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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447 CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
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PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

Plaintiff, Terry Gene Bollea, by counsel, and pursuant to Florida Rule of Civil Procedure 1.610(a)(2), moves this Court for entry of a temporary injunction lasting for the duration of the above-entitled action and until judgment is entered, which: (i) requires Defendants Gawker Media, LLC aka Gawker Media, Gawker Media Group, Inc. aka Gawker Media, Gawker Entertainment, LLC, Gawker Technology, LLC, Gawker Sales, LLC, Nick Denton, A.J. Daulerio, Kate Bennert, Blogwire Hungary Szellemi Alkotast Hasznosito KFT aka Gawker Media (collectively, the "Gawker Defendants" or "Gawker") to remove from their websites the audio and video recording of Mr. Bollea engaged in private, consensual sex (the "Sex Tape"), which is currently posted at *www.gawker.com* ("Gawker.com"); (ii) requires the Gawker Defendants to remove the written narrative describing the private sexual encounter, including the

quotations from the private sexual encounter, from off their websites, including Gawker.com; (iii) enjoins the Gawker Defendants from posting, publishing, exhibiting, or broadcasting any other portions of the full-length video recording, and all clips, still images, audio, and transcripts of that video recording; and (iv) requires the Gawker Defendants to turn over to Mr. Bollea's attorneys and/or to this Court all copies of the full-length video recording, and all clips, still images, audio, and transcripts of that recording. The supporting affidavits of Mr. Bollea, Mr. Bollea's wife, Jennifer Bollea, and Charles J. Harder are filed concurrently herewith.

I. INTRODUCTION

Plaintiff Terry Gene Bollea ("Mr. Bollea"), professionally known as Hulk Hogan, is a famous professional wrestler and celebrity. Several years ago, Mr. Bollea was surreptitiously recorded, without his knowledge or consent, by a hidden camera and microphone as he engaged in consensual sex in a private bedroom. This footage subsequently came into the possession of the Gawker Defendants. Without obscuring any of the audio or visual content, without asking Mr. Bollea whether he had consented to such taping, and in violation of Florida's criminal voyeurism and eavesdropping laws, the Gawker Defendants posted excerpts of the recording (the "Sex Tape") for the purpose of attracting millions of viewers to their website, Gawker.com, and thereby generating tremendous advertising revenues and reaping huge profits. The Sex Tape includes explicit footage of Mr. Bollea fully naked, with an erection, and engaged in explicit sexual intercourse with his partner. Defendant A.J. Daulerio wrote the headline: "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work But Watch It Anyway." *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* (visited April 3, 2013).

When Mr. Bollea learned that audio and video footage of him having sexual relations in a private bedroom had been posted at Gawker.com for the world to view, he demanded that the Gawker Defendants take it down. He expressly told them what they should have known from viewing the video—that Mr. Bollea did not know about and did not consent to the recording of these private moments. Every minute that the video remains posted at Gawker.com, Mr. Bollea suffers extreme embarrassment of a kind that no person in a civilized society should be forced to endure. Mr. Bollea's plea fell on deaf and indifferent ears. The Gawker Defendants continue to this day to broadcast the illegal video.

Gawker's intent in perpetuating this despicable conduct is not, as they claim, to report the news. Rather, Gawker seeks to appeal to the morbid and prurient curiosity of its viewers and, in so doing, profit greatly. This is Gawker's business model, and it works. Defendant Nick Denton, owner of Gawker.com and its affiliated entities, boasted at Gawker.com that the Hulk Hogan Sex Tape (along with another Gawker.com story that posted topless photographs of Kate Middleton) "pushed daily US audience over 1m [one million] – for the first time ever. . . . Those stories bring the site to new readers." Affidavit of Charles J. Harder ("Harder Aff.") ¶ 10, Ex. H. One of Mr. Bollea's own Twitter followers explains that "morbid curiosity" is the reason he watched the Sex Tape. Affidavit of Terry Gene Bollea ("T. Bollea Aff.") ¶ 12, Ex. D. "You're going to watch, you just can't look away." *Id.* Even Gawker acknowledges the private and prohibited nature of the video. At Gawker.com, in the first paragraph of the story accompanying the Sex Tape, Gawker's editor states: "[T]he internet has made it easier for all of us to be shameless voyeurs and deviants . . . we love to watch famous people have sex . . . . We watch this footage because **it's something we're not supposed to see.**" Harder Aff., Exs. A–G (emphasis added).

Thankfully, the First Amendment's protections do not extend to "Peeping Toms" who broadcast their illegally obtained hidden camera recordings of people engaging in sexual intercourse in a private bedroom, or people naked in any other private place such as a changing stall, a doctor's office, a toilet, and other places where a person has a reasonable expectation of privacy. Here, the First Amendment's protections do not extend to Gawker's posting of the illegal, deeply private, video of Mr. Bollea captured surreptitiously in a private bedroom.

The question presented by this motion is whether Gawker should be allowed to continue to subject Mr. Bollea to the extreme embarrassment and emotional distress of having the illegally-obtained, explicit video footage of himself, in a state of complete undress, with an erection, engaged in consensual sexual intercourse in a private bedroom—footage taken without his knowledge and posted against his objections—posted at Gawker.com. From both a societal and legal standpoint, the answer has to be "No." Accordingly, the Court should grant Mr. Bollea's motion to enjoin the Gawker Defendants from continuing to disclose the illegally obtained video footage of his most private moments to millions of viewers, for at least the following reasons:

First, Mr. Bollea will suffer irreparable harm if the injunction is not granted. He is irreparably injured every day that the Sex Tape remains displayed at Gawker.com, his privacy invaded anew with every viewing of his intensely private and intimate matters.

Second, there is no adequate remedy at law. While damages are available for a violation of Mr. Bollea's privacy rights, no amount of money can restore his privacy. Every day, more and more people view the video of Mr. Bollea fully nude, sexually aroused, and having sexual intercourse. Only an injunction can begin to remedy this violation of and intrusion into Mr. Bollea's personal privacy.

Third, Mr. Bollea has a clear legal right to the requested relief. Mr. Bollea can show "a substantial likelihood of success on the merits," *City of Oviedo v. Alafaya Utilities, Inc.*, 704 So.2d 206, 207 (Fla. 5th DCA 1998), for the following causes of action, as explained more fully below: public disclosure of private facts; intentional intrusion upon seclusion; unauthorized use of Mr. Bollea's name and likeness for commercial gain; and intentional infliction of emotional distress. In addition, the surreptitious recording of Mr. Bollea engaged in private sexual relations, and its publication by the Gawker Defendants, violates Florida's criminal "video voyeurism" statute, Fla. Stat. § 810.145(2)(a), and Florida's two-party consent statute, Fla. Stat. § 934.03(1)(a) & (2)(d), and can be enjoined on that independent basis.

Fourth, this motion is brought pursuant to Florida law. Thus, the decision by Judge James D. Whittemore denying Mr. Bollea's previous motion for a preliminary injunction, based on federal standards, does not apply here. Numerous persuasive legal authorities are cited herein that did not apply to, and thus were not presented to, the federal court. Moreover, Mr. Bollea respectfully disagrees with the federal court's reasoning and ruling. In particular, while case law protects journalists who **accidentally or unavoidably** publish invasive material in the course of reporting a legitimate story—the basis for the federal court's ruling—the First Amendment has never been extended to grant a publisher *carte blanche* to **intentionally** publish the most invasive possible material where the public has no legitimate need to see it and its publication is not necessary to report the news. For example, in *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (hereinafter "*Michaels I*"), the court enjoined the broadcast of a celebrity sex tape of Pamela Anderson and Brett Michaels, and held:

> It is also clear that Michaels has a privacy interest in his sex life. While Michaels's voluntary assumption of fame as a rock star throws open his private life to some extent, even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives. *See Virgil*, 527 F.2d at

> 1131 ("[A]ccepting that it is, as matter of law, in the public interest to know about some area of activity, it does not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity."); Restatement 2d Torts § 652D cmt. h.
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> The Court notes that the private matter at issue here is not the fact that Lee and Michaels were romantically involved. Because they sought fame, Lee and Michaels must tolerate some public exposure of the fact of their involvement. *See Eastwood,* 198 Cal.Rptr. at 351. The fact recorded on the Tape, however, is not that Lee and Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.

Michaels I, 5 F. Supp. 2d at 840. Accordingly, the Court should review the instant Motion without any sense of commitment to follow the federal court's incorrect conclusion, on a different and distinguishable motion, which applied federal rather than state law and procedure.

Fifth, the public interest will be served by the temporary injunction. "Where the potential injury to the public outweighs an individual's right to relief, the injunction will be denied." *Dragomirecky v. Town of Ponce Inlet*, 882 So.2d 495, 497 (Fla. 5th DCA 2004). In this case, there is no cognizable injury to the public that would result from the granting of this injunction. If the instant motion is granted, the public will no longer be able to view the Sex Tape, which never should have been publicly broadcast in the first place.

II. STATEMENT OF FACTS

A. The Surreptitious Recording

In or around 2006, Mr. Bollea had an extramarital sexual encounter with the wife of a friend in a bedroom at the friend's house in Florida, with the consent of both the friend and the wife. T. Bollea Aff. ¶ 5. Mr. Bollea was unaware that the encounter would be recorded and never consented in any way to any audio or video recording of the encounter. *Id.* Unbeknownst to Mr. Bollea, a hidden camera and microphone recorded the encounter. *Id.* The recording, from which the Sex Tape was created, was shot from ceiling level, from what appears to be a corner of

the bedroom; the audio recording of the voices of Mr. Bollea and his companion contains a significant amount of ambient noise suggesting that the microphone was placed far away from the bed. Harder Aff., Exs. A–G (Sex Tape at 0:06, 1:16). The Sex Tape contains no acknowledgment by Mr. Bollea of the existence of the recording devices, or that the event was being recorded. Mr. Bollea engages in no conduct (such as "playing to the camera" or adjusting a camera angle) indicating any awareness that he was being recorded. Harder Aff., Exs. A–G. For several years, Mr. Bollea was not informed of the existence of the recording. T. Bollea Aff. ¶ 6. At no time has Mr. Bollea consented to the release or broadcast of any recording of the encounter. *Id.*

B. <u>The Gawker Defendants' Broadcast of Explicit Excerpts from the Recording</u>

Sometime in early 2012, news reports appeared that a tape of Mr. Bollea engaged in a sexual encounter existed and was being "shopped around" to potential buyers. T. Bollea Aff. ¶ 7, Ex. A. In April 2012, some very blurry still photographs, purportedly from the recording, were published by one or more gossip websites. In these photographs, body parts were not visible and it was extremely difficult to discern what was occurring or who was depicted in the video. *See, e.g.*, "EXCLUSIVE: Hulk Hogan Sex Tape Continued–Terry Gene Bolea Sex Tape," *http://thedirty.com/2012/04/exclusive-hulk-hogan-sex-tape-continued-terry-gene-bollea-sex-tape/* (Viewed April 3, 2013).

On or about October 4, 2012, Gawker.com posted its story entitled, "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work But Watch It Anyway," which included the Sex Tape—101 seconds of audio and video from the recording, which included clear images of Mr. Bollea's erect penis and of Mr. Bollea and his companion engaging in sexual intercourse, as well as audio excerpts that included explicit sexual discussion, such as,

"Your big dick feels so good in my pussy." Harder Aff., Exs. A–G. The images and audio were not blocked, blurred, or obscured in any way by the Gawker Defendants.

The post also contains a detailed, graphic description of the contents of the rest of the tape, including a description of Mr. Bollea's penis as "the size of a thermos you'd find in a child's lunchbox," a description of Mr. Bollea's companion holding a used condom containing Mr. Bollea's ejaculate, descriptions of the grunting noises made by Mr. Bollea during sexual intercourse, and quotations from the explicit sexual banter of Mr. Bollea and his companion such as, "Your dick feels so good inside me." *Id.*

True to its title, "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work But Watch It Anyway," the bulk of the post and Sex Tape all focus on a detailed depiction of Mr. Bollea's penis and his sexual acts with his companion; it does not contain any extensive discussion of the sexual relationship between Mr. Bollea and his friend's wife—the topic that the Gawker Defendants claim they were covering as "news" when they published the Sex Tape and the article. Indeed, Gawker's Sex Tape specifically includes images of Mr. Bollea's erect penis and images of Mr. Bollea and his companion engaging in sexual intercourse, as well as explicit sexual dialogue. It is precisely this explicit, invasive, "Not Safe for Work" footage that drives up Gawker's page views and concomitant profits.

The Gawker post containing the Sex Tape has been viewed more than 4,193,758 times since it was posted. Harder Aff. ¶ 9, Exs. A–G. In the week prior to the filing of these moving papers, the post was viewed **more than 5,400** times. *Id.*

Mr. Bollea sent several cease and desist letters and e-mails to the Gawker Defendants demanding that the Sex Tape be removed from the site. T. Bollea Aff. ¶ 7, Exs. A–B. The Gawker Defendants have consistently refused to do so. *Id.* at ¶ 8. Therefore, Mr. Bollea

continues to suffer significant emotional distress and an invasion of his personal privacy due to the continued broadcasting of the Sex Tape on the Internet by the Gawker Defendants. *Id.* at ¶¶ 10–17; *see also* Affidavit of Jennifer Bollea ("J. Bollea Aff.") ¶¶ 2–6 (explaining that she often has nightmares about the Sex Tape and that it causes her significant embarrassment). Further, because of Gawker.com, every person in the world with an internet connection has a "front row seat" in the private bedroom and can easily view images of Mr. Bollea's erect penis and of him engaging in sexual intercourse, even though he never even knew the recording was being made, and did not consent to its production or distribution and has repeatedly demanded its removal. *Id.*

IV. ARGUMENT

A. Mr. Bollea Satisfies Florida's Temporary Injunction Standard

"In order to obtain a temporary injunction, the party seeking the injunction must establish 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 Management Corp. v. City of Treasure Island*, 796 So.2d 481, 485 (Fla. 2001). These four elements are met here.

B. Irreparable Injury Will Result If The Injunction Is Not Granted

Florida courts have found irreparable injury when the defendants' conduct results in a continuing injury to such intangible interests as reputation and goodwill. *Tiffany Sands, Inc. v. Mezhibovsky*, 463 So.2d 349, 351 (Fla. 3d DCA 1985) (breach of noncompetition agreement that was harming plaintiff's business reputation and goodwill constituted sufficient showing of irreparable harm to justify granting of preliminary injunction); *see also Michaels I*, 5 F. Supp. 2d at 838 (release of celebrity sex tape satisfies irreparable harm requirement).

In this case, Mr. Bollea is irreparably injured every day that the Sex Tape, and the accompanying detailed description of the full-length recording, remains online at Gawker.com. Mr. Bollea's privacy is invaded anew with every viewing of these intensely private and intimate matters.

Mr. Bollea expects that the Gawker Defendants will contend that, as a celebrity who has discussed his private life, Mr. Bollea cannot suffer irreparable harm from the release of a sex tape, and further, that since the Sex Tape has been publicly accessible since October 2012 (over Mr. Bollea's objections), any damage has already been done. Neither of these arguments has merit.

There is an obvious and fundamental difference between, on the one hand, *discussing* one's romantic life and, on the other hand, broadcasting a video and audio recording of a person nude and engaged in sexual intercourse in a private residential bedroom where the highest expectations of privacy naturally exist. People undertake the former regularly with friends, family members, and colleagues (and celebrities who often discuss their romantic lives publicly understand that such gossip about their romantic lives will be reported by the press regardless of whether they want it to be). Most, however, would consider it a serious invasion of their privacy if private recordings of them naked or engaged in sexual intercourse in private places were to become public and to be broadcast *permanently* on the Internet. Broadcasting a surreptitiously recorded sex tape containing explicit images of Mr. Bollea's erect penis and Mr. Bollea engaging in sexual intercourse is different both in kind and in degree from any public discussions, whether by Mr. Bollea or others, regarding the person with whom Mr. Bollea was romantically involved or had an extramarital affair.

Additionally, the fact that the Sex Tape has been online since October 2012 does not establish that Mr. Bollea is not entitled to an injunction. Mr. Bollea has not sat on his rights; quite the contrary. Mr. Bollea has vigorously sought the removal of the Sex Tape in every available forum since the Sex Tape was first posted on Gawker.com. *See Miami-Dade County v. Fernandez*, 905 So.2d 213, 216 (Fla. 3d DCA 2005) (rejecting laches defense to motion for temporary injunction: "The landowners have not demonstrated that the county has sat on its rights. To the contrary, the county has sought to remediate the unlawful activities of these landowners since at least July 2001.").

C. <u>There Is No Adequate Remedy At Law</u>

While damages are available for a violation of Mr. Bollea's privacy rights, no amount of money can restore Mr. Bollea's privacy. Every day, more and more people view a video displaying Mr. Bollea in the nude, sexually aroused, and having sexual intercourse. And more and more people read the graphic description of that encounter and the direct quotes from the illegal recording. Only an injunction can begin to remedy this gross violation of and intrusion into Mr. Bollea's personal privacy. *See, e.g.*, *Kessell v. Bridewell*, 872 S.W.2d 837, 841 (Tex. App. 1994) (order prohibiting disclosure of private information necessary because once disclosure is allowed, privacy is degraded); *Gates v. Wheeler*, Case No. A09-2355, 2010 WL 4721331, at *4 (Minn. App. Nov. 23, 2010) (injunction granted against interception of e-mails: "It is difficult to discern what legal remedy would be appropriate or adequate here; monetary damages would not cure the continuing loss of privacy and the disclosure of confidential and privileged information during litigation.").

D. **Mr. Bollea Has A Clear Right To Relief**

To satisfy this element, Mr. Bollea must show "a substantial likelihood of success on the merits." *City of Oviedo*, 704 So.2d at 207.

1. **The Gawker Defendants' Conduct Constitutes a Tortious Public Disclosure of Private Facts**

To show tortious public disclosure of private facts, Mr. Bollea must establish: (1) a publication; (2) of private facts; (3) that are offensive; and (4) that are not of legitimate public concern. *Cape Publications v. Hitchner*, 549 So.2d 1374, 1377 (Fla. 1989). Each element is easily met here.

a. **The Gawker Defendants published private facts concerning Mr. Bollea, the publication of which is offensive to a reasonable person.**

The Gawker Defendants' publication of images of Mr. Bollea fully nude, with his erection visible, and having sexual intercourse, as well as the accompanying graphic description of that encounter, are clearly publications of private facts concerning Mr. Bollea. *Michaels I*, 5 F. Supp. at 840 (holding distribution of a sex tape is a publication of private facts: "Here, distribution of the Tape on the Internet would constitute public disclosure. The content of the Tape—Michaels and Lee engaged in sexual relations—constitutes a set of private facts whose disclosure would be objectionable to a reasonable person."); *accord Restatement (Second) of Torts* § 652D cmt (b) illustration 6 (1977) (illustration of tortious invasion of privacy involving magazine buying photo of man in hotel room in compromising position with mistress and publishing it); *id.* cmt (b) (discussing public disclosure tort: sexual relations "are normally entirely private matters"); *Lewis v. LeGrow*, 670 N.W.2d 675, 685 (Mich. App. 2003) (bedroom

where plaintiff was secretly recorded having sex is a private place from which the general public is excluded).

Further, it should be beyond doubt that the publication of a clandestinely recorded sex tape would be offensive to a reasonable person. *Michaels I*, 5 F. Supp. 2d at 840 (public disclosure of video recording of private sexual relations "would be objectionable to a reasonable person") & 841 ("the Court determines that the plaintiffs are likely to convince the finder of fact that sexual relations are among the most private of private affairs, and that a video recording of two individuals engaged in such relations represents the deepest possible intrusion into such affairs").

b. <u>The Sex Tape is not a matter of legitimate public concern.</u>

First, there is a fundamental—and judicially recognized—difference between the *fact of* an act and the *act itself*. Mr. Bollea will assume, for the sake of this motion only, that merely engaging in truthful gossip about celebrities, including that they had an extramarital dalliance, is a matter of legitimate public concern. However, the broadcast of a surreptitious, illegal recording of two people engaging in consensual sexual intercourse and of a fully nude man's erect penis, as well as the graphic description of that encounter, are not matters of legitimate public concern. In *Doe v. Univision Television Group, Inc.*, 717 So.2d 63 (Fla. 3d DCA 1998), the plaintiff was a woman whose cosmetic surgery procedure was botched. As part of an exposé on botched cosmetic surgery, the defendant television station disclosed her identity. The Court reversed a summary judgment for the television station, holding that the plaintiff had a triable claim for public disclosure of private facts. "[W]hile the topic of the broadcast was of legitimate public concern, plaintiff's identity was not." *Id.* at 65. *Doe* is directly analogous to the case at

bar—whether Mr. Bollea had an affair may have been a matter of legitimate public concern, but the explicit images on the Sex Tape are not.

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

Third, an involuntary disclosure of something private does not waive one's privacy protections. In *Daily Times Democrat v. Graham*, 276 Ala. 380 (Ala. 1964), the plaintiff was photographed with her skirt blown up as she left the Fun House at the county fair, and the photo was published on the front page of the newspaper. The Alabama Supreme Court affirmed a judgment in plaintiff's favor on a claim of public disclosure of private facts. The Court held that where the plaintiff involuntarily discloses something private, the plaintiff does not lose the protection of the invasion of privacy tort. *Id.* at 383–84. Here, Mr. Bollea was involuntarily recorded having sex; he should not, and does not, lose his privacy protections as a result.

c. The broadcast of the Sex Tape is not protected by the First Amendment.

Mr. Bollea anticipates that the Gawker Defendants will argue that the First Amendment extends a broad privilege to the media to broadcast or publish private facts in the course of reporting the "news." However, the case law does *not* extend that principle to this circumstance, where a website, with only the thinnest veneer of "news" coverage, broadcasts a surreptitious, illegal, uncensored recording of sexual activity (and a graphic description of the encounter) that was completely unnecessary to the reporting of the underlying celebrity gossip story.

The cases that have upheld First Amendment protection for public disclosure of intimate images have either involved material that was necessary to tell the story, accidentally depicted, or had already been exposed to public view. Further, while the publication of illegal recordings has been permitted in cases involving journalists reporting official misconduct, the broadcast of an illegal recording of the sexual activity of a celebrity purely for the purpose of titillating the audience has never been held to be protected under the First Amendment.

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

concern, receives no First Amendment protection. *Id.* at 541 (Rehnquist, C.J., dissenting). Thus, a majority of five justices would have held that broadcasting an illegally recorded celebrity sex tape (or indeed, any illegal recording for the purpose of reporting *gossip*) is not protected by the First Amendment.

The Supreme Court has also held that the content of a sex tape is not a matter of public concern in *City of San Diego v. Roe*, 543 U.S. 77 (2004), which denied First Amendment protection to video broadcasts of a police officer masturbating, on the ground that the broadcasts were not matters of public concern. *Id.* at 84.

In 2009, the Eleventh Circuit held that private nude photographs of a celebrity are not newsworthy even if they accompany a biographical article that is newsworthy, and reversed the trial court's dismissal of a complaint for invasion of privacy based on a pornographic magazine's publication of such photographs. *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009). The Court said that if it accepted the defendant's argument, "LFP would be free to publish any nude photographs of almost anyone without permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.'" *Id.* at 1212. This is exactly what the Gawker Defendants claim here, and their claim should similarly be rejected.

In *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. 1996), a newspaper published photos of a mother speaking to her dying son, a homicide victim, as well as her last words to him. The Court held that such facts stated a claim for public disclosure of private facts. "A jury could find that a reasonable member of the public has no concern with the statements a grieving mother makes to her dead son, or with what he looked like lying dead in the hospital, even though he died as the result of a gang shooting." *Id.* at 256. *Green* is directly analogous to this case—the fact that there is an underlying news story (Chicago's gang homicide problem;

Mr. Bollea having an extramarital affair) does not justify publishing or broadcasting purely sensationalistic and invasive content (a mother's last words to her son; Mr. Bollea in the nude with an erection and having sexual intercourse).

In *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998), the California Supreme Court struck a balance between protection of privacy and First Amendment concerns, holding that a television producer defendant was not entitled to summary judgment on an intrusion upon seclusion claim based on the recording and broadcast of conversations between accident victims and emergency workers on a helicopter transporting them to a hospital. However, the Court also addressed the public disclosure tort. "[T]he analysis of newsworthiness does involve courts to some degree in a normative assessment of the 'social value' of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest." *Id.* at 483–84 (emphasis in original). This holding is a direct rejection of the Gawker Defendants' argument that because members of the public may be "interested" in seeing the Sex Tape, their broadcast must be of "legitimate public interest." Not so. *Shulman* is persuasive authority that certain material does not satisfy the legitimate public interest test even though members of the public may be interested in viewing it. *See also Bonome v. Kaysen*, Case No. 032767, 2004 WL 1194731, at *5 (Mass. Super. March 3, 2004) (holding that biography that disclosed aspects of author's relationship with her boyfriend was not tortious, but stating that publications that were "morbid and sensational" and "pr[ied] into [the plaintiff's] private life for its own sake" would not be matters of legitimate public concern and would be actionable).

In sum, to the extent the Gawker Defendants argue that the Sex Tape could be broadcast because the existence of the tape is a matter of legitimate public concern, their deliberate

decision to include uncensored and explicit footage of Mr. Bollea's erect penis and Mr. Bollea engaging in sexual intercourse in the Sex Tape fundamentally undermines that claim. In *Michaels v. Internet Entertainment Group,* Case No. CV 98-0583 DDP (CWx), 1998 WL 882848 (C.D. Cal. Sept. 11, 1998) (hereinafter "*Michaels II*"), the Court held that a television program's broadcast of eight two- to five-second excerpts from a celebrity sex tape, which were blurred and distorted and "revealed little in the way of nudity or explicit sexual acts," *id.* at *10, was a matter of legitimate public concern and protected by the First Amendment. *Michaels II*, when contrasted with *Michaels I* (a decision in the same case by the same judge), shows that if a journalist feels a need to show "proof" of a sex tape's existence, it is possible to do so without invading anyone's privacy by sanitizing the tape and showing just enough to disclose its nature. The Gawker Defendants deliberately did not do that because the entire point of their post was to drive traffic to Gawker.com, and it was only by showing the unexpurgated privacy-invasive footage that they could accomplish this profit-motivated result.

2. The Surreptitious Recording of Plaintiff Engaged in Private Sexual Relations, and its Publication by Defendants, Violated Florida Law, and Can Be Enjoined on that Independent Basis

a. The secret recording of Mr. Bollea violated Florida law.

Both the audio and visual portions of the secretly recorded video of Mr. Bollea were recorded in violation of Florida law. Florida's "video voyeurism" statute defines the offense as when any person, "[f]or his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's

knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy." Fla. Stat. § 810.145(2)(a).

Mr. Bollea had a reasonable expectation of privacy when engaging in sexual relations in the bedroom of a private residence. Mr. Bollea did not know of or consent to the recording, and both parties were clearly undressing and privately exposing their bodies in the tape. Finally, the intention (amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading another person) may be inferred from the recording, preservation, and later release of the recording. Therefore, the video recording was illegal under the statute.

The audio recording was also illegal under Florida's two-party consent statute, which prohibits the intentional interception of an oral communication unless all parties to the conversation consent. Fla. Stat. § 934.03(1)(a) & (2)(d).

b. <u>The dissemination of the Sex Tape (including audio) by the Gawker Defendants also violated Florida law.</u>

Both the video voyeurism statute and the two-party consent statute prohibit dissemination of illegal recordings as well as the recording process itself. Fla. Stat. § 810.145(3) ("A person commits the offense of video voyeurism dissemination if that person, knowing or having reason to believe that an image was created in a manner described in this section, intentionally disseminates, distributes, or transfers the image to another person for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person."); Fla. Stat. § 934.03(1)(c) (a person violates the two-party consent statute if he or she "[i]ntentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of

this subsection"); Fla. Stat. § 934.03(1)(d) (a person violates the two-party consent statute if he or she "[i]ntentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection").

The Gawker Defendants violated—and continue to violate—both of these statutes. The Sex Tape discloses on its face that the recording of Mr. Bollea was surreptitious. Mr. Bollea does not acknowledge the presence of the camera, and the camera is in a place removed from the bed, near the ceiling and in a corner of the room. The microphone picks up a lot of ambient noise and is located far from the participants. Thus, the Gawker Defendants had reason to know that the recordings were made in violation of the video voyeurism and two-party consent laws. Moreover, Mr.. Bollea's counsel sent multiple written communications to the Gawker Defendants, immediately after the video was posted at Gawker.com, advising the Gawker Defendants that the recording was nonconsensual and demanding the removal of the Sex Tape—demands that were ignored.

c. Injunctive relief is available to enjoin violations of Florida criminal law.

Florida law permits courts to enjoin violations of criminal laws. "[W]here intervention of equity is warranted to protect civil rights or property interests and where criminal prosecution is inadequate to effect this purpose, a crime or statutory offense may be enjoined." *Mid-American Waste Systems v. City of Jacksonville*, 596 So.2d 1187, 1189 (Fla. 1st DCA 1992) (quoting *Syfo Water Co. v. Chakoff*, 182 So.2d 17 (Fla. 3d DCA 1965)). Here, the civil right of privacy is at stake and a criminal prosecution will not protect Mr. Bollea's privacy rights; only an injunction will do so. Thus, the Gawker Defendants' continued violation of the video voyeurism and two-

party consent statutes constitutes an independent substantive ground for issuing a temporary injunction.

3. Independently, the Gawker Defendants Are Intruding on Mr. Bollea's Seclusion

Intentional intrusion into the solitude of another is a tort under Florida law. *Purrelli v. State Farm Fire & Casualty Co.*, 698 So.2d 618, 620 (Fla. 2d DCA 1997). A physical trespass is not required. *Id.* In this case, the Gawker Defendants are intruding into Mr. Bollea's seclusion by broadcasting the recording of his private sexual activity. This constitutes an independent substantive basis for injunctive relief.

4. Independently, Defendants Are Using Mr. Bollea's Name and Likeness for Commercial Gain

To prevail on his name and likeness claim, Mr. Bollea must show that the Gawker Defendants used his name or likeness for commercial, trade, or advertising purposes. Fla Stat. 540.08(1); *Loft v. Fuller*, 408 So. 2d 619, 623–24 (Fla. 4th DCA 1981).

There can be no dispute that Mr. Bollea's name and likeness were used by the Gawker Defendants without his consent. The remaining question is whether it was used for a commercial benefit, *i.e.*, "to directly promote the product or service of the publisher." *Loft*, 408 So.2d at 623–24. Clearly, the answer is yes. Gawker.com regularly posts provocative, obscene, and otherwise outrageous content for the purpose of generating page views and, in turn, advertising revenue. Harder Aff. ¶¶12–13, Ex. K. In a 2010 interview, Defendant Denton, the owner of the Gawker Defendants, admits that his websites' most shocking and explicit stories are "the most cost effective marketing you can possibly do." *Id.* Denton also admitted just after the posting of the Sex Tape that the Hulk Hogan sex tape story, along with another story that featured topless

photos of Kate Middleton taken while she was sunbathing at a private estate, "pushed daily US audience over 1m-- for the first time ever.... Those stories bring the site to new readers." *Id.* at ¶ 10, Ex. H.

The commercial purpose also can be inferred from the decision to include explicit footage of Mr. Bollea's erect penis and of Mr. Bollea engaging in sexual intercourse in the Sex Tape. Obviously, if the intention was purely journalistic, that content could have been omitted or obscured. However, the Gawker Defendants not only included the explicit content but intentionally highlighted it as "Not Safe For Work" and told readers to view it anyway—because they were trying to make money by titillating their readers with explicit images of Mr. Bollea, not because it was necessary to report the story.

5. Independently, Defendants Are Intentionally Inflicting Emotional Distress on Mr. Bollea

"In order to state a cause of action for intentional infliction of emotional distress, the plaintiff must demonstrate that: 1) the defendant acted recklessly or intentionally; 2) the defendant's conduct was extreme and outrageous; 3) the defendant's conduct caused the plaintiff's emotional distress; and 4) plaintiff's emotional distress was severe." *Johnson v. Thigpen*, 788 So.2d 410, 412 (Fla. 1st DCA 2001). Here, the Gawker Defendants intentionally posted the Sex Tape and knew full well, or acted in conscious disregard of, the fact that Mr. Bollea would suffer emotional distress from its posting. The posting of the Sex Tape and the graphic description accompanying it was extreme and outrageous and caused severe emotional distress to Mr. Bollea. T. Bollea Aff. ¶¶ 9–17; *see also* J. Bollea Aff. ¶¶ 2–6. This constitutes an independent substantive ground to enjoin the Gawker Defendants' conduct.

E. The Public Interest Will Be Served By Granting An Injunction.

"Where the potential injury to the public outweighs an individual's right to relief, the injunction will be denied." *Dragomirecky v. Town of Ponce Inlet*, 882 So.2d 495, 497 (Fla. 5th DCA 2004). In this case, there is no cognizable injury to the public that would result from the granting of this injunction. The public would no longer be able to view excerpts of a sex tape, and read a graphic description of the remainder of the tape, that should have never been publicly broadcast in the first place. Therefore, this consideration likewise weighs in favor of the granting of an injunction.

V. CONCLUSION

For the foregoing reasons, the Court should grant a temporary injunction in favor of Mr. Bollea and enjoin the Gawker Defendants from continuing to violate Mr. Bollea's privacy rights. Specifically, for the duration of the above-entitled action and until judgment is entered, Mr. Bollea requests that the Gawker Defendants be:

- Ordered to remove the Sex Tape, and all portions and content therein, from off their websites, including Gawker.com;
- Ordered to remove the written narrative describing the private sexual encounter, including the quotations from the private sexual encounter, from off their websites, including Gawker.com;
- Enjoined from posting, publishing, exhibiting, or broadcasting the full-length video recording, and all portions, clips, still images, audio, and transcripts of that video recording; and

- Ordered to turn over to Mr. Bollea's attorneys all copies of the full-length video recording, and all portions, clips, still images, audio, and transcripts of that video recording.

Mr. Bollea further 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 19th day of April, 2013 to the following:

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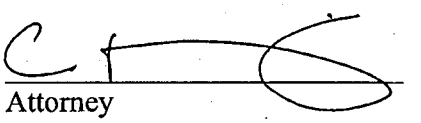

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