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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

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 TERRY BOLLEA'S OPPOSITION TO GAWKER'S, DENTON'S, & DAULERIO'S MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

The Motion for Summary Judgment filed by Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (collectively, the "Gawker Defendants"), despite its length and more than 100 exhibits, glosses over the key facts and issues in this case that ultimately will need to be resolved by a jury:

On October 4, 2012, Gawker posted on its flagship website, Gawker.com, a secretly-recorded, explicit, pornographic video depicting the plaintiff, Terry Bollea (professionally known as Hulk Hogan), engaged in a private sexual encounter in a private bedroom, and depicting Mr. Bollea fully naked, aroused, and engaged in multiple sexual positions, with no

aspect of the video blocked, blurred, pixelated or otherwise obscured (the "Sex Video"). Gawker posted the Sex Video, and left it up on the Internet, knowing, and not caring, that Mr. Bollea was unaware that he was recorded in the private bedroom, and also had not consented to its distribution. On the contrary, he strenuously protested any publication whatsoever and put the world on notice of the illegal filming. Gawker admitted that this was footage the public was "not supposed to see." The Sex Video was viewed by more than seven million (7,000,000) Internet voyeurs, resulting in a massive, highly-intrusive, and long-lasting invasion of Mr. Bollea's privacy.

The individual defendants, Nick Denton and A.J. Daulerio, were directly involved in the publication. In October 2012, Daulerio was Editor-in-Chief of Gawker.com. He received a 30-minute recording of Mr. Bollea's private sexual encounter, supervised the production of a one minute and 41 second "highlight reel" (in his words), and published that Sex Video, along with graphic commentary that he personally wrote, on Gawker.com. Nick Denton, Gawker's founder and CEO, was aware of and approved the publication of the Sex Video, and set the policies and practices at Gawker that gave rise to its publication.

Shortly **before** the Gawker Defendants' publication of the Sex Video, every single member of the editorial staff at Gawker.com had received **actual notice** that Mr. Bollea had been secretly filmed and was seeking criminal and civil prosecution of everyone involved in the filming or distribution/publication of the sex tape. Also, within 24 hours of the Gawker Defendants' publication of the Sex Video, Mr. Bollea's counsel sent Gawker two written cease and desist communications. Gawker responded in writing that it would not remove the Sex Video, and left it up at its website for millions to view.

The Motion for Summary Judgment obfuscates a key distinction between Gawker's publication of the **Sex Video itself**, and its publication of Daulerio's graphic commentary relating to it:

Mr. Bollea's complaint initially alleged claims arising out of both, however, Mr. Bollea made clear in **April 2014**, and has done so consistently since that time, that he is **no longer pursuing a claim based on Daulerio's "commentary."** Mr. Bollea does not seek, as Gawker's motion contends, any liability relating to the commentary. Moreover, Mr. Bollea does not seek to prevent anyone (Gawker or anyone else) from commenting or discussing his relationship with Heather Clem or the existence of a sex video.[1] Mr. Bollea seeks to hold Gawker accountable for **its publication of the Sex Video itself**—showing the graphic video of him naked, aroused, and having sexual intercourse. The video itself was not a matter of public concern; it was not necessary to report the story about the existence of a sex tape involving Mr. Bollea and Ms. Clem, and it was cruel, despicable, and a gross invasion of Mr. Bollea's privacy.

There are at least nine triable issues of material fact, any **one** of which warrants a jury trial:

1. **There is a triable issue of fact concerning whether the Gawker Defendants' publication of the Sex Video itself constitutes a matter of public concern.**

Mr. Bollea's journalism expert, University of Florida Journalism Professor Mike Foley, explains in his affidavit that journalists routinely report stories **without** including visual depictions that invade the privacy of news subjects. News stories about child pornography,

[1] Daulerio's commentary, nevertheless, is relevant to show that his and Gawker's intent was to harm Mr. Bollea, invade his privacy, and drive traffic to Gawker.com, rather than to engage in legitimate discourse regarding a matter of legitimate public concern. Moreover, Gawker admitted in the commentary accompanying its publication of the Sex Video that the video is something "we aren't supposed to see." Thus, the Gawker Defendants admit the video itself is not a matter of "public" concern.

allegations of surreptitious videotaping of locker rooms and restrooms, and celebrity sex tapes, among other examples, are routinely reported in the news media **without** showing the actual video footage. This way, the news gets reported, while privacy gets protected.

The actual video footage of Mr. Bollea naked, aroused, and having sex in multiple positions, filmed without his knowledge or consent, was not and is not a matter of "public concern." The recording was of a **private** sexual encounter in a **private** bedroom. There is zero evidence that Mr. Bollea knew about the recording at the time it was made, or that he consented to the making or distribution of the Sex Video. Just the opposite, he aggressively sought to stop its publication, both before and after Gawker posted the Sex Video. Gawker admitted it received all of his notices. The Gawker Defendants also admitted that they **did not care** if he was secretly filmed or protested its publication, before and after Gawker published it. Gawker also admitted that it believed the Sex Video was surreptitiously recorded based on the footage in the video itself.

**Numerous** other facts in the record support Mr. Bollea's contention that the Gawker Defendants' publication of the footage of Mr. Bollea naked, aroused, and having sex in multiple positions was not an attempt to inform the public on a "matter of public concern," but rather a product of Gawker's business imperatives and dismissive attitude towards privacy:

- Gawker's Editor-in-Chief, Daulerio, instructed Gawker's video editor to create a "highlight reel" of the 30 minute sex video that Gawker received from its anonymous source. Gawker then published the highlight reel that the video editor (and Gawker) produced.
- Gawker's video editor also was instructed to include **explicit** footage of frontal nudity and sexual activity in the Sex Video that would be published.
- The headline that Gawker published for its story accompanying the Sex Video told readers that the tape was "not safe for work" ("NSFW") but that they should "watch it anyway." The story was given the metatag "NSFW," which means it would be displayed in search engine searches for "NSFW" material, so that it would more easily be found by searching "NSFW." According to Gawker's own internal Style

Guide distributed to its writers, this "lead tag" is tremendously important because it leads readers to the story.

- Daulerio's "commentary" that accompanied the Sex Video gave a "play-by-play" account of the entire video of Mr. Bollea's private sexual activity, and made clear Gawker's point that publishing the Sex Video was **not** supposed to be seen by members of the public, but Gawker instructed them to "watch it anyway." By contrast, **news** is material that people are **supposed** to see.

- Gawker's internal communications show its executives bragging about how the Sex Video, as well as a story containing paparazzi photos of Duchess Kate Middleton's bare breasts taken while with a telephoto lens, had driven **record amounts** of traffic to the Gawker website, with the clear implication that Gawker's revenues would go through the roof.

- Gawker's revenues did in fact go through the roof—they **doubled** during the two years following the publication of the Sex Video.[2]

The evidence shows that the Sex Video's purpose was not a "news" purpose, but rather to attract visitors to the Gawker website by titillating them with pornographic content, and to reap the financial rewards of those visitors.

**2. There is a triable issue of fact concerning whether Mr. Bollea's status as a public figure who was asked about and discussed his private life in various forums makes footage of him engaged in private sexual conduct a matter of public concern.**

The Gawker Defendants make a pages-long argument that boils down to one sentence, which we would paraphrase as follows: "Because Mr. Bollea is a celebrity who has been asked about and has discussed his private life publicly, Gawker's publication of a video of him fully naked, aroused, and having sex in multiple positions, while in a private bedroom, is somehow a matter of public concern **as a matter of law**." The argument is nonsensical.

First, it eviscerates the distinction between reporting a story regarding sexual activity and broadcasting pornographic footage of it.

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[2] *See* Jan. 28, 2015 *Business Insider* article, "Gawker Media Generated $45 Million In Net Revenue Last Year And It's Raising A $15 Million Round of Debt," at page BOLLEA 004421, depicting graph of Gawker's revenue from 2010 through 2014. Bollea SUDF ¶211, Ex. 40.

Second, it ignores the central issue of **consent**. The right to privacy is not a right that is forfeited simply because a person allows the public to learn about certain **specific aspects** about one's life.

**Mr. Bollea does not deny that he has allowed the public to learn certain specific aspects of his private life. However, Mr. Bollea emphatically denies that, in doing so, he has somehow waived his right to prohibit the publication of a secret video of him, naked and engaged in private sexual activity, in a private bedroom.** Under the Gawker Defendants' skewed version of privacy, any famous person who has ever spoken publicly about sex, nudity, or going to the bathroom is powerless to stop a "peeping tom" with a video camera, or a video website, from secretly recording and publishing private footage of the person naked, having sex, or going to the bathroom.[3]

If anything, the Gawker Defendants' parade of sleazy gossip and innuendo, which they submit in support of their Motion for Summary Judgment, proves precisely the **opposite** of their point: all those media outlets that covered Mr. Bollea's sex life, including even the *National Enquirer*, at least had the decency **not** to broadcast the Sex Video or any part of it. All of them understood that while the **information** relating to the romantic and sexual lives of celebrities may be matters of public concern, the act of publishing secretly-recorded footage of a celebrity naked and having sex in a private bedroom is **not** a matter of public concern.

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[3] The Gawker Defendants' argument is analogous to arguments made about rape victims that they supposedly forfeit their right to refuse consent to intercourse because they dress or act "sexy." Both arguments improperly conflate two different issues of consent, and argue that consent for one thing (dressing or acting sexy, in the case of a rape victim; or discussing nudity, sex, or going to the bathroom, in the case of an interview of a public figure) is **consent for everything** (rape; or publication of secretly-filmed private footage). That is not the law, and it could mean a wholesale end to privacy, and rape laws, if it were to become the law.

While other news outlets merely **reported about** the "Hulk Hogan sex tape" story—Gawker **exploited it** for the purpose of driving maximum traffic to its website—by publishing the Sex Video itself. Moreover, the purpose of the accompanying narrative was to goad readers into viewing the footage by assuring them that the footage was explicit and they would get to watch Mr. Bollea have sex, while at the same time admitting "it is something we're not supposed to see."

3. **There is a triable issue of fact concerning whether the decision to publish the explicit footage of Mr. Bollea naked, aroused and having sexual intercourse is a matter of "news judgment," to be made by the news outlet itself, in its sole discretion.**

There is ***no*** case or statute holding that news judgment is unlimited and bars all invasion of privacy suits against the news media. Rather, the case law makes clear that it is **not** *per se* necessary to publish a video of full frontal nudity and explicit sexual intercourse to report a story about the existence of such a video. Thus, the Gawker Defendants' decision to publish the Sex Video does **not** constitute a protected news judgment. Rather, it is a jury issue whether its publication was justified by the facts. It speaks volumes that **every other news outlet *rejected*** the Gawker Defendants' judgment and reported the story of the Sex Video, **without** publishing the footage of nudity or sex.

Further, the Gawker Defendants are wrong in contending that it somehow matters that only "nine seconds" of the one minute and 41 seconds that they published depicted sexual activity. First, the Sex Video depicts a sexual **encounter**, all of which occurred in a private room and all of which should have remained private. There is no privilege to broadcast what one does in a bedroom before and after one has sexual intercourse; the **entire** 1 minute and 41 seconds was private activity. Second, Mr. Bollea is depicted **naked** for **45** seconds of the footage

published by Gawker, including the footage of him having sex. Thus, the Gawker Defendants published at least **five times** as much footage constituting the grossest invasion of Mr. Bollea's most intimate activities as it claims it did. Third, even if only the nine seconds depicting oral sex and sexual intercourse were considered, there is no law that permits a defendant to invade someone's privacy so long as the invasive content is only a small percentage of what is published.

4. **There is a triable issue of fact as to whether the public concern test required the Gawker Defendants to block, blur, or otherwise "sanitize" the footage.**

The Gawker Defendants admit that they had the option of blocking or blurring the footage of Mr. Bollea, or publishing only portions of the Sex Video that did **not** show him naked and having sex. The fact that they did **not** do this establishes, once again, that their goal was to bring viewers to the site, and publishing footage of Mr. Bollea fully naked, aroused, and engaged in oral sex and sexual intercourse in multiple positions was the means to that end.

5. **The prior decisions on temporary injunction proceedings, without a full factual record (and before any discovery at all had been conducted) do not have any preclusive effect on the Motion for Summary Judgment proceedings**.

The Gawker Defendants claim that the rulings in their favor on Mr. Bollea's motions for temporary injunctions somehow require that their Motion for Summary Judgment be granted. Those rulings, however, were **not** rulings on the merits, and were based on undeveloped factual records **before any discovery at all had been conducted**. Moreover, the Second District Court of Appeal has repeatedly ruled that those rulings do **not** have preclusive effect here. Gawker asked the Second DCA to stop this litigation based on the injunction orders, and that request was **dismissed**. The factual record has now been fully developed and discloses **numerous triable**

**issues of fact** on Mr. Bollea's claims, including his central claim that his privacy was invaded and the Gawker Defendants' central defense that their publication of the Sex Video was a "matter of public concern." The temporary injunction rulings simply did not decide whether there exist triable issues of fact, and are not relevant here.

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There also are triable issues of fact as to the other claims in the case:

6. **Intentional Infliction of Emotional Distress:** The Gawker Defendants' argument that Mr. Bollea cannot recover on his intentional infliction of emotional distress claim because he does not claim the kind of emotional distress damages that would require medical attention is completely wrong and without merit—the Gawker Defendants confuse the **intensity** of emotional distress with the **type** of emotional distress. There is no doubt that the Gawker Defendants' conduct would cause a reasonable person to suffer severe emotional distress, and triable issues of fact exist on this point.

7. **Violation of the Wiretap Act:** The audio recording of Mr. Bollea and Ms. Clem having sex is **not** a matter of public concern. The Gawker Defendants' "good faith" claim is based on a misreading of the holdings of cases to which they cite, as discussed in greater detail below.

8. **Intrusion upon Seclusion:** The law provides that this tort extends **beyond physical intrusions**. The Gawker Defendants' electronic intrusion gave seven million people a front row seat in the bedroom to watch Mr. Bollea fully naked and having sex. That electronic intrusion of seclusion is just as actionable as if the intrusion were physical.

9. **Right of Publicity:** The evidence supports a jury finding that the Gawker Defendants' use of Mr. Bollea's likeness was "commercial" in nature based on, among other things, their expressed desire and clear efforts to use the Sex Video to drive maximum traffic to Gawker.com,

and receive substantial financial benefits as a result, as well as the fact that Gawker succeeded in that goal and **doubled** its traffic and revenues shortly after its publication of the Sex Video.

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Gawker Defendants' Motion for Summary Judgment is, at its core, an attempt to prevent Mr. Bollea from having his day in court, to preclude a jury comprised of members of this community from determining the many factual issues in this case relating to both liability and damages, to deny Mr. Bollea his Constitutional right to a trial by jury, and to avoid holding Gawker, Denton and Daulerio accountable for their tortious acts. Beyond that, the Motion for Summary Judgment is an attempt to "turn the tables" on Mr. Bollea, put him "on trial," and turn this case into an assassination of Mr. Bollea's character, and a detailed and extensive examination of his private life, rather than what this case is and should be about: an inquiry into Gawker Defendants' invasion of Mr. Bollea's privacy, misappropriation of his publicity rights, and violation of the Wiretap Act; whether Gawker Defendants have a First Amendment privilege to invade his privacy in the way that they did; and calculation of Mr. Bollea's damages if his claims are proven and the Gawker Defendants' defenses are not.

The Gawker Defendants' conduct in this lawsuit also is a warning shot to anyone who might consider attempting to prevent his or her private sexual activity from being broadcast to the world. The Gawker Defendants' position is that the decision to violate anyone's privacy is left solely up to them, and pursuant to their aggressive litigation tactics, anyone who seeks to enforce their privacy rights will have their entire private life "put on trial" by Gawker as punishment. If summary judgment is granted here, Americans will have only so much privacy as the CEO of Gawker decides to give us. When Gawker's CEO, Nick Denton, was asked whether

Gawker sets "a lower value on privacy than most people do," he responded, "I don't think people give a f*ck, actually."

The motion should be denied, and the case should proceed to a jury trial on July 6.

## II. STATEMENT OF FACTS[4]

### *The Defendants: Gawker, Denton & Daulerio and Their Philosophy on Journalism Ethics*

Gawker Media, LLC, the company founded and run by Defendant Nick Denton, operates eight websites focusing on different interest areas ranging from sports to cars to women's issues. Gawker.com is its flagship website, described by a Gawker editor as a "tabloid at heart," and, according to Nick Denton, a website that adheres to the tagline: "without access, favor or discretion." Bollea SUDF ¶¶149–150. The writing style is admittedly "sexual" and "mean." Bollea SUDF ¶150. The subjects it covers, according to former Managing Editor, Emma Carmichael, amount to "yellow journalism" and, according to Master Lecturer of Journalism at the University of Florida, Professor Mike Foley, constitute "pornography." Bollea SUDF ¶¶151–152.

Professor Foley explains in his expert report that journalists are ethically bound to "minimize harm" to the subjects about whom they report. Bollea SUDF ¶152. Gawker, however, does not believe in journalism ethics. Its stories pay no regard to whether they will cause harm.

Gawker's total disregard for ethical journalism originates from the top, namely, its CEO and founder, Defendant Nick Denton. *The Washington Post* quoted Denton as saying: "We don't

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[4] Mr. Bollea files herewith a Statement of Disputed and Undisputed Facts in Opposition to Gawker Defendants' Motion for Summary Judgment ("Bollea SUDF"), as well as a separate Confidential Statement of Disputed and Undisputed Facts ("Bollea Conf. SUDF"), which includes those facts that have been designated as "confidential" under the Agreed Protective Order entered in this action on July 25, 2013.

seek to do good. We may inadvertently do good. We may inadvertently commit journalism. That is not the institutional intention." Bollea USDF ¶153.[5]

Denton further described his philosophy at his deposition:

> I believe in total freedom and information transparency. **I want everybody to know everything.** And I think society, this country that I moved to will be better off if we could talk freely about everything. So that's – I'm an extremist when it comes to that.

Bollea SUDF ¶155.

In an interview with *Playboy* magazine, Denton was asked: "Is it possible you set a lower value on privacy than most people do?" His response: "I don't think people give a f*ck, actually." Bollea SUDF ¶156.

A.J. Daulerio was Gawker.com's Editor-in-Chief and fulfilled and executed the company philosophy: to make sure **everybody** knew **everything**. Before becoming Editor-in-Chief of Gawker.com, Daulerio was Editor-in-Chief at Deadspin (Gawker's sports site). In addition to being the architect of the gross invasion of Mr. Bollea's privacy that is the subject of this case:

- A.J. Daulerio, on a Gawker website, linked readers to where they could view the secretly-filmed footage of ESPN reporter Erin Andrews naked in her private hotel room, recorded by a peeping tom. That recording was found to constitute a crime, and the peeping tom was sentenced to 2.5 years in prison. Bollea SUDF ¶ 158.
- Even Emma Carmichael, the Managing Editor of Gawker.com at the time of the posting of the Sex Video, admitted when asked about the Erin Andrews story: "I likely would not have included the link. . . . **I don't think the video is needed to illustrate that point in this case**." Bollea SUDF ¶158. In other words, the publication of the secret recording of her naked was not needed to tell the story that

[5] "The whole point of the company is that we trust our reporters to be smart and judicious without having to adopt the ethical pretense that what they're doing is anything but a sort of professionalized rudeness." -- Tommy Craggs, Executive Director of Deadspin, Gawker's sports website (Bollea SUDF ¶154); "Journalism ethics is nothing more than a measure of the scurrilousness your brand will bear." -- Tommy Craggs (Bollea SUDF ¶154); "Journalism ethics are the same as plumber ethics." -- John Cook, former Editor-in-Chief of Gawker.com, current Executive Editor for Investigations at Gawker Media (Bollea SUDF ¶154).

Erin Andrews had been secretly filmed naked. For the same reason here, the Gawker Defendants' publication of the Sex Video was not necessary to tell the story about Mr. Bollea, the Clems and the secret filming of him naked and having sex.

- A.J. Daulerio once posted an explicit video of a young and extremely intoxicated girl being sexually assaulted on the floor of a men's bathroom in a bar in Indiana, lying in a pool of urine. Bollea SUDF ¶ 159. Daulerio admitted that the young girl may have been raped based on her high level of intoxication. *Id.* When the girl and her father pleaded with Daulerio and Gawker's legal team to remove the video, Gawker responded: "This is a news story, and completely newsworthy. It's the truth, which can be hurtful, granted, but one's actions can have unintended consequences . . . we believe that we are publishing this legitimately and as such, we will not remove the clip." *Id.*

- Gawker published private footage of actor Eric Dane in a hot tub with his wife, actress Rebecca Gayheart, and a female friend of theirs (topless but not having sex). Bollea SUDF ¶160.

- Gawker published photos of Kate Middleton sunbathing topless taken by a paparazzo with a telephoto lens. Bollea SUDF ¶ 161

- A.J. Daulerio and Gawker paid $12,000 for an alleged photo of NFL quarterback Brett Favre's penis and published it. Bollea Conf. SUDF ¶162.

If it were up to the Gawker Defendants, there would be no privacy in America—everyone's secrets would be exposed, the intimate details of their lives would be fully published—and everyone would gather at Gawker to mock, ridicule, and **gawk** at what previously was confined to private conversations and closed bedroom doors. In other words, if it were up to Gawker, **all walls would become windows**, and no privacy would exist **anywhere**.

David Carr, who covered media for *The New York Times*, analogized Gawker to a group of junior high school girls:

> There was a group of ninth grade girls who knew everything, who saw everything, who said everything, the mean girls who just you know ran the show and **laid waste to everyone they saw**. That's Gawker. They rule the playground.

Bollea SUDF ¶163. Gawker's efforts to lay waste to everyone in their path is not journalism; it is, as Mr. Carr put it, "disgusting" and "despicable." *Id.* University of Florida Journalism

Professor Mike Foley agrees. *Id.* Foley says Gawker's practices are "not journalism;" they are "pornography." Bollea SUDF ¶152.

***Gawker's Focus on Driving Traffic to Its Site***

At Gawker, the focus is on generating traffic. In the reception area of Gawker's offices looms the "Big Board"—a large screen monitor "that shows the most popular stories throughout the blog network in a given day or minute." Bollea SUDF ¶164. Carmichael testified that the Big Board is (and was) visible on the computer screens of the editorial staff at Gawker. *Id.* Unlike most news websites, every Gawker story prominently lists the number of visitors who viewed the story. *Id.* The obvious purpose is to instill in each writer and editor the need to drive maximum possible traffic to the Gawker sites—in order to generate the maximum possible revenue and profits.

According to Denton, **sex** brings traffic, or, as he puts it: "Scandal sells. . . . The staples of old yellow journalism are the staples of new yellow journalism: sex, crime; and, even better, sex crime." Bollea SUDF ¶165. These are the kind of stories that Denton says cause advertisers to "shower [Gawker] with dollars" because they draw in unique viewers. Bollea SUDF ¶165.

Gawker's disdain for journalism ethics, coupled with its insatiable appetite for traffic, revenues and profits is the reason we are here today. It is that sinister combination that makes Gawker unique among news organizations—no other news outlet aired any nudity or sexual content from the secretly-filmed, illegal recording of Mr. Bollea.

***The Surreptitious and Illegal Recording of Mr. Bollea***

Throughout the past two years of discovery, the Gawker Defendants have tried to find support for their conspiracy theory that Mr. Bollea somehow was "in on" the filming and release of the Sex Video, supposedly as a way to enrich himself or advance his career. That theory is

baseless, and always has been. After deposing all of the people involved in the video, and others peripheral to it as well, the Gawker Defendants have uncovered **zero** evidentiary support for this conspiracy theory because it simply is not true.

The testimony of Bubba Clem, Heather Clem and Terry Bollea is consistent on this point. All three testified that the sexual encounter between Mr. Bollea and Ms. Clem was **not** Mr. Bollea's idea. Bollea Conf. SUDF ¶166. Rather, Mr. Bollea was at a very low point in his life; he was physically, emotionally and legally separated from his wife, who made clear their marriage was permanently over and who had gone to live somewhere else. Bollea Conf. SUDF ¶167. When Mr. Bollea was at his most vulnerable, in mid-2007, the Clems lured Mr. Bollea into a sexual encounter with Heather in their private bedroom (Bollea Conf. SUDF ¶167), and caused him to be filmed without his knowledge. Bollea Conf. SUDF 168–169. Bubba Clem later downloaded the secretly-recorded footage onto a disc and took it to his office at the radio station. Bollea SUDF ¶168.

Every percipient witness with knowledge in this case has consistently testified that Mr. Bollea **did not know** that he had been filmed, **did not know** of the existence of a video of the encounter, and **did not authorize** the release or distribution of any such video. Bollea Conf. SUDF ¶¶168–169.

***The Early Reports of a Sex Video, and Mr. Bollea's Early Public Statements that He Was Illegally Recorded***

In March and April of 2012, rumors of a possible "Hulk Hogan sex tape" surfaced. Bollea SUDF ¶170. Mr. Bollea wanted it known, and told the press in no uncertain terms, that any such footage was **secretly recorded illegally**, that he knew nothing about it, never authorized it, and wanted the video never to "see the light of day." *Id.*

Gawker itself was aware of Mr. Bollea's statements, because every member of the editorial staff at Gawker.com received the following press reports from emails to the Gawker Tips account on: March 7, 2012 ("Hulk Hogan says the sex tape being shopped to porn companies was 'secretly filmed' WITHOUT his permission…and claims the footage is nothing less than an 'outrageous invasion of privacy.'… Hulk's lawyer David Houston has released a statement … saying … 'We will take all necessary steps to enforce both civil and criminal liability.'"); March 8, 2012 ("The former WWE star says he was taped, and the video is being distributed, without his knowledge of the taping or permission to distribute it"); March 8, 2012 ("[Hulk] was adamant that he had no idea he was being taped and he would go after the people behind the tape both civilly and criminally . . . Hulk and his lawyer could not have been clearer on TMZ Live yesterday . . . they don't want that tape to see the light of day"); March 12, 2012 ("Hogan says [the] tape was made without his knowledge"); and April 26, 2012 ("Hulk Hogan is freaking OUT over screen grabs of his alleged sex tape that have leaked onto the Internet"). Bollea SUDF ¶171. Gawker's Managing Editor in March/April 2012, Emma Carmichael, confirmed that every member of Gawker's editorial staff, including all editors and all writers, received these Gawker Tips emails. Bollea SUDF ¶171.

***The Gawker Defendants' Receipt of the Illegally Recorded Sex Video***

In late September 2012, A.J. Daulerio was approached via email by talent agent Tony Burton of Buchwald & Associates in New York about whether he was interested in a video of "Hulk Hogan" having sex. Bollea Conf. SUDF ¶172. Notwithstanding Gawker's **actual awareness** that the video had been illegally recorded, illegally obtained, illegally shopped to third parties, and Mr. Bollea and his attorney were aggressively pursuing both criminal and civil

remedies against everyone involved—Defendant Daulerio expressed **immediate interest** in the video.

The video arrived in the mail from an anonymous source. Bollea Conf. SUDF ¶173. Once the video arrived at Gawker's offices, Gawker employees immediately started watching it and commenting on it. Bollea SUDF ¶ 174; Bollea Conf. SUDF ¶174. Gawker produced internal e-mails and instant messages of its employees making fun of Mr. Bollea, including his genitals, and making cruel comments about the Sex Video. Bollea SUDF ¶ 174; Bollea Conf. SUDF ¶174. The inter-office commentary undermines Gawker's contention that its purpose in publishing the video was to inform the public and report "the news." The matter was an **office joke** to Gawker, with no consideration to the people whose lives hung in the balance.

Gawker.com's Managing Editor at the time, Emma Carmichael, testified that she was the first person to watch the video at Gawker:

> Q. Was it assumed at Gawker that [Terry Bollea] did not approve the release of the sex video?
> A. Yes.
> . . .
> Q. The camera was from a very high point of view, correct?
> A. Yes.
> Q. And the camera appeared to be fairly far away from the bed, correct?
> A. As best as I could recall, yes.
> . . .
> Q. Of the video that you saw, did you ever see Hulk Hogan or the female look into the camera?
> A. From what I saw, no, they did not.

Bollea SUDF ¶¶175–176.

The video contains no indication that Mr. Bollea was aware of a camera present. Editor-in-Chief A.J. Daulerio admitted this during his deposition: "Q. . . . Have you ever seen any evidence that Hulk Hogan knew at the time of the encounter that that encounter was being videotaped? A. No." Bollea SUDF ¶177. The video was shot from an angle above and far

away from the bed, as if from a camera at or near the ceiling, and the footage appeared to be from a surveillance camera. Bollea SUDF ¶176. But those facts made no difference to Gawker's editorial decision-making. A.J. Daulerio testified that he saw no difference between someone being surreptitiously recorded and someone who voluntarily recorded himself having sex, and further testified that he would have published the Sex Video even if he knew definitively that it was surreptitiously recorded without Mr. Bollea's consent. Bollea SUDF ¶178

***The Gawker Defendants' Production of the Highlight Reel***

Despite knowing the illegal circumstances under which the footage was recorded and distributed, and despite the mysterious circumstances surrounding the anonymous receipt of the video:

- No one at Gawker contacted Terry Bollea, or his lawyer, David Houston, or Heather or Bubba Clem–presumably because Gawker knew they would not give permission to publish (Bollea SUDF ¶179); and
- No one at Gawker blocked, blurred or pixilated Mr. Bollea's and Heather Clem's private parts or sexual acts before broadcasting them to the world–even though Gawker admits it had the ability to do so (Bollea SUDF ¶180).

The Gawker Defendants instead edited the video **to include** footage of each of Mr. Bollea's and Heather Clem's multiple sexual positions, sexual acts, their oral sex, and Mr. Bollea aroused. Bollea SUDF ¶181. Gawker editors A.J. Daulerio and Emma Carmichael **expressly instructed** video editor Kate Bennert to **include** explicit footage of Mr. Bollea having sex, and to include footage of Mr. Bollea aroused. *Id.*

Gawker did not, as it argues, show "only enough" of the sex tape to prove to the audience that the tape existed, and included sex. A pixilated still, or a pixilated one or two seconds of footage, would have accomplished that goal, if Gawker had such a goal. On the contrary, Gawker created a "highlight reel"—the very term used by Editor-in-Chief A. J. Daulerio to

describe the video that he and his staff produced and broadcast to the world. Bollea Conf. SUDF ¶182. The Sex Video contains one minute and forty-one seconds of a private sexual encounter, including 45 second of Mr. Bollea naked—as Harvard Professor Leslie John put it, the preamble, the sexual acts themselves, and the *denoument*. Bollea SUDF ¶183; Bollea Conf. SUDF ¶183.

***The Gawker Defendants' Publication of the Sex Video Violated Journalism's Ethical Rules and Guidelines***

On October 4, 2012, Gawker did what no other news outlet or website had done, although several outlets reported on the alleged contents of the video: Gawker **published** the Sex Video.

Journalism Professor Mike Foley, a Master Lecturer at the University of Florida and a former award-winning reporter, editor, and senior executive at the *St. Petersburg Times* (now the *Tampa Bay Times*), states in his affidavit, based on his 40 years of journalistic experience, that:

(1) While the story that Mr. Bollea had sex with Heather Clem and that a sex tape existed was news, the publication of the actual content of the Sex Video was not newsworthy—rather, it was "pornography." Bollea SUDF ¶¶152, 184.

(2) Journalists routinely avoid publishing material that is invasive of people's privacy unless absolutely necessary to tell the story. Bollea SUDF ¶185.

(3) Where such material is necessary to the story, journalists use the least invasive material available. *Id.*

(4) Specifically, where stories involve video footage of persons in the nude in private settings (such as stories of women who were secretly recorded in locker rooms), journalistic outlets never run the footage. Bollea SUDF ¶186.

(5) It was not necessary for Gawker to publish the Sex Video to tell the story of its existence and the circumstances surrounding it. Bollea SUDF ¶187.

Further, former Editor-in-Chief of Gawker.com, Defendant Daulerio himself admitted under oath that the inclusion of footage of Mr. Bollea's penis was **not newsworthy**. Instead, it was included merely to "add color" to Mr. Daulerio's "commentary." Bollea SUDF ¶188.

The so-called "commentary"—entitled "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe For Work But Watch it Anyway"—reads like lurid voyeurism, not news. It includes: (1) a headline that directs readers to watch the Sex Video; (2) an admission that when readers watch famous people have sex, they are "shameless voyeurs and deviants;" (3) **an admission that "we are not supposed to see" the Sex Video**; (4) a graphic description of the sex acts and positions of Mr. Bollea and Ms. Clem; (5) a graphic description of Mr. Bollea aroused; (6) a graphic description of the noises made by Mr. Bollea at the point of climax; (8) and an admission that the Sex Video contains "not safe for work" content (a common Internet description of pornographic content). Bollea SUDF ¶189–192.[6] None of these descriptions of Mr. Bollea constitute a matter of public concern. The private nature of the acts (nudity and sex), the private location (a private bedroom), the secret filming of Mr. Bollea, and the admission by Gawker and Daulerio that it is something we are "not supposed to see" is overwhelming evidence of the **private** nature of the Sex Video, and therefore **not** a matter of "public concern." Likewise, the commentary is **not**, as Gawker contends, commentary on Mr. Bollea's public image, or his relationship with Ms. Clem, or his relationship with his ex-wife Linda, or his sex life **generally**, or for that matter commentary on **any of the interviews or press coverage** of Mr. Bollea, copies of which were attached to Defendants' Motion for Summary Judgment. Rather, the commentary is simply gratuitous descriptions of sex and

[6] The tag NSFW ("not safe for work") was included so it would show up in search engine searches when Internet users searched for that type of content (*i.e.*, pornography, not news).

admissions that it is something that people are "not supposed to see"—as opposed to **news**, which is something that people **are** supposed to see.

***Gawker Refuses to Remove the Highlight Reel***

Mr. Bollea swiftly reacted to the publication of the Sex Video. His counsel wrote Gawker, stating that the video was surreptitiously recorded, released without his consent, and that the continued publication of it was offensive and harmful to Mr. Bollea, and demanded its removal. Bollea SUDF ¶193; Bollea Conf. SUDF ¶193. Gawker refused to take the Sex Video down, and Defendant Denton (founder and CEO) called Mr. Bollea's pleas to his humanity "not persuasive." Bollea SUDF ¶194.

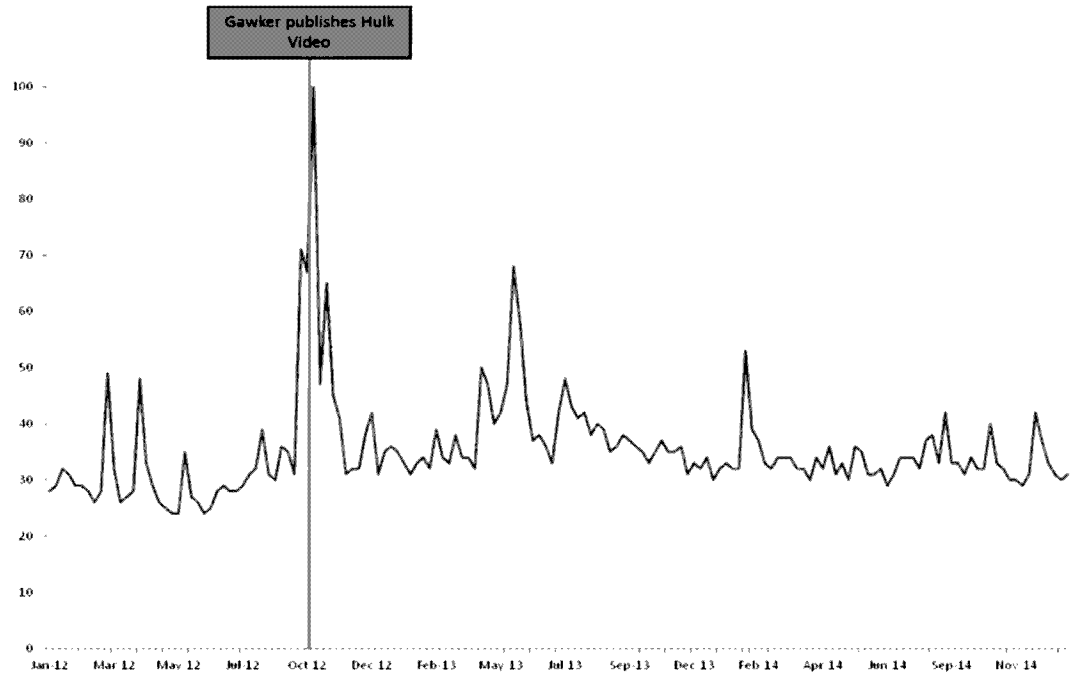
After filing this lawsuit, Mr. Bollea moved for a temporary injunction from this Court, and the Court entered an order enjoining the publication of the Sex Video and the accompanying "commentary." Gawker refused to comply with the Court's order. Instead, Gawker published a story entitled "A Judge Told Us to Take Down Our Hulk Hogan Post. We Won't." Bollea SUDF ¶195. As the headline promised, Gawker refused to remove the commentary in violation of the court order, and though it did remove the Sex Video from Gawker.com, it simultaneously added a link to the same Gawker-edited Sex Video at a third party site, directing viewers to continue to watch the court-enjoined Sex Video. Bollea SUDF ¶196. Although the temporary injunction order eventually was reversed, Gawker never even pretended to obey it when it was in force, choosing instead to continue to violate Mr. Bollea's privacy.

Perhaps even more egregious, during the course of this litigation, the Gawker Defendants **threatened** through their counsel to publish **additional footage** of Mr. Bollea having sexual intercourse. Bollea SUDF ¶197. Emma Carmichael also testified at her deposition that a **second** sex video of Mr. Bollea was edited and produced by Gawker, but has not yet been published to

Gawker.com. Bollea SUDF ¶198. The Gawker Defendants' threat hangs like the Sword of Damocles over Mr. Bollea, as he continues to seek to protect his privacy and seek appropriate remedies for the Gawker Defendants' 2012–2013 violation of his privacy.

***Gawker Generates Traffic, Revenues and Profits as Mr. Bollea Suffers Extreme and Continued Distress***

From October 4, 2012 through April 25, 2013, at least 5.35 million unique visitors flocked to the Gawker.com webpage. Bollea SUDF ¶199. At least 2.5 million people watched the Sex Video at Gawker.com (Bollea SUDF ¶200); and an additional 4.5 million people watched the same Gawker-produced Sex Video at other websites (mostly porn sites) that had lifted the video from Gawker.com, for a total of at least **7 million** total views. Bollea Conf. SUDF ¶201. The Sex Video generated the second-most page views of any Gawker.com story in 2012, and spiked Google searches for the term "Gawker" (not Hulk or Hogan sex tape) to their highest level throughout the history of Gawker.com, both past and present. Bollea SUDF ¶202.




(Bollea SUDF ¶202; Ex. 50_C to Aff. of K. Turkel, Esq.).

Gawker used the Sex Video as a form of **advertisement** for Gawker—a way to bring users into the Gawker universe where they could then become available to Gawker's advertisers and generate revenue and profits for Gawker. Bollea SUDF ¶203. The Gawker Defendants' sex tape expert, Kevin Blatt, testified that advertising revenue is generated by publishing a celebrity sex tape on a website, even if the celebrity sex tape is posted for free. Bollea SUDF ¶204. Blatt himself has used a celebrity sex tape to promote traffic to a website, much like the Gawker Defendants did here. Bollea SUDF ¶204.

Gawker advertised the Sex Video on its Facebook page in what its own expert witness conceded was an attempt to draw traffic to the Gawker site. Bollea SUDF ¶205; Bollea Conf. Conf. SUDF ¶205. Gawker's expert witness further conceded that Gawker used the Sex Video as a form of viral marketing to generate additional viewers. Bollea Conf. SUDF ¶205.

According to Gawker's corporate designee, COO Scott Kidder, Gawker had an employee bonus program tied to traffic and paid the maximum possible employee bonus to Gawker employees during the month of October 2012 because of the traffic generated by the Sex Video. Bollea SUDF ¶206. Denton and Daulerio admitted that, if the story had been published without the Sex Video, it would have generated significantly less traffic. Bollea SUDF ¶207. Thus, showing pornographic footage of Mr. Bollea naked and having sex was the only way to generate the traffic that Gawker sought. Daulerio agreed that "sex sells" and brings traffic to websites, and that without the Sex Video, there would have been less traffic. Bollea SUDF ¶207.

Denton **bragged** that the publication of the Sex Video, along with Gawker's earlier publication of the surreptitiously-taken photos of Duchess Kate Middleton's breasts, boosted daily U.S. traffic to Gawker.com to **over one million users per day for the first time ever** (stating Gawker "scored with royal breasts and Hulk sex" and boasting about the huge traffic

those stories brought to Gawker.com). Bollea SUDF ¶208. Gawker's corporate designee, COO Scott Kidder, further conceded that the publication of the Sex Video could produce revenue for Gawker by bringing new, repeat visitors to Gawker.com who read other articles with advertising. Bollea SUDF ¶209; *see also* Bollea SUDF ¶210 (Kuntz Tr. 133:13–22: "From an advertising perspective, if I knew that those five million people that visited the site were ultimately going to be people that came back to the site time and time again is what we call **repeat visitors** or readers and they visit certain sections of the site that **we have an opportunity to monetize**, then yes, there could be some value there." (emphasis added)).

While Gawker reaped the benefits of the increased traffic, revenue, profits and worldwide attention, Mr. Bollea faced a firestorm caused by Gawker's invasion of his privacy. Among other things, tabloid media speculated (falsely) that he was involved in "shopping" his own tape. The Gawker Defendants' contention that Mr. Bollea's interviews with the press—largely to correct false stories about the sex tape—somehow evidence Mr. Bollea's own supposed "lack of concern for his privacy," and "supposed desire to talk publicly about his sex life," is a gross mischaracterization of the evidence, and also highly offensive—adding insult to injury. Mr. Bollea's media appearances were intended to prevent further release of the Sex Video, and to quell speculation in published reports that he supposedly had something to do with the release of the Sex Video. Bollea SUDF ¶212. He had little choice but to agree to interviews about the Sex Video, both in Spring 2012 when reports surfaced that a "sex tape" was "being shopped," and

again in October 2012 after Gawker had released the Sex Video.[7] Mr. Bollea testified at his deposition that giving these interviews was embarrassing to him, as they would be to anyone. Bollea Conf. SUDF ¶213.

Moreover, in October 2012, Mr. Bollea had been scheduled months in advance for a media tour to promote a pay-per-view wrestling event called "Bound for Glory" and was contractually obligated to do so. Bollea SUDF ¶214. Thus, he faced a choice of having the sex video torpedo his career, or comply with his contractual obligations. He reluctantly went on the tour and was asked about the Sex Video as well as the pay-per-view wrestling event, though he dreaded questions about the former and wanted to talk about the latter. Bollea Conf. SUDF ¶214.

Mr. Bollea suffered a breakdown as a result of the publication of the Sex Video. He testified that it destroyed his life. He could not function, sleep, eat, or think straight. Bollea Conf. SUDF ¶215. Gawker's release of the Sex Video was the most stressful situation Mr. Bollea ever faced in his life. Bollea Conf. SUDF ¶216. Mr. Bollea has cried, worried about its impact on his children, and its impact on his current marriage, and he often is confronted by strangers in public who have seen the Sex Video and try to engage him in conversation about it, often with his wife and/or children present. Bollea Conf. SUDF ¶217.

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[7] First Amendment privileges that make it difficult for public figures such as Mr. Bollea to sue for defamation are premised specifically on the fact that public figures have a media platform to correct false information that is being disseminated. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156 (1967) ("[T]he issue of who is a public figure turns on who has access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."). By analogy, Mr. Bollea cannot and should not be faulted for using the media to correct false stories and stop the further dissemination of the Sex Video. In other words, his doing so should hardly serve as a waiver of his sexual privacy rights—as Gawker contends.

## III. ARGUMENT

### A. Standard for Summary Judgment

Under Florida law, summary judgment is proper **only** if, based upon examination of admissible evidence, no genuine issue of fact exists and the movant is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510; *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000).

A "material fact," for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case. *Continental Concrete, Inc. v. Lakes at La Paz III Ltd. Partnership*, 758 So.2d 1214, 1217 (Fla. 4th DCA 2000). "The burden to conclusively prove the nonexistence of a material fact is on the moving party." *Id.*

The Court must take all facts that the opposing party states as true, and must draw all reasonable inferences in his favor. *Bradford v. Bernstein*, 510 So.2d 1204, 1206 (Fla. 2d DCA 1987). The Court may not try or weigh facts on a motion for summary judgment. *Id.* "If the record reflects the existence of any genuine issue of material fact, **or the possibility of an issue**, or if the record raises **even the slightest doubt that an issue might exist**, summary judgment is improper." *Christian v. Overstreet Paving Co.*, 679 So.2d 839, 840 (Fla. 2d DCA 1996) (emphasis added). "On a motion for summary judgment, unless and until material facts at issue presented to the trial court are so crystallized, conclusive, and compelling as to leave nothing for the court's determination but questions of law, those facts, as well as any defenses, must be submitted to the jury for its resolution." *Dreggors v. Wausau Insurance Co.*, 995 So.2d 547, 550 (Fla. 5th DCA 2008).

**B. There are triable issues of fact as to whether the Sex Video itself is a matter of public concern.**

Gawker argues that, as a matter of **law**, the Sex Video is a matter of public concern. In making this argument, Gawker misstates the law and conflates reporting about Mr. Bollea's sex life with publishing actual footage of Mr. Bollea fully naked and having sex.

Scholars have long recognized the importance of legal protections for the most intimate areas of our life. Samuel Warren and Louis Brandeis (who became a Justice of the United States Supreme Court) stated in their seminal HARVARD LAW REVIEW article, *The Right to Privacy*: "Gossip . . . has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). "The common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?" *Id.* at 220. Moreover, law scholar Lance Rothenberg wrote: "In Western society, one of the most fundamental and universal expectations of privacy involves the ability to control exposure of one's body." Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, And the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AMERICAN UNIV. L. REV. 1127, 1135 (2011).

These important privacy concerns are balanced against the freedom of the press to report matters of legitimate public concern. This balance has been struck by the courts in the form of the "public concern" test (also sometimes called "newsworthiness"), which allows individuals to bring actions for an invasion of privacy, but restricts them when a journalist is reporting a matter of legitimate public concern.

It is well-established that the public concern test is ordinarily a **question for the jury**. *See e.g.*, *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 564 (Cal. Ct. App. 1988) (newsworthiness "is a question to be answered by the jury"); *Virgil v. Sports Illustrated*, 424 F.Supp. 1286, 1290 (S. D. Cal. 1976) (holding "newsworthiness is an issue dependent on the present state of community mores and, therefore, particularly suitable for jury determination"); *Capra v. Thoroughbred Racing Ass'n of North America, Inc.*, 787 F.2d 463, 464 (9th Cir. 1986) (jury must weigh issue of newsworthiness). The matter is a jury question because of the complex array of factors that comprise a determination that a matter is one of legitimate public concern. *See Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969) (California Supreme Court holding: "In determining whether a particular incident is 'newsworthy' and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the **social value** of the facts published, the depth of the article's intrusion into ostensibly **private affairs**, and the extent to which the party voluntarily acceded to a position of public notoriety."). For summary judgment to be appropriate, the Gawker Defendants must establish that **no reasonable juror** could find their publication of the Sex Video to be anything other than a matter of legitimate public concern. They have not done so.

Despite all attempts by the Gawker Defendants to obscure it, the law is clear that pornographic footage taken from sex tapes is the quintessential example of speech that is **not** a matter of legitimate public concern. In *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001), the Supreme Court announced protections for journalists who publish illegal recordings on matters of public concern, but **declined to extend** constitutional protection for disclosure of the contents of illegal recordings of "domestic gossip or other information of purely private concern." Further, **a majority of the Justices of the United States Supreme Court expressly exempted**

**celebrity sex videos from constitutional protection as matters of public concern**. *Id.* at 540 (Breyer, J., concurring) (stating that a case involving the broadcast of a celebrity sex tape constitutes a "truly private matter" not protected by the First Amendment);[8] *id.* at 541 (Rehnquist, C.J., dissenting) (taking position that disseminating the contents of illegal recordings is not protected by the First Amendment).[9] Moreover, in *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004), the U.S. Supreme Court held that broadcasts of sexual activity on the Internet are **not matters of public concern**.

"All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest." *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 483–84 (Cal. 1998) (emphasis in original). Tulane Law School Professor Amy Gajda, writing about this very lawsuit in her recently-published book, states: "The Hulk Hogan case is not the Pentagon Papers case, one that involved the publication of information about war, after all; it involves an act so intimate that even the media-protective *Restatement* suggests that **celebrities should be able to keep their sex lives private**." Amy Gajda, *The First Amendment Bubble: How Privacy And Paparazzi Threaten a Free Press* at 4 (2015) (emphasis added); *see* RESTATEMENT (SECOND) OF TORTS § 652D comment (b) illustration 6 (1977) (illustration stating that it is a tortious invasion of privacy for a magazine to buy and publish a photo of a man in a hotel room in a compromising position with his mistress); *id.* comment (b) (discussing public

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[8] Justice Breyer's concurrence in *Bartnicki* cited with approval *Michaels v. Internet Ent. Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998), the case that enjoined distribution of the Pamela Anderson sex tape, in making his argument that the contents of celebrity sex tapes were not matters of public concern.

[9] Both the original, clandestine recording of Plaintiff's and Ms. Clem's private sexual encounter and Gawker's publication of the Sex Video violated Florida's Video Voyeurism Act (Fla. Stat. § 810.145(2)(a)) and Florida's Wiretap Act (Fla. Stat.§ 934.03).

disclosure tort, stating that sexual relations "are normally **entirely private matters**" (emphasis added)).[10]

Many authorities hold that the publication of private nude photographs and private sex tapes can constitute **actionable invasions of privacy**. In *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1212 (11th Cir. 2009), the Eleventh Circuit **rejected a First Amendment defense asserted by a magazine that published private nude photos of a celebrity**. The Eleventh Circuit reasoned that, if the defense were accepted, the defendant "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.'" **Thus, the Eleventh Circuit rejected the very same argument made by the Gawker Defendants in their Motion for Summary Judgment here.**

In *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998), the U.S. District Court held that the publication of a consensually-recorded sex tape of actress Pamela Anderson and rock star Bret Michaels was an actionable violation of their privacy, and was not protected by the First Amendment, because "the visual and aural details of their sexual relations" were "facts which are ordinarily considered **private even for celebrities**." 5 F. Supp. 2d at 840 (emphasis added). *Michaels* further held:

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[10] While Illustration 6 involves a hardware merchant, a private figure, the authors of the Restatement believed that privacy rights extend to celebrities as well. The very next comment to Section 652D confirms this: "[T]he home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen. The extent of the authority to make public private facts is not, however, unlimited. There may be some **intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself**." Restatement (Second) of Torts § 652D comment h (emphasis added).

> 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.***
>
> 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. . . . 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.

*Id.* at 840.

A recent Utah appellate court decision underscores the inappropriateness of a pre-trial dismissal of a claim for public disclosure of private facts when there are **factual disputes** about key issues in the case. In *Judge v. Saltz Plastic Surgery, PC*, 330 P.3d 126 (Utah App. 2014), the court **reversed a summary judgment for the defendant**, where the plaintiff alleged defendant had distributed to the media topless "before and after" photos of the plaintiff, a patient at the defendant's cosmetic surgery clinic.

First, the Court held that the issue of whether private facts are a matter of public concern touches on **community standards** and therefore is a **jury question**: "the determination of whether the private facts were sufficiently related to a matter of public interest to have themselves become matters of public interest necessarily implicated factual questions . . . respecting the state of community mores." *Id.* at 135 (internal quotation omitted). So long as "reasonable minds could differ as to whether the private facts have become matters of legitimate public interest," it is improper to grant a summary judgment for the defendant. *Id.* at 136.

Second, the Court held that reasonable minds can differ as to whether a person's decision to put certain private information into the public eye constitutes a waiver of privacy rights as to **other** private information. "[R]easonable minds could differ on whether appearing on television to discuss cosmetic surgery gives rise to a legitimate public interest in viewing explicit

photographic documentation of the results of the interviewee's surgery." *Id.* The Court reasoned that there are legitimate reasons why a person might want to allow one otherwise private fact to become public, while protecting other related private facts: "Appearances can change. A college student may decide to play on the 'skins' side of a 'shirts versus skins' basketball game in a public park. By doing so, he may have made a public fact of what his torso looked like on that day in that park such that publication of a picture taken while he was playing would not be actionable. But by doffing his shirt, he would not lose the ability to argue that a future picture of his torso exposes a private fact. Our shirtless basketball player may be willing to make a public fact of his exercise-honed torso in his twenties but swim with his shirt on thirty years later to avoid revealing extra pounds, medical scars, or now-regretted tattoos." *Id.* at 134–35.

The *Judge v. Saltz Plastic Surgery* case also is instructive regarding the minimal burden for opposing summary judgment in a case with similar claims to those at issue here. The First Amendment issues that the Gawker Defendants raise depend entirely on **factual issues,** such as whether Mr. Bollea's alleged disclosure of certain aspects of his private life (mainly, media interviews) constitutes a waiver of his right to privacy as to other aspects of his private life, such as the publication of a video showing him fully naked, aroused, and having sex in a private bedroom. Only a jury, with a proper factual record in front of it, can make the decisive determination of whether the Sex Video remained a matter of private concern, or became a matter of legitimate public concern.

The Gawker Defendants' motion does not address any of the following numerous facts, which create triable issues as to whether the Sex Video is and was a matter of legitimate public concern:

1. The fact that video footage of Mr. Bollea fully naked and engaged in explicit sexual acts was not necessary to report the story of Mr. Bollea's relationship with Ms. Clem or the existence of a sex tape from their encounter.

2. The fact that the pornography in the Sex Video is a result of a deliberate editorial decision of Gawker to include that explicit material and make a "highlight reel" of it.

3. The fact that the explicit content of the Sex Video was marketed to the public as pornography ("not safe for work"), and thus is not journalism.

4. The fact that the Gawker Defendants had the technical ability to block, blur, or pixelate the footage, which would allow them to report on the existence of the Sex Video, while protecting Mr. Bollea's privacy.

5. The fact that numerous news outlets reported the same "**story**" as the Gawker Defendants—of the existence of the sex tape and Mr. Bollea's relationship with Bubba and Heather Clem—but correctly did so **without** publishing any sexually explicit footage.

6. The fact that Gawker's executives, including CEO Nick Denton, have been publicly disdainful of privacy rights in general.

7. The fact that Gawker's business is to routinely publish explicit sexual content, such as the Sex Video, to generate traffic and readership, and thereby generate revenues and profits.

8. The fact that the Gawker Defendants' publication of the Sex Video is a violation of established standards of journalism ethics, which Gawker's management says that it does not believe in anyway.

9. The fact that the Gawker Defendants' publication of the Sex Video is consistent with a longstanding course of conduct whereby Gawker has repeatedly and routinely invaded

people's privacy for no journalistic reason at all, including the incidents involving ESPN reporter Erin Andrews, Duchess Kate Middleton, actress Rebecca Gayheart, and NFL quarterback Brett Favre, as well as publication of footage of the young woman in Indiana being sexually assaulted in the bathroom of a sports bar. As confirmed by the testimony of University of Florida Journalism Professor Mike Foley, who served for 40 years at the *St. Petersburg Times*, Gawker has consistently acted as **pornographers**, not journalists.

10. The fact that Gawker.com's then-Editor in Chief A.J. Daulerio admitted that it was not necessary to show Mr. Bollea's penis in the Sex Video to report the news, and then-Managing Director Emma Carmichael admitted it was not necessary to link to the nude video of Erin Andrews to tell the story of her peeping tom, but Gawker did both anyway.

The limitation recognized in *Bartnicki,* in which illegal recordings of private sexual activity is **not protected,** is extremely important, particularly in light of the commercial market for celebrity sex videos. Internet media companies are willing to pay significant sums of money for footage of celebrities naked or having sex. **If the Gawker Defendants' position, that they can freely publish secretly-recorded video of celebrities in private places naked and/or having sex, were accepted as the law, people and companies would be incentivized to secretly record celebrities naked and/or engaged in sexual activity, in locations such as hotel rooms and private homes where they have reasonable expectations of privacy, and Internet media companies would be incentivized to publish those videos or "highlight reels" of the full video as occurred here, and cite the Reporters Shield Law to protect the identities of their video sources.** The type of invasion of privacy Mr. Bollea and Erin Andrews have endured would become commonplace. The First Amendment was never intended to create

a commercial market for illegal recordings of private sexual activities, and the framers of our Bill of Rights, themselves celebrities, would be horrified by the concept.

The Gawker Defendants cite *Lee v. Penthouse International, Ltd.*, No. CV96-7069SVW, 1997 WL 33384309 (C.D. Cal. Mar. 19 1997), in support of their public concern argument. *Lee* involved nude photographs of Pamela Anderson and Tommy Lee that were published alongside an article about their sex tape. The Court rejected the public disclosure of private facts claim **not** on a newsworthiness / public concern defense, but because the photographs had already been published in other publications. *Id.* at 5. Here, it is undisputed that Gawker was the first to publish the Sex Video.

The Gawker Defendants also cite *Cinel v. Connick*, 15 F.3d 1338, 1345–46 (5th Cir. 1994), which held that the broadcast of portions of a video recording of a clergyman having sex with underage boys was not actionable. However, we can assume from the fact that the footage aired on broadcast and syndicated television (according to the statement of facts), the footage was heavily sanitized (blurred or pixilated). Independently, the Gawker Defendants' comparison is preposterous—the media in *Cinel* was documenting the abuse of young boys; while here, Gawker published the private activities of two consenting adults behind closed doors.

The remaining cases cited by the Gawker Defendants are distinguishable. *Cape Publications, Inc. v. Hitchner*, 549 So.2d 1374 (Fla. 1989) (newspaper published details of child abuse allegations from a recent, newsworthy criminal trial); *Snyder v. Phelps*, 562 U.S. 443 (2011) (protesters picketed military funerals to protest policies of the U.S. military); *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA 1982) (publication of photo of plaintiff clad in dishtowel (not naked) leaving house after being held hostage); *Walker v. Florida Dep't of Law Enforcement*, 845 S0.2d 339 (Fla. 3d DCA 2003 (release of criminal record of a

schoolteacher); *Paula Jones v. Turner*, 1995 WL 106111 (S.D.N.Y. Feb. 7) (nude photos of litigant who sued the President of the United States and who had denied posing in the nude; the existence of the photos called into doubt the credibility of her allegations against the President).

**C. Mr. Bollea's status as a celebrity who has discussed his private life in public does not waive his right to privacy in surreptitiously-recorded footage of him having private, consensual sexual relations in a private bedroom.**

The Gawker Defendants' collection of media interviews and public statements about Mr. Bollea's sex life (including numerous interviews **to correct false reports** that Mr. Bollea supposedly was behind the release of the Sex Video, and to address the negative publicity he was receiving) does not prove that **footage** of Mr. Bollea fully naked and having sex is a matter of legitimate public concern, or that Mr. Bollea consented to its publication. Many people, public and private figures alike, speak publicly about sex. It is a staple of many celebrity interviews and coverage in publications such as *People* and *Us Weekly*.

Recent media discussions have included: (1) television personalities Barbara Walters and Oprah Winfrey each admitting to sleeping with men who were in committed relationships; (2) television host Nick Cannon discussing having sex with his then-wife singer Mariah Carey while listening to her music; (3) actor James Franco discussing receiving an S&M-themed birthday cake, with images of whips and sex toys; (4) basketball player Lamar Odom talking about his preferences as to whether women should shave their pubic hair; and (5) singer Robin Thicke discussing that he and his then-wife enjoyed having sex while playing his music.[11] Mr.

[11] Evann Gastaldo, *10 Severe Cases of Celeb TMI*, Newser (Feb. 2, 2014, 10:57 AM), http://www.newser.com/story/181201/10-severe-cases-of-celeb-tmi.html; Anon., *Barbara Walters and Oprah Congratulate Themselves: We Were Other Women But We Were NOT Mistresses!*, Huffington Post (May 14, 2008, 5:12 AM) http://www.huffingtonpost.com/2008/05/06/barbara-walters-and-oprah_n_100473.html.

Bollea also is not alone in discussing his sexual activity in a celebrity autobiography: Barbara Walters, Jane Fonda and Rue McClanahan all discussed their sex lives in their books.[12]

The Gawker Defendants' position is that anyone who discusses sex publicly has thereby waived all rights to their sexual privacy and made actual **footage** of themselves naked and having sex a matter of "public concern" and therefore fair game for broadcast—even if the celebrity was **secretly filmed**, did not consent to the publication, and immediately demanded its removal from the Internet (the facts regarding Mr. Bollea in this case). Fortunately, the Gawker Defendants' position is not the law. [13]

In his recently-published book, law professor and former U.S. Supreme Court clerk Neil Richards analyzes this issue extensively and concludes that "[w]hile it might create First Amendment difficulties for a court to impose damages or enjoin a gossip website's disclosure of [news about] a celebrity affair, the worldwide distribution of the accompanying sex video would be another matter entirely under the First Amendment." Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* at 53 (2015). Making specific reference to this lawsuit, Professor Richards states: "In fact, the defendants in [the *Bollea v. Gawker*] case seemed to recognize this fact when they labeled the video 'NSFW,' or 'Not Safe For Work.'" *Id.*

The Gawker Defendants' position, if accepted, would chill the very First Amendment rights and vibrant culture of celebrity news reporting that Gawker claims it seeks to protect.

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[12] Barbara Walters, *Audition* at 58, 65, 99 and 213 (2008); Jane Fonda, *My Life So Far* at 95-96, 102, 147, 154-155 and 483 (2005); Rue McClanahan, *My First Five Husbands... and the Ones Who Got Away* at 28, 41, 78-79, 87, 107-108, 128, 218, 264 and 284-285 (2007).

[13] Similarly, Cameron Diaz once talked about "pooping" in an interview. Evann Gastaldo, *10 Severe Cases of Celeb TMI*, *supra*. Under Gawker's twisted reasoning, this would make secretly-taped footage of Ms. Diaz using the toilet a matter of "public concern" and fair game for publication. That cannot be the law.

Celebrities would never talk openly about their private lives if doing so came at the cost of permitting anyone to publish secretly-taped footage of them naked and/or having sex. [14]

**D. The Gawker Defendants cannot rely on "news judgment" to defend their decision to publish the explicit footage of Mr. Bollea naked, aroused and having sexual intercourse.**

In this case, the news judgment of every news publication that covered the story of Mr. Bollea's relationship with Heather Clem and the existence of the Sex Video was **not to publish** footage of them naked or engaged in sex. The Gawker Defendants' argument that the Court should defer to Gawker's judgment to publish what no other news outlet would publish therefore fails. Professor Foley's affidavit regarding the standards in the journalism industry further establish that Gawker's publication of pornographic footage was an invasion of privacy and not a matter of legitimate news judgment. *See* Foley Aff. ¶¶ 7–28. Moreover, the case law cited herein, including *Bartnicki*, *San Diego v. Roe*, *Toffoloni*, and *Michaels*, makes clear that **there is no First Amendment privilege to publish an explicit celebrity sex video**. While the "news judgment" doctrine cited by the Gawker Defendants may allow some deference to journalists who publish sensitive material in borderline cases while covering a story, such as where non-explicit portions of sex tapes have been aired as part of stories about rape and child abuse—which are clear matters of public concern (*see Cinel, supra*)—the defense offers no refuge to a website that publishes illegally-recorded explicit sexual footage of consenting adults in a private bedroom to drive up its traffic and profits.

The Gawker Defendants make much of the length of the sexual footage they published, which they claim is nine seconds out of the one minute and 41 seconds of private activity in a

[14] The jury may also take into account the fact that the footage was secretly recorded in a private home. It is well established that privacy rights are at their maximum with respect to activities within a private home. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (observing that the interior of a private residence is "the prototypical and hence most commonly litigated area of protected privacy").

private bedroom that they published. The argument is absurd. First, the Gawker Defendants broadcast **forty-five** seconds, not nine, of Mr. Bollea naked. That footage is just as invasive of Mr. Bollea's privacy as the footage of him having sex. Second, 100% of the one minute and 41 second Sex Video consisted of pre-sex dialogue, sex, and post-sex dialogue, all of which is highly invasive and highly embarrassing. Third, even assuming the absurd premise that only the nine seconds "counts," the Gawker Defendants do not gain the right to invade Mr. Bollea's privacy and publish explicit footage of Mr. Bollea naked and having sex simply because they also published a greater amount of footage that supposedly was "less invasive," and less explicit. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565 (1985), the U.S. Supreme Court rejected a fair use argument in a copyright case that relied on the number of pages that were not copied, because the defendant took the "heart of the book" by copying portions of Gerald Ford's memoirs that dealt with the resignation and pardon of Richard Nixon. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the U.S. Supreme Court held that a TV news broadcast of the meaningful part of a "human cannonball" act that showed the performer getting shot out of a cannon and landing in a net was actionable as a violation of right of publicity and unprotected by the First Amendment. Similar to *Harper & Row* and *Zacchini*, the Gawker Defendants published key footage (of Mr. Bollea naked, aroused, and having sex), and did it deliberately because that was the "not safe for work" footage that would drive traffic to Gawker.com. The fact that the key footage was broadcast alongside other footage that supposedly was "less invasive" does not shield the Gawker Defendants from liability.

The Gawker Defendants also amazingly cite to the unenforced Florida adultery and fornication statutes in support of an argument that they supposedly were documenting some sort of a crime by publishing the Sex Video. It is questionable whether these statutes even are

constitutional in light of *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas' sodomy statute as violation of privacy rights under Due Process clause). Even assuming the constitutionality of these laws, the Gawker Defendants' argument is nonsensical, because A.J. Daulerio's story that accompanied the Sex Video made no mention of any alleged crime. Also, by the Gawker Defendants' logic, websites can publish secretly-filmed footage of people in Florida having sex in private bedrooms if the relationship does not strictly conform to Florida's marriage statutes, under the theory it is documenting an alleged crime.[15]

**E. Unblocked and unblurred footage showing Mr. Bollea naked, aroused, and having sexual intercourse in multiple positions is not a matter of public concern.**

The Gawker Defendants rely on *Michaels v. Internet Entertainment Group, Inc.*, No. CV 98-0583 DDP (CWx), 1998 WL 882848 (C.D. Cal. Sep. 11, 1998), where the same U.S. District Court that enjoined the distribution of the Pamela Anderson-Bret Michaels sex tape declined to enjoin a national television show's news **story** regarding the tape, which included sanitized clips showing no nudity or sex. The Gawker Defendants ignore the single, salient fact that distinguishes the two situations: the news report **sanitized the images** taken from the sex tape and **did not broadcast any nudity or sexual acts**. *Id.* at *10 ("The video images presented in the Hard Copy broadcast—while highly suggestive—were brief and revealed little in the way of nudity or explicit sexual acts."). Similarly, *Anderson v. Suiters*, 499 F.3d 1228, 1237 (10th Cir. 2007), another case cited by the Gawker Defendants, involved a media broadcast of excerpts of a video recording of a rape, but the victim, Anderson, "was never identified by name, and the

[15] The implication of the Gawker Defendants' argument that Mr. Bollea committed adultery under Florida law also is false. Fla. Stat. § 798.01 prohibits Floridians from living in an open state of adultery, and the case law makes clear that a handful of sexual encounters does not constitute an "open state of adultery." *Braswell v. State*, 101 So. 232, 232–33 (Fla. 1924). This should be especially true of sexual encounters that occur, as Mr. Bollea's encounters with Ms. Clem did, after Mr. Bollea had separated from his then-wife Linda, who had moved out of their home permanently and relocated to California, thousands of miles away.

excerpted portion of the videotape was limited to a few movements of the alleged attacker's naked body without disclosing the sexual acts in great detail; only Anderson's feet and calves were clearly visible, and they bore no identifying characteristics." *Id.*

Here, the Gawker Defendants edited the Sex Video into what A.J. Daulerio described as a "highlight reel," and deliberately **included** explicit images of Mr. Bollea fully naked, aroused, receiving oral sex, and engaged in multiple positions of sexual intercourse. The Gawker Defendants **admitted** that they could have sanitized still or video images by blurring Mr. Bollea's body parts or showing only his face. However, they chose not to because doing so would have defeated their purpose of maximizing traffic to Gawker.com and thereby maximizing advertising revenues. The Gawker Defendants **deliberately** used the **most explicit** footage of Mr. Bollea—aroused, with full frontal nudity and engaged in sexual intercourse—and boasted that the footage was "not safe for work," admitted that it was "something we're not supposed to see," but nevertheless instructed readers to "watch it anyway." The Gawker Defendants' conduct was the **antithesis** of the actions of a journalist reporting a story.

* * *

The Gawker Defendants do not contest that if there is a triable issue of fact as to whether the Sex Video is a matter of legitimate public concern, the case must go to trial. Because several triable issues of fact exist, as discussed throughout this brief, the Motion for Summary Judgment must be denied.

### F. The Second DCA Opinion on the Temporary Injunction Appeal Should Not Be Given Preclusive Effect Here.

The Gawker Defendants argue that the Second DCA's opinion reversing the temporary injunction forecloses a trial on the issue of public concern. This argument repeatedly has been rejected by this Court, and also was rejected by the Second DCA when it dismissed Gawker's

petition for certiorari. (The Gawker Defendants argue that the decision was not on the merits, but Gawker briefed this issue **extensively** and its arguments clearly did not persuade the Second DCA.) The same argument should be rejected again here.

Appeals from orders on motions for temporary injunctions do not have preclusive effect on the remainder of the litigation. In *Hasley v. Harrell*, 971 So.2d 149, 152 (Fla. 2d DCA 2007), the Second DCA expressly held that "a true temporary injunction is not law of the case." The Second DCA further held in *Hasley*: "[U]nderpinning this doctrine is the fact that, at the preliminary injunction stage, the parties are not required to completely prove their cases. Thus, an appellate court's ruling on a preliminary injunction, where review is made based on a record made at a less-than-full hearing, is not binding at a later trial on the merits." *Id.* The *Hasley* court distinguished the situation of a temporary injunction based on a less-than-full hearing from one where a trial court conducts a **full trial** before granting an injunction. When an injunction is granted following a full trial, the appellate ruling would be law-of-the-case. *Id.* Here, by contrast, the trial court's temporary injunction order was granted **without** an evidentiary hearing, and before Mr. Bollea could even conduct discovery. *Accord Whitby v. Infinity Radio Inc.*, 951 So.2d 890, 896 (Fla. 4th DCA 2007); *Ladner v. Plaza del Prado Condominium Ass'n, Inc.*, 423 So.2d 927, 928–29 (Fla. 3d DCA 1982).

Importantly, **the rule that a temporary injunction ruling is not law-of-the-case for later proceedings applies even when the later proceedings involve "the same facts."** *Belair v. City of Treasure Island*, 611 So.2d 1285, 1289 (Fla. 2d DCA 1992) (emphasis added).

The Second DCA's ruling reversing the temporary injunction was predicated on factual conclusions based on the limited record before the Court, and therefore cannot be applied to deny

Mr. Bollea the opportunity to develop a full factual record to support his request for a permanent injunction and damages.

1. Public concern. The Court based its determination of the "matter of public concern" issue on the limited record before it, considering the issue of Mr. Bollea's willingness to discuss his sex life in public, including the encounter that was surreptitiously-recorded and resulting in the Sex Video. However, as shown in this opposition, there are triable issues of fact as to **why** Mr. Bollea engaged in such discussions, whether they made footage of Mr. Bollea naked and having sex a matter of legitimate public concern, and the extent to which these discussions matter, given that all other news outlets reported the story of Mr. Bollea's relationship with Ms. Clem and the Sex Video, but **did not** publish the explicit footage of nudity or sex.[16]

2. Commercial Use. The Second DCA based its determination regarding alleged non-commercial use on **factual** findings that Gawker supposedly had not attempted to profit commercially from the video. However, after the discovery, there are many triable issues of fact as to whether the publication of the Sex Video was designed to further Gawker's strategy of driving traffic to its website, as discussed more fully below.

3. Unlawful recording. The Second DCA based its determination on its **factual** finding that the Sex Video was newsworthy and a matter of public concern. There are disputed, triable issues of fact as to this issue.

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[16] The Gawker Defendants argue that courts examine the **context** of the publication, as well as its content, when evaluating First Amendment public concern arguments. Mr. Bollea agrees, and this point cuts **against** the Gawker Defendants' position. The contextual factors the Gawker Defendants wish to argue, such as the extent to which Mr. Bollea's sex life was discussed in the press and by the public, the extent to which such discussion was voluntary or was necessitated by the release of the Sex Video, and whether verbal or written discussions of one's sex life are the equivalent of showing explicit video footage of sexual activity, are **disputed factual issues** that would need to be determined by a jury and cannot be resolved by the Court as a matter of law.

The Gawker Defendants' "controlling precedent" argument—that the Second DCA's and U.S. District Court's opinions were published opinions that had to be "followed" by this Court—fails for the same reason.

The Second DCA itself **rejected** the same argument that the Gawker Defendants make here. In the temporary injunction appeal, Gawker argued that the Second DCA need not reach the merits because, in an earlier action, the U.S. District Court issued a decision denying a temporary injunction that should be given collateral estoppel effect. The Second DCA **rejected** that argument on the ground that temporary injunction proceedings are **not final** and, therefore, do not have collateral estoppel effect. The Second DCA held that "the federal court did not draw any decisive conclusions on the merits," merely finding that "Mr. Bollea was not entitled to injunctive relief at a preliminary stage in the proceedings;" thus, the federal court's ruling was not binding on this Court or the Second DCA.

This holding and its rationale are equally applicable here. Based on the limited factual record available to it, the Court of Appeal did not, and could not, reach "decisive conclusions on the merits" concerning factual issues such as whether Mr. Bollea's public statements regarding his private life were sufficient to make distribution of the surreptitiously-recorded Sex Video newsworthy and a matter of public concern.

The Second DCA and U.S. District Court said nothing at all about whether Mr. Bollea had identified triable issues of fact or whether the Gawker Defendants were entitled to summary judgment. The block quote from the U.S. District Court that the Gawker Defendants include in support of their "precedent" argument is replete with findings that only a jury can resolve. The Gawker Defendants quote the U.S. District Court opining on how Mr. Daulerio's article discussed the Sex Video "in a manner designed to comment on the public's fascination with

celebrity sex in general" and Hulk Hogan's status as an American hero in particular. *Moving Papers* at 12. Whether the thrust of Mr. Daulerio's article was what the District Court felt it was, or what Mr. Bollea feels it was (a prurient exposition of the intimate details of his sexual activity), is a question that only a jury can resolve.

As the Florida Supreme Court has long held, "[s]tare decisis relates only to the determination of questions of law. It has no relation whatever to the binding effect of determinations of fact." *Forman v. Florida Land Holding Corp.*, 102 So.2d 596, 598 (Fla. 1958). "It is elementary that the holding in an appellate decision is limited to the actual facts recited in the opinion." *Adams v. Aetna Casualty & Surety Co.*, 574 So.2d 1142, 1153 (Fla. 1st DCA 1991). Thus, in *Shaw v. Jain*, 914 So.2d 458, 461 (Fla. 1st DCA 2005), the First DCA declined to give controlling effect to a prior appellate ruling where the material facts of the prior case were not sufficiently similar to the case at bar. *Accord Jaylene, Inc. v. Moots*, 995 So.2d 566, 570 (Fla. 2d DCA 2008).

The Gawker Defendants' authorities are inapposite:

1. *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So.2d 160, 165 (Fla. 5th DCA 2003), holds that a **purely legal issue of statutory interpretation** (classifying the type of ordinance at issue) decided in a temporary injunction appeal is controlling.

2. *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So.2d 565, 568 (Fla. 1st DCA 1994), is the same as *Galaxy Fireworks*, a pure statutory interpretation issue.

3. In *Bradenton Group, Inc. v. State*, 970 So.2d 403 (Fla. 5th DCA 2007), the Court applied a ruling on a temporary injunction in which the Florida Supreme Court held that the lottery statute did not apply to bingo. That is a pure legal issue, in contrast to the factual issues of public concern and commercial use that are at issue here.

## G. There Are Triable Issues of Fact As To the Other Causes of Action

The Gawker Defendants' arguments as to why summary judgment should be granted as to the other causes of action are without merit:

1. **Intentional Infliction of Emotional Distress ("IIED"):** There are triable issues of fact as to whether the Gawker Defendants intentionally inflicted emotional distress on Mr. Bollea. Their only argument to the contrary is that somehow the fact that Mr. Bollea claims "garden variety" emotional distress, *i.e.*, that he did not see a doctor and seek recovery of medical bills, means that the emotional distress supposedly could not have been severe. They are completely wrong on the law, and the argument confuses two completely different concepts. *Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D. Cal. 2012) (denying discovery of plaintiff's medical history as invasive of plaintiff's privacy on basis of garden variety emotional distress doctrine despite the fact that plaintiff pleaded a claim for intentional infliction of emotional distress).

Mr. Bollea's claim was for garden variety emotional distress because it was for **the kind of emotional distress that any reasonable person would suffer in having a secretly-filmed video of them naked and having sex in a private bedroom released on the Internet and millions of people viewing it**. That does not, however, mean that his distress was not severe. Indeed, the jury is permitted to conclude that any reasonable person would suffer **severe** emotional distress if the Gawker Defendants had done to him or her what they did to Mr. Bollea.

The Gawker Defendants cite *Kraeer Funeral Homes, Inc. v. Noble*, 521 So.2d 324, 325 (Fla. 4th DCA 1988), defining the emotional distress element of the IIED tort as being distress that no reasonable person in a civilized society should be expected to endure. It clearly is a jury

question whether any member of the community should be expected to endure the distress of having one's private sexual activity broadcast to millions of people on the Internet.

2. **Violation of Florida's Wiretap Act:** There are triable issues of fact as to Mr. Bollea's Wiretap Act claim. The Gawker Defendants contend that that they supposedly acted "in good faith" because Judge Whittemore and the Second DCA expressed agreement with some of their legal contentions in the temporary injunction context. The Gawker Defendants' alleged good faith, however, is a **jury question**. The decisions to which the Gawker Defendants cite were not defenses of their conduct or reasonableness, but holdings that temporary injunctive relief was not available under the circumstances, and based on a limited factual record, prior to any discovery. The Gawker Defendants' public concern argument is based on a misreading of **the U.S. Supreme Court's decision in *Bartnicki*, which holds that sex tapes are <u>not</u> matters of public concern**. The Gawker Defendants could not have relied in good faith on this argument, and the question of their good faith must be determined by the trier of fact. *Wright v. Florida*, 495 F.2d 1086, 1090 (5th Cir. 1974) (holding even where wiretap was ostensibly authorized by judicial decision, issue of good faith under Florida Wiretap Act must be resolved on specific facts of case).

3. **Intrusion Upon Seclusion:** There are triable issues of fact as to Mr. Bollea's claim for intrusion upon seclusion. The case law is clear that it extends **not only** to physical intrusions, such as a person hiding in the bedroom while Mr. Bollea and Ms. Clem have sex, but also to **electronic** intrusions as well. The Gawker Defendants might not have physically trespassed on the Clems' property, but they did **electronically** invite millions of people into the Clems' private bedroom to watch Mr. Bollea and Ms. Clem fully naked and having sex.

The Gawker Defendants' intrusion argument suggests that one can only sue the party who actually placed the cameras in the room for electronic intrusion. However, no such requirement appears in any of the cases cited by the Gawker Defendants. The case law requires that Mr. Bollea's privacy be electronically intruded, and a jury reasonably can conclude that the publication of an explicit, clandestinely-recorded sex video qualifies. *See Zirena v. Capital One Bank (USA) NA*, No. 11-24158-CIV, 2012 WL 843489 at *2 (S.D. Fla. Feb. 2 2012) (defining intrusion tort as "physically *or electronically* intruding into one's private quarters" and holding that harassing phone calls were actionable) (emphasis in original). The tort vindicates the "right of a private person to be free from public gaze." *Allstate Insurance Co. v. Ginsburg*, 863 So.2d 156, 162 (Fla. 2003).[17] Publishing private footage of intimate activities violates this right by allowing the public to gaze right in. Here, the Gawker Defendants enabled the public to gaze at Mr. Bollea naked and having sex. There is no reason this electronic intrusion should not be actionable.

4. **Right of Publicity:** There are triable issues of fact as to Mr. Bollea's right of publicity claim. The Gawker Defendants contend that their use of Mr. Bollea's name and image was not "commercial" because his name and image supposedly were not used to promote a specific product or service. However, there are ample facts from which a reasonable jury can conclude that the Sex Video was used to promote **Gawker's websites**, including Gawker.com, and that it was the Gawker Defendants' deliberate strategy to use the Sex Video to drive substantial web traffic to Gawker. Gawker reaped huge financial revenue from the 5.3 million people who flocked to Gawker's web environment to watch the sex video. The Gawker

[17] *Oppenheim v. I.C. System, Inc.*, 695 F. Supp. 2d 1303, 1309 & n. 2 (M.D. Fla. 2010), cited by the Gawker Defendants, cites this language from *Ginsburg* with approval, and nowhere holds that displaying private sexual activity in a private bedroom to the world is not an intrusion.

Defendants argue that the fact that a journalistic outlet is profitable does not mean that all of its stories have a commercial purpose; however, whether the purpose of publishing the Sex Video was to report the news or promote Gawker's websites and drive traffic and profits is a **jury question**.

*Tyne v. Time Warner Entertainment Co., L.P.*, 901 So.2d 802 (Fla. 2005), cited by Gawker, is not to the contrary. *Tyne* holds that depicting individuals' names and likenesses in a motion picture drama is not actionable because that does not constitute the direct promotion of a good or service. In *Tyne*, the purpose of the motion picture was to tell a story involving the plaintiffs; by contrast, here, there is a triable issue of fact as to whether the purpose of publishing the Sex Video was to drive traffic to Gawker's websites and generate revenues and profits instead of (as Gawker claims) to report legitimate news about Mr. Bollea.

Additionally, the use of names and likenesses on the Internet raises issues that the Court did not confront in *Tyne*. Internet news websites such as Gawker do not sell subscriptions, do not sell single copies, and do not sell admission tickets. Their sole source of revenue is the traffic that is generated from their content. Thus, in addition to publishing news reports as any journalistic outlet would, Gawker publishes content, such as the page that contained the Sex Video, for the purpose of furthering the business model, generating traffic, and generating revenue through that traffic. The Sex Video thus served as a form of commercial marketing or promotion for Gawker Media generally; a way to bring users into the Gawker universe where they could then become available to Gawker's advertisers and thereby generate revenue and profits for Gawker. Bollea SUDF ¶203. The Gawker Defendants' expert, Kevin Blatt, testified that advertising revenue is generated by publishing a celebrity sex tape on a website, even if the celebrity sex tape is posted for free. Bollea SUDF ¶204. Blatt himself has used a celebrity sex

tape to promote traffic to a website, much like the Gawker Defendants did here. *Id.* (Blatt. Tr. 58:18–59:18: testifying that his promotion of the Paris Hilton sex video on the *Howard Stern Show* resulted in "a lot" of hits to sexbrat.com, which was hosting the video). Gawker explicitly **advertised the Sex Video on its Facebook page** in what its expert witness conceded was an attempt to draw traffic to the Gawker site. Bollea SUDF ¶205; Bollea Conf. SUDF ¶205. Gawker virally marketed the Sex Video to generate additional viewers. *Id.*

The use of the "Hulk Hogan" name, in this context, therefore certainly was in connection with the advertisement or promotion of a service; it promoted Gawker, and it did so successfully, bringing millions of people on board. *Tyne* therefore does not bar the publicity claim here.[18]

## IV. CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment should be denied and the case should proceed to trial.

Respectfully submitted,

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-and-

[18] For this reason, the First Amendment concerns which the Gawker Defendants raise are groundless. Imposing liability in this case would not have any effect on any of the news reporting on the Internet that utilizes people's names and likenesses. It would only apply a stricter standard to the small number of posts that were designed not to report actual news but simply to drive traffic to a website.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 11th day of May, 2015 to the following:

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