gawker in this court, Plaintiff Terry Gene Bollea, also known as "Hulk Hogan" ("Hogan"), exhaustively litigated those claims in federal court. In that earlier action, he unsuccessfully litigated *five* separate motions seeking either a temporary restraining order, preliminary injunction or injunction pending appeal before ultimately abandoning that action. He is collaterally estopped from recycling his requests for an injunction a sixth time, and the Court should deny his motion

[1] Other than defendant Heather Clem, who is separately represented, to date the only defendants served with process in this action are Gawker Media, LLC, the entity that actually operates Gawker.com and publishes the content at issue, and A.J. Daulerio. Mr. Daulerio no longer works for Gawker and has no ability to control whether Gawker.com continues to publish the content at issue. In addition, neither he nor any of the other unserved defendants (i.e., those other than Gawker Media, LLC) committed any of the acts complained of in plaintiff's Complaint; they appear not to be subject to this Court's jurisdiction, and expressly preserve their jurisdictional defenses until they respond to the Complaint. In any event, any effort to enjoin any of the other defendants from continuing to display the content at issue would fail for the same reasons as set forth herein.

for the same reasons previously adopted by the federal court. Indeed, as he had before, Hogan now asks this Court to invoke its equitable powers to issue a prior restraint on speech, among the most disfavored types of relief known in American jurisprudence. Such an order is presumptively unconstitutional, and plaintiff has not made the extraordinary showing required to justify such relief. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 560 (1976). For the reasons set forth below, the Motion should be denied.

STATEMENT OF THE CASE

A. Factual Background

According to his Complaint, Hogan "has devoted a tremendous amount of his time and effort to developing his career as a professional champion wrestler, motion picture actor, and television personality, and to developing his universal goodwill, reputation and brand." Am. Compl. ¶ 32; *see also id.* ¶ 77 (same); Bollea Decl. ¶¶ 2-4 (describing wrestling, television, film and endorsement activities). However, in this action, he complains about the posting on the Internet of a story (the "Gawker Story") about a video (the "Video") of him cheating on his wife of many years (Linda Hogan) with the wife (Heather Clem) of his best friend (Bubba the Love Sponge, himself a well-known radio personality, also known as Todd Alan Clem), with his best friend's blessing – together with brief excerpts (the "Excerpts") of the Video lasting a total of 101 seconds. Am. Compl. ¶¶ 1, 26; Bollea Decl. ¶ 5. He concedes that Gawker had no part in making the initial Video; indeed, he originally claimed in this action that the Clems recorded it, Compl. ¶¶ 12, 18, and now after settling with Mr. Clem, asserts those claims against Mrs. Clem, Am. Compl. ¶¶ 26, 38. The sexual encounter itself took place in Mrs. Clem's bedroom, Bollea Decl. ¶ 5, and appears to have been recorded on a home surveillance system.

According to news reports by others, in March 2012, seven months before Gawker posted the Excerpts at issue (the "Excerpts"), the full Video was being "shopped," *see* Fugate Decl. Exs. (hereinafter, "Ex.") 8-9, following which plaintiff publicly claimed that he had been set up in that Video, Exs. 10-13. In April, photographs from the Video were posted on other Internet websites, some of which suggested at the time that the woman in the Video was indeed Mrs. Clem. Exs. 14-17. Plaintiff again publicly responded. Exs. 18. In that same time frame, plaintiff provided an audio interview and, despite his current claims about his public image, admitted that he had no idea who the woman in the sex tape was because he had sex with a lot of women during that period – adding, "'During that time, I don't even remember people's names, much less girls.'" Ex. 19 (includes 4 minute interview). Moreover, in 2009, long before reports of the tape surfaced, plaintiff published an autobiography, *My Life Outside the Ring*, in which he described *inter alia* an affair he had while still married to Linda Hogan, admitting that the details of the affair "became national news." Ex. 7.[2]

As a result of these prior reports by other parties, and the interest in the topic fueled by plaintiff himself, by the time Gawker posted its story and accompanying brief Excerpts of the Video, the full Video had already been the subject of widespread public discussion, including by plaintiff. In fact, while the full Video lasts more than 30 minutes, the Excerpts posted by

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[2] *See* Ex. 7 (excerpts from Hulk Hogan's *My Life Outside the Ring*) at 230-31 ("So on February 28, my affair became national news. I don't think there's a blog or entertainment show in America that didn't run with the story of Hulk Hogan cheating on his wife. I was humiliated. I was angry. I didn't know what to do. There was no one to sue – the story was true. I couldn't even figure out who to be angry with, except for myself for letting it happen in the first place."); *id.* at 185 ("Next thing I know, the two of us started kissing. Not to sound perverted or anything, but it was fantastic. Here I am in my fifties now, and this was a really attractive thirty-four-year-old woman, with dark hair and a curvaceous body. . . . It felt good. It was such an emotional and physical release. We didn't have sex that night, but it opened the door. Over the course of the next two months we did have sex, maybe five different times. That was it. Linda had no idea. For a while it had that sort of naughty appeal, like a kid sneaking some chocolate that he's not supposed to have."); *see also* Ex. 20 (*Publisher's Weekly* review of *My Life Outside the Ring* noting book's attention to plaintiff's infidelity).

Gawker last a total of one minute and 41 seconds and depict fewer than ten seconds of sexual activity. Ex. 21.[3] The Excerpts begin with Bubba the Love Sponge encouraging his wife and plaintiff to have sex while he waits in another room. *Id.* They also depict plaintiff receiving a phone call and deciding not to take it, and principally depict conversations between plaintiff and Mrs. Clem in which plaintiff stated *inter alia*: that he should instead be at home; that he had been working out; that he just ate, felt "like a pig" and was out of breath; and that his son's girlfriend's twin sister had proposed a liaison with plaintiff. *Id.* Noting that the Video had been "circulated last April" and the subject of prior reports on numerous celebrity news websites, the Gawker Story's text offers a humorous description of both the sex and the conversation depicted in the Video, comments on the public's fascination with celebrities' sex lives, attempts to capture both the disappointment and satisfaction of knowing that "celebrity sex" is often ordinary, and repeatedly notes that the Video appears to be depicting plaintiff's affair with his best friend's wife with his best friend's blessing – a fact subsequently confirmed by plaintiff. *Id.*; *see also* Harder Decl. Exs. A-G (submitting seven copies of Gawker Story in public court file).

Following the posting of the Gawker Story and the Excerpts, both the Clems and plaintiff appear to have confirmed that the woman appearing in the tape is indeed Mrs. Clem. Ex. 22. Reports about the full Video have also noted that, at its conclusion, Bubba the Love Sponge is heard to say to his wife, "'If we ever did want to retire, all we'd have to do is use this footage.'" Ex. 23. Immediately after plaintiff filed this lawsuit, Bubba the Love Sponge made multiple public statements to the effect that plaintiff himself played a part in the release of the Video, Exs.

[3] *See* http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway.

24-27,[4] and, at the very least, would have certainly been aware that his sexual encounter with Mrs. Clem was being taped, as it was widely known that the Clems had cameras in every room in their house.[5] Remarkably, after Mr. Clem settled plaintiff's lawsuit against him, he issued a public apology asserting the exact opposite. Exs. 28-29.

B. Procedural History

On October 15, 2012, eleven days after the Gawker Story and Excerpts were posted, plaintiff filed an action in the Middle District of Florida against Gawker, as well as the seven other Gawker-affiliated defendants presently named as defendants herein (collectively, the "Gawker Defendants"), asserting essentially the same factual and legal claims asserted here. *See Bollea v. Gawker Media, LLC, et al.*, No. 8:12-cv-02348-T-27TBM (M.D. Fla.) (the "Prior *Bollea* Action"); Ex. 5 (docket sheet). On that same day, plaintiff initiated this action against Mr. and Mrs. Clem.

The next day, plaintiff filed in the Prior *Bollea* Action a motion for a temporary restraining order and a separate motion for a preliminary injunction against the Gawker Defendants, both seeking, *inter alia*, an order enjoining publication of the Gawker Story and Excerpts. Ex. 5 at Dkts. 4-5. On October 22, 2012, the federal district denied plaintiff's motion

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[4] *See* Fugate Decl. Ex. 24 (Bubba the Love Sponge reportedly told his radio audience that "his ex-best friend Hulk was in on the sex tape's release from the get go," that plaintiff "was in on the stunt," and that he is "'the ultimate, lying showman,'" adding "'You can't play the victim like that."); *id.* Ex. 26 (quoting source saying that "Hulk's 'surprise' at the tape being leaked is a ruse and that he's known about it for years and even had the ability to stop the sale last year," adding, "'Hulk acting all shocked at the release of the tape is crap'"); *id.* Ex. 27 (reports Clem calling plaintiff a "'hypocritical fraud'" and "accus[ing] Hogan of trying to save his public image and endorsements by trying to appear like the biggest victim").

[5] In an interview on the Howard Stern radio program shortly after this action was filed, Bubba the Love Sponge stated that plaintiff would definitely have known about the taping, because it was well-known that the he and his wife had video surveillance cameras constantly recording throughout their home, and plaintiff had previously lived with them during a three month period. *See* http://www.youtube.com/watch?v=IwPQRPHTMPA at 4:35-5:14. During the interview, Mr. Stern agreed that all of the Clems' friends knew that everything that happened in that house was recorded, joking that he was worried about staying at their house for just that reason. *Id.* at 19:00-19:10.

for a TRO, finding that plaintiff "failed to show that immediate irreparable injury, loss, or damage will result before Defendants can be heard in opposition." Ex. 1 (Order).

After full briefing, the federal court held a hearing on Hogan's Motion for Preliminary Injunction on November 8, 2012. Ex. 5 at Dkts. 28-29, 41; Ex. 30 (transcript). At the hearing, plaintiff relied heavily, as he does here, on *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) ("*Michaels I*"), in which the *commercial* sale of an *entire* sex tape was enjoined based both on privacy and copyright grounds. Indeed, at the hearing, the Court expressed its view that "you cannot eliminate from the *Michaels* case the fact that this particular video had been copyrighted." Ex. 30 at 25:24 – 26:1. Plaintiff advised the Court that it would be amending its Complaint to assert a claim for copyright infringement. *Id.* at 35:11 – 36:25; *see also id.* (court questioning how plaintiff will "copyright a film that he, under oath, claims he did not produce, was not aware of being produced"). For its part, Gawker pointed to a later decision in *Michaels* in which the same judge entered summary judgment for a different defendant who had reported on the controversy over the tape and had included brief excerpts in its broadcast, just as Gawker has done here. *See id.* at 27:11 – 28:4 (citing *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at *10 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*")).

On November 14, 2012, the Court in the Prior *Bollea* Action denied plaintiff's motion for a preliminary injunction in a detailed written order. *See Bollea*, 2012 WL 5509624 (M.D. Fla. Nov. 14, 2012) ("*Bollea I*") (Ex. 2). In denying plaintiff's motion, the court found that:

- Plaintiff had "failed to satisfy his heavy burden to overcome the presumption that the requested preliminary injunction would be an unconstitutional prior restraint." *Id.* at *3.
- "Plaintiff ha[d] failed to introduce evidence demonstrating that he would suffer irreparable harm if Defendants are not forced to remove the Video excerpts from the Internet, that the balancing of harm warrants entry of a preliminary injunction, or that the public interest would be served by the entry of a preliminary injunction." *Id.* at *4.

- "Plaintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community." *Id.* at *3.

- Because the Video is a matter of public concern, plaintiff's claims are barred under both the First Amendment and common law tort principles. *Id.*

- "Defendants' decision to post ***excerpts*** of the Video online is appropriately left to editorial discretion . . . ." *Id.* (emphasis in original) (citing *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1149 n.9 (S.D. Fla. 1990), for the proposition that "the judgment of what is newsworthy is primarily a function of the publisher, not the courts").

- "It is true that Defendants stand to indirectly profit from the posting of the Video excerpts to the extent it drives additional traffic to Defendants' website. This is true, however, with respect to any information posted online by any media outlet and is distinguishable from *selling* access to the Video solely for commercial gain." *Id.* at *3 n.7.

The next day, plaintiff filed an interlocutory appeal from that order to the Eleventh Circuit. Ex. 5 at Dkt. 49. Four days later, on November 19, 2012, he filed a motion with the district court for a preliminary injunction pending appeal, which the district court subsequently denied, holding that "[p]laintiff has failed to demonstrate any of the four factors warranting the 'extraordinary remedy' of a preliminary injunction pending appeal." Ex. 3 (Order).

Following plaintiff's settlement with Bubba the Love Sponge Clem in this action, pursuant to which Mr. Clem purported to assign his copyright interest in the Video to plaintiff, plaintiff filed an amended complaint in the Prior *Bollea* Action asserting ownership of a copyright in the Video and alleging infringement by defendants. This was followed on November 30, 2012, by yet another motion seeking preliminary injunctive relief, this time seeking to enjoin Gawker's purported copyright infringement. Ex. 5 at Dkts. 42, 60.

On December 14, 2012, while plaintiff's latest preliminary injunction motion was still pending in the federal district court, plaintiff filed a Motion for Injunction Pending Appeal in the Eleventh Circuit. Ex. 6. On December 21, 2012, the federal district court denied plaintiff's

Motion for a Preliminary Injunction to Enjoin Copyright Infringement. *See Bollea v. Gawker*, --- F. Supp. 2d ---, 2012 WL 7005357 (M.D. Fla. Dec. 21, 2012) ("*Bollea II*") (Ex. 4). As is relevant here, in its Order the Court:

- reiterated its prior holdings that (a) the Gawker Story and Excerpts involved a matter of public concern and (b) were not sold for commercial purposes. *Id.* at *2 & * 2 n.3.

- declined again to enter a "prior restraint in derogation of the First Amendment," *id.* at *4, and reiterated that "even minimal interference with the First Amendment freedom of the press causes an irreparable injury" to defendants, *id.*

- found that the Gawker Story and the Excerpts were written and edited in a manner "designed to comment on the public's fascination with celebrity sex in general, and more specifically Plaintiff's status as a 'Real Life American Hero to many,' as well as the controversy surrounding the allegedly surreptitious taping of sexual relations between Plaintiff and the then wife of his best friend – a fact that was previously reported by other sources and was already the subject of substantial discussion by numerous media outlets." *Id.* at *2.

- found significant that "Defendants did not simply post the entire Video – or substantial portions thereof, but rather posted a carefully edited excerpt consisting of less than two minutes of the thirty minute video of which less than ten seconds depicted explicit sexual activity." *Id.* at *4 n.6; *see also id.* at *4 (also noting Video was "relatively poor quality").

On December 28, 2012, plaintiff filed a notice of voluntary dismissal of the Prior *Bollea* Action. Ex. 5 at Dkt. 68. At the time, the Gawker Defendants' motion to dismiss was fully briefed and pending before the district court, *id.* at Dkts. 63, 67, while plaintiff's Motion for Injunction Pending Appeal was pending in the Eleventh Circuit, Ex. 6. That same day, plaintiff filed his Amended Complaint in this action, dropping Mr. Clem as a defendant and joining each of the Gawker Defendants to his pre-existing suit against Mrs. Clem. *See* Am. Compl.

Gawker then removed this action to federal court, including to prevent plaintiff from filing "additional successive motions for injunctive relief in state court." Notice of Removal ¶ 4. The federal district court granted plaintiff's motion to remand on March 28, 2013. Ex. 5 at

Dkt. 29. Three weeks later, on April 19, 2013, plaintiff filed this motion, seeking substantially the same relief he sought in his five prior requests for injunctive relief in federal court.

At bottom, this case involves exaggerated claims that publishing a "sex tape" – which depicts roughly nine seconds of sexual activity in extremely grainy footage amidst otherwise uneventful conversation – warrants the award of substantial damages (when the case was in federal court, plaintiff was seeking $100,000,000.00), the imposition of a constructive trust, the disclosure of a confidential source, and the entry of a prior restraint in derogation of the First Amendment. Given that Hogan's five prior requests for preliminary relief have been denied, Gawker played no role in recording the original Video, there was extensive prior news reporting about it, and the limited Excerpts that Gawker posted, plaintiff is not entitled to such extraordinary relief. His Motion should be denied in its entirety.

ARGUMENT

I. PLAINTIFF IS BARRED BY COLLATERAL ESTOPPEL FROM RELITIGATING HIS ENTITLEMENT TO PRELIMINARY INJUNCTIVE RELIEF.

Plaintiff's motion for a temporary injunction should be denied for the simple reason that the relief he seeks is barred by principles of collateral estoppel. Plaintiff already sought, and was denied, preliminary injunctive relief in the federal district court on precisely the same facts as presented here. Accordingly, the issue of his entitlement to that relief as been fully litigated and he should not be permitted to get yet another "bite at the apple" simply because he dismissed his action in federal court and then re-filed it in this forum.

"Collateral estoppel is a judicial doctrine which prevents identical parties from relitigating the same issues that have already been decided." *Carnival Corp. v. Middleton*, 941 So. 2d 421 424 (Fla. 3d DCA 2006). The purpose of this doctrine is to "'prevent[] repetitious litigation of what is essentially the same dispute.'" *M.C.G. v. Hillsborough Cnty. Sch. Bd.*, 927

So. 224, 227 (Fla. 2d DCA 2006). Where, as here, the relevant prior decision was issued in federal court, Florida courts apply federal collateral estoppel principles. *Amador v. Fla. Bd. of Regents ex rel. Fla. Int'l Univ.*, 830 So. 2d 120, 122 (Fla. 3d DCA 2002). Thus, the controlling inquiry is to "assume hypothetically" that the relief in question is being sought in federal court and to "ask what analysis the federal court[] would apply with respect to issue preclusion." *Id.*

Under federal law, principles of collateral estoppel bar a plaintiff from relitigating an issue already decided in a prior proceeding where:

> (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the first action; and (4) the party against who collateral estoppel is asserted must had a full and fair opportunity to litigate the issue in the prior proceeding.

Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir. 2000) (quoting *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998)). Here, each of these considerations compels a finding of collateral estoppel.

First, Hogan is, once again, seeking to enjoin the publication of the Gawker Story and the Excerpts, and he is doing based on the same causes of action he asserted in the federal case. *Compare Bollea I*, 2012 WL 5509624, at *2 (noting that plaintiff has asserted claims based, *inter alia*, on "(1) invasion of privacy by intrusion upon seclusion, (2) publication of private facts, (3) violation of the Florida common law right of publicity, [and] (4) intentional infliction of emotional distress") *with* Mot. at 5, 21-22 (asserting entitlement to injunctive relief based on those claims).

Second, plaintiff fully presented his case for the relief he seeks here in the prior proceeding, and the federal district court rejected that case in a thorough and substantial decision, issued after full briefing by both parties and a hearing (as well as in several other rulings).

Moreover, although plaintiff contends that the prior federal decisions can be disregarded because they were based on "federal standards," Mot. at 5, he does not identify a single salient difference between the legal principles applied in that prior action and the ones that apply here, and, in fact, relies throughout his motion on federal decisions and decisions from other jurisdictions.[6]

Third, the prior federal decision was a substantive ruling fully and finally adjudicating Hogan's earlier motion for a preliminary injunction (and other decisions fully adjudicated his other requests for injunctive relief). That it was not a final determination on the merits does not prevent it from operating as a bar to the relief plaintiff seeks here. That is because "a preliminary injunction *is* a final judgment on the merits . . . *of the limited issue presented by the preliminary injunction* – i.e., whether the plaintiffs can show likelihood of success on the merits, irreparable harm, and the other necessary factors." *Hayes v. Ridge*, 946 F. Supp. 354, 366 (E.D. Pa. 1996) (emphasis in original); *see also Cestoro v. Rosa*, 198 F. Supp. 2d 73, 89 (D.P.R. 2002) ("preliminary injunction [ruling] is a final judgment on the merits [as to] the limited issue presented by the injunction").

Accordingly, federal courts routinely hold that "a preliminary injunction ruling has preclusive effect with regard to subsequent motions for preliminary injunction." *Hayes*, 946 F. Supp. at 364. *See, e.g.*, *Bridal Expo, Inc. v. Van Florestein*, 2009 WL 255862, at *4-5 (S.D. Tex. Feb. 3, 2009) (collateral estoppel barred plaintiff's attempt to relitigate entitlement to preliminary injunction); *Hayes*, 946 F. Supp. at 366 (denying second motion for preliminary injunction on

[6] Indeed, the only apparent difference between the preliminary injunction standard applied by the federal district court and the temporary injunction standard plaintiff urges this Court to apply here is that the latter standard requires a showing of "a clear legal right to the requested relief," Mot. at 9, whereas the former requires "'a substantial likelihood of success on the merits of the underlying case,'" *Bollea I*, 2012 WL 5509624, at *1 (citation omitted). Not only does plaintiff fail to explain the import of this distinction, but he uses the two standards interchangeably. *See* Mot. at 12 (explaining that, to satisfy the "clear right to relief" standard, he "must show 'a substantial likelihood of success on the merits'") (quoting *City of Oviedo v. Alfaya Utils., Inc.*, 704 So. 2d 206, 207 (Fla. 5th DCA 1998)).

collateral estoppel grounds where there were no "substantial considerations" not raised in the prior proceeding); *Dairymen, Inc. v. FTC*, 1981 WL 2140, at *1 (W.D. Ky. Aug. 5, 1981) (principles of collateral estoppel barred plaintiff from obtaining temporary injunction where same request had been made and denied in prior federal proceeding); *Lyon Ford, Inc. v. Ford Mktg. Corp.*, 337 F. Supp. 691, 695 (E.D.N.Y. 1971) (denying second request for preliminary injunction on collateral estoppel grounds, where first request was denied on the merits after "full and fair" hearing). As a leading treatise on federal law explains, a prior ruling on a preliminary injunction motion is properly given estoppel effect where "the same showings are made and . . . nothing more is involved than an effort to invoke a second discretionary balancing of the same interests." 18A Charles A. Wright, Arthur R. Miller, *et al.*, *Federal Practice & Procedure* § 4445 (2d ed. 2012).

Finally, plaintiff had a full and fair opportunity to litigate his claims before the prior forum – in this case, multiple times. In that regard, he has not pointed to any changed factual circumstances that would warrant disregarding the prior federal decision. Indeed, apart from his disingenuous claim that the prior decision rested on uniquely "federal standards," Mot. at 5, plaintiff's central explanation for why this Court should disregard the prior federal ruling is that he "disagrees with the federal court's reasoning and ruling," and that, therefore, this "Court should review the instant Motion without any sense of commitment to follow the federal court's incorrect conclusion." Mot. at 5-6. In other words, plaintiff is "simply attempting an end run around the federal court's adverse determination by re-litigating the same issue," which he is "precluded from doing . . . under the doctrine of collateral estoppel." *E.I. DuPont de Nemours & Co. v. Melvin Piedmont Nursery*, 971 So. 2d 897, 898 (Fla. 3d DCA. 2007). Plaintiff's motion should, accordingly, be denied.

II. PLAINTIFF SEEKS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

Should the Court allow plaintiff to relitigate the issue, the Supreme Court has long emphasized that a request to enjoin a publication – *i.e.*, a prior restraint – comes to a court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *State ex rel. Miami Herald Publ'g Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1976) (same).[7] Prior restraints constitute "one of the most extraordinary remedies known to our jurisprudence" and are universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559, 562; *see also CBS, Inc. v. United States District Court*, 729 F.2d 1174, 1177 (9th Cir. 1984) ("the first amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave"). Indeed, some two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of just the sort of prior restraint on a media outlet sought here. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).[8]

In *Near v. Minnesota*, 283 U.S. 697, 716 (1931), the Supreme Court emphasized that a prior restraint may be imposed only in "exceptional cases" such as the intended publication of

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[7] In this context, a prior restraint refers to a preliminary order halting dissemination of content. *See, e.g.*, *Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (discussing prior restraint doctrine in context of request to take down existing web postings); *United States v. Carmichael*, 326 F. Supp. 2d 1303, 1304-05 (M.D. Ala. 2004) (order requiring defendant to "take down" a website would constitute an impermissible prior restraint on speech).

[8] The bright-line drawn around prior restraints is so fundamental that a number of Supreme Court opinions have expressed the ban on judicial injunctions against publication as an absolute. *See, e.g.*, *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (the main purpose of the First and Fourteenth Amendments "is to prevent all such *previous restraints* against publications as had been practiced by other governments") (internal quotations marks and citations omitted) (emphasis in original); *Grosjean* v. *Am. Press Co.*, 297 U.S. 233, 249 (1936) (the First Amendment "meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, or their circulation").

the sailing dates of military transports or the number and location of troops in time of war. In *New York Times Co. v. United States*, 403 U.S. at 723-24, the Court rejected the government's request to enjoin publication of the Pentagon Papers, which allegedly had been stolen, despite allegations of imminent impairment of the national security. Because the "dominant purpose" of the First Amendment was to outlaw prior restraints, the Court imposed both a "'heavy presumption against [their] constitutional validity'" and "'a heavy burden of showing justification for the imposition of such a restraint.'" *Id.* at 714 (quoting *Bantam Books, Inc.*, 372 U.S. at 70, and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *see also, e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) ("[t]he presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties").

These First Amendment principles were reaffirmed in 1994 in an action seeking to enjoin the broadcast of a news report that included hidden-camera footage. In *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers), Justice Blackmun wrote:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.

Id. at 1317 (citations omitted). *See also Food Lion Inc. v. Capital Cities/ABC, Inc.*, 20 Media L. Rep. (BNA) 2263, 2264, 1992 WL 456652, at *2 (M.D.N.C. Sept. 28, 1992) (refusing to enjoin broadcast of hidden-camera footage despite allegation that "Defendants secured the [videotape] material in question unlawfully"). As the Sixth Circuit explained, "'[p]rohibiting [publication] is the essence of censorship,' and is allowed only under exceptional circumstances." *Procter &*

Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996) (quoting *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1986), *modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987)). In a case such as this, therefore, "publication must threaten an interest more fundamental than the First Amendment itself" in order to justify a prior restraint. *Id.* at 227.

Against this backdrop of core First Amendment protections against prior restraints, plaintiff makes essentially four arguments. First, he contends that "the broadcast of the Sex Tape is not protected by the First Amendment," asserting that an injunction may properly issue. Mot. at 15-18. However, of the few authorities plaintiff relies upon to support his assertion, none involves a request for a prior restraint at the outset of a case, relief which, as explained above, is subjected to a markedly higher standard. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 520 (2001) (reviewing order denying motion for summary judgment); *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004) (reviewing order granting motion to dismiss); *Toffoloni v. LFP Publ'g Group, LLC*, 572 F.3d 1201, 1207-08 (11th Cir. 2009) (reviewing order granting motion to dismiss); *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. Ct. 1996) (reviewing order on motion to dismiss); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) (reviewing order entering summary judgment); *Bonome v. Kaysen*, 2004 WL 1194731, at *1 (Mass. Super. Mar. 3, 2004) (*granting* defendants motion to dismiss privacy claims).

Second, Hogan appears to argue that the heavy presumption against prior restraints does not apply in this case because Gawker allegedly came into possession of confidential information the creation of which may have constituted a criminal offense. Quite apart from the fact that Gawker played no part in the creation of the original Video, or that its conduct was in no way criminal, *see* Part III.A.2 *infra*, the method by which the media obtains information bears "no relation to the right of [the press] to disseminate the information in its possession" and is not

therefore an appropriate basis for entering a prior restraint. *Procter & Gamble Co.*, 78 F.3d at 225. This conclusion follows a long line of precedent holding that, even where information has been obtained illegally, a prior restraint is not appropriate. Instead, remedies for any such alleged misdeeds must be pursued *after* publication or broadcast. This distinction between "prior restraint" and "subsequent punishment" is based upon a "theory deeply etched in our law," that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them . . . beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 558-59; *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (the "special vice" of a prior restraint is that "communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment").

Thus, in *New York Times v. United States*, it was "seemingly uncontested . . . that the [Pentagon papers] . . . were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired." 403 U.S. at 754 (Harlan, J., dissenting). Nonetheless, while several members of the six-Justice majority indicated, without deciding, that the newspapers might be subject to post-publication criminal prosecution under federal espionage laws, they emphasized that even unlawful conduct could not justify the imposition of a prior restraint. *See id.* at 733 (White, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 747-48 (Marshall, J., concurring). *See also CBS, Inc. v. Davis*, 510 U.S. at 1318 ("[N]or is the prior restraint doctrine inapplicable because the videotape was obtained through the 'calculated misdeeds' of CBS"). In this case, plaintiff can pursue whatever claims he may have for damages for the dissemination of any information to which he objects. He may not invoke the extraordinary remedy of prior restraint.

Third, Hogan appears to assert that, because his claim involves an asserted privacy interest, the law prohibiting prior restraints does not apply. But that makes no difference. *See Org. for a Better Austin v. Keefe*, 402 U.S. at 419-20 (declining to issue injunction based on claimed invasion of privacy). For example, the D.C. Circuit vacated a prior restraint banning a cable network from airing videotaped footage of a child using anatomically correct dolls to demonstrate alleged sexual abuse in her therapist's office, despite alleged irreparable harm to the child's privacy interests. *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648, 1990 WL 71961, at *1 (D.C. Cir. Apr. 6, 1990) (reversing *Foretich v. Lifetime Cable*, 17 Media L. Rep. (BNA) 1647 (D.D.C. April 6, 1990)). The Court declared that any alleged invasion of her privacy must instead be "redressed in legal actions that do not require a prior restraint in derogation of the First Amendment." *Id.* Other courts have similarly rejected requests for prior restraints based on claimed invasion of privacy in connection with the publication of intimate video or photographs. *See, e.g.*, *Vrasic v. Leibel*, 106 So. 3d 485, 487 (Fla. 4th DCA 2013) (vacating injunction in case alleging claims for, *inter alia*, invasion of privacy, statutory misappropriation, and intentional infliction of emotional distress and arising out of circulation of naked photograph of private figure plaintiff as well as publication of unflattering book using his name); *Bosley v. WildWetT.com*, 2004 WL 1093037 (6th Cir. Apr. 21, 2004) (issuing stay of preliminary injunction on photographs of plaintiff at "wet T-shirt" contest); *Jones v. Turner*, 23 Media L. Rep. (BNA) 1122, 1995 WL 106111 (S.D.N.Y. Feb. 7, 1995) (refusing to preliminarily enjoin the publication of nude photographs of Paula Corbin Jones in *Penthouse* magazine).

Indeed, the Supreme Court has made clear that "privacy concerns give way when balanced against the interests" protected by the First Amendment. *Bartnicki*, 532 U.S. at 534. Florida courts faced with claims purportedly asserted to protect privacy rights have consistently

followed this principle and reached the same conclusion. *See, e.g.*, *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 611-12 (Fla. 5th DCA 2007) ("time after time, when the high court has been called upon to consider whether the free exercise of speech under the First Amendment may be curtailed to protect privacy rights, it has not been hesitant in resolving the ostensible conflict in favor of the exercise of free speech"); *In re Branam Children*, 32 So. 3d 673, 674 (Fla. 3d DCA 2010) (order restricting dissemination of photographs of and information about minor children did not overcome strong presumption against prior restraints); *In re Fullwood*, 35 Media L. Rep. (BNA) 1547 (Fla. Cir. 2007) (protecting privacy interests of children did not justify restraint on publishing images of murdered child where similar information had already been released); *Miami Herald Publ'g Co. v. Morphonios*, 467 So. 2d 1026, 1030 (Fla. 3d DCA 1985) (reversing prior restraint on broadcasting testimony of minor victim of sex abuse).[9]

Finally, plaintiff claims that the courts can issue an injunction to protect his "reputation and goodwill" from being irreparably injured. Mot. at 9. The sole Florida authority Hogan relies on involved a noncompetition agreement, where the parties had entered a *bargain* designed to protect reputation and goodwill. *See Tiffany Sands, Inc. v. Mezhibovsky*, 463 So. 2d 349, 351 (Fla. 3d DCA 1985) (crediting salon owner's testimony that he would suffer "injury to the salon's goodwill and business reputation" sufficient "to support the enforcement of the non-competition agreement"). In the absence of such a bargain, both Supreme Court and Florida precedent make clear that protecting reputational interests is a flatly insufficient ground for

[9] This substantial body of law undercuts plaintiff's assertion – unsupported by any authority – that the case law only "protects journalists who **accidentally or unavoidably** publish invasive material in the course of reporting a legitimate story" but that "the First Amendment has never been extended to grant a publisher *carte blanche* to **intentionally** publish" materials that a plaintiff contends "is not necessary to report the news." Mot. at 5.

entering a prior restraint. *See, e.g.*, *Org. for a Better Austin v. Keefe*, 402 U.S. at 419 ("No prior decisions support the claim that the interest of [a party] in being free from public criticism . . . warrants the use of the injunctive power of a court."); *Moore v. City Dry Cleaners & Laundry*, 41 So. 2d 865, 873 (Fla. 1949) (Where "a party is amenable to suit . . . and such party is made accountable under the fundamental law for an abuse of the right of free expression, a court of equity will not enjoin the commission of a threatened" injury to reputation because "the imposition of judicial restraints in such a case would clearly amount to prior censorship, a basic evil denounced by both the Federal and State constitutions."); *Reiter v. Mason*, 563 So. 2d 749, 750-51 (Fla. 3d DCA 1990) (dissolving injunction against injuring party's "character or reputation" as "[i]t is settled that 'a court of equity will not enjoin the commission'" of such an act because "an action for damages will ordinarily provide a complete remedy.") (citation omitted).

The First Amendment principles articulated in this long and unbroken line of precedent demonstrate that a prior restraint may not properly issue in this case.

III. HOGAN CANNOT SATISFY HIS BURDEN OF PROVING HIS ENTITLEMENT TO A TEMPORARY INJUNCTION IN ANY EVENT.

Even apart from the extraordinary constitutional limitations on prior restraints, to obtain a temporary injunction, plaintiff must also demonstrate that "(1) irreparable injury will result if the injunction is not granted; (2) there is no adequate remedy at law; (3) the party has a clear legal right to the requested relief; and (4) the public interest will be served by the temporary injunction." *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 n.9 (Fla. 2001). "The purpose of a temporary injunction is not to resolve a dispute on the merits, but rather to preserve the status quo until the final hearing when full relief may be granted." *Tiffany Sands, Inc.*, 463 So. 2d at 350-51. Moreover, as the Sixth Circuit has emphasized, there is "a

fundamental difference between a standard [injunction] in a non-speech context and a special injunctive order granting a prior restraint. . . . [T]he latter . . . is a different beast in the First Amendment context." *Procter & Gamble Co.*, 78 F.3d at 226. Plaintiff cannot meet his burden of showing he is entitled to such extraordinary relief.

A. Plaintiff Cannot Establish a Clear Legal Right to Relief.

Plaintiff cannot demonstrate a clear legal right to relief on the merits of his claims sufficient to justify the imposition of a prior restraint.

1. Publication of Private Facts

To establish the tort of publication of private facts, plaintiff must show (1) the publication, (2) of private facts, (3) that are highly offensive, and (4) that are not of public concern. *See, e.g.*, *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (citing *Restatement (Second) of Torts* § 652D). This claim fails for at least two independent reasons.

First, the facts were not private at the time the Gawker Story was posted, but had been widely disseminated prior to that time in both news reports and photographs. *See* Exs. 10-24; *see also Bollea I*, 2012 WL 5509624, at *3 (noting that plaintiff's own book described a prior affair and other prior reports by third parties detailed content of Video). It is well settled that "[r]epublication of facts already publicized elsewhere cannot provide a basis for an invasion of privacy claim." *Heath*, 732 F. Supp. at 1149; *see also Lee v. Penthouse Int'l Ltd.*, 1997 WL 33384309, at *6 (C.D. Cal. Mar. 19, 1997) (no private facts claim for publishing previously disclosed sexually intimate photographs of Tommy Lee and Pamela Anderson because "'there can be no privacy with respect to a matter which is already public'") (citation omitted). Because the facts disclosed were already public, plaintiff cannot state a claim for publication of private facts as a matter of law.

Second, the Gawker Story and accompanying Excerpts involve a matter of public concern. As the Florida Supreme Court has emphasized: "the requirement of lack of public concern is a formidable obstacle" which "has been recognized . . . as being so broad as to nearly swallow the tort." *Hitchner*, 549 So. 2d at 1377 (dismissing invasion of privacy claims where facts were a matter of public concern). *See also Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. 3d DCA 1993) ("the publication of private facts is not an invasion of privacy where these facts are also of public concern."). Here, as the federal court has already held twice in the Prior *Bollea* Action, there can be no doubt that the Gawker Story and Excerpts are a matter of public interest and concern. *Bollea I*, 2012 WL 5509624, at *3 ("the Video is a subject of general interest and concern to the community."); *Bollea II*, 2012 WL 7005357, at *2 n.3 (same). *See also Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("'[Drawing a] line between the informing and the entertaining is too elusive for the protection of . . . freedom of the press.'") (citation omitted); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 351 (Cal. App. 1983) ("the purported romantic involvements" of celebrities are "matter[s] of public concern"); *Restatement (Second) of Torts* § 652D cmt. g (matters of public concern include "news" as "publishers and broadcasters have themselves defined the term" including "matters of genuine, even if more or less deplorable, popular appeal"); *Shulman*, 955 P.2d at 488 (Mot. at 17) (entering summary judgment on claim for publication of private facts against broadcaster who included video depicting private figure accident victim's suffering and her "intimate private, medical facts" because they related to report on rescue operations); *Bollea I*, 2012 WL 5509624, at *2 n.3 (matters of public concern "'extend[] beyond subjects of political or public affairs to all matters of the kind customarily regarded as 'news' and all matters giving information to the public for purposes of education, amusement or enlightenment'") (quoting *Anonsen v. Donahue*, 857

S.W.2d 700, 703-04 (Tex. App. 1993)). Particularly in light of the image plaintiff purports to convey to the public, the fact he cheated on his own wife with the wife of his best friend – another celebrity – with the friend's blessing and while he waited in another room, speaks directly to his character and the image he claims to have cultivated.[10]

Although Hogan relies heavily on *Michaels I*, *see, e.g.*, Mot. at 5-6, 9, 13, 14, the defendant there was simply selling a complete copy of a sex tape involving Bret Michaels and Pamela Anderson, and, as such, was engaged in "purely commercial speech." *Bollea I*, 2012 WL 5509624, at *3 (citing *Michaels I*, 5 F. Supp. 2d at 834-35). (Moreover, *Michaels I* relied heavily on plaintiffs' claim for copyright infringement, a claim Hogan abandoned when he dismissed his federal action.) In circumstances more analogous to the Gawker Story, the same court subsequently found – even in an era when celebrity sex tapes were far less ubiquitous than they are now – that there was no actionable invasion of privacy by a different defendant, which had broadcast a report about that same tape, together with a series of excerpts, because the report constituted a matter of public concern. *See Michaels II*, 1998 WL 882848, at *10 (because plaintiff "is a voluntary public figure" and the purportedly "private matters broadcast bore a substantial nexus to a matter of public interest," privacy claim "fails as a matter of law"). Other

[10] In this regard, the cases upon which Hogan principally relies, Mot. 12-14, several of which were decided half a century ago, involve private figures whose actions did not involve a matter of public concern. *See, e.g.*, *Doe v. Univision Television Grp.*, 717 So. 2d 63 (Fla. 3d DCA 1998) (disclosing private figure's identity in connection with report about botched surgeries not matter of public concern); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. 3d DCA 1961) (directing readers to call private figure to hear a sexy voice not matter of public concern); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (1964) (publishing photograph of private figure at county fair with her skirt blown up by wind not matter of public concern); *Restatement (Second) of Torts* § 652D cmt. b (illustration involving sale of photograph of adulterous affair involves *private figure*, namely, "an undistinguished hardware merchant"); *see also Shulman*, 955 P.2d at 480 (cautioning that "the First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal."). Moreover, *Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. App. 2003) (Mot. at 12), did not involve a claim for publication of private facts at all, but merely the secret recording a sexual encounter held to constitute actionable intrusion. In any event, none of these decisions involved motions for temporary injunctive relief.

courts considering similar purportedly private depictions of nudity or sex have drawn the same line. *See Lee*, 1997 WL 33384309, at *5 ("the sex life of Tommy Lee and Pamela Anderson Lee is . . . a legitimate subject for an article by *Penthouse*" and sexually explicit images of the couple accompanying the article were "newsworthy," especially given prior reports and statements by plaintiffs about their sex lives); *Jones v. Turner*, 23 Media L. Rep. (BNA) 1122, 1995 WL 106111, at *21 (S.D.N.Y. Feb. 7, 1995) (refusing to enjoin publication of nude photographs of Paula Corbin Jones in *Penthouse* magazine where photographs bore relationship to accompanying article and article involved matter of public interest).[11]

At bottom, Hogan asks this Court to judicially enforce the favorable image he and his publicists have tried to advance and to suppress or punish additional information others put forward that calls that image into question. But for important societal reasons, "the judgment of what is newsworthy is primarily a function of the publisher, not the courts." *Heath*, 732 F. Supp. at 1149 n.9. *Accord Bollea I*, 2012 WL 5509624, at *3 ("Defendants' decision to post ***excerpts*** of the Video online is appropriately left to editorial discretion") (emphasis in original). *See also Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427 (Fla. 5th DCA 1982) (publication of photograph of plaintiff clad only in a dish towel, which illustrated report about abduction and rescue, held to be of legitimate public concern); *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 102 n.9 (2d Cir. 2000) ("In media cases, the scope of what is 'arguably within the sphere of public concern' has been held to be extraordinarily broad with great deference paid to what the

[11] Although *Toffoloni* (relied on by Hogan, *see* Mot. at 16) addressed a right of publicity claim, not the publication of private facts, its conclusion hews this same line. There, the Court found twenty-year-old modeling photographs of a female wrestler not newsworthy because they were unrelated to the "incident of public concern" – namely, her murder. 572 F.3d at 1211. But the Court of Appeals confirmed that publication of photographs that are *related to* a news report about a matter of public concern *are* unquestionably protected. *Id.* (citing as an example *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956) (finding no invasion of privacy from newspaper's publication of gruesome photographs of body of murdered child "as illustrative of an article about her murder and the subsequent investigation" because they were "directly related to the 'incident of public interest' – the child's death")).

publisher deems to be of public interest.") (citation omitted); *Shulman*, 955 P.2d 488 (Mot. at 17) ("The courts do not, and constitutionally could not, sit as superior editors of the press."). Accordingly, as a matter of law Hogan cannot demonstrate he is clearly entitled to relief for this reason as well.

2. Alleged Violations of Florida Criminal Law

a. The Florida Wiretap Act

Hogan alleges that the *recording* of the Video violated Florida's Wiretap Act. Putting aside the apparent dispute about whether he consented to the recording, *see, e.g.*, Exs. 24-27, it is undisputed that Gawker (and the other Gawker defendants) played no role whatsoever in the recording of the Video. *See, e.g.*, Am. Compl. ¶ 26. As a result, there is therefore no likelihood of success on the merits of such a claim against Gawker or the other Gawker defendants.

Hogan next alleges that the *dissemination* of the Excerpts violated the dissemination provisions of the Wiretap Act. As the Supreme Court explained most recently in *Bartnicki*, 532 U.S. at 528, 535, in finding unconstitutional the analogous "dissemination" provisions of the federal Wiretap Act in similar circumstances, a wiretap statute cannot be constitutionally enforced to punish the *publication* of a communication about a matter of public concern where defendants played no role in *recording* or *intercepting* it. In *Bartnicki*, a telephone call between two teachers' union officials, discussing possible violence against a school official, was intercepted and recorded in violation of the Wiretap Act. *Id.* at 518-19. The recording was then provided to a radio station and a citizens group, each of which disseminated portions of the call. *Id.* In the resulting lawsuit, the Court held that, even with respect to information that the radio host and head of the citizens group had "reason to know" was unlawfully obtained, they could not be sanctioned for its disclosure when the information relates to a matter of public concern.

See id. at 535 (holding that illegality of how third party acquires information will not "remove the First Amendment shield from criticism of [plaintiff's] conduct") (citations omitted). Thus, where, as here, the "'publisher of information has obtained the information in question in a manner lawful in itself, but from a source who has [recorded] it unlawfully,'" that "stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 528, 535 (citation omitted). Any claimed "right of privacy" in such circumstances cannot constitutionally "'prohibit any publication of matter which is of public or general interest.'" *Id.* at 534 (citation omitted).[12]

Indeed, *Bartnicki* is the latest in a series of Supreme Court decisions finding it unconstitutional under the First Amendment to sanction the retransmission of information that was lawfully obtained even if someone else earlier violated a statute or court order. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (no liability for publication of identity of rape victim when such information was obtained from police report released by law enforcement agency in violation of Florida statute); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) (invalidating West Virginia statute prohibiting publication of identity of juvenile defendant without first obtaining court order; reiterating that a state cannot restrain a person from reporting information that he did nothing unlawful in obtaining); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (invalidating Georgia law restricting publication of rape victim's name because defendant had obtained information lawfully despite statute's prohibition against its release); *see also Boehner v. McDermott*, 484 F.3d 573, 586 (D.C. Cir. 2007) (opinion of

[12] Hogan relies on Justice Breyer's citation of *Michaels I* in his concurring opinion in *Bartnicki*. *See* Mot. at 15 (citing *Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring)). That Justice Breyer cited *Michaels I*, which involved the *commercial* distribution of an *entire* sex tape as an example of something that might not constitute a matter of public concern, illustrates Gawker's point. Because he did not cite to *Michaels II*, which involved a gossip program's report on that tape and included excerpts of it, plaintiff's assertion that, under *Bartnicki*, the protection of the First Amendment does not apply to "the broadcast of illegally made recordings by journalists to the reporting of gossip," Mot. at 15, is incorrect.

Sentelle, J.) (First Amendment precludes liability for publishers who simply disseminated contents of an unlawfully intercepted communication, there recorded in Florida, even if they *knew* the interception was unlawful, *knew* the identity of the person who intercepted it, and in fact *had personal interactions* with that person); *Jean v. Mass. State Police*, 492 F.3d 24, 29-30 (1st Cir. 2007) (affirming First Amendment protection for publication of unlawfully recorded videotape of warrantless residential search that had been provided to community activist who then posted video on the Internet).

Wholly apart from this constitutional bar, the Florida wiretap statute on its face provides a "complete defense" based on a "good faith reliance" on a "good faith determination that Florida or federal law . . . permitted the conduct complained of." Fla. Stat. § 934.10(2)(c); *see also, e.g.*, *Minotty v. Baudo*, 42 So. 3d 824, 831 (Fla. 4th DCA 2010) ("Chapter 934 was modeled after the Federal Wiretap Act, 18 U.S.C. § 2510 *et seq.* . . . Florida follows federal courts as to the meaning of provisions after which Chapter 934 was modeled."). Given that Gawker is certainly entitled to rely on U.S. Supreme Court authority declaring unconstitutional the imposition of liability under the federal counterpart to the Florida statute in analogous circumstances, plaintiff cannot establish a clear right to relief under the statute's own terms.[13]

b. The Florida Video Voyeurism Statute

In his Complaint, plaintiff also alleges that he is "informed and believes" that defendants' conduct is actionable in part because dissemination of the Excerpts constitutes a felony under Florida's Video Voyeurism Act. *See* Am. Compl. ¶ 4. Putting aside the constitutional bar for enforcing such a provision in these circumstances, as discussed in the preceding section, his

[13] On January 4, 2013, when this action was pending in federal court, Gawker notified the Florida Attorney General that it was challenging the application of the Florida Wiretap Act and provided a copy of its motion to dismiss that advanced these same arguments. Although the Attorney General is permitted to intervene to defend the statute pursuant to Federal Rule of Civil Procedure 5.1, she did not do so.

invocation of this Act fails for two additional reasons. First, the statute does not create a private right of action and he has not asserted one. *See Kamau v. Slate*, 2012 WL 5390001, at *9 (N.D. Fla. Oct. 1, 2012). Second, the statute does not apply on its face because: (a) at the time the Video was recorded six years ago, the statute did not apply to recordings made in the "interior of a residential dwelling" (that language was added in 2012, *see* Amended Notes to Fla. Stat. § 810.145); and (b) therefore any "dissemination" was not "knowing" or with "reason to believe" that the Video was "created" in violation of the statute, as required by Fla. Stat. § 810.145(4)(a). *See also id.* § 810.145(5)(c) (exception for surveillance cameras known to the person recorded).[14]

3. Intrusion Upon Seclusion

To state a claim for intrusion upon seclusion, Hogan must establish that Gawker "'physically or electronically intrud[ed] into one's private quarters.'" *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 158 (Fla. 2003) (citation omitted). *See also, e.g., Spilfogel v. Fox Broad. Co.*, 433 F. App'x 724, 726 (11th Cir. 2011) (*per curiam*) ("Under Florida law, . . . tort [of intrusion] requires intrusions 'into a "place" in which there is a reasonable expectation of privacy.'") (citation omitted); *Stasiak v. Kingswood Co-Op, Inc.*, 2012 WL 527537, at *2 (M.D. Fla. Feb. 17, 2012) (same); *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1308 (M.D. Fla. 2010) (same), *aff'd*, 627 F.3d 833 (11th Cir. 2010). Plaintiff alleges he was surreptitiously videotaped without his knowledge or consent (albeit not in his own "private quarters," but those

[14] Although plaintiff contends that a violation of criminal law authorizes issuance of an injunction, he appears to ignore the general rule that courts will *not* enjoin the commission of a crime. *See, e.g., Lansky v. State ex rel. Gibbs*, 145 Fla. 301, 303 (1940) ("The rule is that equity will not enjoin criminal violations because there is ample authority in the criminal courts to punish evil-doers."); *Horne v. Endres*, 61 So. 3d 428, 431-32 (Fla. 1st DCA 2011) ("In general, equity will not enjoin even criminal violations, as such."); *Syfo Water Co. v. Chakoff*, 182 So. 2d 17, 18-19 (Fla. 3d DCA 1965) (Mot. at 20; *denying* injunction) ("Generally, injunctive relief will not lie to restrain a criminal act unaccompanied by some recognized ground of equitable relief."); 29 *Fla. Jur. 2d Injunctions* § 57 ("As a rule, equity has no jurisdiction to enjoin the commission of a crime, nor will equity act to prevent an illegal act merely because it is illegal. That is, where acts complained of are violations of the criminal law, equity will not on that ground alone interfere by injunction to prevent their commission.").

of the Clems). *See, e.g.*, Am. Compl. ¶¶ 1, 26. He does not allege, however, that Gawker (or the other Gawker Defendants) participated in any way in creating that Video or any other fact that would constitute an actionable intrusion.

Instead, he claims that by "acquiring, viewing, editing, posting, publishing, distributing, disseminating and exploiting" the Video, Gawker intruded upon his seclusion. Am. Compl. ¶ 68; *see also* Mot. at 21 (contending that "the Gawker Defendants are intruding into Mr. Bollea's seclusion by *broadcasting* the recording of his private sexual activity") (emphasis added). To the extent plaintiff alleges that the tort is not limited to physical or electronic intrusions, but extends to an "intrusion into the solitude of another," *id.*, that is a clear misstatement of Florida law. Indeed, "the Florida Supreme Court [has] defined intrusion as 'physically or electronically intruding into one's private quarters,'" which "is significantly narrower than 'one who intrudes physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns.'" *Oppenheim*, 695 F. Supp. 2d at 1308 n.2 (quoting *Ginsberg*, 863 So. 2d at 162). Thus, Hogan has not established a clear legal right to relief on his claim for intrusion. Moreover, in the context of a motion for injunctive relief seeking removal of content from a website, such a claim is of no help. Whatever physical invasion may have occurred is long since completed; there is no ongoing intrusion by Gawker (or anyone else) to be restrained.

4. Common Law Right of Publicity

In analyzing right of publicity claims, courts in Florida have found that the common law right of publicity is "substantially identical" to the statutory right under Fla. Stat. § 540.08. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006). *See also Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255 (S.D. Fla. 2010) (employing § 540.08 analysis to dismiss common law right of publicity claim); *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d

1205 (M.D. Fla. 2002) (same). Under either, a plaintiff must establish that his name, image, or likeness was used for a "commercial" purpose. *See* Fla. Stat. § 540.08; *Fuentes*, 721 F. Supp. 2d at 1260-61. This he cannot do.

To establish a commercial purpose, Florida state and federal courts have uniformly held that plaintiff must show his "name or likeness is used to directly promote a commercial product or service, *separate and apart* from the publication [at issue]." *Fuentes*, 721 F. Supp. 2d at 1258 (emphasis in original). *See also Lane*, 242 F. Supp. 2d at 1212 (statutory right of publicity prohibits "using a person's name or likeness to directly promote a product or service"); *Epic Metals Corp. v. CONDEC, Inc.*, 867 F. Supp. 1009, 1016 (M.D. Fla. 1994) (same); *NFL v. The Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983) (same). As the court explained in *Loft v. Fuller*, 408 So. 2d 619, 622-23 (Fla. 4th DCA 1981), publishing a plaintiff's name, likeness, or image is actionable "not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else."[15]

In determining whether Gawker's "use" of plaintiff's image was "commercial," the fact that it sells advertising or makes a profit – like any other media entity – is immaterial. *See Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 808-09 (Fla. 2005) ("'That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.'") (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)); *see also Bollea I*, 2012 WL 5509624, at *3 n.7 (While "Defendants stand to indirectly profit" if the Video "drives additional traffic to Defendants'

[15] In that regard, plaintiff's ongoing assertions that he has no intention of exploiting the Video – let alone the Excerpts – further undercuts this claim. *See, e.g.*, *Bollea II*, 2012 WL 7005357, at *4 ("This is not a case in which the posting of [the Excerpts] . . . impacts the commercial advantage of controlling the release of those materials. Indeed, there is no evidence that Plaintiff ever intends to release the Video and, in fact, it is quite likely that Plaintiff seeks to recover [it] for the sole purpose of destroying – not publishing – the" Video.).

website," that is true "with respect to any information posted online by any media outlet and is distinguishable from ***selling*** access to the Video solely for the purpose of commercial gain.") (emphasis in original); *Bollea II*, 2012 WL 7005357, at *2 (quoting same finding); *Vrasic*, 106 So. 3d at 487 (speech "is protected even though it is carried in a form that is 'sold' for profit") (citations omitted). Thus, the only issue here is whether plaintiff's image was used by Gawker to "merely advertise[] a product or service for business purposes." *Tyne*, 901 So. 2d at 809 (citing *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996)). Plaintiff does not claim any such thing, and indeed, he cannot. *See* Am. Compl. ¶¶ 78-80 (alleging defendants' use of "Plaintiff's name, image, identity and persona in connection with" the Gawker Story and Excerpts). Applying these principles balancing the First Amendment and the misappropriation tort, the *Michaels* court, in a third opinion, clarified its order prohibiting sales by IEG, the entity actually *selling* the *full* tape, to permit it "to report on or comment on matters of public interest" or even "to attract attention to IEG as a news medium." *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 35242549, at *4-5 (C.D. Cal. Feb. 27, 1998) ("*Michaels III*").

Because Hogan has not established a "commercial" use, the publication at issue is both protected by the First Amendment and does not satisfy an essential element of the tort. *See Valentine v. CBS, Inc.*, 698 F.2d 430, 433 (11th Cir. 1983) (publisher did not violate right of publicity where defendants did not use plaintiff's name to directly promote a product or service); *Tyne*, 901 So. 2d at 809 (dismissing misappropriation claim for same reason); *Fuentes*, 721 F. Supp. 2d at 1260 (same where plaintiff could not allege that defendants "used his name and likeness to promote some other product or service"). As such, plaintiff cannot establish a clear right to relief on his claim for common law misappropriation.

5. Intentional Infliction of Emotional Distress

First, plaintiff has not met his burden of establishing that that Gawker's conduct was "intentional or reckless" with respect to plaintiff's alleged emotional distress. *See Lockhart v. Steiner Mgmt. Servs., LLC*, 2011 WL 1743766, at *3 (S.D. Fla. May 6, 2011) (conclusory assertions that defendant engaged in "'intentional misconduct designed and intended to cause . . . severe emotional distress'" were insufficient) (citation omitted). Hogan's sole factual contention in this regard is that Gawker refused his requests not to publish and, later, to take down, the Excerpts. *See* Am. Compl. ¶ 86. But publishers are regularly subjected to such requests, and plaintiff's theory would expose any publisher who stood on its right to publish to a claim for IIED. Moreover, where Gawker edited the more than 30-minute Video down to less than two minutes of Excerpts, and included only approximately nine seconds of sexually explicit footage – all in connection with a news report and commentary – such conduct is a far cry from the kind that Florida courts have found to qualify as intentionally or recklessly causing severe emotional distress. *See, e.g.*, *Nims v. Harrison*, 768 So. 2d 1198, 1199-1200 (Fla. 1st DCA 2000) (defendant threatened to kill teacher and rape her children in student newsletter); *Williams v. City of Minneola*, 575 So. 2d 683, 686 (Fla. 5th DCA 1991) (police officers viewed videotape of autopsy of man who died of an apparent drug overdose at officer's home in a "party atmosphere").

Second, plaintiff has not established "outrageous" conduct for purposes of his IIED claim. Here, the publication of the Gawker Story and the Excerpts, including approximately nine seconds of footage of plaintiff engaged in sexual activity, hardly qualifies, especially in light of plaintiff's own public discussions of his sex life. *See Bridges*, 423 So. 2d 426 (publication of article photograph of plaintiff clad only in a dish towel, which illustrated report about abduction

and rescue, not sufficiently outrageous); *Nickerson v. HSNi, LLC*, 2011 WL 3584366, at *3 (M.D. Fla. Aug. 15, 2011) (rejecting IIED claim where conduct alleged, "while perhaps unlawful, [wa]s not sufficiently outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"). Moreover, because Gawker's conduct – posting a news report and commentary accompanied by excerpts – mirrored the conduct approved by the Court in *Michaels II*, it cannot as a matter of law be outrageous. *See Toffoloni v. LFP Publ'g Grp., LLC*, 483 F. App'x 561, 563-64 (11th Cir.) (*per curiam*), *cert. denied*, 132 S. Ct. 792 (2012) ("*Toffoloni II*") (finding no evidence of intentional conduct to support award of punitive damages where defendants believed their use involved a matter of public concern).

Third, plaintiff has not pled facts that, if proven, would establish the publication caused him *severe* emotional distress. His Complaint pleads that "[a]s a proximate result of" defendants' conduct, he "has suffered . . . substantial emotional distress, anxiety and worry." Am. Compl. ¶ 89; *see also* Bollea Decl. ¶ 9 (claiming that he felt "embarrassed, uncomfortable, shamed, distressed, and devastated"); *id.* at ¶ 16 (claiming publication of Excerpts has "flipped my life upside down, has rattled my current marriage, has been devastating to me and my family, and has caused me severe emotional distress"). But these conclusory assertions are insufficient to establish the sort of *severe* emotional distress required to pursue this cause of action. *See Nickerson*, 2011 WL 3584366, at *3 (conclusory allegations of emotional distress were insufficient to state IIED claim). *Cf. Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1254-55 (S.D. Fla. 2008) (plaintiff sufficiently demonstrated that torture of her son caused her severe

emotional distress including "insomnia and constant nightmares since her son was imprisoned").[16]

Finally, under settled Supreme Court authority, a plaintiff faces a very high bar under the First Amendment in attempting to penalize expression on the ground that it caused emotional distress. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1219 (2011) (rejecting IIED claim brought by parent of deceased soldier against organization that protested soldier's funeral with hateful signs); *Hustler v. Falwell*, 485 U.S. at 55-57 (rejecting IIED claim brought by distinguished preacher against publisher of cartoon depicting him as losing his virginity to his mother in an outhouse).

In this context, it is Hogan's burden to demonstrate a clear entitlement to relief. For the foregoing reasons, he is unable to do so here.

B. Plaintiff Cannot Demonstrate Irreparable Harm or That There is No Adequate Remedy at Law.

Claims of irreparable injury and the availability of an adequate remedy at law are logically addressed together. Plaintiff contends he is entitled to a temporary injunction because the Gawker Story and the Excerpts are causing "irreparable injury that cannot adequately be compensated by monetary damages." Am. Compl. ¶¶ 63, 73, 80, 91, 106. But each of plaintiff's legal theories contemplates an effective remedy at law, if proven, in the form of money damages. *See, e.g.*, Mot. at 4 (conceding that money "damages are available for a violation of Mr. Bollea's

[16] To the extent plaintiff also now pleads injury to his "personal and professional reputation and career," Am. Compl. ¶ 89, such a claim is barred by *Hustler v. Falwell*, 485 U.S. 46 (1988), which prohibits IIED claims arising out of speech, where such speech would not independently support a defamation claim, *see id.* at 50-51. Here, because the speech was indisputably true – and therefore published without actual malice in the constitutional sense – any alleged injury to reputation may not be redressed through a claim for IIED. *Id. See also, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (in case of broadcast of indisputably true hidden camera footage, rejecting efforts to redress injury to reputation "under non-reputational tort claims, without satisfying the stricter (First Amendment) standards" because "such an end-run around First Amendment stricture is foreclosed by" *Falwell*).

privacy rights"). Economic loss, even if difficult to quantify, is no basis for enjoining the press. *See, e.g.*, *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) (noting the "presumption that preliminary injunctions will not issue in cases where the harm suffered may be remedied by money damages at judgment"); *In re King World Prods., Inc.*, 898 F.2d 56, 60 (6th Cir. 1990) (that plaintiff's economic damages may be difficult to quantify is no basis for injunctive relief).

Plaintiff also claims injury because he has "spent considerable time and effort developing [his] career as a professional champion wrestler and in developing [his] brand." Bollea Decl. ¶ 4. He amplifies this as one of his principal concerns by listing his various accomplishments in wrestling, his film and television appearances, and his endorsements for products including: blenders; indoor grills; energy drinks; microwavable hamburgers, cheeseburgers and chicken sandwiches; and nutritional dietary products. *Id.* ¶¶ 2-4; *see also id.* ¶ 4 (claiming he has developed his "reputation and international notoriety to create substantial value in [his] identity"). It is well settled, however, that "private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds" for keeping information from the public. *Procter & Gamble Co.*, 78 F.3d at 225-26. A claim of prejudicial publicity is insufficient to justify a prior restraint even in the most extraordinary circumstances. Indeed, in *Organization for a Better Austin v. Keefe*, 402 U.S. at 419, the Supreme Court emphasized that "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism . . . warrants use of the injunctive powers of a court." Taking at face value plaintiff's assertion that he has cultivated a public image and reputation, he cannot use that reputation as the legal justification to silence the reporting of information – here, that he cheated on his wife with

the wife of his best friend, who is himself a well-known celebrity and who consented to the liaison – that might undercut that carefully orchestrated public persona.[17]

C. The Public Interest Weighs Against Granting a Preliminary Injunction.

The final consideration is the public interest. The public has an interest in the free flow of information about public figures, particularly amidst ongoing reports and public statements by plaintiff. That interest would be curtailed in this case – and chilled in others – by the issuance of a prior restraint. "This factor weighs heavily in favor of denying the plaintiff's motion. The public interest lies with the unfettered ability . . . to report" information to the public. *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 267 (E.D. Va. 1995) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980)).

Indeed, as the Sixth Circuit recognized in reversing such a preliminary order, the purpose of such relief is to preserve the status quo. "Where the freedom of the press is concerned, . . . the status quo is to 'publish news promptly that editors decide to publish. A restraining order *disturbs* the status quo and impinges on the exercise of editorial discretion.'" *Proctor & Gamble*, 78 F.3d at 226 (citation omitted) (emphasis added). "Rather than having no effect, 'a prior restraint, by . . . definition, has an immediate and irreversible sanction'" on the media defendant. *Id.* (citations omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005) (Sotomayor, J.) (a "prior restraint is not constitutionally inoffensive merely because it is temporary").

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[17] Moreover, plaintiff's claimed reputational and psychic injury is at best speculative and is not supported by a shred of actual evidence. *Holland Am. Ins. Co. v. Roy*, 777 F.2d 992, 997 (5th Cir. 1985) ("[s]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant" to justify the granting of an injunction); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 736 (7th Cir. 1976) ("One prerequisite for injunctive relief, of course, is irreparable injury, and that injury must be more than speculative.").

This is particularly the case where the contents of the full Video have been described in prior reports and depicted in screen shots, and excerpts of the Video have since been posted on many other websites, Am. Compl. ¶ 30, such that injunctive relief against Gawker would be ineffectual. *See, e.g.*, *Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d at 985 (because the documents at issue had been "transmitted over the internet via [other] websites. . . all over the world," court concluded that the "'cat is out of the bag'" and the requested injunction would not "serve its intended purpose") (citation omitted); *In re Zyprexa Prods. Liab. Litig.*, 474 F. Supp. 2d 385, 426 (E.D.N.Y. 2007) ("[p]rohibiting five of the internet's millions of websites from posting the documents will not substantially lower the risk of harm posed to" the complaining party and "would be a fruitless exercise of the court's equitable power"), *aff'd*, 617 F.3d 186 (2d Cir. 2010). Indeed, as the federal court previously found in denying plaintiff's second of five attempts to secure injunctive relief, "this is an example of where the proverbial 'cat is out of the bag,' rendering injunctive relief ineffective in protecting the professed privacy rights of the Plaintiff. Thus, even if Plaintiff's privacy concerns could arguably justify injunctive relief, it is not apparent that entry of the requested preliminary injunction would serve its intended purpose." *Bollea I*, 2012 WL 5509624, at *4 (citations omitted).[18]

[18] Plaintiff also "requests that he not be required to post a bond because no costs or damages will be sustained by the Gawker Defendants if they are wrongfully enjoined." Mot. at 24. Putting aside that he himself contends that the Gawker Story and Excerpts are "generating tremendous advertising revenues [and] huge profits," *id.* at 2, the Court may not award injunctive relief without a bond: "*No temporary injunction shall be entered* unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." Fla. R. Civ. P. 1.610(b) (emphasis added). Indeed, "[a]n injunction is defective if it does not require the movant to post a bond. 'The trial court cannot waive this requirement nor can it comply by setting a nominal amount.'" *Florida High Sch. Activities Ass'n v. Mander ex rel. Mander*, 932 So. 2d 314, 315-16 (Fla. 2d DCA 2006) (citation omitted). *See also Braswell v. Braswell*, 881 So. 2d 1193, 1202 (Fla. 3d DCA 2004) (reversing and remanding where trial court denied defendant's request for evidentiary hearing on injunction bond).

CONCLUSION

For the foregoing reasons, the Motion should be denied in its entirety.

Respectfully submitted,

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