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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM, *et al.*,

Defendants.
_____/

PUBLISHER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Gawker Media, LLC ("Gawker"), Nick Denton and A.J. Daulerio (collectively, the "Publisher Defendants") hereby file this motion for summary judgment, pursuant to Florida Rule of Civil Procedure 1.510, because there is no genuine issue of material fact and they are entitled to judgment as a matter of law. This Motion is supported by the incorporated memorandum of law, as well as separate Statements of Undisputed Material Facts, supporting affidavits and exhibits thereto.

PRELIMINARY STATEMENT

The extensive and undisputed record now before the Court conclusively establishes that, *before* Gawker published its story, the personal life, romantic affairs, and explicit details of the sex life of plaintiff Hulk Hogan, an internationally famous celebrity, had been the subject of widespread media coverage and public discussion, often by Hogan himself and frequently to advance his career. In addition to the substantial media coverage these aspects of his life attracted, Hogan highlighted them in his two autobiographies, his reality television show *Hogan Knows Best*, his media appearances and interviews too numerous to count, and through his very public and exceedingly graphic descriptions of his sex life – including the size of his penis,

various sexual techniques, where he likes to ejaculate, and his use of his mustache in performing oral sex. Hogan similarly participated in the widespread public discussion and media coverage of the sex tape that already had been ongoing for many months before the challenged publication. As explained below, all this prior public discussion and media coverage, routinely initiated by Hogan himself, makes that subject newsworthy as a matter of law and absolutely protected against liability by the First Amendment.

When this case began, Hogan initiated his lawsuit seeking 100 million dollars. His reason: Gawker published a report and commentary about a sex tape featuring him and defendant Heather Clem, accompanied by brief and heavily edited excerpts of a longer recording containing grainy, black and white security camera footage. Hogan claimed that his sexual relations were private and not newsworthy, and that he was emotionally devastated. Hogan also claimed Gawker violated his publicity rights, asking to be paid what a full-length Hulk Hogan sex tape would have earned had he marketed it and had anyone been willing to pay for it.

Hogan tried out his claims in federal court and lost, with the federal judge repeatedly concluding at the outset that the publication at issue was newsworthy and therefore protected by the First Amendment. When he then moved over to state court, the Court of Appeal unanimously reached the same conclusion at the temporary injunction stage. While this Court declined to apply that ruling at the motion to dismiss stage, it advised that the question could properly be revisited on summary judgment after full discovery. The Publisher Defendants now ask the Court to do just that. Indeed, after two and a half years of litigation and exhaustive discovery, it is clear that Hogan's initial contentions, including that this is not a newsworthy subject as defined in the law, simply do not withstand even passing scrutiny.

The undisputed record confirms that, long *before* Gawker's publication, Hogan's intimate affairs routinely were the subject of widespread media coverage. This national coverage has focused on a range of matters, from his extramarital affair with Christiane Plante, a friend of his daughter's during the *Hogan Knows Best* years, to an alleged sexual assault – which he has emphatically and publicly denied – of a woman named Kate Kennedy and the widespread coverage of the ensuing federal court lawsuit arising out of those claims. Indeed, at the time of the sexual encounter at issue here, he was still married to his long-time wife and *Hogan Knows Best* co-star, Linda Hogan, and the show was still on the air. Accordingly, Gawker's reporting was, among other things, commenting on, and providing video evidence of, Hogan's adultery, a subject that had indisputably received widespread media attention *before* Gawker's publication.

The undisputed record also confirms that, *before* Gawker's publication, *this very tape* had been the subject of widespread media coverage, including the publication of both descriptions and visual images of the sexual acts shown on the tape. Hogan and his counsel actively participated in this ongoing public discussion, with Hogan (a) claiming he had no idea who the woman in the tape was because he slept with a lot of women during that period, and (b) flat out denying that he would sleep with Heather Clem (even though he had already done so).

And the undisputed record confirms that, *long before* Gawker's publication, Hogan himself regularly publicized to a national audience the intimate details of his life, including especially the graphic details of his sex life that he now claims are private and not newsworthy. This self-generated publicity has not been limited to his reality television show, or his autobiography, *My Life Outside the Ring*, which purports to provide readers with an inside look at his personal life, discussing, among other things, his cocaine and steroid use, a near suicide attempt, and details of the Plante affair. In fact, Hogan's public discussion of his intimate affairs

– often in connection with promoting his career or those of his family members – has focused on the precise details of his sex life that he complains were improperly publicized here:

- He has, for example, described to a national radio audience in broadcast after broadcast: the size of his penis; hanging a towel on his erection after looking at photo spreads of a *Penthouse* Pet; performing oral sex on his wife Linda, including to savor her fluids in his mustache; her technique for manually pleasuring him in the car; injuries he sustained while trying to "bang it down to a nub" while having sex with her standing up; where he prefers to ejaculate; and the most number of women he had in his hotel room at the same time.
- He appeared in a photo spread in a men's magazine in which he shown with a woman straddling his pelvis while he fondles her naked breasts, grabbing the naked buttocks of another, and rubbing the naked breasts of others on his skin.
- He appeared on *Howard Stern*'s national radio program with his family to promote their reality television program and his daughter's new record album. During that program they discussed each of their respective sex lives in great detail, including whether Stern could take Brooke's virginity (she was then 18); the sexual habits of son Nick (then 16); whether wife Linda was a virgin when she met Hogan; and whether Hogan had ever had sex with a virgin and how big his penis is.
- And despite Hogan's oft-repeated public claim that his new wife, Jennifer, is less public than Linda Hogan, he and Jennifer appeared together on *Howard Stern* for an extended and graphic discussion of their sexual practices, including how often they have sex, the size of his penis, the need for lubrication as a result, Hogan's

performance of oral sex on Jennifer to provide that lubrication, him spanking her with his big hands, his condom size, etc.

Again, all of this – *all of this* – was *before* Gawker published a word.

Under settled law, speech reporting and commenting on a topic that has been the subject of such widespread public discussion – whether it is Hogan's sex life generally, this sex tape specifically, or the extramarital affair it depicts – cannot form the basis of privacy claims seeking to impose crushing financial liability.

Under settled law, an internationally known celebrity is not permitted to sexualize his public image to this degree – placing his sex life front and center for years, and, more recently, participating in extensive discussions of the very sex tape at issue – and then seek to hold Gawker liable for reporting and commenting on that tape and its contents, claiming the subject is somehow not newsworthy.

And, under settled law, Hogan may not expansively create a public personality – be it his carefully orchestrated "Great American Hero" persona or his "Check Out My Sex Life" persona – and then try to punish or censor those who would participate in that public discussion in ways that he does not like.

What Gawker does, and what Gawker did here, may not be to everyone's taste or liking, but the First Amendment does not permit the imposition of liability on that basis. The time has now come for this Court to say so, to enter judgment against him and to dismiss all of his claims with prejudice.

Finally, even apart from the overarching First Amendment protection for speech on matters of public concern that is fatal to Hogan's whole case, each of his claims other than for publication of private facts must now be dismissed for additional reasons. As explained herein,

there can be no liability for common law misappropriation because Gawker did not use of his name and likeness to advertise a product or service (indeed Gawker displayed no ads on this story). There can be no liability for intrusion upon seclusion because the Publisher Defendants played no role in recording the video, only learning about it some five years after the fact, and the intrusion tort does not punish the simple act of publication as a matter of law. There can be no liability for intentional infliction of emotional distress because Hogan's concession that he suffered only "garden variety" emotional distress precludes such a claim (since it requires proof of "severe" emotional distress). And, finally, there can be no liability under the Wiretap Act because the Publisher Defendants had a good faith belief that their conduct was constitutionally protected (which, in fact, it was).

Motion for Summary Judgment

1. Plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan," sued the Publisher Defendants in this action for (a) invasion of privacy (publication of private facts), (b) intrusion upon seclusion, (c) common law misappropriation of the right of publicity, (d) intentional infliction of emotional distress, and (e) violation of Florida's Wiretap Act, Fla. Stat. § 934.10(2)(c). *See* First Am. Compl. (Ex. 1) ¶¶ 59-93, 100-108.[1]

2. The allegations against the Publisher Defendants are based on a report and commentary published on www.gawker.com on October 4, 2012 (the "Story"). The Story addressed the then-ongoing public controversy about a sex tape featuring Hogan – specifically, an encounter between Hogan, who was married at the time of the encounter, and Heather Clem, who was also married at the time to Hogan's best friend, celebrity radio shock jock Bubba the

[1] Hogan also asserted a claim for negligent infliction of emotional distress against the Publisher Defendants, but voluntarily dismissed that cause of action on December 4, 2014. Because that claim had previously been voluntarily dismissed by the plaintiff when this dispute was in federal court, that claim may not be re-filed. *See* Fla. R. Civ. P. 1.420(a)(1).

Love Sponge Clem. The Story more generally addressed both the public's fascination with celebrities, including their romantic and sexual affairs, as well as Hogan's public persona. It was published amidst substantial ongoing public discussion of Hogan's romantic and sexual affairs, including by Hogan himself. A copy of the Story is attached as Exhibit 12.[2]

3. The Story was accompanied by one minute and forty-one seconds of heavily edited excerpts of the tape at issue (the "Excerpts"). The Excerpts include roughly **nine seconds** of sexual activity in grainy, black and white footage and otherwise depict conversation between Hogan and Mrs. Clem, along with subtitles that were added by Gawker. A copy of the Excerpts is attached as Exhibit 92. The Story and the Excerpts are referred to collectively as the "Publication."

4. The Publisher Defendants are entitled to judgment as a matter of law because:

a. The Publication addressed the ongoing and robust public discussion, in which Hogan himself actively participated, about both this sex tape, the extramarital affair it depicts, and his sex life as well as his public persona more generally. The Publication was therefore newsworthy and addressed a matter of public interest. For that reason, it is protected as a matter of law from liability in connection with all of Hogan's causes of action against the Publisher Defendants under both the common law and the First Amendment.

b. Any use of plaintiff's name or likeness in the Publication was not "commercial" – *i.e.*, they were not used to advertise a product or service. Therefore, there can be no

[2] Hogan also sued both Bubba the Love Sponge Clem and Heather Clem alleging that they were responsible for recording the encounter and providing it to Gawker. Hogan dismissed his claims against Mr. Clem in December 2012, following a press release announcing a settlement between them. Hogan's claims against Mrs. Clem remain pending.

liability against the Publisher Defendants for common law misappropriation of Hogan's right of publicity.

c. The Publisher Defendants did not play any role in filming or recording Hogan or the Clems, and therefore cannot as a matter of law be liable for intrusion upon seclusion, which does not punish publication, but requires a *physical* or *electronic* intrusion by the defendant.

d. Hogan's claim for intentional infliction of emotional distress is fatally flawed because he has conceded that he suffered only "garden variety" emotional injuries as a result of the conduct at issue, rather than the severe emotion distress required to establish this claim.

e. The Publisher Defendants did not record the sex tape at issue, so Hogan's claim under the Florida Wiretap Act is limited to the *publication* of materials that were allegedly recorded in violation of the Act. Not only does the First Amendment prohibit the imposition of liability in such circumstances, but under the statute itself the Publisher Defendants' good-faith belief that their conduct was constitutionally protected bars Hogan from prevailing on his Wiretap Act claim as a matter of law.

MEMORANDUM OF LAW

Undisputed Facts

5. The Publisher Defendants have filed herewith Statement of Undisputed Material Facts ("SUMF") as well as a separate Confidential Statement of Undisputed Materials Facts ("Confidential SUMF" or "Conf. SUMF"), the latter of which addresses those facts that have been designated (by Hogan, Mrs. Clem and certain third party witnesses) as "confidential" under the Agreed Protective Order entered in this action on July 25, 2013.

6. The Publisher Defendants have also filed herewith the Affidavit of Rachel E. Fugate and the Confidential Supplemental Affidavit of Rachel E. Fugate, attaching documents and testimony referenced in the SUMF and Confidential SUMF, respectively.

7. As reflected in the SUMF and the Confidential SUMF:

a. Hogan and Heather Clem engaged in sexual relations while each married to someone else (the "Sexual Affair").

b. At the time of the Sexual Affair, Hogan was married to Linda Hogan, and Heather Clem was married to Bubba Clem.

c. The Sexual Affair was recorded by Bubba Clem, and the Publisher Defendants played no role in the recording (the "Video Recording").

d. Prior to any conduct by the Publisher Defendants, there was widespread public discussion, including by Hogan himself, of intimate details of his personal life, including specifically his romantic affairs and graphic descriptions of his sexual practices.

e. Prior to any conduct by the Publisher Defendants, there was widespread discussion in the media, including by Hogan himself, of the Video Recording of the Sexual Affair between Hogan and Heather Clem.

f. After all this prior media coverage, Gawker published its news report and commentary, accompanied by one minute and 41 seconds of heavily-edited footage from the full 30 minute Video Recording.

g. The Publisher Defendants did not promote any separate product or service in connection with the Publication.

h. The Publisher Defendants believed that the Publication addressed a matter of public concern.

i. Following the Publication, there continued to be widespread public discussion about the Video Recording of the Sexual Affair, including by Hogan himself.

j. By his own admission, Hogan has suffered at most only "garden variety" emotional distress from the Publication.

Each of the items of record evidence supporting these nine undisputed facts is set forth in the SUMF and Confidential SUMF, and the accompanying affidavits.

ARGUMENT

A. Summary Judgment Standard

8. Florida Rule of Civil Procedure 1.510 provides that summary judgment is appropriate where the evidence shows that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. In cases touching First Amendment rights, "pretrial dispositions are especially appropriate because of the chilling effect these cases have on freedom of speech." *Stewart v. Sun-Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 4th DCA 1997); *see also Karp v. Miami Herald Publ'g Co.*, 359 So. 2d 580, 581 (Fla. 3d DCA 1978) (same).

9. Here, there is no genuine issue of material fact and the Publisher Defendants are entitled to judgment as a matter of law. Each of the facts on which the Publisher Defendants relies is undisputed. These include the substantial record of public discussion and media coverage of Hogan's romantic and sexual affairs, including by Hogan himself, all of which is offered simply for the fact that the coverage was published or broadcast. And these include undisputed testimony about (a) the creation of both the original sex tape and the writing and editing of Gawker's Publication, (b) the fact that the Publisher Defendants did not sell either the

complete sex tape they received or the brief excerpts they posted, or use them to promote a product or service, and (c) Hogan's limitation of his claims to "garden variety" emotional distress purportedly resulting from the Publication.

B. Because the Publication Was Published Against a Backdrop of Substantial Public Discussion of Hogan's Sexual and Romantic Affairs, Including by Hogan Himself, It Involves a Matter of Public Concern and is Therefore Absolutely Protected by the First Amendment.

10. As Hogan conceded in the prior appeal in this case, there can be no civil liability arising out of speech involving a matter of public concern. *See* Ex. 106 to the Fugate Aff. at 18 (excerpts from Hogan's answer brief in prior injunction appeal conceding that the "First Amendment precludes civil remedies" where the "material is of legitimate public concern"). That is true whether it is a media publication, *see, e.g.*, *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (newspaper report), or some other type of speech, *see, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1220 (2011) (picketing at fallen soldier's funeral). As the Supreme Court has emphasized, "speech" on "matters of public concern" is "at the heart of the First Amendment's protection." *Snyder*, 131 S. Ct. at 1215.

11. This core principle of First Amendment law precludes civil liability for each of Hogan's five claims asserted against the Publisher Defendants. *See, e.g.*, *Hitchner*, 549 So. 2d at 1377 (claim for invasion of privacy/publication of private facts requires that the speech at issue not involve a matter of public concern); *Snyder*, 131 S. Ct. at 1220 (claims for intrusion upon seclusion and intentional infliction of emotional distress cannot be based on speech involving a matter of public concern); *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34, 36 (Fla. 1955) (unauthorized use of a plaintiff's name or likeness in connection with the dissemination of news or other matters of public interest cannot give rise to liability); *Cape Publ'ns v. Bridges, Inc.*, 423 So. 2d 426, 427 (Fla. 5th DCA 1982) (same); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (no

liability under publication prong of wiretap act for publication of illegally recorded information where, as here, information involves a "matter of public concern" and publisher played no role in illegal recording).

12. As the Court is aware, in prior proceedings, both the United States District Court and a unanimous panel of the District Court of Appeal concluded that *this publication* involved a matter of public concern. In the federal court, Judge Whittemore found:

> Gawker . . . posted an edited excerpt of the Video together with nearly three pages of commentary and editorial describing and discussing the Video in a manner designed to comment on the public's fascination with celebrity sex in general, and more specifically [Hulk Hogan'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.

Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1328-29 (M.D. Fla. 2012). *See also Bollea v. Gawker Media, LLC*, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012) (the video excerpts published by Gawker were "a subject of general interest and concern to the community" because of Hogan'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").

13. After the case was re-filed in state court, the Court of Appeal repeatedly held that "it is clear that . . . the report and the related video excerpts address matters of public concern." *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1201 (Fla. 2d DCA 2014); *see also id.* at 1202 ("the written report and video excerpts are linked to a matter of public concern"); *id.* at 1203 ("the speech in question here is indeed a matter of legitimate public concern"). The appeals court emphasized that "the mere fact that the publication contains arguably inappropriate and

otherwise sexually explicit content does not remove it from the realm of legitimate public interest." *Id.* at 1201.

14. The Court of Appeal based its conclusion on the fact that, when the Publication was published, there was a preexisting "public controversy surrounding [Hogan's] affair [with Mrs. Clem] and the Sex Tape, exacerbated in part by [Hogan] himself." *Id.* at 1201. In reaching this conclusion, the Court of Appeal also emphasized Hogan's long history of sharing the details of his personal life, including his sex life, with the public. *See id.* at 1200-01 (Hogan "openly discussed an affair he had while married to Linda Bollea in his published autobiography and otherwise discussed his family, marriage, and sex life through various media outlets"); *see also id.* at 1201 n.5 (citing *Hulk Hogan—Yes, I Banged Bubba's Wife*, TMZ (Oct. 9, 2012, 6:08AM)). The appeals court also observed that Gawker "'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 1202 (citation omitted).

15. As the Court is aware, the Publisher Defendants believed that, in light of the Court of Appeal's ruling, this case was ripe for dismissal at the motion to dismiss stage. Hogan, for his part, contended that the appellate ruling was decided at a preliminary stage without a full record, that this Court could not consider matters outside of the pleadings on a motion to dismiss, and that additional discovery was needed to be able to present a fully developed factual record. In response to the parties' arguments, this Court acknowledged at the motion to dismiss hearing that the Court of Appeal's ruling was "preceden[t] for this particular case," but nevertheless described it as "not conclusive" at the motion to dismiss stage. Apr. 23, 2014 Hrg. Tr. (Ex. 107) at 71:23 – 72:12 ("It's not saying to me 'dismiss the case'" at that stage.); *see also id.* at 62:19-

20 (denying motion to dismiss in light of the "standard for the motion to dismiss"); *id.* at 64:6 – 65:6 (THE COURT: describing some arguments as more appropriate for a summary judgment motion because the "amended complaint is at the beginning of the case. It's not after all of the discovery has taken place."); *id.* at 77:3-8 (counsel for Hogan arguing that motion to dismiss must be adjudicated based on allegations of complaint, but conceding that once discovery is completed "it's subject for a motion for summary judgment").[3] Now that fact discovery is over and we have a full record that is properly considered on summary judgment, the Court should enter summary judgment because the portion of that record germane to this motion is undisputed. Indeed, at this stage, the record before the Court is dramatically expanded from the record that was previously before either this Court or the Court of Appeals, and it conclusively demonstrates that the Publisher Defendants are entitled to judgment as a matter of law because the subject of their Publication was newsworthy as defined by the case law.

16. In adjudicating that question, whether treated as law of the case or merely applicable precedent, the Court of Appeal's analysis of the public-concern issue in the context of a celebrity sex tape provides a clear roadmap for this Court's application of law to the undisputed facts at the summary judgment stage – which, explained below, is consistent with how this issue is adjudicated by courts in Florida and throughout the country. Thus, while the *record* might

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[3] As the Court is aware, Gawker's subsequent writ petition on this issue was dismissed on jurisdictional grounds. *Gawker Media, LLC v. Bollea*, 2014 WL 7237392 (Fla. 2d DCA Dec. 19, 2014) (*per curiam*) (stating that petition was "Dismissed"). The law is clear that, where a writ petition has been "dismissed" (as opposed to "denied"), that dismissal reflects no view of the underlying arguments on the merits, and thus has no effect on their viability going forward. *See, e.g.*, *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 448-49 & n.3 (Fla. 2d DCA 1995) (explaining distinction between "dismissal" and "denial," and emphasizing that dismissal is accorded no "*res judicata* effect"); *see also id.* at 649 n.3 (using the term "dismissed" signals that a writ petition has been rejected exclusively on jurisdictional grounds and should not be viewed as having reviewed an order "on the merits when that is not correct"); 3 FLA. JUR. 2D APPELLATE REVIEW § 473 (2015) (explaining that, if an appeals court has no jurisdiction over a writ petition, "then the petition should be dismissed rather than denied").

have been different and less well developed at the temporary injuction stage, the *legal analysis* of how to approach the public-concern issue does not change. *See, e.g.*, *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 165 (Fla. 5th DCA 2003) (describing application of law to facts in *3299 N. Fed. Highway, Inc. v. Board of Cnty. Comm'rs of Broward Cnty.*, 646 So. 2d 215 (Fla. 4th DCA 1994), a temporary injunction decision, as "controlling precedent" as to issue presented on summary judgment); *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So. 2d 565, 568 (Fla. 1st DCA 1994) (in appeal from grant of summary judgment, relying on *T.J.R. Holding Co. v. Alachua Cnty.*, 617 So. 2d 798 (Fla. 1st DCA 1993), a temporary injunction decision, for rule that expert testimony is improper in interpreting non-technical language in ordinance); *see also Bradenton Grp., Inc. v. State of Florida*, 970 So. 2d 403, 411 (Fla. 5th DCA 2007) (legal ruling made during prior temporary injunction appeal applied when that issue was re-presented on the merits).

17. This is especially so in this context because the far more extensive record at this stage provides substantial additional support for the Court of Appeal's initial conclusion that the Publication addressed a matter of public concern. Courts routinely examine both the publication itself and *the context* in which it is disseminated, including whether the subject matter is already the subject of public discussion, in determining whether it is newsworthy and protected against liability. *See, e.g.*, *Snyder*, 131 S. Ct. at 1216 (analyzing "content, form and context" of speech and ruling as a matter of law that it involved a matter of public concern); *Loft v. Fuller*, 408 So. 2d 619, 620 (Fla. 4th DCA 1981) (relying on prior reports "which received extensive publicity by the news media" in concluding that book involved matter of public concern and affirming order dismissing right of publicity claim); *Walker v. Fla. Dep't of Law Enforcement*, 845 So. 2d 339, 340 (Fla. 3d DCA 2003) (considering publicly available statements about plaintiff and

affirming dismissal where "claimant could not state a cause of action for invasion of privacy, as a matter of law, because the information allegedly disseminated . . . constituted a matter of legitimate public interest or concern"). Here, that record conclusively demonstrates that the intimate details of Hogan's romantic and sexual life in general and the sex tape specifically were already the subject of widespread public discussion and media coverage, including with great frequency and in graphic detail by Hogan himself. *See, e.g.*, SUMF Part IV (describing public discussion and media coverage of Hogan's romantic and sexual affairs, including by Hogan himself); SUMF Part V (describing prior public discussion and media coverage of sex-tape story, including by Hogan himself).

18. Such a conclusion is also entirely consistent with numerous other rulings in which other publications and broadcasts have, despite their inclusion of depictions of sex or nudity, been found to involve a matter of public concern and to be non-actionable where the subject was otherwise newsworthy. *See, e.g.*, *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at *10 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*") (granting summary judgment to publisher of a news report about a celebrity sex tape accompanied by brief excerpts, finding it was not an actionable invasion of privacy because excerpts of tape "bore a substantial nexus to a matter of public interest"); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309, at *5 (C.D. Cal. Mar. 19, 1997) ("the sex life of Tommy Lee and Pamela Anderson is . . . a legitimate subject for an article," and sexually explicit pictures of the couple accompanying the article were "newsworthy," particularly in light of plaintiffs' own statements on *Howard Stern* and in other media outlets extensively discussing the "frequency of their sexual encounters and some of [their] sexual proclivities"); *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (affirming dismissal of invasion of privacy claims from broadcast of videotapes of private figure priest's

sexual activities with young men because they involved a matter of public concern); *Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (even though videotape of alleged rape was "highly personal and intimate in nature," use of excerpts in news broadcast addressed matter of public concern and were protected by the First Amendment as a matter of law); *Jones v. Turner*, 1995 WL 106111 (S.D.N.Y. Feb. 7, 1995) (*Penthouse* magazine's publication of nude photographs of Paula Jones were newsworthy because they involved a "sex scandal" and accompanied an article about her); *Bridges*, 423 So. 2d at 427-28 & n.3 (publishing photo of plaintiff escaping her kidnapper wearing only a dish towel was not actionable invasion of privacy or intentional infliction of emotional distress because it was a newsworthy story).

19. This is especially so where, as here, the events depicted in the Video Recording depict a criminal offense in Florida, *see* Fla. Stat. §§ 798.01, 798.02, and many other states, even if many (including the Publisher Defendants) might question whether such conduct should properly be criminalized. *See, e.g.*, *Hitchner*, 549 So. 2d at 1378 ("'[t]he commission of [a] crime" is "without question" an "event[ ] of legitimate concern to the public'") (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)); *Bridges*, 423 So.2d at 426 (reversing jury verdict for story concerning plaintiff's estranged husband's abducting her and holding her hostage, and photograph of her fleeing in a towel, because it addressed matter of public concern); *El Amin v. Miami Herald*, 9 Media L. Rptr. 1079, 1082 (Fla. Cir. Ct. 1983) (no action for invasion of privacy could be maintained for report of domestic assault against plaintiff where plaintiff "was involved in an incident that was newsworthy because of the public interest in crime").

20. The bottom line is that the Publication addressed a matter of public concern, one that had already been the subject of substantial public discussion and media coverage. This

included the following **ALL BEFORE THE PUBLICATION WAS PUBLISHED BY GAWKER**:

a. Widespread public discussion and media coverage of Hogan's extramarital affairs, including an alleged sexual encounter with Kate Kennedy (and a resulting federal court lawsuit) and an affair with Christiane Plante, SUMF Part IV-B;

b. Widespread public discussion and media coverage of *the sex tape* itself, including by Hogan, who both denied that he would have sex with Heather Clem and then said he did not know who the woman in the video was because he slept with so many women during that period in his life, SUMF Part V;

c. Widespread cultural fascination with celebrity, the extent to which their lives are ordinary or unique, and the public's fixation on their personal affairs, as exemplified by Hogan's life and career, SUMF Part IV;

d. Widespread public discussion in the media about adultery (a criminal offense in Florida), including as depicted on the tape, and Hogan's public denials that he had cheated on his wife, including the claim in his 2009 autobiography that "I'm not the cheating kind," and his 2011 statement that he would never sleep with Heather Clem, SUMF Part IV-B;

e. Widespread discussion in the media, by Hogan himself, of his intimate affairs, including the graphic details of his sexual life, including the size of his penis, where he likes to ejaculate, the most women he slept with at the same time, performing oral sex on his wife Linda including to savor her bodily fluids in his mustache, her techniques for manually pleasuring him, his use of

lubricants with his new wife Jennifer including through oral sex, that he spanks her during sex, etc., SUMF Part IV-C.

Again, it is undisputed that these topics were the subject of widespread public discussion all *before* Gawker wrote one word.

21. That overwhelming record conclusively establishes that the subject matter of the Publication was newsworthy. Once that is established, then fine-tuned judgments about how the Publication should have been crafted – *i.e.*, whether to include nine seconds of sexual activity or eighteen seconds or only two seconds or none at all – are for the publisher to make, not a court. *See, e.g.*, *Bollea*, 129 So. 3d at 1202 ("it is the primary function of the publisher to determine what is newsworthy and . . . the court should generally not substitute its judgment for that of the publisher") (citing *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328, 331 (Fla. 2d DCA 1983)); *Cinel*, 15 F.3d at 1346 (affirming dismissal of privacy claim arising out of airing of portions of videotapes depicting plaintiff, a Catholic priest, engaged in sexual acts, and observing, "[p]erhaps the use of the materials reflected the media's insensitivity, and no doubt [plaintiff] was embarrassed, but we are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern"); *Bridges*, 423 So. 2d at 427-28 & n.3 (publishing photo of plaintiff escaping her kidnapper wearing only a dish towel might "be considered by some to be in bad taste," but court's role is not to establish "canons of good taste for the press or public").

22. The case of *Shulman v. Group W Products, Inc.*, 955 P.2d 469 (Cal. 1998), frequently cited by Hogan in these proceedings, illustrates this fundamental point. There, the defendant aired video footage "showing . . . 'intimate private, medical" treatment of a private figure that the court conceded "was not *necessary* to enable the public to understand the

significance of the accident or the rescue.'" *Id.* at 483-84, 488. Nonetheless, the court held that the video footage addressed a matter of public concern, explaining:

> The standard, however, is not necessity. That the broadcast *could* have been edited to exclude some of [plaintiff's] words and images . . . is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.

Id. at 488.

23. Based on the undisputed facts, the Publisher Defendants are entitled to a finding by this Court that the Publication – even if not to Hogan's or the Court's liking – involved a matter of public concern, was "newsworthy" in the sense that term is used in the case law, and therefore protected against liability. On that basis, the Court should enter summary judgment in the Publisher Defendants' favor on each of Hogan's claims and should dismiss plaintiff's Amended Complaint as to the Publisher Defendants with prejudice.

C. Each of Hogan's Tag-Along Claims Fails For Additional Reasons As Well.

24. Even if the public-concern issue did not decisively require the entry of judgment against Hogan, as demonstrated above, he would still be left with only one triable claim – the claim for publication of private facts. The summary judgment record makes clear that Hogan's four other remaining claims against the Publisher Defendants are each fatally deficient for reasons additional to the central ground that the Publication addressed a matter of public concern.

1. Hogan's Right of Publicity Claim Fails For The Additional Reason That His Name and Likeness Were Not Used For a Commercial Purpose.

25. The Publisher Defendants are entitled to summary judgment on Hogan's right of publicity claim because they did not use his name and likeness for a commercial purpose. Florida law is clear that the unauthorized "[i]nclusion of one's name, likeness, portrait, or

photograph in any type of publication *alone* does not give rise to a valid cause of action." *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1258 (S.D. Fla. 2010) (emphasis in original). Rather, the unauthorized use must be for a "commercial" purpose in the relevant sense, defined as the use of a plaintiff's name or likeness "*directly* [to] promote a product or service" other than the publication. *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 808-10 (Fla. 2005) (emphasis added).[4]

26. This substantial limitation on the scope of a commercial misappropriation claim exists for a very important reason. A rule that permitted plaintiffs to control the use of their names or likenesses for purposes of providing news reporting or commentary would represent a substantial interference on First Amendment freedoms – by improperly requiring news outlets to pay news subjects for reporting on them, thus giving those subjects control over whether and how they are featured in reporting. *See Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. 4th DCA 1981) (expansion of right of publicity claim beyond instances in which names and likeness are used directly to promote products or services would "result in substantial confrontation [with] the first amendment to the United States Constitution guaranteeing freedom of the press and speech"); *see also Tyne*, 901 So. 2d at 810 (raising similar constitutional concerns).

27. This is precisely how courts have drawn the line specifically in the sex-tape context. For instance, in *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 837-

[4] Although Hogan has asserted a common law claim for right of publicity, rather than a statutory claim such as at issue in *Tyne*, that makes no difference. 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); *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); 19A FLA. JUR. 2D, DEFAMATION & PRIVACY § 225 (2015) ("The elements of common law invasion of privacy based on commercial misappropriation of a person's likeness coincide with the elements of unauthorized publication of a name and likeness in violation of the statute, and are substantially identical.").

39 (C.D. Cal. 1998) ("*Michaels I*"), where the court enjoined the use of plaintiffs' names and likenesses in connection with promoting the *sale* of a *complete* sex tape, the court nonetheless held that the defendant *could* use their names and likenesses "to attract attention to [itself] as a news medium." Similarly, in a subsequent decision in that case, *Michaels II*, 1998 WL 882848, at *5-6, the court granted summary judgment on the right of publicity claim to a different defendant that published excerpts from the sex tape because the defendant was using the excerpts – and, thus, the plaintiffs' names and likenesses – to report about the existence of the tape and the controversy associated with it, and was not promoting the sale of the tape or any other product or service.

28. Under this analysis, the Publisher Defendants are entitled to summary judgment on Hogan's commercial misappropriation claim. It is undisputed that the Publisher Defendants did not use Hogan's name or likeness to promote the sale of the complete sex tape or to promote the sale of any other product or service. SUMF ¶¶ 125-126. Admittedly, the parties disagree as to whether, and to what extent, Gawker profited from the Publication, especially in light of the fact that it sold no advertising in connection with the post. But that disagreement is immaterial: even if the Court were to credit Hogan's claims that Gawker profited from the publication (just as publishers and broadcasters profit from the inclusion of attention-getting stories in their newspapers, magazines and television broadcasts), that cannot change the outcome. As the court explained in *Loft*, 408 So. 2d at 622-23, 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." *See also Tyne*, 901 So. 2d at 808-09 ("'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, 501-02 (1952)).

29. Hogan's related contention that Gawker used interest in the Publication to draw readers to its sites, and thus to build its audience, is equally immaterial. Although the record shows that any brief spike in traffic Gawker received did not in fact result in a sustained growth in its audience, even crediting Hogan's contrary assertion does not change the outcome under governing law. Television stations routinely show commercials during their news broadcasts promoting their own entertainment programming aired at other times in their schedule, in the obvious hopes of attracting additional viewers and building their audience. That does not permit the subject of a news story to seek damages for the inclusion of their name and likeness in that news story. The key point is that the "use of one's name, likeness, portrait or photograph, whether in a news report, television show, play, novel, or the like is not actionable unless the individual's 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). No such actionable use occurred here. *See Bollea*, 129 So. 3d at 1202 n.6 ("We are aware that Gawker Media is likely to profit indirectly from publishing the report with video excerpts to the extent that it increases traffic to Gawker Media's website. However, this is distinguishable from selling the Sex Tape purely for commercial purposes.").

2. Hogan's Intrusion Claim Fails For The Additional Reason That The Publisher Defendants Were Not Responsible For Any Physical Or Electronic Intrusion.

30. The Publisher Defendants are entitled to summary judgment on Hogan's claim for intrusion upon seclusion because they played no role in recording the sex tape from which they later published excerpts. That fact has now been conclusively established in discovery. *See* SUMF Part III, Conf. SUMF Part III. Similarly, there is no dispute that none of the Publication

Defendants was even aware that the recording existed until 2012, some five years after it was made. SUMF ¶ 32.

31. The Florida Supreme Court has defined the tort of intrusion upon seclusion as conduct actually consisting of "physically or electronically intruding into one's private quarters," and not the act of publication. *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 158 (Fla. 2003). In other words, the relevant intrusion must be intrusion into some physical "'place' in which there is a reasonable expectation of privacy," not an abstract or merely metaphorical intrusion. *Id.* at 162. Accordingly, if there is an intrusion claim arising out of the facts of this case, it can only be based on the allegedly surreptitious *recording* of the video footage. By contrast, the Publisher Defendants can be liable, if at all, only for claims arising out of acts of *publication*, which cannot, by definition, include a claim for intrusion. *See, e.g.*, *Bradley v. City of St. Cloud*, 2013 WL 3270403, at *4-5 (M.D. Fla. June 26, 2013) (dismissing intrusion upon seclusion claim where there was no physical or electronic intrusion into a private physical space); *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309 & n.2 (M.D. Fla. 2010) (publication is neither necessary, nor sufficient, to establish an actionable intrusion); *see also Pearson v. Dodd*, 410 F.2d 701, 703-06 (D.C. Cir. 1969) (holding that journalists who had received and published excerpts of documents stolen from a United States Senator's office were not liable for intrusion upon seclusion, and noting that "in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate"); *Doe v. Peterson*, 784 F. Supp. 2d 831, 843 (E.D. Mich. 2011) (website that published nude photographs of plaintiff could not be held liable for intrusion upon seclusion because website "merely received images already obtained by non-parties to this case").

3. Hogan's Claim For Intentional Infliction of Emotional Distress Fails Because He Concedes He Suffered Only "Garden Variety" Emotional Distress, Not the "Severe" Emotional Distress Required to Establish This Claim.

32. In his sworn interrogatory responses, Hogan expressly limited his claim of emotional distress to a claim for "'garden variety' emotional distress." SUMF ¶ 146. This concession precludes him from establishing that he suffered "severe" emotional distress, which is a required element of his intentional infliction of emotional distress claim. *See Clemente v. Horne*, 707 So. 2d 865, 866-67 (Fla. 3d DCA 1998) (an intentional infliction of emotional distress claim requires emotional distress that is "severe"). Hogan's concession was memorialized in an Order by this Court, having been offered by him to limit the Publisher Defendants' discovery. *See* SUMF ¶ 147; Ex. 103 (Feb. 26, 2014 Order) at ¶ 4 (limiting discovery that could be taken by Publisher Defendants as to Hogan's claims for emotional distress and indicating that "[t]his portion of the Court's ruling is based on the representations of [Hogan's] counsel at the hearing that . . . [Hogan] is not asserting claims for any physical injury and is limiting claims for emotional injuries to 'garden variety emotional distress damages'").

33. Such "garden variety" emotional distress is, by definition, insufficient to qualify as "severe" emotional distress, which Florida law defines as "emotional distress of such a substantial quality or enduring quality, that no reasonable person in a civilized society should be expected to endure it." *Kraeer Funeral Homes, Inc. v. Noble*, 521 So. 2d 324, 325 (Fla. 4th DCA 1988). "Garden variety" emotional distress, on the other hand, has been defined as "ordinary or commonplace emotional distress," and "simple or usual," and specifically contrasted with the variety of emotional distress implicated by an intentional infliction of emotional distress claim. *Chase v. Nova Se. Univ., Inc.*, 2012 WL 1936082, at *3-4 (S.D. Fla. May. 29, 2012); *see also Wheeler v. City of Orlando*, 2007 WL 4247889, at *3 (M.D. Fla. Nov.

30, 2007) (noting that bringing a claim for intentional infliction of emotional distress requires asserting more than "garden variety claim of emotional distress").

34. Accordingly, the Publisher Defendants are entitled to summary judgment on this claim for this reason as well. *See, e.g.*, *Murdock v. L.A. Fitness Int'l, LLC*, 2012 WL 5331224, at *4 n.8 (D. Minn. Oct. 29, 2012) (dismissing intentional emotional distress claim where all that was claimed was "'garden variety' emotional distress" supported by plaintiff's testimony that he suffered from, *inter alia*, "[d]epression, chronic fatigue, irritability, sleep abnormalities, insomnia, tiredness throughout the day, [and] malaise"); *Taylor v. Trees, Inc.*, --- F. Supp. 3d ---, 2014 WL 5781251, at *6-7 & n.8 (E.D. Cal. Nov. 5, 2014) (agreeing that asserting only "'garden variety' emotional distress" precludes a showing of "severe" emotional distress, and indicating that summary judgment is appropriate where plaintiff asserts emotional distress as "an independent cause of action" as Hogan does here). Having successfully limited the scope of the Publisher Defendants' discovery by limiting his emotional distress claims, Hogan cannot, now that discovery has concluded, turn around and assert that his emotional distress was "severe."[5]

4. Hogan's Wiretap Act Claim Fails for the Additional Reason that the Publisher Defendants Had a Good-Faith Belief that their Conduct Was Constitutionally Protected.

35. It is settled law that a wiretap statute cannot be constitutionally enforced to punish the *publication* of a communication about a matter of public concern where, as here, the defendants played no role in *recording* or *intercepting* it. This was affirmed most recently by the U.S. Supreme Court in *Bartnicki*, 532 U.S. at 528, 535, in which the Court found

[5] At any rate, Hogan has conceded that he did not seek medical or other treatment as a result of the Gawker Publication, SUMF ¶ 148, which, on its own, takes his asserted "emotional distress" out of the "severe" category. *See, e.g.*, *Mixon v. K Mart Corp.*, 1994 WL 462449, at *3 (M.D. Fla. Aug. 2, 1994) (granting summary judgment on intentional infliction of emotional distress claim where plaintiff claimed to have suffered emotional problems, but offered no evidence of medical or psychiatric treatment for his condition).

unconstitutional the "dissemination" provisions of the federal Wiretap Act as applied under such circumstances. *See also Boehner v. McDermott*, 484 F.3d 573, 586 (D.C. Cir. 2007) (opinion of Sentelle, J.) (*en banc*) (First Amendment precludes liability on publishers who simply disseminated the contents of an unlawfully intercepted communication, 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);[6] *Jean v. Mass. State Police*, 492 F.3d 24, 29-30 (1st Cir. 2007) (affirming First Amendment protection for publication of unlawfully recorded videotape that had been provided to community activist who then posted video on the Internet).

36. As set forth above, the Publisher Defendants are entitled to summary judgment as to Hogan's claim under the Florida's Wiretap Act because the Publication addressed matter of public concern and they played no role in the original recording of the sex tape. But, even if the public-concern issue did not preclude liability, the Publisher Defendants are still entitled to summary judgment because of their good-faith belief that their publication of the Excerpts was constitutionally protected. On the face of the statute, the Florida Wiretap Act 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 Brillinger v. City of Lake Worth*, 978 So. 2d 265, 268 (Fla. 4th DCA 2008) (describing good-faith defense under statute).

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[6] Judge Sentelle's opinion dissented from the Court's ruling upholding the entry of summary judgment against Representative McDermott only because he, unlike the newspaper defendants, had violated a legal duty imposed on him as a member of the House Ethics Committee to maintain the confidentiality of information provided to him in that capacity. *See* 484 F.3d at 581. However, as to the principles announced in *Bartnicki* as they apply here, Judge Sentelle's opinion spoke for a majority of the *en banc* Court. *See* 484 F.3d at 582 ("On the issue considered by the Supreme Court in *Bartnicki*, . . . this opinion speaks for the court.") (opinion of Sentelle, J.); *id.* at 581 ("a majority of the members of this Court . . . join Part I of Judge Sentelle's dissent") (Griffith, J., concurring).

37. The deposition testimony provided by the Publisher Defendants and their employees conclusively establishes that they had a good-faith belief that the Publication addressed a matter of public concern, and that its publication could therefore not give rise to liability. *See* SUMF Part VII (describing relevant testimony of Publisher Defendants). That the Publisher Defendants held this belief in good faith is further confirmed by the fact that both Judge Whittemore and a unanimous panel of the Court of Appeals came to the same belief, with the appeals court specifically holding that the Publication was protected under *Bartnicki*. *See Bollea*, 129 So. 3d at 1203 ("As the speech in question here is indeed a matter of legitimate public concern, the holding in *Bartnicki* applies."); *Bollea*, 913 F. Supp. 2d at 1328-29 (Publication commented on matter of public concern).

38. Accordingly, having reached the same conclusion that four distinguished jurists later reached, the Publisher Defendants are, at a minimum, entitled to summary judgment under the good-faith belief provision of the Florida Wiretap Act. *See Brillinger*, 978 So. 2d at 268 (defendant was entitled to summary judgment on Wiretap Act claim under § 934.10(2)(c) where evidence confirmed that defendant had a good-faith belief that its illegal interception was permitted); *see also Rice v. Rice*, 951 F.2d 942, 946 (8th Cir. 1992) (defendant was entitled to summary judgment under similar provision of Federal Wiretap Act because record evidence indicated that she acted in good-faith belief that tapping her own phone was permitted). In both of those cases, the question was whether a *recording* made in violation of the statute was otherwise not actionable. Here, the question is whether a *publication* that allegedly violates the act is actionable. Particularly given the serious constitutional questions raised by punishing solely *publication* of such information, the Court should enter summary judgment in the Publisher Defendants' favor with respect to this cause of action.

CONCLUSION

For the foregoing reasons, the Publisher Defendants respectfully request that summary judgment be entered in their favor as to each of the claims asserted against them.

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Respectfully submitted,

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