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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM, *et al.*,

Defendants.
_____/

PUBLISHER DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

After stripping away Hogan's rhetoric, irrelevant argument, and immaterial facts, the *substance* of his Opposition ("Opp.") actually confirms that the Publisher Defendants are entitled to summary judgment under well-settled First Amendment doctrine and, on his tag-along claims, for a number of additional reasons as well.

First, Hogan concedes, as he must, that the public concern doctrine is dispositive of all of his claims, and that numerous cases hold that depictions of sex or nudity can, despite their otherwise private nature, be protected under that doctrine. While he relies on out-of-state authorities that are no longer good law to contend this is a jury question, the governing law is clear that this is an issue properly decided by the Court on summary judgment.

Second, Hogan concedes that the facts material to the public concern analysis (the content of the Publication and the context in which it was distributed) are undisputed. Specifically, Hogan concedes, as he must, that his personal life, romantic life, sex life and this very sex tape were all the subject of widespread media coverage and public discussion – including by Hogan himself, often in extraordinarily graphic detail – all prior to the Publication.

Third, recognizing that the record conclusively establishes that the *topic* of his sex life and the sex tape are in fact matters of public concern, he pivots and makes the remarkable concession that he is "**no longer pursuing a claim**" based on the written report and commentary, limiting his claims to the one minute and forty one seconds of video excerpts. Opp. at 3. While he then argues that the excerpts are actionable because they were not "necessary" to reporting the story, his concession is actually fatal to his claims since the Public Concern analysis focuses on the overall topic – which he now concedes is newsworthy and non-actionable – and precludes courts from making fine-grained judgments about whether individual aspects of a report are "necessary."

Fourth, Hogan mounts various side shows, making arguments about things like whether he waived his privacy through his graphic talk about his sex life and the sex tape, and whether other publications have any bearing on the outcome. But, those extraneous issues populating his brief are all immaterial to the public concern analysis.

Finally, he only barely addresses the Publisher Defendants' arguments that, separate and apart from the public concern issue that is dispositive of the whole case, four of his five causes of action must be dismissed for other reasons as well.

I. SUMMARY JUDGMENT IS WARRANTED UNDER THE PUBLIC CONCERN DOCTRINE.

A. Hogan Agrees that the Public Concern Issue is Dispositive.

1. In the Publisher Defendants' motion, they explained that the public concern doctrine is dispositive of all five of Hogan's claims against them. Mot. at 11-12. In his Opposition, Hogan concedes, as he must, that settled legal principle: that he cannot prevail on any of his claims where a publication addresses a matter of public concern or was "newsworthy." *See* Opp. at 27 (conceding that "the 'public concern' test (also sometimes called

'newsworthiness')" restricts "actions for an invasion of privacy" in order to protect "the freedom of the press to report [such] matters"). Indeed, as the Florida Supreme Court has emphasized, "the requirement of lack of public concern is a formidable obstacle" which "has been recognized . . . as being so broad as to nearly swallow the tort." *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989). While both sides agree that the public concern doctrine limits Hogan's tort claims, his papers essentially ask: how could excerpts of a sex tape possibly be a matter of public concern? While that question has some obvious surface appeal, there are four key principles that inform the application of the public concern doctrine and explain why it applies to the undisputed facts of this case to bar liability.

2. ***First***, at its core, the public concern doctrine recognizes that things that the general public is talking about are constitutionally protected topics of discussion. The U.S. Supreme Court has emphasized that such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1215 (2011) (citation omitted). As the Court explained, what constitutes a matter of public concern must be construed broadly to include any "subject of general interest," lest "courts themselves . . . become inadvertent censors." *Id.* at 1216. Thus, although the question of whether something is a matter of public concern is frequently also referred to as "newsworthiness," it is not "limited to 'news'" in the traditional sense, but "extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment." RESTATEMENT (SECOND) OF TORTS § 652D cmt. j. *See also Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("'[Drawing a] line between the informing and the entertaining is too elusive for the protection of . . . freedom of the press.'") (citation omitted). As a result, gossip about celebrities falls well within the public concern doctrine's protection,

including, as is the case here, scrutiny about their marital fidelity and adultery, particularly as it relates to the image a celebrity tries to project to the public. *See, e.g.*, *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 351 (Cal. App. 1983) ("We have no doubt that . . . the purported romantic involvements" of celebrities – there, details of an alleged "love triangle" involving Clint Eastwood and two other celebrities published in the *National Enquirer* – is a "matter of public concern."); RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (matters of public concern include "matters of genuine, even if more or less deplorable, popular appeal," and providing as examples, a drug overdose, a rare disease, the "birth of a child to a twelve year old girl" and a suicide).

3. ***Second***, matters of public concern frequently involve speech that is highly offensive, but that in no way limits the protection the First Amendment affords. The Supreme Court has protected all manner of controversial and often highly offensive speech. This includes picketing at a fallen soldier's funeral while attacking his service to his country, *see Snyder*, 131 S. Ct. at 1213 (messages including "Thank God for 9/11," "Thank God for Dead Soldiers," and "God Hates You," all directed to mourners at a funeral), and an image published in *Hustler* magazine conveying that the Reverend Jerry Falwell, despite being a man of devout faith, lost his virginity in an outhouse to his mother, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).[1] In reaching these results, the Court has explained that the "inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern" and has emphasized that such speech "cannot be restricted simply

[1] Indeed, in recent terms, the Court has accorded First Amendment protection to videos showing animals being crushed to death, *United States v. Stevens*, 559 U.S. 460 (2010); gruesomely violent video games sold to children, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011); and lying about having received a military medal of honor, *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

because it is upsetting or arouses contempt." *Snyder*, 131 S. Ct. at 1216, 1219 (citation omitted). Thus, in *Snyder*, the Court dismissed plaintiff's invasion of privacy claims because "'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection'" and dismissed plaintiff's intentional infliction claim because we must tolerate "even outrageous speech" under the Constitution. *Id.* at 1219-20 (citation omitted).

4. ***Third***, even though this would at first seem counterintuitive, topics become matters of public concern when they are the subject of widespread public interest, even if they are otherwise normally the kinds of things that are kept private. Courts have routinely held precisely that, applying the public concern doctrine to protect public disclosure of things that might in different circumstances be private, including, for example: video footage of the "intimate, private medical" treatment of a highway accident victim, *see Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998); the sexual orientation of a private citizen who fortuitously saved President Ford's life, *see Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. App. 1984); the identity of a rape victim, *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); and disclosure to Phil Donahue's national television audience of the details of rape and incest, *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex. App. 1993). Indeed, the privacy tort itself expressly distinguishes between whether a fact is private and whether the publication disclosing that fact nonetheless addresses a matter of public concern, treating those two questions as separate elements. *See, e.g.*, *Hitchner*, 549 So. 2d at 1377 (to establish privacy tort, a plaintiff must show the publication of private facts *and* that the facts are not of public concern). As explained below, this distinction is critically important as much of Hogan's papers focus on the privacy element, conflating it with the public concern analysis. *See, e.g.*, Opp. at 20 (arguing,

incorrectly, that because of "the **private** nature of the Sex Video," it is "therefore **not** a matter of 'public concern'").

5. Applying these same principles, courts have regularly found that images of sex or nudity, when connected to an ongoing public discussion or controversy, involve matters of public concern even though they involve conduct generally considered to be private. *See, e.g.*, *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*") (gossip outlet's report about celebrity sex tape that included excerpts from tape); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309 (C.D. Cal. Mar. 19, 1997) (*Penthouse* magazine article about sex life of celebrities accompanied by sexually explicit photos of them); *Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (even though videotape of alleged rape was "highly personal and intimate in nature," use of excerpts in news broadcast addressed matter of public concern and was protected by First Amendment as a matter of law); *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994) (video footage of molestation of young men by private figure priest); *Jones v. Turner*, 1995 WL 106111 (S.D.N.Y. Feb. 7, 1995) (*Penthouse* magazine's unauthorized publication of nude photographs of Paula Jones were newsworthy because they involved a "sex scandal" and accompanied an article about her). As the *Restatement* explains, while "[s]exual relations . . . are normally entirely private matters," there is no invasion of privacy where "the matter is of legitimate public interest." RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.

6. Significantly, Hogan has conceded that the *topic* of the Publication was a matter of public concern. He has now abandoned all claims arising out of the Publication's written report and commentary and has conceded that his relationship with Heather Clem, the existence of a sex video, and the detailed descriptions of it in the written commentary are non-actionable

and an acceptable subject of media coverage and public discussion. *See* Opp. at 3 (Hogan "is **no longer pursuing a claim based on Daulerio's 'commentary'"** and he "does not seek to prevent anyone (Gawker or anyone else), from commenting [on] or discussing his relationship with Heather Clem or the existence of a sex video") (emphasis in original). This concession is fatal to his claims. As detailed above, a substantial body of governing law precludes liability based on the inclusion, in a concededly newsworthy story, of images addressing the same subject, even if they depict sex or nudity. There is literally no case that allows liability to be imposed in such circumstances, and Hogan has not pointed to any. Thus, the limited question remaining is this: Given that the report and commentary – including its graphic description of the full sex tape – is now concededly a proper subject of reporting, can the editorial decision to complement that text with brief excerpts from the tape itself be actionable, based on the contention that the excerpts were "unnecessary" to the story? The answer is clearly "No," based on a fourth and final key principle.

7. ***Fourth***, the public concern analysis asks simply whether the *topic* involves a matter of public concern and whether the challenged aspect(s) of the publication are related to that topic. It does not contemplate an evaluation of whether each detail or each image is necessary or appropriate, or whether a different person might have handled the story differently, and for good reason. A litany of First Amendment cases makes clear that judges may not take out their red pen to edit individual passages or images from speech about a topic of public concern, nor may they permit jurors to do so. In *Michaels II*, the court made exactly that point in rejecting the plaintiff's argument that there was a fact question as to whether it was necessary for the defendant's report to inform viewers where they could watch the full Pamela Anderson Lee/Brett Michaels sex tape:

> Lee contends that because Paramount could have prepared a story on the newsworthy dissemination of the Tape without describing where and when it would be shown, there exists a genuine issue of fact as to whether Paramount exceeded the scope of the newsworthiness privilege by advertising the Tape. *The problem with this contention is that it requires the Court to sit as a 'superior editor' over Paramount's decisions on how to present the story.*

1998 WL 882848, at *6 (emphasis added); *see also Anderson*, 499 F.3d at 1236 (endorsing "aggregate" approach to public concern analysis, "rather than itemizing what in the news report would qualify [as a matter of public concern] and what could remain private") (citation omitted); *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1221 (10th Cir. 2007) ("courts have not defined the tort of public disclosure of private facts in a way that would obligate a publisher to parse out" and publish only "concededly public interest information"); *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989) (emphasizing, in case challenging disclosure of a rape victim's name: "[J]udges . . . must resist the temptation to edit journalists aggressively. . . . Exuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists."); Mot. at 19-20 (citing numerous other cases applying the principle that editorial choices made in reporting sensitive subjects, including to publish images of sex or nudity, are protected under the public concern doctrine).

8. The application of the public concern doctrine has played out in the exact fashion described above in the cases involving sex and nudity, including this one. First, courts examine the *context* and *content* of the challenged publication to determine whether the *topic* is the subject of controversy or under public discussion, including by the plaintiff. *See* Opp. at 43 n.16 (Hogan "agrees" that "courts examine the **context** of the publication, as well as its content, when evaluating First Amendment public concern argument"). Second, courts reject arguments that this analysis somehow proceeds differently if the topics might otherwise be offensive or controversial. Third, courts recognize that sex or nudity is, if the public concern test is otherwise

satisfied, protected. Finally, courts examine whether the report and accompanying images bear a *nexus* to that topic, allowing wide editorial discretion and rejecting arguments that particular aspects were not necessary or could have been (or should have been) excised. For example, in *Lee*, 1997 WL 33384309, at *4-5, the court concluded that "the sex life of Tommy Lee and Pamela Anderson Lee is . . . a legitimate subject for an article," and that sexually explicit pictures of the couple accompanying an article in *Penthouse* magazine were "newsworthy." The Court based its holding in significant part on the public discussion of their sex life, including plaintiffs' own statements on *Howard Stern* and in other media outlets extensively addressing the "frequency of their sexual encounters and some of [their] sexual proclivities," just as Hogan did here. *Id.* at *5; *see also id.* (reciting that, in another published interview, "Ms. Lee disclosed that her name is tattooed on her husband's penis; that she and her husband were constantly having sex in her trailer on the set of the movie 'Barb Wire'; [and] that she and her husband took Polaroid photographs of themselves having sex"). Based on the public discussion of their sex lives and the images at issue, the Court concluded that both the *Penthouse* article and the accompanying images were newsworthy, emphasizing that "the intimate nature of the photographs . . . is simply not relevant for determining newsworthiness." *Id.*[2]

9. Similarly, in *Michaels II*, 1998 WL 882848, at *8-10 & n.4, the court held that the publication of sex tape excerpts was protected based both on their connection to a newsworthy report about the controversy over the sex tape and on prior media reports addressing the sexualization of plaintiff's image. Specifically, "because the private matters broadcast bore a substantial nexus to a matter of public interest," and the depiction of the sexual relations was

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[2] Hogan contends that *Lee* did not address the public concern issue, and only addressed whether the photographs were private. *See* Opp. at 35. He is wrong. As the discussion above makes plain, the Court engaged in an extensive analysis of the public concern issue, and found the publication of the sexually explicit photographs protected on that basis.

"clearly part of the story," the defendant was entitled to summary judgment on plaintiff's privacy claim as a matter of law. *Michaels II*, 1998 WL 882848, at *10. Likewise, in *Jones v. Turner*, 1995 WL 106111, at *21, *Penthouse* magazine's publication of nude photographs of Paula Jones taken by her former boyfriend accompanying an article about her lawsuit against President Clinton were newsworthy, based simply on the fact that "the pictures in question have a relationship to the accompanying article, and that the article is a matter of public interest." So, too, here: the article is concededly a matter of public concern and the excerpts "in question have a relationship to the accompanying article." At bottom, where the topic is a matter of public concern, and there is a relationship or nexus between that topic and the images or video, there can be no liability for publishing them. *See Anderson*, 499 F.3d at 1236 ("While the sensitive nature of the material might make its disclosure highly offensive to a reasonable person, that does not make the videotape any less newsworthy so long as the material as a whole is substantially relevant to a legitimate matter of public concern.").

10. Following cases like *Lee, Jones* and *Michaels II*, the Court of Appeal employed the same analysis in *this* case to conclude that *both* the written "report" *and* "the related video excerpts address matters of public concern." *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1201 (Fla. 2d DCA 2014); *see also id.* at 1202 ("the written report and video excerpts are linked to a matter of public concern"); *id.* at 1203 (same). In reaching this conclusion, the court looked first at the content and context of the Publication, considering facts of exactly the type the Publisher Defendants have assembled in support of their summary judgment motion – *i.e.*, facts showing (a) the preexisting "public controversy surrounding [Hogan's] affair with [Mrs. Clem] and the Sex Tape, exacerbated . . . by [Hogan] himself," and (b) substantial prior interest in Hogan's personal and sex life more generally, fueled in significant degree by Hogan's long

history of discussing those topics in public. *Id.* at 1200-01 & n.5; *see also* Opp. at 43 (conceding that the Court of Appeal's conclusion relied on Hogan's "willingness to discuss his sex life in public, including the encounter that was surreptitiously-recorded and resulting in the Sex Video"). Second, the Court emphasized that "the mere fact that the publication contains arguably inappropriate or otherwise sexually explicit content does not remove it from the realm of legitimate public interest," and cited numerous cases in which publication of sexually explicit content was found to be protected speech on matters of public concern. 129 So. 3d at 1201 (citations omitted). Finally, the Court held that, because "the written report and video excerpts are linked to a matter of public concern – Mr. Bollea's extramarital affair and the video evidence of such," it "was within Gawker Media's editorial discretion to publish the written report and video excerpts." *Id.* at 1202.[3]

11. Under this well-established analysis, including as articulated by the Court of Appeals in this very case, the Publisher Defendants are entitled to summary judgment on the basis of the undisputed record of facts that are material to this issue, as described below.

B. The Facts Material to the Public Concern Issue Are Undisputed.

12. The Publisher Defendants demonstrated in their opening motion papers that (a) *prior to the Publication at issue*, there was widespread media coverage and public discussion of Hogan's romantic and sexual affairs, the graphic details of his sex life and this sex tape, including by Hogan himself; (b) the Publication addressed those controversies; and (c) the subject continued to be the subject of widespread media coverage and public discussion, including by Hogan himself, after the Publication, *see* Publisher Defendants' Statement of Undisputed Material Facts ("SUMF"), Undisputed Fact Nos. 4-6, 8.

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[3] Hogan's argument that the DCA opinion is neither preclusive nor applicable precedent is addressed below in Part I.C.3.

13. None of this is disputed. Specifically, to quote Hogan's response to the Publisher Defendants' Statement of Undisputed Material Facts ("SUMF"):

a. It is "**Undisputed** that Mr. Bollea's private life has received media coverage," and that he has "discussed aspects of his private life in public," including "in radio interviews." Hogan's Response to Publisher Defendants' SUMF ("SUMF Resp.") ¶¶ 39, 41, 53; *see also id.* ¶¶ 41-45 ("**Undisputed** that Mr. Bollea's relationship with [Christiane] Plante became public," was "the subject of press coverage," and was "discussed . . . in his book, *My Life Outside the Ring*," including his statement that, but for his affair with Plante, "I'm not the cheating kind."); *id.* 46-54 (**"Undisputed** that the Kate Kennedy matter received press coverage," that "the litigation with Ms. Kennedy received media coverage," and that Linda Hogan publicly discussed it, and other aspects of Hogan's sex life, including in her book *Wrestling the Hulk: My Life Against the Ropes*).

b. It is "**Undisputed** that Mr. Bollea engaged in discussions about sex on radio programming," discussing, for example: the size of his penis and what size condoms he wears; where he likes to ejaculate; his erection holding his towel in place; the number of women he had been with in one night; Linda Hogan manually pleasuring him; using his mustache to perform oral sex on her and as a "flavor saver"; and his sexual practices with his new wife Jennifer, including the use of lubrication, preparing her with oral sex, and spanking. SUMF Resp. ¶¶ 57, 58, 59, 60, 61, 62, 63,

64, 66, 67, 68 (repeatedly confirming these facts are "**Undisputed**"); *see also id.* ¶ 56 ("**Undisputed** that the photo shoot occurred and appeared in *Oui* magazine").[4]

c. It is "**Undisputed**" that in the "seven months before the Publication at issue," there were dozens of published reports about the sex tape, including on the websites of *The Huffington Post*, the *Today Show*, *The National Enquirer*, *The Daily Telegraph*, *USA Today*, *The New York Post*, and *The Christian Post*, and that the subject was also discussed on the *Howard Stern Show*. SUMF Resp. ¶¶ 73-111; *see also id.* ¶¶ 94-98 ("**Undisputed**" that *The Dirty* published . . . article[s] and screen shots" from the video, that another website republished those screen shots and that a third hyperlinked to them); ¶ 70 ("**Undisputed**" that, on a 2011 *Howard Stern* broadcast, Hogan denied that he would ever have sex with Heather Clem); ¶ 75 ("**Undisputed**" that seven months before the Publication, Hogan stated that he had no idea who the woman in the video was because, during a "four- or five-month window where [he] was going crazy," he could not "even remember people's names . . . much less girls," and that "the truth is it wasn't just one brunette").

14. The *context* in which the Publication was published is thus undisputed. Hogan's private life, romantic life, sexual affairs and this very sex tape were already matters of public concern, a point which Hogan now does not dispute given his concession that the text of the report and commentary were protected. (Hogan also concedes that the public has a cultural fascination with the sex lives of celebrities in general, stating, "Many people, public and private figures alike, speak publicly about sex. It is a staple of many celebrity interviews and coverage

[4] Hogan claims to dispute the Publisher Defendants' *descriptions* of photographs published in *Oui* magazine depicting him fondling women's naked breasts and buttocks, SUMF Resp. ¶ 56, but he does not dispute the *contents* of the actual photos, which speak for themselves, *see* Fugate Aff. Ex. 43.

in publications such as *People* and *Us Weekly*." Opp. at 36.) Similarly, Hogan concedes that the *content* of the Publication itself expressly addressed this ongoing public discussion and media coverage, including the controversy over the sex tape in which Hogan and his counsel actively participated. *See, e.g.*, SUMF Resp. ¶ 121 (it is "**Undisputed**" that the Publication "referenced and hyperlinked to some of the prior coverage of the Hulk Hogan sex tape").[5]

C. Hogan's Contrary Arguments Are Without Merit.

15. The Publisher Defendants' argument is ultimately a simple one: the public concern doctrine applies because, as Hogan has now conceded, the subject of the Publication addressed ongoing public controversy and discussion, in which Hogan actively participated, about his sex life and this tape, facts which he does not and cannot dispute. Hogan's lengthy opposition papers try avoid this application of settled law – including precedent from the Court of Appeal in this case – to undisputed facts with unavailing arguments and immaterial facts.

1. Public Concern is a threshold issue to be decided by the Court.

16. Hogan first contends that "[i]t is well-established that the public concern test is ordinarily a question for the jury." Opp. at 28. He is simply wrong. The opposite is true: courts, including Florida courts, routinely decide the public concern issue as a matter of law, as they should. *See, e.g.*, *Hitchner*, 549 So. 2d at 1377-78 (deciding public-concern issue as matter of law at summary judgment stage); *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427-28 (Fla. 5th DCA 1982) (same at post-trial motion stage); *Doe v. Sarasota-Bradenton Fla. Television*

[5] Further confirming this point, it is "**Undisputed**" that after the Publication there continued to be widespread media attention and public discussion, including by Hogan himself, including that he "made media appearances in which he discussed his relationship with the Clems" and his "sexual relationship with Ms. Clem." *Id.* ¶¶ 133-43 ("**Undisputed**" that, after the Publication, he gave various interviews "in which he discussed the Sex Video" and "discussed his sexual relationship with Ms. Clem"); *id.* ¶ 24 ("**Undisputed**" that Hogan publicly stated he had sexual relations with Ms. Clem twice).

Co., 436 So. 2d 328, 329-30 (Fla. 2d DCA 1983) (same at motion to dismiss stage); *Loft v. Fuller*, 408 So. 2d 619, 620 (Fla. 4th DCA 1981) (same at motion to dismiss stage); *Walker v. Fla. Dep't of Law Enforcement*, 845 So. 2d 339, 340 (Fla. 3d DCA 2003) (same at motion to dismiss stage); *see also Cinel*, 15 F.3d at 1345-46 (affirming dismissal of case arising from broadcast of sexually oriented video because "[w]hether a matter is of public concern is a question of law for the court").

17. Moreover, the U.S. Supreme Court itself has emphasized that, in applying the public concern doctrine, judges are constitutionally "obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Snyder*, 131 S. Ct. at 1215-16 (internal marks and citations omitted). Hogan's contrary suggestion that the Publisher Defendants' summary judgment motion is somehow an effort "to deny his Constitutional right to a trial by jury," Opp. at 10, is wrong both as a matter of Florida civil procedure, which, of course, permits the filing and adjudication of dispositive motions, and fundamental First Amendment law under which such dispositive motions are routinely granted to ensure that protected speech is not chilled or punished.[6]

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[6] While the Publisher Defendants rely on numerous U.S. Supreme Court and Florida authorities, Hogan cites neither and instead reaches for decades-old California decisions, in so doing misrepresenting the current state of California law on this point. *See* Opp. at 28. Each California case he cites was decided before the extensive analysis of this issue in *Shulman v. Group W Productions*, 955 P.2d at 479-89, a case that Hogan has frequently relied on, *see, e.g.*, Opp. at 29. There, the California Supreme Court found that video of "intimate, private medical treatment" of an accident victim "was newsworthy as a matter of law" and expressly eschewed "balanc[ing] interests in an ad hoc fashion in each case," as Hogan urges here. *See also Wilkins v. NBC*, 84 Cal. Rptr. 2d 329, 341 (Cal. App. 1999) ("We find the disputed material newsworthy as a matter of law."); *Four Navy Seals v. AP*, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005) (granting motion to dismiss because "publication was newsworthy" as a matter of law); *Michaels II*, 1998 WL 882848, at *10 (sex tape excerpts were newsworthy as a matter of law).

2. Hogan's claim that images of sex or nudity are, by definition, never matters of public concern is wrong.

18. Despite arguing elsewhere that the public concern issue is a jury question, Hogan separately contends that it is a legal issue and that, as a matter of law, excerpts of a sex tape – no matter how brief or how newsworthy – can never involve a matter of public concern. *See, e.g.*, Opp. at 28 (the "law is clear that" the type of speech at issue here represents "the quintessential example of speech that is not a matter of legitimate public concern"); *see also* Opp. at 34, 38 (same). Leaving aside that this statement ignores the contrary holding by the Court of Appeal in this very case, the few other cases on which he relies in no way support this sweeping proposition.

19. First, Hogan's arguments with respect to four of the five cases he cites were already considered and rejected by the Court of Appeal in its prior decision. *See* Addendum Ex. 1. The Court expressly distinguished three of those cases in holding that the Video Excerpts involved a matter of public concern. *See Bollea*, 129 So. 3d at 1201-02 (distinguishing *City of San Diego v. Roe*, 543 U.S. 77 (2004), *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201 (11th Cir. 2009), and *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) ("*Michaels I*")). Although Hogan contends that a *concurring* opinion in a fourth case, *Bartnicki v. Vopper*, 532 U.S. 514 (2001), supports his position, he advanced the same argument to the Court of Appeal, *see* Addendum Ex. 1, which rejected it, instead relying on the majority opinion in *Bartnicki* in finding the Publication constitutionally protected. *See Bollea*, 129 So. 3d at 1203 ("As the speech in question here is indeed a matter of legitimate public concern, the holding in *Bartnicki* applies."). The Court of Appeal's prior rejection of these same legal arguments should settle the matter. *See Daniel v. Fla. State Tpk. Auth.*, 237 So. 2d 222, 222 (Fla. 1st DCA 1970) (rejecting appellant's legal arguments where they had been "rejected by the Supreme Court

earlier when appellant sought review of an interlocutory order denying appellant's prayer for a temporary injunction").

20. Second, even apart from that prior ruling, these cases do not dictate a contrary conclusion here. *Roe*, *Toffoloni*, and *Michaels I* each involved a depiction of sex or nudity that was manifestly unrelated to a matter of public concern. For example, Hogan contends that *Roe* sweepingly held that all "broadcasts of sexual activity on the Internet are **not matters of public concern**," Opp. at 29, but the Court simply rejected a First Amendment claim by police officer who was fired for selling videos of himself masturbating in his police uniform because they had no connection to any reporting or commentary about a subject of ongoing public discussion. *See Roe*, 543 U.S. at 78, 84; *see also Toffoloni*, 572 F.3d at 1211 (although *Hustler* magazine article about murder of female wrestler involved a matter of public concern, twenty-year-old nude modeling photographs of her accompanying article bore no nexus to murder); *Michaels I*, 5 F. Supp. 2d at 828, 841-42 (public concern doctrine did not protect *sale* of *full* sex tape, unaccompanied by report or commentary).[7] And a single citation to *Michaels I* – a case involving the *sale* of a *complete* sex tape – in Justice Breyer's concurrence in *Bartnicki* hardly means that the full Court adopted a *per se* rule that any video footage of sex or nudity, no matter no matter how brief or how newsworthy, can never be a matter of public concern, especially since the majority expressly declined to reach that question. *See Bartnicki*, 532 U.S. at 533.

21. Finally, Hogan's reliance on a fifth case from an intermediate appellate court in Utah, *Judge v. Saltz Plastic Surgery, PC*, 330 P.3d 126 (Utah App. 2014) (Opp. at 31-32), is

[7] Moreover, the extended passage Hogan quotes from *Michaels I* addresses whether the images are *private* not whether they involve a matter of public concern. Opp. at 30-31 (analyzing whether "Michaels has a privacy interest in his sex life"). In that regard, in another passage omitted by Hogan, the Court noted that a short clip of 148 seconds had previously been distributed. *See* 5 F. Supp. 2d at 841.

entirely misplaced. Hogan fails to inform the Court that the Utah Supreme Court granted certiorari in *Judge* to review the very issue on which Hogan would have this Court look to that case for guidance: whether the public concern issue raises factual questions that preclude entry of summary judgment. *See Judge v. Saltz*, 341 P.3d 253 (Utah 2014) (Table); Addendum Ex. 2 (Nov. 21, 2014 Order by Supreme Court of Utah granting writ of certiorari on, *inter alia*, issue of "whether the court of appeals erred" in applying public-concern test in such a fashion as "to conclude that disputed issues of fact precluded summary judgment on Respondent's claim of publication of private facts"). Moreover, even if the decision were not currently under review by a higher court, the specific substantive point that Hogan purports to derive from *Judge* – "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," Opp. at 31 – is based on the court's lengthy discussion of whether the facts were *private*, not its separate treatment of whether their disclosure was sufficiently linked to a matter of *public concern*. *Judge*, 330 P.3d at 134-35. As to the latter issue, the case involved a private figure's surgery in circumstances where neither she nor her surgery had been the subject of any public discussion, including by her. *Id.* at 135. Accordingly, the *Judge* decision, even were its validity not currently an open question, does not bear on the issues raised in this motion.

3. The prior opinion of the Court of Appeal cannot be disregarded.

22. Hogan's contention that the public concern doctrine never applies to depictions of sex or nudity is all the more remarkable given the Court of Appeal's prior conclusion to the contrary in this very case. Hogan suggests that this Court should not even treat that prior decision as *persuasive* authority because it arose in the temporary injunction context. At the same time, he urges this Court to follow *Michaels I* (cited at Opp. at 30-31, 38), a *California*

preliminary injunction decision that the Court of Appeals expressly ruled is inapplicable to this case. *See Bollea*, 129 So. 3d at 1202 (rejecting *Michaels I*). That makes no sense.

23. Even assuming for argument's sake that the prior Court of Appeal decision is not entitled to *preclusive* effect,[8] as a published appellate decision, its analysis of the public concern issue in the context of celebrity sex tapes is at a minimum Florida appellate precedent, as this Court has already recognized. *See* Apr. 23, 2014 Hrg. Tr. (Fugate Aff. Ex. 107) at 71:23 – 72:12 (describing Court of Appeal's ruling as "preceden[t] for this particular case"); *see also Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008) ("the opinion of a district court is binding on all trial courts in the state"); Mot. at 15 (citing cases in which holdings in temporary injunction appeals were treated as precedential at merits stage). Indeed, another Court of Appeal decision recently treated the *Bollea* opinion as precedent at the merits stage, notwithstanding that it arose in the temporary injunction context. *See Parkerson v. State*, --- So. 3d ----, 2015 WL 1930312, at *5 (Fla. 4th DCA Apr. 29, 2015) (relying on *Bollea* to distinguish between incidentally earning a profit and having a purely commercial purpose).

24. Moreover, Hogan concedes that an appellate court's *analysis* does operate as precedent. Specifically, Hogan admits that the DCA's "'determination of questions of law'" is binding, and that a prior appellate ruling is "controlling . . . where the material facts of the prior

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[8] Hogan's categorical assertion that "[a]ppeals from orders on motions for temporary injunctions do not have preclusive effect on the remainder of the litigation," Opp. at 42, is incorrect. *See, e.g.*, *Johnson v. Globe Data Sys.*, 785 So. 2d 1290, 1291-92 (Fla. 5th DCA 2001) (earlier appellate ruling in temporary injunction context that defendant's violations of non-compete clause gave rise to presumption of irreparable harm was "law of the case" going forward and mandated issuance of permanent injunction at merits stage because facts underlying initial ruling had not changed). Hogan also contends that the Court of Appeal's dismissal of the Publisher Defendants' writ petition means that it decided "on the merits" that its temporary injunction ruling does "**not** have preclusive effect here." Opp. at 8, 41-42. But a "dismissal" means only that the appeals court lacked jurisdiction to decide the writ petition, and says nothing about whether the merits "arguments clearly did not persuade the Second DCA," as Hogan alleges. *Id.* at 42; *see* Mot. at 14 n.3 (addressing same).

case" are "sufficiently similar to the case at bar." Opp. at 45 (citations omitted). Here, the "prior case" and the "case at bar" are the *same case*, and the now-expanded record only serves to *reinforce* the Court of Appeal's public concern holding, as it demonstrates that Hogan's sex life and the sex tape were the subject of even greater public attention than was evident based on the temporary injunction record. Mot. at 13-15; SUMF ¶¶ 33-112. Other than his disagreement with that decision, Hogan's only response is to claim that he should have "the opportunity to develop a full factual record to support his request" for relief. Opp. at 43. But, on a post-discovery motion for summary judgment, the time for developing that record is over, and he has failed to identify a single fact uncovered since the Court of Appeal issued its decision that would render its analysis of the public concern issue inapplicable.[9]

4. Lack of consent or "waiver" is immaterial to application of the Public Concern doctrine.

25. Hogan tries to negate the undisputed record of substantial public discussion of his sex life and the sex tape, including by Hogan himself, by contending that his statements were not intended to "*waive*" his privacy in connection with the Publication. *See* Opp. at 5-6, 32, 36-38. But his argument fundamentally misconstrues the nature of the public concern analysis. It is *not* the Publisher Defendants' position that Hogan's "disclosure of certain aspects of his private life" necessarily "constitutes a waiver of his right to privacy as to other aspects of his private life." Opp. at 32. Hogan's argument in this regard blurs together two analytically distinct elements of his claims: whether he maintained his sex life as *private* and whether the publication addressed a *matter of public concern* when that topic later became a subject of ongoing public controversy.

[9] Bollea also claims that the Court of Appeal's rejection of Gawker's collateral estoppel arguments disposes of the Publisher Defendants' arguments here. Opp. at 44. But, the Court of Appeal recognized that the federal decision, even if not preclusive, was "unquestionably persuasive." *Bollea*, 129 So. 3d at 1204. Moreover, the collateral estoppel effect of a federal ruling says nothing about whether this Court is separately obliged to follow the detailed legal analysis set forth in a ruling by its directly superior appellate court.

See Hitchner, 549 So. 2d at 1377 (whether publication addressed matter of public concern is distinct from whether facts were maintained as private); *Michaels II*, 1998 WL 882848, at *8-10 & n.4 (rejecting argument that plaintiff waived *privacy* interest in sex tape excerpts by publicizing her sex life, yet granting summary judgment to publisher because, even if "the acts depicted" on tape were *private*, publication of excerpts from tape nonetheless "bore a substantial nexus to a matter of public interest" based on public discussion of her sex life and the tape).

26. The effect of these prior disclosures on his *privacy* interests is not relevant to the *public concern* analysis, which is the sole focus here. For these purposes, those prior disclosures demonstrate that both Hogan's sex life and the sex tape were the subject of ongoing public controversy and was therefore *newsworthy*, as was the case in *Lee*, *Michaels II*, in the Court of Appeal's opinion in this case, and in a number of other cases involving sex or nudity. Indeed, while Hogan complains that the Publisher Defendants are attempting to "turn the tables" on him, to "put him 'on trial,'" and to "turn this case into an assassination of [his] character" by conducting "a detailed and extensive examination of his private life," Opp. at 10, they in fact relied only on *published* or *broadcast* statements, including his own, that have long since been public, in establishing that the Publication addressed an ongoing matter of *public concern*.[10]

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[10] Hogan contends that he only talked about the sex tape to correct suggestions that he was in on its recording or release and that his motivation for making otherwise undisputed public statements is a jury question. Opp. 24, 25 n.7, 43. But the public concern analysis does not evaluate a news subject's motivation for engaging in public discussion (indeed, although not the case here, a topic could involve a matter of public concern even if the subject said nothing but the topic was still a subject of widespread public discussion by others). In any event, it remains undisputed here that Hogan voluntarily engaged in years of extraordinarily graphic discussion of his sex life before the sex tape controversy could have even arguably required a response, SUMF Resp. ¶¶ 56-68, and then, once that controversy began, in no way limited himself to denying that he was involved in making or disseminating the tape, *see, e.g.*, *id.* ¶ 75 (seven months before the Publication, Hogan stated that he had no idea who the woman in the video was because he could not remember "names . . . much less girls," and that "the truth is it wasn't just one brunette").

27. The same goes for Hogan's related contention that his consent to airing some parts of his sex life in public is not consent to airing all parts. *See, e.g.*, Opp. at 2, 6, 35 & n.3. Consent is not part of the public concern inquiry. It is hornbook law that a journalist need not obtain consent from a news story's subject before publishing about a matter of public interest. Indeed, the First Amendment would be largely meaningless if journalists were required to give veto power to the subjects of their articles and photographs. *See, e.g.*, *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1261 (S.D. Fla. 2010) (news use of image does not need to be authorized); *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1150 (S.D. Fla. 1990) (where publisher uses photo or name in news context, "consent is irrelevant"); *Stafford v. Hayes*, 327 So. 2d 871 (Fla. 1st DCA 1976) (consent to use name or image unnecessary where plaintiff is an "actor in a newsworthy occurrence of public interest").

28. Accordingly, in each of the prior cases in which a court has determined that the publication of sex or nudity was newsworthy, the plaintiff had not consented to publication. *See, e.g.*, *Bridges*, 423 So. 2d at 428 (news use of image of plaintiff partially nude, however "embarrassing or distressful to the plaintiff," does not need to be authorized if newsworthy); *Michaels II*, 1998 WL 882848, at *10 (granting summary judgment to publisher of a news report about a celebrity sex tape accompanied by brief excerpts, even though celebrities depicted had vigorously objected to publication); *Lee*, 1997 WL 33384309, at *5 (sexually explicit pictures of celebrity couple accompanying article were "newsworthy" even though published without consent); *Cinel*, 15 F.3d at 1345-46 (videotapes of private figure priest's sexual activities with young men involved a matter of public concern even though published without his consent); *Anderson*, 499 F.3d at 1236 (even though videotape of alleged rape was "highly personal and intimate in nature," and published without victim's consent, use of excerpts in news broadcast

addressed matter of public concern); *Jones*, 1995 WL 106111, at *21 (*Penthouse* magazine's publication of nude photographs of Paula Jones, published without her consent, was newsworthy and protected).[11]

5. Hogan's contentions that publishing the Excerpts was "unnecessary," contrary to "journalistic ethics," or different from other media coverage of this issue are all immaterial.

29. Hogan claims that the Excerpts were not newsworthy because they were not "necessary," Opp. at 7-8, 19-20, 33-34, 41, because publishing them supposedly violated canons of journalistic ethics, *id.* at 19, 33, and because other outlets did not publish them, *id.* at 6-7, 33, 38. The crux of Hogan's arguments is that, while the First Amendment may protect written reporting and commentary about the sex tape, by Gawker and others, publishing images from the sex tape is a bridge too far.

30. As explained in Part I.A. above, if the *topic* otherwise qualifies for protection under the public concern doctrine, there is no separate analysis of whether a particular aspect of a report is "necessary." This approach provides protections for individuals for truly private and non-newsworthy matters, while at the same time removing courts and/or juries from the business of super-editing publications after the fact, deciding that a particular sentence, phrase or image (or portion thereof) was not to their liking. The point of the First Amendment is that people are free from Government control over which speech is "necessary" and which speech is not, as numerous cases make plain. *See, e.g.*, Mot. at 19-20.

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[11] Hogan crudely analogizes his consent and wavier arguments to a rape victim who, simply by "dressing or acting sexy," did not consent to forcible sex. Opp. at 6 n.3. With respect, a public figure facing unwelcome press is worlds apart from a person being forcibly compelled against his or her will to have sexual intercourse. But Hogan's analogy is inapposite for an additional reason: consent is always legally required before having sex with someone, but publishing a report of otherwise private facts can be based either on the consent of the subject *or* because the topic is newsworthy, even if the subject of the story does not consent.

31. Hogan tries to get around this rule by relying on a purported journalism expert, Michael Foley, who opines that the Excerpts were not in his judgment "newsworthy." *See* Opp. at 19; Foley Aff. ¶ 12. Putting aside that his "expert" has not served as a practicing journalist since 1992 and worked only for a daily newspaper before the age of Internet publishing, Foley Aff. ¶ 2, his conclusions about whether something is newsworthy *journalistically speaking* have no bearing on the separate *legal* analysis of whether something addresses a matter of public concern, as defined by the case law. Indeed, the whole point of the public concern doctrine and the First Amendment principles that animate it is that, if a publication addresses a matter of public concern, its author is entitled to editorial discretion in how to cover that subject. Courts and purported experts are not permitted to undertake a granular review of each sentence and each image as some sort of after-the-fact superior editor, or to opine that they might have written a different story, might have written the same story but omitted the Excerpts, or might have written no story at all. Accordingly, to the extent that Foley is offering his journalistic opinion, it is immaterial, because Hogan may not rely on an expert to impose standards on the defendant that are not imposed by law. *See* Charles W. Ehrhardt, 1 FLA. PRAC., EVIDENCE § 703.1 (2014 ed.) (explaining that one of the dangers of permitting expert testimony on legal issues is "that the witness will apply a standard or definition which is different from that defined by the applicable law"). And to the extent he is offering expert testimony on a legal question that is properly decided by the Court, it is inadmissible and not properly considered on summary judgment. *Cnty. of Volusia v. Kemp*, 764 So. 2d 770, 773 (Fla. 5th DCA 2000) (the law does not allow "an expert . . . to render an opinion which applies a legal standard to a set of facts"); *see also*

Anderson, 499 F.3d at 1237-38 (declining to consider expert testimony that publication "was unnewsworthy" because that testimony addressed an "ultimate question of law").[12]

32. Hogan is also off base in contending that publications other than Gawker "understood that while 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 . . . is not a matter of public concern." Opp. at 6; *see also id.* at 38 (Court should reject defendants' argument that it "should defer to Gawker's judgment to publish what no other news outlet would publish"). It is simply incorrect that that every publication that reported about the sex tape controversy *except Gawker* refrained from publishing images from the tape depicting sex or nudity. Before Gawker published anything, *The Dirty* published multiple screen shots from a sex tape, another publication republished those images, and a third hyperlinked to them, facts Hogan agrees are "**Undisputed**." *See* SUMF Resp. ¶¶ 94-98. And after Gawker published excerpts from the tape, other publications, including Buzzfeed.com and Tampa Bay's ABC Action News, published portions of those excerpts.[13]

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[12] Hogan repeatedly relies on Foley's opinion that the Publication is "pornography" not news. Opp. at 19, 33, 34. As an initial matter, labeling the Publisher Defendants as pornographers simply ignores the overwhelming majority of what they publish. But, even if Foley were correct, the First Amendment fully protects pornography, and the public concern doctrine is not limited just to "news" in the traditional sense, as numerous cases protecting images of sex or nudity in clearly pornographic publications make plain. *See, e.g.*, *Lee*, 1997 WL 33384309; *Jones*, 1995 WL 106111 (both addressing images published in *Penthouse*); *see also Hustler v. Falwell*, 485 U.S. at 46 (image in *Hustler*). Thus, Foley's conclusions in this regard are contrary to settled law and are inadmissible on that basis as well.

[13] *See, e.g.*, https://www.youtube.com/watch?v=vFE9R45wuRE (ABC Action News); http://www.buzzfeed.com/jpmoore/the-greatest-hits-of-the-hulk-hogan-sex-tape#.dggwGPMKW (Buzzfeed.com). Indeed, Hogan misses the irony of arguing that the Excerpts were only published at gawker.com while at the same time arguing elsewhere in his papers that they were republished at numerous other sites (unconnected to Gawker), *see* Turkel Aff. Ex. 38, and that Gawker took them down while linking to another site where they remained available, *see id.* Ex. 37.

33. Moreover, even if Hogan's point were factually correct, that other publishers report about a topic differently is immaterial to whether the publication at issue involves a matter of public concern, as set forth above in Part I.A., explaining that courts are not in the business of substituting their editorial judgment for publishers. In *Michaels II*, for instance, the defendant *could* have reported about the Pamela Anderson Lee/Brett Michaels sex tape without broadcasting any footage from it, and other media outlets no doubt did. Still, the court concluded that "because the private matters broadcast bore a substantial nexus to a matter of public interest," the defendant was entitled to summary judgment on Ms. Lee's privacy claim. *Michaels II*, 1998 WL 882848, at *10. In *Bridges*, the newspaper defendant *could* have reported about the plaintiff's abduction without publishing a photograph of her wearing only a dish towel, but the court held that publishing the photograph, which "could be considered by some to be in bad taste," was nevertheless protected as "newsworthy." *Bridges*, 423 So. 2d at 427-28. And, in *Jones v. Turner*, *Penthouse* magazine *could* have reported about Paula Jones's lawsuit against President Clinton without publishing nude photographs of her, as literally *thousands* of other media outlets managed to do. Yet, the court still concluded "that the pictures in question have a relationship to the accompanying article, and that the article is a matter of public interest." *Jones*, 1995 WL 106111, at *21.[14]

[14] Hogan also contends that whether the specific footage was "necessary" is somehow a fact issue, including because (a) it was the "result of a deliberate editorial decisions," including not to "block, blur or pixelate the footage" and to describe it as "not safe for work," (b) some journalists (including Foley) would have chosen not to publish them, and (c) other news outlets reported the story without publishing "sexually explicit footage." Opp. at 3-8 (points 1, 3 & 4); 33-34 (points 1-5, 8-10). Leaving aside that most of these "facts" are not disputed and are therefore not triable (*e.g.*, the parties agree that the Excerpts were not in fact blurred or pixelated, and the Publication was in fact labeled "not safe for work"), the public concern analysis simply does not include an evaluation of necessity as a matter of law.

6. Other publications and extraneous statements are immaterial.

34. Finally, Hogan focuses on other stories published by Gawker, extraneous statements made by its employees, and statements by others. *See, e.g.*, Opp. at 5, 11-14, 33-34. This is simply a sideshow that distracts from the legal question properly before the Court about whether *this* story is newsworthy and therefore protected against liability. Florida law does not permit Hogan to "prove" that the Publisher Defendants committed an actionable invasion of privacy by pointing to other allegedly invasive publications to show that this publication was part of "longstanding course of conduct" of invading privacy, or that Denton has been "publicly disdainful of privacy rights." Opp. at 33-34 (including points 6,7 & 9).[15] *See* Fla. Stat. § 90.404(1)-(2) (evidence of other alleged "bad acts" is inadmissible to show propensity or character); *Thigpen v. UPS, Inc.*, 990 So. 2d 639, 647 (Fla. 4th DCA 2008) (testimony regarding prior instances in which defendant had unjustly terminated employees was not admissible in wrongful termination suit); *Bulkmatic Trans. Co. v. Taylor*, 860 So. 2d 436, 447 (Fla. 1st DCA 2003) (under Section 90.404, evidence of prior of alleged "bad acts" is not admissible to prove that a defendant acted similarly in this case). Accordingly, even if Hogan's description accurately reflected Gawker's publications, *see* note 12 *supra*, they are irrelevant to the summary judgment analysis. *See, e.g.*, *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244, 1249 (Fla. 1st DCA

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[15] Moreover, Hogan has simply misrepresented the facts of record. Contrary to what he asserts, Opp. at 12-13, 34; SUMF Resp. ¶ 158, the record does *not* establish that Gawker published a link to surreptitiously recorded footage of ESPN reporter Erin Andrews naked in her hotel room. Rather, as the portion of Daulerio's deposition transcript that Hogan cites makes clear, Gawker "didn't actually post a link to the video." Daulerio Dep. (Turkel Ex. 4) at 87:25 – 88:2. Similarly, Hogan quotes the late *New York Times* media reporter David Carr's criticism of Gawker's approach to a particular topic, Opp. at 13-14, but that same interview describes Carr as a "fan" of Gawker, quoting him at length describing what he "love[s] about Gawker," *see* Foley Aff. Ex. A at 7:58 – 8:42. And, Hogan claims that Gawker has threatened to publish additional portions of the full sex tape, Opp. at 21-22, but that is flat out wrong, as one of Gawker's then-editors testified. *See* Cook Dep. at 160:16 – 161:24 ("There is no interest on the part of anybody at Gawker that I'm aware of in publishing any more of the video than we already published").

2008) ("A trial court cannot consider inadmissible evidence in determining the disposition of a motion for summary judgment."); *Leaseco, Inc. v. Bartlett*, 257 So. 2d 629, 632 (Fla. 4th DCA 1972) ("On motion for summary judgment factual issues may not be created by reference to matters which at trial would be wholly inadmissible in evidence.").

35. The same is true of the related contention that the Publication was not newsworthy because supposedly Gawker "routinely" publishes "explicit sexual content . . . to generate . . . revenue and profits." Opp. at 33; *see also id.* at 22-24 (describing Gawker's alleged focus on monetizing content). Not only are Gawker's supposed general practices inadmissible to establish alleged wrongdoing here, but a publisher's alleged financial motivation does not enter into the public concern inquiry.[16] Indeed, in every single one of the cases the Publisher Defendants cited finding the publication of sex or nudity to be newsworthy, the defendants – which ranged from mainstream media companies like The Hearst Corporation and Tribune to the publishers of adult magazines like *Penthouse* and *Hustler* – were all publishing for a profit. That fact in no way precluded the courts from determining that the publications were newsworthy and protected. *See, e.g.*, *Lee*, 1997 WL 33384309, at *5 (publication of nude photos of celebrity was newsworthy even though "[t]here can be no doubt that Penthouse International believed that these photographs would attract buyers for its magazine"); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip

[16] Moreover, to the extent that Hogan is attempting to argue that Gawker's general profit motive, one shared by all publishers, translated into a profit motive with respect to this Publication, he is again misstating the actual record. *See, e.g.*, SUMF Resp. ¶ 125 ("**Undisputed**" that "[n]o advertising was displayed on the Publication"); Denton Dep. (Turkel Ex. 7) at 194:24 – 196:13 ("Q: Did you mean to convey that [this article and another] also scored financially for Gawker? A: No."). More generally, Hogan cites and attaches an article he claims has Denton saying that stories about "**sex**" will "'shower' Gawker 'with dollars' because they draw in unique viewers." Opp. at 14 (quoting Turkel Ex. 16). But the actual article he cites describes a 2010 memo by Denton praising popular stories involving things like "Gizmodo's first look [at] the new Microsoft tablet or io9's Avatar review." Turkel Ex. 16 at 1.

communications of the otherwise available constitutional protection, our cases from *New York Times* [*Co. v. Sullivan*, 376 U.S. 254 (1964),] to *Hustler Magazine* [*Inc. v. Falwell*, 485 U.S. 46 (1988),] would be little more than empty vessels.").

II. THE PUBLISHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON HOGAN'S TAG-ALONG CLAIMS FOR ADDITIONAL REASONS.

Even if the Court were to conclude that the public concern doctrine does not dispose of the entire case, the Court should at a minimum enter summary judgment with respect to his four tag-along causes of action for the additional reasons explained below and to streamline any trial in this action.

A. Common Law Misappropriation: The Undisputed Facts Make Clear That Hogan's Name or Likeness Was Not Used for a Commercial Purpose.

36. In their opening papers, the Publisher Defendants explained that, to establish misappropriation, Hogan is required to show that Gawker's use of his name and likeness was "commercial," a term of art that does not encompass any effort to make money, but is limited to the promotion of a product or service other than the publication itself. Mot. at 20-23. In his Opposition, Hogan concedes that, under the relevant legal standard as articulated by the Florida Supreme Court, the unauthorized use of a plaintiff's name and/or likeness is only actionable as a right of publicity violation if used in "the direct promotion of a product or service." Opp. at 49 (citing *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802 (Fla. 2005)). Hogan further concedes that in this case his name and likeness were *not* used to promote the sale of any product or service, and, in fact, that Gawker did not even display any advertising in connection with the Publication. *See* SUMF Resp. ¶¶ 125-126. That should end the matter. Hogan has no claim for misappropriation of his right of publicity.

37. Hogan makes two arguments in an attempt to avoid this inevitable conclusion, neither of which has merit. First, he contends, *with no supporting authority at all*, that the clear holding of *Tyne* does not apply because the Internet is somehow different. Specifically, Hogan contends that internet publications are in effect promotions that are used to generate traffic to the website, thus building the website's audience and (potentially) the amount it can charge its advertisers. Opp. at 49-50; *see also id.* at 23 ("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.").

38. Leaving aside that this is *not* an actual difference between internet publishers and publishers in more traditional media (all of whom use popular stories, including about high-profile figures, to build their audiences), the courts have expressly rejected the notion that the kind of use Hogan is describing counts as "commercial," as that term is defined for these purposes. For instance, in *Somerson v. World Wrestling Entertainment, Inc.*, 956 F. Supp. 2d 1360, 1370 (N.D. Ga. 2013), the court rejected a former professional wrestler's argument that the use of his name and likeness on a wrestling company's website was "commercial" because his name and likeness were being used "to market wrestling and attract people to [its] website." The court held that, even assuming *both* that the website was able to increase its traffic by taking advantage of the general interest in the plaintiff, *and* that it was ultimately able to monetize that traffic increase, that "would amount to, if anything, advertising that is *incidental* to the use of plaintiff's identity," and, accordingly, not a commercial use. *Id.* (emphasis added); *see also Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 316 (Cal. App. 2001) (rejecting argument that use of former baseball players' names and likenesses on official website for Major

League Baseball was commercial because website was used "to increase interest in baseball, with the belief that this would increase attendance at games").

39. Indeed, the law even permits a publisher, whether online or otherwise, that publishes a story about a celebrity to then use that celebrity's name and likeness *directly* to promote the publication and its other offerings, a use that goes well beyond the kind of indirect promotion through general "audience building" of which Hogan is accusing Gawker here. *See, e.g.*, *Fuentes*, 721 F. Supp. 2d at 1259 (no liability where there was no allegation that "name and likeness were used to promote a product or service *separate and apart* from the television show") (emphasis in original); *Page v. Something Weird Video*, 960 F. Supp. 1438, 1445 (C.D. Cal. 1996) (use of plaintiff's name and likeness not only to promote films in which plaintiff appeared, but also defendant's entire video catalogue, was not actionable); *Leddy v. Narragansett Television, L.P.*, 843 A.2d 481, 490 (R.I. 2004) (television news advertisement using excerpts from news story about plaintiff in effort "to attract viewers to [defendant's] future news broadcasts" was protected); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 12 (1st Dep't 1975) (republication of photograph of Joe Namath originally used in news story for purposes of promoting subscriptions to magazine was not actionable).

40. Nor is Hogan on any stronger ground with his second argument – that there is a jury question as to whether Gawker's *purpose* in publishing the Publication was to report and comment on a newsworthy matter or to reap profits. Opp. at 48-49. The analysis does not turn on whether the publisher's *motivation* was to report, or to profit, or both. Were the law otherwise, there would be a jury question in every case in which a right of publicity claim is brought against a for-profit publication. But, the law is clear that the mere fact that "one of the *purposes*" of a publisher may have been "to make money," does not render its use of plaintiff's

name or likeness actionable where that use was not otherwise "commercial" as defined by the law. *Loft*, 408 So. 2d at 623 (affirming dismissal of right of publicity action where court accepted that publisher was seeking to profit) (emphasis added); *see also Tyne*, 901 So. 2d at 810 (deciding right of publicity claim as a matter of law even though defendant Time Warner clearly distributed and advertised the film, *The Perfect Storm*, to make a profit). That law does not change simply because Gawker is an online publisher, looking to attract web traffic, rather than sell newspaper or magazine subscriptions, movie tickets, or physical copies of its publications. *Cf. Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("our cases provide no basis for qualifying the level of First Amendment" protection that applies to internet speech).

B. Intrusion: The Undisputed Facts Make Clear That The Publisher Defendants Did Not Commit an Actionable Intrusion.

41. It is undisputed that the Publisher Defendants played no role in the original recording of the sex tape, *see* SUMF Resp. ¶¶ 28-32, a point Hogan repeatedly affirms in his opposition to Mrs. Clem's motion for summary judgment, *see, e.g.*, Clem Opp. at 8 (arguing that the Publisher Defendants' summary judgment arguments are inapplicable to Mrs. Clem because Hogan "seeks to hold them liable for publishing and disseminating the [excerpts] they made from the Secret Recording, rather than recording it in the first instance . . . ."); *id.* at 2 (same).

42. Hogan's sole argument for holding the Publisher Defendants liable for intrusion, even in the absence of any actual intrusion on their part, is to assert that the tort encompasses "physically *or electronically* intruding into one's private quarters." Opp. at 48 (quoting *Zirena v. Capital One Bank (USA) NA*, 2012 WL 843489, at *2 (S.D. Fla. 2, 2012)) (emphasis in original). But the Publisher Defendants have never maintained otherwise, and, in fact, quoted that exact definition of the tort in their opening papers. Mot. at 24 (quoting *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 158 (Fla. 2003)). The point, however, is that the intrusion must involve an

actual intrusion into some physical "'place,'" *Ginsberg*, 863 So. 2d at 162, even if it is accomplished by means of some electronic device such as a telephoto lens or a "bug" to eavesdrop. *See, e.g.*, *Zirena*, 2012 WL 843489, at *2 (actionable intrusion committed via a telephone); *see also Bradley v. City of St. Cloud*, 2013 WL 3270403, at *5 (M.D. Fla. June 26, 2013) (intrusion claim requires intrusion "into [a] home or another private place"). The electronic *publication* of allegedly invasive material, which is what is at issue here, is simply not covered by the tort. *See* Mot. at 24 (citing numerous authorities explaining that intrusion upon seclusion is not a publication tort).

C. IIED: The Undisputed Evidence Confirms that Hogan Did Not Suffer "Severe" Emotional Distress, As Required.

43. Hogan again concedes that he is asserting only "garden variety" emotional distress and that he sought no medical or psychiatric treatment in connection with his alleged emotional injuries. Opp. at 46; SUMF Resp. ¶¶ 146-148. He also concedes that, to recover, he is required to demonstrate "**severe**" emotional distress. Opp. at 46. Despite this, he contends that he may pursue an IIED claim because his "claim . . . for garden variety emotional distress [is] for the kind of emotional distress that any reasonable person would suffer" in these circumstances and the jury is permitted to infer that a "reasonable person would suffer severe emotional distress if the Gawker Defendants had done to him or her what they did to Mr. Bollea." Opp. at 46.

44. Hogan cites no support for his position and, in fact, there is none. Nor does he address the numerous authorities cited in the Publisher Defendants' opening brief. Mot. at 25-26. Succeeding on an IIED claim requires *evidence* that the defendant's conduct actually "*caused* emotion[al] distress" that "was severe." *Winter Haven Hosp., Inc. v. Lilies*, 148 So. 3d 507, 515 (Fla. 2d DCA 2014) (emphasis added). That cannot be done simply by demonstrating

that defendant's conduct was of a type that *could* cause a reasonable person such distress. As the *Restatement* makes clear, the tort is established "only where the emotional distress *has in fact resulted*, and *where it is severe*. . . . Severe distress must be *proved*." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (emphasis added). Hogan's gambit, that he can avoid all discovery on his emotional state, allege garden variety emotional distress, overcome summary judgment, and have the jury infer that he *in fact* suffered *severe* emotional distress should be flatly rejected. Because he has conceded that he only suffered "garden variety emotional distress," which is by definition limited to "ordinary or commonplace emotional distress," *Chase v. Nova Se. Univ., Inc.*, 2012 WL 1936082, at *3 (S.D. Fla. May. 29, 2012), he cannot make the required showing, and summary judgment should be entered on this claim.[17]

D. Florida Wiretap Act: Hogan's "Wiretap Publication" Claim Also Fails.

45. Hogan's claim under the Wiretap Act fails because, as the Court of Appeal explained in its prior decision, where, as here, "a publisher lawfully obtains the information in question, the speech is protected by the First Amendment provided it is a matter of public concern, even if the source recorded it unlawfully." *Bollea*, 129 So. 3d at 1201 (citing *Bartnicki*, 532 U.S. at 535). Even apart from the application of *Bartnicki*, Hogan is incorrect that the Publisher Defendants' good-faith defense against his Wiretap Act claim presents a question that must be resolved by a jury. The only case he cites to support his position, *Wright v. Florida*, 495

[17] Moreover, even if his brief testimony on this subject were credited, it is insufficient as a matter of law to establish severe emotional distress. *See* Mot. at 26 (citing numerous cases on this point that are nowhere addressed by Hogan); *see also, e.g.*, *Roddy v. City of Villa Rica, Ga.*, 536 F. App'x 995, 1003 (11th Cir. 2013) (affirming summary judgment on IIED claim because plaintiff's testimony that he "got into depression mode that you wouldn't never believe" and "had trouble sleeping" was insufficient to establish that his emotional distress was "severe"); *EEOC v. Univ. of Phoenix, Inc.*, 505 F. Supp. 2d 1045, 1062-63 (D.N.M. 2007) (granting summary judgment on IIED claim where only evidence of distress was plaintiff's testimony that she felt "like vomiting," had "between five and ten nightmares," lost "sleep," sought "medical assistance," and was "too tired and emotionally distracted" to care for her children).

F.2d 1086 (5th Cir. 1974) (Opp. at 47), involved the application of the good-faith defense at the pleadings stage on a motion to dismiss, and in no way precludes resolving the issue on summary judgment. *Id.* at 1090 ("the defense is not determined conclusively by the pleadings"). As the Publisher Defendants' opening papers make clear, the good-faith defense issue can be, and properly is, resolved at summary judgment. *See* Mot. at 28 (citing *Brillinger v. City of Lake Worth*, 978 So. 2d 265 (Fla. 4th DCA 2008)).

46. In this case, the summary judgment record contains literally *zero* evidence that the Publisher Defendants acted with anything but a good-faith belief that their conduct was lawful, and undisputed evidence that they had such a belief (a belief ultimately shared by a number of judges considering this case). It is an elementary rule of civil procedure that a party opposing summary judgment "must come forward with counterevidence sufficient to reveal a genuine issue" of material fact where, as here, the moving party has met its initial burden of demonstrating the absence of such an issue. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). "It is not enough for the opposing partly merely to assert that an issue does exist." *Id.* Hogan has simply not even come close to meeting his burden here. *See, e.g.*, *Carbonell v. BellSouth Telecomms., Inc.*, 675 So. 2d 705, 706 (Fla. 3d DCA 1996) (granting summary judgment based solely on unrebutted testimony of witness for moving party); *Fleming v. Peoples First Fin. Sav. & Loan Assoc.*, 667 So. 2d 273, 273-74 (Fla. 1st DCA 1995) (granting summary judgment on issue involving state of mind where party opposing summary judgment failed to submit admissible evidence that would permit a jury to rule in its favor).

CONCLUSION

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

Dated: May 22, 2015

Respectfully submitted,

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Addendum to the Publisher Defendants' Reply in Support of their Motion for Summary Judgment

Exhibit 1

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 2D13-1951

GAWKER MEDIA, LLC

Defendant/Appellant

v.

TERRY GENE BOLLEA,
Professionally known as HULK HOGAN

Plaintiff/Appellee

ON APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA
(Case No. 12012447-CI-011)

ANSWER BRIEF OF PLAINTIFF/APPELLEE TERRY GENE BOLLEA

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B. Gawker Media's First Amendment Arguments Have No Merit

The Sex Tape and the Sex Narrative are unprotected by the First Amendment. Where a public disclosure of private facts is established, the First Amendment precludes civil remedies **only** if the invasive material is of legitimate public concern. The contents of a clandestinely recorded sex tape depicting full frontal nudity and private sexual activity, in the bedroom of a private home, do not qualify as matters of legitimate public concern. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (declining to extend constitutional protection for disclosure of the contents of illegal recordings to "domestic gossip or other areas of purely private 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); *id.* at 541 (Rehnquist, C.J., dissenting) (taking position that disseminating the contents of illegal recordings is not protected by the First Amendment); *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (holding 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,*

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holding and is unpersuasive. *Bridal Expo, Inc. v. Van Florestein*, No. 4:08-cv-03777, 2009 WL 255862 (S.D. Tex. Feb. 3, 2009), is an unpublished trial court case that is unpersuasive in light of the Eleventh Circuit's holding in *David Vincent.*

Inc., 955 P.2d 469, 483–84 (Cal. 1998) (emphasis in original).

A number of authorities hold that the publication of private nude photographs and private sex tapes can constitute actionable invasions of privacy. In *Toffoloni v. LFP Publ'g Group, LLC*, 572 F.3d 1201, 1212 (11th Cir. 2009), the Eleventh Circuit rejected a First Amendment claim because, if accepted, "LFP would be free to publish any nude photographs of almost anyone without permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy,'" *i.e.*, it rejected the precise argument made by Gawker Media in the case at bar.

Moreover, in *Michaels v. Internet Ent. Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (hereinafter "*Michaels I*"), the District Court held that the online publication on the Internet of a sex tape of actress Pamela Anderson and rock star Brett Michaels 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".[7]

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[7] In *Michaels I*, the court enjoined the broadcast of a celebrity sex tape of Pamela Anderson and Brett Michaels, and held:

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

Additionally, the Sex Narrative is unprotected speech as well. The Sex Narrative simply records in graphic detail the contents of the clandestine recording of Plaintiff's private sexual activities which the public was not and is not entitled to witness. A holding that the Sex Narrative is constitutionally protected would be the equivalent of saying that, while the press could not broadcast the tape of an illegally recorded conversation, it could quote every word stated in it and describe every other detail of the audio recording. Plaintiff obviously has a strong interest in preventing the dissemination of the specific images contained in the Sex Tape. Yet Plaintiff has an equally strong interest in maintaining his privacy with respect to the contents of the Sex Narrative, including the size and shape of his penis, the manner in which he communicates during a sexual climax, and the positions and details of his private sexual activity.

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

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> The Court notes that the private matter at issue here is not the fact that Lee and Michaels were romantically involved. Because they sought fame, Lee and Michaels must tolerate some public exposure of the fact of their involvement. . . . The fact recorded on the Tape, however, is not that Lee and Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.

Michaels I, 5 F. Supp. 2d at 840.

Act (Fla. Stat.§ 934.03). Gawker Media contends that *Bartnicki* immunizes its illegal conduct. This contention badly misconstrues *Bartnicki's* holding. The rule announced in *Bartnicki*, which privileged the publication of certain illegally recorded materials, was expressly limited to news of public importance. All of the justices stated, more or less specifically, that **publication of illegally recorded celebrity sex tapes is not protected under the *Bartnicki* rule**. *Bartnicki,* 532 U.S. at 533, 540–41. Other than its mis-citation to *Bartnicki*, Gawker Media makes no substantive argument that it did not violate the Wiretap Act.[8]

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[8] Gawker Media cannot assert a good faith defense under the Wiretap Act based on *Bartnicki*, because *Bartnicki* is clear that its protections do not extend to the recording of private sexual activity. *Bartnicki,* 532 U.S. at 540.

Gawker Media cites a number of other cases that, consistent with *Bartnicki*, hold that illegally obtained information **regarding matters of important public interest** can be published. *See Gawker Media Initial Bf.* at 34. None of them come close to holding that publication of clandestine, illegal "Peeping Tom"-style recordings of private sexual activity are protected by the First Amendment (a position that, as noted above, is **expressly rejected by *Bartnicki***). *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (publication of identity of rape victim); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (same); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (publication of identity of juvenile offender).

The limitation recognized in *Bartnicki* that declines to extend protection to illegal recordings of private sexual activity is extremely important given the well-established market for celebrity sex videos. Large Internet media corporations are willing to pay significant sums of money for footage of celebrities in the nude or having sex. **If Gawker Media's position were accepted as the law, this would create a huge incentive for people to make illegal recordings of celebrities in the nude or engaging in sexual activity in locations such as hotel rooms and homes where they have reasonable expectations of privacy.** The invasion of privacy that ESPN reporter Erin Andrews endured (where footage of her in the nude was clandestinely filmed through a hotel room peephole) would become commonplace. Those who make such recordings could then "fence" them to

VII. CONCLUSION

For the foregoing reasons, the order granting a temporary injunction should be affirmed.

Respectfully submitted,

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Addendum to the Publisher Defendants' Reply in Support of their Motion for Summary Judgment

Exhibit 2

IN THE SUPREME COURT OF THE STATE OF UTAH

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Conilyn Judge,

Respondent,

v. Case No. 20140654-SC

Saltz Plastic Surgery, P.C.; and
Renato Saltz, M.D.;

Petitioners.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on July 23, 2014.

The Petition for Writ of Certiorari is granted as to the following issues:

1. Whether this Court should adopt the Restatement (Second) of Torts § 652D(b), which requires that "the matter publicized . . . not [be] of legitimate concern to the public," and whether the court of appeals erred in defining and applying that provision to conclude that disputed issues of fact precluded summary judgment on Respondent's claim of publication of private facts.

2. Whether the court of appeals erred in reversing summary judgment dismissing a claim for intrusion on seclusion by holding there were disputed issues of material fact concerning the scope and meaning of a consent form signed by Respondent.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that

permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

11/24/15
Date

Ronald E. Nehring
Associate Chief Justice