

EXHIBIT 35-C

to the

**CONFIDENTIAL DECLARATION
OF GREGG D. THOMAS
IN SUPPORT OF PLAINTIFFS' OBJECTIONS**

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA; et al.,

Defendants.

**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
PUBLISHER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 1.510 of Florida Rules of Civil Procedure, defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio hereby submit, through the undersigned attorneys, their statement of undisputed material facts in support of their concurrently-filed motion for summary judgment:

THE PARTIES

A. Plaintiff

1. Plaintiff Terry Gene Bollea, better known as "Hulk Hogan" ("Hogan"), is a "professional champion wrestler, motion picture actor, and television personality." Am. Compl. (Ex. 1) ¶ 25; *see also id.* ¶ 77 (same).¹ He is a "twelve-time world wrestling champion," *id.*, and "was inducted in the WWF Hall of Fame in 2005," Aff. of T. Bollea, dated Apr. 18, 2013 ("Hogan Aff.") (Ex. 2) at ¶ 2. He has appeared in films such as *Rocky III*, *Suburban Commando*, and *Mr. Nanny*. *Id.* ¶ 3. He also "starred in the reality television series *Hogan Knows Best*," *id.*,

¹ Exhibits are attached to the Affidavit of Rachel E. Fugate, Esq.

as well as in other television shows such as *Thunder in Paradise* and *American Gladiators*, Hogan Dep. (Ex. 3) at 131:16-22. *See also* Ex. 4 at ¶ 41 (complaint filed by Hogan in different action, asserting that he “starred with his family in a VH1 reality show titled Hogan Knows Best,” which was set in their family home and purported to give the public a glimpse into the lives of Hogan and his then-wife Linda as they struggled “to fulfill their dreams for their children while still maintaining their sense of closeness”).

2. According to Hogan, since the mid-1980s, he has been a famous “celebrity,” which he defines as “someone who’s been around long enough or made enough of an impact doing radio or TV” such that “they are recognizable by name [or] look” and are “very, very well established” in the media. Hogan Dep. (Ex. 3) at 58:13 – 59: 21; *see also id.* (noting that he “became a household word”); B. Clem Dep. (Ex. 5) at 53:25 – 54:1 (describing Hogan as “one of the biggest celebrities in the world”).

3. Hogan has participated in numerous “commercial endorsement opportunities, including for a blender known as the Hulk Hogan Thunder Mixer, an indoor grill known as The Hulk Hogan Ultimate Grill, and an energy drink known as Hogan Energy.” Hogan Aff. ¶ 4 (Ex. 2). Hogan has endorsed Right Guard deodorant, Hogan Dep. (Ex. 3) at 148:22 – 149:1, as well a “line of microwavable hamburgers, cheeseburgers and chicken sandwiches,” known as “Hulkster Burgers.” Hogan Aff. (Ex. 2) ¶ 4. He also launched “a website called Hogan Nutrition, which features many nutritional and dietary products.” *Id.*

4. Hogan has a “sports agent,” a second agent for “[p]rimarily film and TV stuff,” and a publicist. Hogan Dep. (Ex. 3) at 69:5-10, 70:13-23; Traub Dep. (Ex. 6) at 31:20 – 32:20. Working with partners, he has a “Hulk Hogan” website, a website hosting service called Hostamania, a shop selling memorabilia, and a “Hogan’s Beach” restaurant. Hogan Dep. (Ex. 3)

at 50:16-20, 163:1 – 164:4, 177:22 – 178:3. *See also* Confidential Supplemental Statement of Undisputed Material Facts in Support of Publisher Defendants’ Motion for Summary Judgment (“Conf. SUMF”) ¶ 4.

5. According to Hogan, he has attempted to create an “impeccable” public image as “the all America hero, you know, the training, prayers and vitamins.” Hogan Dep. (Ex. 3) at 28:16-24; *see also id.* at 36:19 – 38:5 (testifying that “the character Hulk Hogan is an all American character,” and “an all American hero,” with the “all American California tan”) *id.* at 45:15-19 (testifying that he believes he has “a reputation for honesty” and “[f]or being a straight shooter”). *See also* Conf. SUMF ¶ 5.

B. Former Defendant Bubba the Love Sponge Clem

6. Former defendant Bubba the Love Sponge Clem is a radio “shock jock.” Hogan Dep. (Ex. 3) at 205:24 – 206:1; H. Clem Dep. (Ex. 7) at 40:12-20; B. Clem Dep. (Ex. 5) at 99:23. Previously known as Todd Clem, his “legal name” is now “Bubba the Love Sponge Clem,” which is based on a “big contraceptive.” B. Clem Dep. (Ex. 5) at 11:10-13, 236:10-17, 237:14 – 238:14.

7. He is “very controversial,” *id.* at 102:2-3, and has often “courted controversy,” H. Clem Dep. (Ex. 7) at 41:5-9; *see also id.* at 42:5-11 (Mr. Clem’s former wife describing him as “saying that there is no such thing as bad publicity, as long as they spell your name right”); Conf. SUMF ¶ 7. Bubba Clem frequently talked about sex on his show, including with his guests, who include porn stars and strippers – for example, Stormy Daniels, a “triple X star.” B. Clem Dep. (Ex. 5) at 148:4 – 151:7. He has also had “people perform sex acts on [his] radio show” when it was on satellite radio and “uncensored.” *Id.* at 153:16 – 154:23.

8. In that regard, from 2006 to 2008, Clem broadcast his program on Howard Stern's channel on Sirius, and then in 2008 he "started doing double duty where [he] did afternoons for Howard [Stern] and mornings at WHPT locally, syndicated in several different other places." B. Clem Dep. (Ex. 5) at 48:5-11; *see also id.* at 93:17 – 95:25 (same and also describing Internet broadcasts for 2-3 years). According to Clem, his show was ranked first in his target demographic of men aged 25 to 54. *Id.* at 97:19 – 98:18; *see also id.* at 381:2-3 (B. Clem: "I've been number one for nine years").

9. One of Bubba Clem's former employees, Richard Peirce, whose on-show nickname was "Big Dick," described the show as "insane, frat house, just fun." Peirce Dep. (Ex. 8) at 19:1-5; *see also id.* at 19:19 – 20:1 ("We were definitely a dirty, juvenile show" that was "controversial" in "[e]very way. I don't think there was a way we weren't."); *id.* at 20:18 – 22:13 (describing sexual nature of show, including having strippers and porn stars as guests and having people "call in and have sex on the air," adding "We were on satellite for a reason."); *id.* at 91:1-21 (describing that porn star named "Akira" was a regular guest who was "naked all the time" and that Bubba Clem aired excerpts of a recording of her having sex with co-host Matt Loyd).

10. David Rice, another of Bubba Clem's employees, testified that "sexual topics" made up a "pretty high percentage of the content" of his radio show, and that, when guests would appear on the show, Bubba Clem would steer the conversation to sexual topics when the guest would allow it. Rice Dep. (Ex. 9) at 13:21 – 15:8.

11. Bubba Clem also has a website called Bubba Raw, which posts videos either created for that purpose or taken from events occurring in the studio during broadcasts. *See, e.g.*, B. Clem Dep. (Ex. 5) at 117:7-19 (describing video, "instead of 'Rock Me Amadeus,'" they "did

‘F--k me . . . General Petraeus,’” in which they “Photoshopped General Petraeus’ head on a bunch of male strippers”). On that companion video site, visitors could see “graphic things that were filmed,” such as “nudity” or having one of their “guys have a sex act with a rubber vagina.” Peirce Dep. (Ex. 8) at 24:1-15.

12. Bubba Clem’s studios had widespread electronic surveillance, including in the green room. *Id.* at 25:22 – 27:17 (“we secretly mic’d up the green room so they wouldn’t know they were being listened to” and “[w]e would use that for bits.”); B. Clem Dep. (Ex. 5) at 190:7 – 191:14 (describing listening in on guests in the green room), 193:21-24 (describing that some guests were not told there was a camera in the green room).

13. Until shortly before this lawsuit began, Bubba Clem was Hogan’s best friend. H. Clem Dep. (Ex. 7) at 9:23 – 10:1; B. Clem Dep. (Ex. 5) at 54:18-24. Hogan was the best man at Bubba Clem’s wedding. B. Clem Dep. (Ex. 5) at 54:18-24. *See also* Conf. SUMF ¶ 13.

14. For many years, Hogan was a “regular guest on the Bubba the Love Sponge’s radio show.” Ex. 4 at ¶ 46; Hogan Dep. (Ex. 3) at 206:4-6. Because the Bubba the Love Sponge Show had a national radio audience, Hogan used it as a vehicle for keeping his name in the public eye. *Id.* at 209:8-17.

15. Bubba Clem was named as a defendant in this case when the Complaint was filed on October 15, 2012. *See* Complaint (filed Oct. 15, 2012) (Ex. 10). That Complaint alleged that Bubba Clem was responsible for the creation of the sex tape at the center of this litigation. *Id.* at ¶ 1; Part I *infra*. On October 29, 2012, exactly two weeks after the lawsuit was filed, Hogan’s publicist issued a press release announcing that Hogan had settled his claims against Bubba Clem. Traub Dep. (Ex. 6) at 149:2 – 150:16; *see also* Conf. SUMF ¶ 15. When Hogan later

amended his complaint to include claims against the Publisher Defendants, Bubba Clem was no longer listed as a defendant. *See* Am. Compl. (Ex. 1).

C. Defendant Heather Clem

16. Defendant Heather Clem was married to Bubba the Love Sponge Clem from January 2007 to February 2012. H. Clem Dep. (Ex. 7) at 9:6-13; B. Clem. Dep. (Ex. 5) at 44:21-25. Since her divorce, she is known as Heather Cole. To avoid confusion, and with no disrespect intended to Ms. Cole, she is referred to herein as “Heather Clem,” the name used to identify her in the caption of this case.

17. Heather Clem was an occasional guest on Bubba Clem’s radio show. Rice Dep. (Ex. 9) at 20:17-18. *See also* Conf. SUMF ¶ 17.

18. One of Bubba Clem’s former employees testified that Heather Clem participated in photo shoots for Bubba Clem’s website in which she was “practically nude.” Peirce Dep. (Ex. 8) at 85:4-24 (if she was not “completely nude . . . , there might have been her hand – they were suggestive photos”). That employee also testified that Bubba Clem would show others “topless photos of [Heather Clem] on his phone,” that he “shot a wet T-shirt video [of] her in her shower” so “we had all seen her naked,” and that in the time he worked for Bubba Clem, he saw two or three such videos of Heather Clem. *Id.* at 83:15-25. According to that employee, Bubba “did it like a bragging thing. She’s good looking for him, especially.” *Id.* at 84:13-25.

19. As described in greater detail below, with Bubba Clem’s blessing, Heather Clem had sexual relations with Hogan. *See* Part I *infra*.

D. The Publisher Defendants

20. Defendant Gawker Media, LLC (“Gawker”) is a publisher of eight popular websites on a range of topics. In addition to gawker.com, which is at issue in this lawsuit and

focuses on news and entertainment, Gawker publishes www.gizmodo.com (focusing on technology), www.deadspin.com (focusing on sports), www.jezebel.com (focusing on women's interests), www.lifehacker.com (focusing on general life tips and tricks), www.io9.com (focusing on science fiction, fantasy and futurism), www.kotaku.com (focusing on video games), and www.jalopnik.com (focusing on cars and the auto industry).

21. Defendant Nick Denton is the Chief Executive Officer of defendant Gawker. Am. Compl. (Ex. 1) ¶ 21.

22. Defendant A.J. Daulerio served as the editor of gawker.com from November 2011 to January 2013, following two earlier stints as a writer and then editor for one of Gawker's other websites (deadspin.com). Daulerio Dep. (Ex. 11) at 22:5 – 25:9. He is the author of the article at issue in this action. *See, e.g.*, Ex. 12 (article at issue identifying Daulerio as author).

23. Gawker, Denton and Daulerio are collectively referred to herein as the “Publisher Defendants.”

I. UNDISPUTED FACT NO. 1: Hogan and Heather Clem engaged in sexual relations while each married to someone else (the “Sexual Affair”).

24. Hogan concedes that he engaged in “sexual relations with defendant Heather Clem,” in Clem's bedroom. Am. Compl. (Ex. 1) ¶ 26. In public statements addressing the sex-tape controversy, Hogan stated that he had sexual relations with Mrs. Clem at least “twice.” Ex. 13 (*Howard Stern Show*, Oct. 9, 2012) at 21:26 – 21:55. *See also* Conf. SUMF ¶ 24.

25. Hogan made various public statements following Gawker's Publication, in which he stated that he had “heard stories” that the Clems “partied,” and that he was aware that the Clems “had kind of, like, an alternative lifestyle,” and were “swingers.” Ex. 14 (*Sway in the*

Morning, Oct. 10, 2012) at 5:35 – 6:15; Ex. 15 (*HuffPost Live*, Oct. 9, 2012) at 11:14-11:28. *See also* Conf. SUMF ¶ 25.

II. UNDISPUTED FACT NO. 2: At the time of the Sexual Affair, Hogan was married to Linda Hogan, and Heather Clem was married to Bubba Clem.

26. Hogan was married to Linda Hogan for 23 years. Hogan Dep. (Ex. 3) at 109:24 – 110:3. Linda filed for divorce in November 2007. *Id.* at 110:4-9. *See also* Conf. SUMF ¶ 26.

27. Heather Clem and Bubba Clem were married in January 2007. H. Clem Dep. (Ex. 7) at 9:6-7; B. Clem. Dep. (Ex. 5) at 44:21-25. A number of celebrities, including Howard Stern and Hulk Hogan, attended their wedding; it was covered by the press; and it received “a lot of publicity.” B. Clem Dep. (Ex. 5) at 135:1-5, 162:21 – 163:1; H. Clem Dep. (Ex. 7) at 38:22 – 40:6. Heather and Bubba Clem were ultimately divorced in February 2012. *Id.* at 9:8-13.

III. UNDISPUTED FACT NO. 3: The Sexual Affair was recorded by Bubba Clem, and the Publisher Defendants played no role in the recording.

28. The Video Recording of the Sexual Affair was made by Bubba Clem. Compl. ¶ 1, 12. *See also* Conf. SUMF ¶ 28.

29. At his deposition, Bubba Clem described his home video surveillance system, including the camera installed in the bedroom. B. Clem Dep. (Ex. 5) at 194:11 – 195:3. *See also* Conf. SUMF ¶ 29.

30. Peirce, Bubba Clem’s former employee, testified that he “knew [Bubba Clem] had surveillance cameras in his house similar to what we had at the studio” because “[h]e would talk about that all the time, nanny cams and stuff like that.” Peirce Dep. (Ex. 8) at 72:4-21.

31. The Publisher Defendants played no part in recording the Sexual Affair. Ex. 16 (Gawker Media, LLC’s Response to Interrogatory No. 5) (“Gawker did not make the Video and has no personal knowledge about its creation.”).

32. The Publisher Defendants did not know about any the Video Recording until more than five years later, in late 2012. *Id.*; *see also* Daulerio Dep. (Ex. 11) at 112:14-24.

IV. UNDISPUTED FACT NO. 4: Prior to any conduct by the Publisher Defendants, there was widespread public discussion, including by Hogan himself, of intimate details of Hogan’s personal life, including specifically his romantic and sexual affairs.

A. Widespread Public Attention Focused on Hogan’s Personal Life Generally, Including By Hogan Himself

33. In 2002, Hogan published his first autobiography, *Hollywood Hulk Hogan*, in which he chronicled his career to that point. Ex. 17 (excerpts from *Hollywood Hulk Hogan*).

34. In 2009, Hogan published his second autobiography, *My Life Outside the Ring*, which he described as his opportunity finally to “open up about everything in his life.” Ex. 18 (excerpts from *My Life Outside the Ring*) at 8. The book chronicled the various personal controversies that had consumed Hogan’s life in recent years and how those controversies played out in the press. *See, e.g., id.* at 1-2, 185-88, 252-54, 276-78, 284-87 (describing, *inter alia*, an alleged suicide attempt, an affair he had, a drawn-out dispute with his ex-wife, his son’s accident and prison sentence, and the controversy over attempts to monetize his son’s subsequent release from prison). Hogan’s second autobiography also specifically discusses his romantic and sexual life, and that aspect of his book is described in the next section.

35. From 2005 to 2007, Hogan and his entire family participated in a reality show, *Hogan Knows Best*, which centered on their domestic lives. Ex. 4 at ¶ 41; Hogan Dep. (Ex. 3) at 161:17 – 162:6. At the time the show started production, his daughter Brooke was 16 and his son Nick was 14. Hogan Dep. (Ex. 3) at 161:17 – 162:6. According to Hogan, the “premise of the show was Hulk Hogan and his celebrity family pretty much doing a lightly-scripted, fun, over-the-top show, an entertainment show.” *Id.* at 135:6-10. In *My Life Outside The Ring*, Hogan stated that he told his family that agreeing to do the show would mean “no more privacy,” further explaining that he had given “the producers the keys to the house, so they could come in super early in the morning and shoot us in bed while we were still sleeping. I didn’t care if my butt was hanging out or if I had drool on my pillow. That was part of the appeal of the show – to let people into the Hogans’s ‘real life.’” Ex. 18 at 175-77.

36. *Hogan Knows Best*, like his book *My Life Outside the Ring*, purported to provide an inside glimpse into Hogan’s personal life, and, as such routinely put seemingly personal details of Hogan and his family on display. *See* Ex. 19 (*Hogan Knows Best*, Season 2, Ep. 1) at 14:36 – 19:00 (discussing use of birth control); Ex. 20 (*Hogan Knows Best*, Season 4, Ep. 1) at 3:43 – 6:05 (showing counseling session where Hogan and his wife discussed sexual problems they were having in their marriage and, in particular, that his sex drive outstripped hers).

37. In addition to agents and managers, Hogan has employed a New York public relations consultant, Elizabeth Rosenthal Traub (“Traub”), for at least a decade. Traub Dep. (Ex. 6) at 31:20 – 32:20. Traub and her public relations agency also provided public relations services in connection with the Video Recordings and this Lawsuit. *Id.* at 85:22 – 86:5.

38. According to Traub, Hogan’s personal life, including his romantic and sexual life, has been the subject of significant media attention, due to his status as a celebrity who has

been a “part of the national conscience” for over thirty years. *Id.* at 34:19 – 35:21. Traub confirmed that Hogan is widely known by the public not only for his wrestling exploits, but also for his reality show and the “personal drama” that has pervaded his life and defined the later part of his career. *Id.* at 35:16-21; *see also id.* at 43:16 – 45:12 (agreeing that Hogan’s “personal” and “family” life are covered by the press, including “the tabloids”).

39. As Ms. Traub acknowledged, the press has routinely reported on Hogan’s personal and family life. This includes his divorce from his long-time wife and reality television co-star, Linda Hogan; the imprisonment of his son, Nick Bollea, in connection with an accident that left a family friend permanently disabled; the release of a tape of jailhouse conversations with his son in which the two are heard discussing plans to turn Nick’s release from prison into another reality television show; and revelations of an alleged affair with Christiane Plante, a close friend of his daughter, Brooke. *See, e.g.*, Ex. 21 (April 2009 *Rolling Stone* article entitled “Hulk at Twilight,” describing various scandals that had pervaded Hogan’s life since the height of his fame as a wrestler in the 1980s and 90s, quoting Hogan as saying, about his ex-wife’s dalliance with a much younger man during the divorce, “I could have turned everything into a crime scene, like O.J. Simpson cutting everybody’s throat,” a statement that itself generated substantial additional media coverage); Ex. 22 (*New York Times* review of Hogan’s book, *My Life Outside the Ring*, noting its confessional subject matter); Ex. 23 (March 7, 2012 *The New York Post* article, published seven months before the Publication at issue in this action, placing sex-tape controversy in context of other personal scandals involving Hogan that have received substantial public attention).

B. Widespread Public Attention Focused on Hogan’s Romantic and Sex Life, Including by Hogan Himself.

40. In addition to the attention Hogan’s personal life has consistently received in general, Hogan’s sexual and romantic life – including his marital fidelity – also has been the subject of widespread public attention, including, with great frequency, by Hogan himself.

41. For example, in *My Life Outside the Ring*, Hogan described an extramarital affair he had in 2007 with Christiane Plante, a close friend of his daughter Brooke, who had been assigned by Brooke’s record company to assist her. Ex. 18 at 186-88. According to Hogan’s book: “Christiane was so great with Brooke. She did everything she could to look after her, and I loved seeing someone take care of my daughter that way. She was just so positive and caring. . . . [s]he and Brooke became really close. Almost like best friends in a way.” *Id.* at 186.

42. Hogan described his affair with Ms. Plante in his book as follows:

Next thing I know, the two of us started kissing. Not to sound perverted or anything, but it was fantastic. Here I am in my fifties now, and this was a really attractive thirty-four-year-old woman, with dark hair and a curvaceous body. . . . It was such an emotional and physical release. We didn’t have sex that night, but it opened the door. Over the course of the next two months we did have sex, maybe five different times. That was it. Linda had no idea. For a while it had that sort of a naughty appeal, like a kid sneaking some chocolate he’s not supposed to have.

Id. at 187-88.

43. The affair became public when the *National Enquirer* published a letter Plante wrote to Brooke, admitting that the affair had happened and apologizing. Ex. 24 (*National Enquirer* article); see also Ex. 18 at 253 (portion of *My Life Outside the Ring* describing same).

44. Hogan acknowledged in his book that his “affair became national news. I don’t think there’s a blog or entertainment show in America that didn’t run with the story of Hulk Hogan cheating on his wife. I was humiliated. I was angry. I didn’t know what to do. There

was no one to sue – the story was true. I couldn’t even figure out who to be angry with, except for myself for letting it happen in the first place.” Ex. 18 at 253. In *My Life Outside the Ring*, Hogan also wrote: “Almost from the outset of our marriage Linda was sure I was cheating with some girl or another. It never made any sense to me. *I’m just not the cheating kind.*” *Id.* at 159 (emphasis added). In that book, Hogan also declared, about his affair with Ms. Plante, “Like I said, I had never done anything like this in twenty-two years of marriage.” *Id.* at 188.

45. As Hogan noted in his book, the news coverage of the Plante affair was extensive. *See, e.g.*, Ex. 25 (article published on the *Perez Hilton* website on March 8, 2008 entitled “Hulk’s Other Woman SPEAKS!” which noted that Plante confessed to reporter for the *National Enquirer* after being confronted with concrete evidence of affair with Hogan); Ex. 26 (March 10, 2008 *National Enquirer* article entitled “Trouble on the Horizon,” which noted that “[w]hile Hulk grappled with his troubled marriage during last season’s ‘Hogan Knows Best’, ... he was carrying on a shocking affair with [Plante,] the former assistant and friend of daughter Brooke”); Ex. 27 (March 17, 2008 *National Enquirer* article entitled “Hulk Hogan Reeling After More Cheating Allegations,” which noted that after revelation of Plante affair, “Hulk Hogan is fighting more claims that he cheated on his wife,” including an affair with Elizabeth Hulette, the one-time wife of Hogan’s wrestling rival Randy “Macho Man” Savage); Ex. 28 (November 6, 2008 *E-Online* article entitled “Linda Hogan: Hulk’s Affair Killed Our Marriage” which quoted Linda’s publicist describing “the real reason Linda filed for divorce, two words: HULK’S CHEATING!”).

46. This was not the first time that sexual relations outside Hogan’s marriage had been the subject of widespread media coverage. In 1996, Hogan received substantial public attention in connection with a 1995 incident in which a Minnesota woman named Kate Kennedy

claimed that he sexually assaulted her by forcing her to perform oral sex on him. *See* Ex. 29 (affidavit from Kate Kennedy). Hogan sued Kennedy in the United States District Court for the District of Minnesota, accusing her and her counsel of extortion, and she countersued for sexual battery. Ex. 30 (Answer and Counterclaim filed by Kennedy) at ¶ 6.

47. According to Ms. Kennedy's court filings:

On September 2, 1995, I was sexually assaulted by Terry Gene Bollea, aka 'Hulk Hogan.' On that date at the Bloomington Marriott Hotel, Terry Gene Bollea forcibly placed his penis in my mouth. He did so in spite of my clear verbal demands that he stop the assault. The assault occurred under circumstances where he could not possibly have believed that based upon my conduct, I was consenting to his actions. Upon information and belief, Terry Gene Bollea stands 6'7" tall and weighs 275 lbs.

See Ex. 29 (Kate Kennedy affidavit) at ¶ 2; *see also* Ex. 30 (Answer and Counterclaim).

48. In his court filings at the time, Hogan denied that he had sexually assaulted Ms. Kennedy. Ex. 31 ¶ 2 ("I d[id] not sexually assault defendant Kate Kennedy on September 2, 1995 or at any other time."); *see also* Ex. 32 (Hogan's federal court complaint). *See also* Conf. SUMF ¶ 48.

49. The subsequent litigation over Ms. Kennedy's accusations and Hogan's denials received nationwide media coverage. *See, e.g.*, Exs. 33-37 (articles in AP Online, *St. Paul Pioneer Press*, *South Florida Sun-Sentinel*, *Chicago Tribune*, and *USA Today* addressing allegations and lawsuit).

50. Hogan himself discussed the incident in his second autobiography saying Kennedy "showed up" at his hotel room and that, "[h]er lawsuit against me was eventually settled, and part of that settlement involved confidentiality agreements." Ex. 18 at 158.

51. The Kate Kennedy incident received renewed public attention in 2011, following the publication of *Wrestling the Hulk: My Life Against the Ropes*, a book by Hogan's ex-wife,

Linda Hogan. There, she discussed the Kate Kennedy episode, including the toll it had taken on her marriage to Hogan, and his efforts to enlist her in helping him repair his image in the media in light of the public attention garnered by Ms. Kennedy's allegations. *See* Ex. 38 (excerpts from *Wrestling the Hulk*) at 110 ("I never really knew the circumstances surrounding the Kate Kennedy accusations and Terry certainly wasn't telling me the whole truth. From what I gathered, Kennedy had filed a claim for sexual battery and Terry needed to fight these charges in court and in the media. Unless I stood proudly beside him, he would lose both battles."); *id.* at 105 ("Terry swore up and down that he did not sleep with her, but what he did admit doing was more than enough: he cheated on me, and this time it definitely wasn't my imagination.").

52. Hogan's divorce from Linda, and the allegations of infidelity that accompanied those proceedings, were thus played out in the media, especially because of the public attention focused on their marriage that resulted from the reality show (*Hogan Knows Best*) that centered on it. For example, a November 25, 2007 E-Online article reported that Linda Bollea had filed for divorce, noting that "[t]he possibility that the couple would part ways was the subject of an episode of their VH1 reality show, Hogan Knows Best," though, "[o]n the show, however, they ultimately reconciled." Ex. 39.

53. During an October 12, 2011 interview on the *Howard Stern Show*, Hogan complained that his ex-wife had been wrongfully accusing him of serial infidelity when all she had on him was that "one mistake in Minnesota" (Kate Kennedy) and that he had been "running with one of the record execs in Miami" (Christiane Plante). Ex. 40 at 17:42 – 18:01.

54. Finally, Linda Hogan also leveled public accusations that Hogan had an affair with long-time friend and fellow wrestler Ed "Brutus Beefcake" Leslie. There was substantial coverage of those allegations, Hogan's denials, and the defamation lawsuit he filed against her as

a result. *See, e.g.*, Ex. 41 (August 16, 2011 *Radar Online* article entitled “Linda Hogan Suggests Hulk Hogan Had ‘Intimate Relationship’ With Brutus Beefcake,” which noted that ex-wife implied on radio show that Hogan had an “intimate relationship” with fellow wrestler Ed “Brutus Beefcake” Leslie); Ex. 42 (December 10, 2011 *US Weekly* article entitled “Hulk Hogan Sues Ex-Wife Linda Bollea for Claiming Abuse, Gay Affair,” which noted that Hogan had filed a defamation suit against ex-wife Linda following her claims that he was physically abusive during the marriage and had an extra-marital affair with male wrestler Ed “Brutus Beefcake” Leslie). *See also* Conf. SUMF ¶ 54.

C. Widespread Public Discussion of the Graphic Details of Hogan’s Sex Life, Including By Hogan Himself

55. In addition to the widespread public attention focusing on Hogan’s personal life and romantic affairs, there has also been widespread public discussion of the intimate and graphic details of his sex life, including by Hogan himself and often in connection with his efforts to promote his career or those of his family members.

56. For instance, in 1982, to promote his appearance in *Rocky III*, Hogan posed for a photo spread in *Oui* magazine, in which he appeared with a number of naked or mostly naked women. Ex. 43. In the photo spread, Hogan is shown fondling the naked buttocks and breasts of the women, having them rub their naked breasts against his skin, and shown with one of the mostly naked women straddling him across his pelvis while he grabs her naked breasts. *Id.* During an exchange between Hogan and Bubba Clem on the *Bubba the Love Sponge* radio program on October 31, 2006, Bubba Clem referred to this photo shoot, stating, “Hogan, you’re the one who did a photo shoot with *Oui* magazine and had a threesome.” Ex. 44 at 13:35 – 13:50. *See also* Hogan Dep. (Ex. 3) at 18:12 – 19:20 (describing photo shoot).

57. During a broadcast of the *Bubba the Love Sponge Show* that aired on February 9, 2006, Hogan engaged in sexual banter with a “Penthouse Pet” who was being interviewed, and described his erection. Specifically, after noting that his wife would not hear the broadcast because “Linda ain’t got no satellite radio,” Hogan was asked by the *Penthouse* model, “Hulk, have you seen my p---y?,” to which Hogan replied, “What are you talking about, brother, you know I’ve seen that thing,” adding that he was working out in just a towel and now would not have a problem keeping his towel in place because he could just use his “hard on.” Ex. 45 at 33:30 – 37:10.

58. During an August 28, 2006 broadcast of the *Bubba the Love Sponge Show*, Hogan discussed where he prefers to ejaculate when he has sex with a woman (or, in Clem’s vernacular, where he “like[s] to nut at”). In response to Bubba Clem’s specific question of whether he preferred to ejaculate inside a woman’s vagina or “to pull out and squirt it all over,” Hogan announced that he was “in it to win it,” a detail he shared with Clem’s national radio audience. Ex. 46 at 48:20 – 49:16.

59. During an October 16, 2006 broadcast of the *Bubba the Love Sponge Show*, Hogan and his then-wife Linda engaged in a detailed discussion of their sexual practices on the air. Calling in from the car on the drive from Miami to Tampa, Hogan reported that he threw his back out having sex the previous night, after which Linda stated that, “instead of me, like, trying to sit up on top banging it down to a nub, he was – he was trying to bang it down to a nub and he broke something.” Ex. 47 at 24:20 – 25:45. Hogan and Bubba Clem then had the following exchange:

HOGAN: I was standing up. And instead of going back and forth like a log like Frankenstein, I was actually trying to get some hip movement like I seen on the pornos, you know . . . where those young guys get those hip things going, you know?

CLEM: You got a – you got a fake hip, though.

HOGAN: And I threw my lower back out. Whatever Linda, shut the f--k up

. . .

CLEM: Did that affect your boner at all?

HOGAN: Oh, dude, that sucker went away instantly. That pain makes everything go away.

HATLEY [one of Clem's producers]: Did you at least try to finish yourself off later on?

. . .

L. HOGAN: I made him finish the job.

Id. Bubba Clem also asked Hogan “Did Linda get an orgasm?” to which Hogan replied, “Oh, yeah, yeah. She always gets one when I’m around, dog.” *Id.* at 25:29 – 25:40.

60. In that same broadcast, Hogan also described in detail performing oral sex on his wife, including that he preserves the smell of her fluids in his mustache, so that, as Clem put it, during a wrestling match, Hogan “could pay homage to the oral that [he] gave [Linda] backstage”:

CLEM: Hey, Hogan. You can – you can always resort to just oral. I mean – I mean, you’re probably pretty good at that. That Fu Manchu probably feels good.

HATLEY [one of Clem's producers]: Oh, man. That thing’s got to tickle.

HOGAN: Hey, brother, I’ve had that on for a long time for a reason. This ain’t for show. This is for go. (Laughter.)

HATLEY: The flavor saver?

CLEM: The flavor saver.

HOGAN: Oh, yeah, why do you think when I make that face in the middle of the ring, when I’m sniffing my mustache?

Id. at 28:15 – 28:55. Linda Hogan then described how, when Hogan “does the sniffy-the-mustache thing or whatever you call that gimmick” in the ring, “[i]t’s his little sign to show me

that he's thinking about me." *Id.* at 28:55 – 29:21. Clem then opined to Hogan, "you threw your hip out but you better not throw out your tongue or you're out of here." *Id.* at 29:21 – 29:35.

61. The following day, on October 17, 2006, Hogan again called into Bubba Clem's radio program. Hogan confessed that he and his wife were pleasuring each other in the car the previous day:

CLEM: I thought maybe you – I thought you were getting some head.

HOGAN: Oh, we were playing stick shift.

CLEM: Does she still give head in the car?

HOGAN: No, man, we were playing stick shift, though.

CLEM: Oh, hand job?

HOGAN: You shift mine, and I'll shift yours.

Ex. 48 at 40:15 – 40:40. Further describing his wife's technique for manually pleasuring him, Hogan stated, "She's got a – she's got a torque converter." *Id.*

62. On an October 20, 2006 broadcast of the *Bubba the Love Sponge Show*, Hogan engaged in a discussion of the most women he ever had sex with at one time:

CLEM: What's the most women you ever had in your hotel room at one time?

HOGAN: Me?

CLEM: Yeah.

HOGAN: Back in the diz [i.e., day]?²

CLEM: Back in the day –

² During his appearances on the *Bubba the Love Sponge Show*, Hogan and Bubba Clem would routinely modify words inserting the letter "z," a style of speaking that Hogan has explained is associated with professional wrestling and traceable to its origins in the world of "carnies." See Ex. 17 at 36 (excerpts from *Hollywood Hulk Hogan*).

HOGAN: Well, there's been several at one time, but then they scrizammed when I started playing Hulkster says And I had five of them that – I made them stand on the bized, you know?

CLEM: Mmm hmm.

HOGAN: . . . [F]ive of them stand on the bized and then, as Hulkster says, take your tizop off. They hung in there. Then Hulkster says, take your briz off. They hung in there.

CLEM: Right.

HOGAN: And when I give them the, [take] off your panties grizanny, a couple of them scrizammed.

CLEM: So you're down to three?

HOGAN: And then I said, you know, do the Bubba Thumb McGillicutty gimmick.

CLEM: You did the Two-Finger Cul-de-sac Jones?

HOGAN: Yeah, and that broke it down to two, and the two stayed. Stay all night. Stay a little longer.

Ex. 49 at 53:35 – 54:40.

63. In that same broadcast, Bubba Clem reported that a fan had emailed to ask Hogan, “How big is your penis?” Hogan initially responded that, if Bubba Clem “tell[s] all your fans right now, keep Brooke at number one while her record release is sold, Tuesday all through the week, . . . I'll tell you exactly how big that Loch Ness monster is.”

CLEM: How big your c--k is?

HOGAN: Yeah.

Id. at 56:00 – 56:30. Later, after Clem stated that he has seen Hogan's penis before, he and Hogan participated in an extended discussion about the size of Hogan's penis, including various mathematical computations involving that subject and its relationship to the size of Hogan's feet:

HOGAN: They called me – they called me King Triton.

CLEM: Exactly. I would say hard you're probably 7 ½ or 8 inches.

HOGAN: Sh-t.

...

HOGAN: Dude, I got size 15 feet. I wear a size 15 ring on my – wedding ring.

...

HOGAN: Figure it out.

CLEM: Well, you ain't got a 15-inch c--k, Hogan.

HOGAN: No, it's two-thirds the size of your feet and your hands, jack-off.

CLEM: Well, what's 66 percent of 15, Brent?

NED [a recurring character on Clem's show]: Ten.

HOGAN: What the f--k? What is – what is – what is – what's five times three?

CLEM: So you're saying – Ned said that you're right at 10.

HOGAN: Ned should know. I done bent his ass over – (laughter) –

NED: It felt like 10.

CLEM: So Hogan, you're claiming – you're claiming to maybe have a 10-inch c--k.

HOGAN: I'm not claiming. Those are the facts, Jack.

Id. at 56:50 – 57:45; *see also* Ex. 50 at 34:30 (Nov. 1, 2006 broadcast of the *Bubba the Love Sponge Show* in which Hogan and Bubba Clem discussed a magazine photo of Hogan in a Speedo-style bathing suit with a visible erection, and, in response to Bubba Clem's questions about whether the magazine was "trying to accentuate [Hogan's] boner" and whether it "always hang[s] out to the left," Hogan stated he "was sleeping in the sun with a hizalf hizard-on," or, as Bubba Clem and his co-host put it, he was "just half hard" and "it's always left"); *id.* at 42:49 – 43:08 (Clem stating to Hogan, "It's f--king Hulk Hogan with a big boner . . . to the left – seven and a half inches of f--king King Triton").

64. Hogan also repeatedly discussed the details of his sex life – and the sex lives of his entire family – during numerous appearances on the *Howard Stern Show*. For instance, on October 23, 2006, Hogan and his entire family appeared on the show to promote *Hogan Knows Best*, and his daughter’s recording career, including her new album that was being released the next day. Ex. 51. During the national broadcast, each member of the Hogan family answered questions from Stern and his colleagues about each of their sex lives. Brooke (then 18) was asked about and discussed what “base” she had reached. *Id.* at 8:49-9:20. When Stern told her, “I would love to take your virginity,” Hogan responded with a “Wow” and “Howard, she’s the right height.” *Id.* at 36:40 – 36:53. During that same broadcast, Nick (then 16) talked about his sex life (according to Brooke: “Nick’s swinging and banging and doing his thing”); whether he would “bang” Brooke’s friends or various celebrities; the size of his penis (according to Stern: “Don’t measure from your testicles. That’s cheating.”); and his use of condoms. *Id.* at 26:31 – 26:54, 30:50 – 32:20. For their part, Hogan and his then-wife, Linda, talked about the last time they had had sex, whether “in all the women that [he has] been with” Hogan ever had sex with a virgin (“no”); whether Linda was a virgin when they met (“no”); and how large his penis is (“ten inches”). *Id.* at 26:38 – 26:45, 36:55 – 37:07.

65. On April 29, 2010, Hogan and his then-fiancée (and now wife) Jennifer McDaniel, appeared on the *Howard Stern Show*, during which they discussed their sex life in graphic detail before a national audience. Ex. 52. For example, Stern, Hogan and Jennifer (along with Stern’s co-host Robin Quivers) had the following exchange describing their sex life in detail:

STERN: [Hogan] he has tremendous demands, doesn’t he? Physical needs? Yes?

MCDANIEL: Yes, which – I find that flattering.

STERN: And you have no –

MCDANIEL: I'm happy that he wants it all the time. That's good.

STERN: And you willingly give it to him at least once a day?

MCDANIEL: Sometimes not, if we're busy –

STERN: Right, right.

MCDANIEL: – or tired – but usually.

STERN: And the lovemaking is violent, you say? It's very fierce?

MCDANIEL: Sometimes, especially if we drink saki.

STERN: Really? What happens? I mean, are you saying –

MCDANIEL: He's putting – (inaudible) –

HOGAN: Uh-oh, oh, yeah, I'm out. I'm done.

STERN: What are you saying? You're saying –

HOGAN: I'm done.

STERN: – you're saying that he – does he put it in you and ram you very hard?

HOGAN: (Laughs.)

STERN: Does he?

MCDANIEL: Yes.

STERN: He does?

HOGAN: Oh, easy! (Laughter.)

STERN: When you – and you like it hard, right?

MCDANIEL: I don't think I have a choice.

STERN: You don't have a choice?

QUIVERS: (Laughs.)

MCDANIEL: I mean, sometimes like, in the morning, he'll be, like, hey baby.

STERN: Right.

MCDANIEL: You know, like, good morning. Wake up. But –

STERN: But he takes you very, very fast.

MCDANIEL: But usually it's –

STERN: Yeah, and rams it in? Wow. From behind? I picture him like a wild –

MCDANIEL: How do you know this? Is he psychic?

STERN: I picture him like a wild animal.

MCDANIEL: He's sexually psychic.

Id. at 28:35 – 29:42.

66. As the conversation continued, Hogan and McDaniel then proceeded to discuss in detail the size of Hogan’s penis and their use of lubrication as a result, prompting Hogan to suggest a video of their sex life called “Hulk Gone Wild”:

STERN: [W]ere you scared when you looked at his Hulk Hogan c--k . . . if I may be blunt? (Laughter.)

MCDANIEL: I was, like –

HOGAN: (Laughs.) It was painted red and yellow.

MCDANIEL: – where’s the lube?

STERN: No kidding? Did you have to lube in order to accommodate him?

MCDANIEL: Heck, yeah.

STERN: Really?

MCDANIEL: Yes.

STERN: Oh, for Christ –

MCDANIEL: Yes.

STERN: No kidding? Look at Robin salivating.

QUIVERS: I’m just fascinated. (Laughs.)

STERN: Wow, he was so thick or long that you –

MCDANIEL: Both –

STERN: – became panicked? Did you become panicked?

MCDANIEL: I got a little bit nervous, yes.

STERN: And you said, I’m –

MCDANIEL: I think I had to have a little shot of champagne or something. I was, like –

STERN: And was lube really involved that first time?

HOGAN: Brutal –

STERN: Wow, no kidding?

MCDANIEL: Yeah.

HOGAN: Brutal –

QUIVERS: But apparently you are. (Laughs.)

STERN: [to Hogan] You’re a brute. You’re an animal.

HOGAN: Hulk it up, brother. Hulk it up.

STERN: Hulk it up. Hulk it up.

...

STERN: Why couldn't – why couldn't – why couldn't the Hulkster prepare you with oral sex and everything?

MCDANIEL: Oh, no, he –

STERN: He did?

QUIVERS: Still doesn't help – apparently that's what's going on here.

MCDANIEL: I mean, he's very gracious. He's very gracious.

STERN: And it still doesn't help? Even with nature's lube?

MCDANIEL: He's not a selfish lover.

...

STERN: So in other words, even with natural lubrication to handle his girth, it was impossible? . . .

MCDANIEL: That's correct.

STERN: Whoa, what a story.

QUIVERS: (Laughs.)

HOGAN: Hulk gone wild.

STERN: Wow.

HOGAN: Hulk, I feel – I'm feeling a video coming out here: "Hulk Gone Wild."

Id. at 33:25 – 34:42.

67. In that same broadcast, Hogan and McDaniel also discussed Hogan's practice of spanking his then-fiancée:

STERN: Does he spank you? He does?

MCDANIEL: It hurts.

STERN: Oh, my God. Look at the size of these –

MCDANIEL: Look at his hands.

STERN: Look at those hands.

HOGAN: Oh, man!

STERN: Often you spank her? Why? Because she's bad, right?

HOGAN: She's bad. . . .

STERN: She's bad. She's running around naked in front of the neighbors.

. . .

STERN: She likes being spanked?

. . .

HOGAN: Yeah.

Id. at 40:23 – 40:45.

68. In that same broadcast, Hogan also discussed the size of his penis, the fact that he needed to use “Magnum” condoms, and that he was not currently using condoms to have sex:

STERN: When you buy condoms, do you buy those Magnums, the extra-large ones?

HOGAN: Back in the day, yeah.

STERN: No kidding? Magnums?

QUIVERS: Oh, but he's not using them now?

HOGAN: Yeah, they fit – they fit like a thimble.

STERN: Are you serious? You buy a Magnum?

HOGAN: No, I don't buy them.

STERN: No, but I mean, I'm saying. Is that the brand you use, Magnums?

HOGAN: Back in the day, yeah.

STERN: No kidding? You're that big? . . .

No kidding? A Magnum? That's the crème de la crème for big men. Good lord.

HOGAN: Hulk it up, brother.

Id. at 56:30 – 57:04.

69. All of the above public discussion of Hogan's sex life preceded the publication of the Gawker Publication. For the avoidance of doubt, the Publisher Defendants take no position on whether any of the conduct described, including by Hogan, occurred or occurred in the manner described. They simply rely on the fact that these topics were the subject of extensive national media coverage and public discussion, including in significant respects by Hogan himself, prior to the Publication.

V. UNDISPUTED FACT NO. 5: Prior to any conduct by the Publisher Defendants, there was widespread discussion in the media, including by Hogan himself, of the Video Recording of Sexual Affair Between Hogan and Heather Clem.

70. The topic of sexual relations between Hogan and Heather Clem was first discussed publicly during an October 12, 2011 appearance by Hogan on the *Howard Stern Show*.³ In the midst of a discussion of whether the Clems (who had just separated) were going to end up divorcing, including whether “there was any cheating involved,” Stern asked Hogan “would you ever f--k Heather?” Ex. 40 at 11:33 – 13:39. Hogan responded, “No,” citing “man law, brother.” *Id.* (At the time of Hogan’s denial, he already had engaged in sexual relations with Heather Clem.)

71. Despite Hogan’s public denial, in early 2012, there was widespread discussion in the radio community about a sex tape involving Hogan and Heather Clem. Richard Peirce, Bubba Clem’s former employee testified, that “prior to anything being published on the internet,” it “spread through radio pretty quick,” Peirce Dep. (Ex. 8) at 78:7-20, and “it wasn’t just people that were in the satellite world,” but the discussion extended to “the terrestrial world too. It got around in radio to people kind of fast,” *id.* at 82:4-7.

72. Peirce received an instant message with what he described as “a timeline” of the video footage, and explained that he had been hearing such rumors for “a couple of months” before “receiving the instant message.” Peirce Dep. (Ex. 8) at 79:4-10, 82:8-10, 95:12 – 97:7. *See also* Conf. SUMF ¶ 72.

³ Prior to that, the topic was raised – albeit in jest – during a November 1, 2006 broadcast of the *Bubba the Love Sponge Show*. There, Bubba Clem played a parody sketch that portrayed Hogan, Bubba Clem, and Heather Clem in what the sketch described as a “threesome,” with the punch line being that both men were ignoring Heather Clem sexually. Ex. 50 at 0:01 – 0:50.

73. The first public report about a Hulk Hogan sex tape appeared on March 7, 2012, seven months before the Publication at issue was published by Gawker. On that date, the celebrity news website *TMZ* reported that “[a] sex tape featuring legendary wrestler Hulk Hogan has surfaced,” and that it is “currently being shopped to a major porn studio.” Ex. 53. *See also* B. Clem Dep. (Ex. 5) at 390:17 – 393:16 (describing reaction to March 7, 2012 *TMZ* article).

74. That same day, *TMZ* published two additional articles on the sex-tape story. *See* Exs. 54, 55. *TMZ* also posted a satirical video about the sex-tape controversy, including about Hogan’s wrestling persona and his family life. Ex. 56.

75. On the day that *TMZ* broke the sex-tape story (March 7, 2012), Hogan addressed the emerging sex-tape scandal during an interview that was broadcast on *TMZ Live*. Ex. 57 at 2:06 – 11:45. Accompanied by his attorney, David Houston, Hogan stated that he did not know who the woman in the tape – who had not yet been identified as Heather Clem – might be, saying: “between the divorce from Linda and the time I met Jennifer I had about four and a half months that I really went crazy. And I actually wrote about it in my book, about staying drunk and crazy and hitting all the bars. So I was really out of my mind for a while.” *Id.* at 3:10 – 3:27. After hearing a brief description of what is on the tape, and being asked whether that rang any bells as to who the woman could be, Hogan responded:

You know . . . , I’m not trying to be a smart aleck. I’m horrible with remembering names, you know? . . . But during that time, that four- or five-month window where I was going crazy, I was – the first thing I did was I – when I sat down with Jennifer, I said, I don’t even remember people’s names, you know, last weekend that I met, I meet so many people, much less girls five or six or seven years ago, or five years ago, whenever it was, it’s just I couldn’t remember a name if I had to. And the truth is it wasn’t just one brunette. I was running pretty wild there for a few months.

Id. at 4:52 – 6:17. *See also* Conf. SUMF ¶ 75.

76. During that same interview, Hogan and his attorney repeatedly joked with the show's hosts about the sex tape, exchanging banter about the thong-shaped tan line allegedly on display on the tape, and also expressing mock relief that the tape did not show Hogan "with a guy." Ex. 57 at 9:34 – 10:45 ("Houston: 'Yeah, well, that was the only thing we thought could be worse: if it was a young male. So we were grateful.'").

77. Based on this initial reporting, the sex-tape story became national news in March 2012, seven months before Gawker's Publication was published. For example, on March 7, 2012, *E-Online* published an article entitled: "Hulk Hogan Sex Tape: Shop at Your Own Risk." Ex. 58. The article stated that Hogan and his attorney, Houston, seem to know who the woman in the sex tape is, quoting Houston as saying, "We are two shades short of referring her to the state attorney in Florida," and that "This is a felony in Florida." *Id.*; see also Ex. 59 (same article published by NBC on its *Today Show* website on March 8, 2012).⁴

78. Also on March 7, 2012, the *Huffington Post* published an article entitled "Hulk Hogan Sex Tape Surfaces: Wrestler Claims He Was Filmed in Secret," which noted Hogan's "thong-shaped tan line" and that the "unidentified brunette" was neither his ex-wife nor his current wife. Ex. 60.

79. Also on March 7, 2012, the *VHI Access* website published an article entitled "Hulk Hogan Sex Tape Surfaces," which noted that the video shows Hogan getting naked and "messing around" with a "mystery woman." Ex. 61.

80. Also on March 7, 2012, VH1 published another article on its website entitled "Report: A Hulk Hogan Sex Tape Is Out There," which noted: "As is the case with many-a-

⁴ To the Publisher Defendants' knowledge, no charges were ever brought by any law enforcement agency, state or federal, related to the sex tape.

celebrity-sex tape, it's the [pornography distributor] Vivid Entertainment boss, Steve Hirsch, who broke the news as he was the one given the tape by a third party." Ex. 62.

81. Also on March 7, 2012, the wrestling website *TWNPnews.com* published an article entitled "Sextape Featuring Hulk Hogan with Another Woman Being Shopped Around," which noted that the video shows Hogan bragging that he has been "working out again." Ex. 63.

82. Also on March 7, 2012, the *National Enquirer* published an article on its website entitled "Hulk Hogan Sex Tape," which noted that a sex tape had surfaced, was being shopped to "a major porn studio," and showed "Hulk disrobing as a naked brunette offers herself to him lying on a bed." Ex. 64.

83. Also on March 7, 2012, the sports focused website *Bleacher Report* published an article entitled "Pro Wrestling News: Hulk Hogan Sex Tape Surfaces: 'I'm the Victim,'" which noted that "according to TMZ.com Hogan believed the tape's time-line was approximately five years ago, and he does not remember who this woman was" and quoted Hogan as stating, "During that time, I don't even remember people's names, much less girls." Ex. 65.

84. Also on March 7, 2012, *The Daily Caller* published an article entitled "Finally, a Hulk Hogan Sex Tape," which noted that the tape showed Hogan "wearing nothing except his thong-shaped tan line and blindingly white mustache" and that he bragged to his "evening companion" that he had started to work out again. Ex. 66.

85. The next day, on March 8, 2012, still seven months before the Publication at issue was published by Gawker, *Digital Spy* published an article entitled "Hulk Hogan Urged by Porn Producer to Officially Release Sex Tape," which reported that the video features Hogan with a woman who was neither his wife or ex-wife and also noted that Hogan had sued his ex-wife over "claims that he carried on a homosexual affair during their marriage." Ex. 67.

86. Also on March 8, 2012, *The Hollywood Gossip* published an article entitled “Hulk Hogan on Sex Tape Partner Identity: Got Me!,” which noted that Hogan did not deny the existence of the sex tape but “pleaded ignorance” as to the identity of the woman in the video, pointing to a “four-month alcohol/banging binge he went on between the period of divorcing long-time wife Linda and meeting new wife Jennifer McDaniel.” Ex. 68.

87. Also on March 8, 2012, *The Daily Telegraph* published on its website an article entitled “Wrestling great Hulk Hogan cannot recall women in sex tape as he slept with many after Linda Hogan marriage break-up,” which noted that Hogan explained that “he hasn’t had sex with another woman since meeting his new wife five years ago so the tape must be at least five years old.” Ex. 69.

88. Also on March 8, 2012, the wrestling publication *PWMania* published a post entitled “Hulk Hogan & His Lawyer Respond To Sex Tape (Audio),” which noted that Hogan “strongly questions” the motivations of the woman in the tape for “secretly taping” the incident and “now coming forward out of the blue after 5 years later.” Ex. 70.

89. Also on March 8, 2012, *USA Today* published an article on its website entitled “Hulk Hogan’s attorney issues sex tape warning,” which noted that Hogan and his attorney know the identity of the woman in the video and that Hogan believed tape was made “when his drinking and partying got out of hand in the wake of his divorce in 2007.” Ex. 71.

90. The next day, on March 9, 2012, and still seven months before the Publication at issue was published by Gawker, *The New Zealand Herald* published an article on its website entitled “Hulk Hogan ‘appalled’ at mystery sex tape release,” which noted that Hogan admitted to a period where he went “crazy” and was “running wild” with several women. Ex. 72.

91. Many of these initial reports about the sex tape (all of which preceded the Publication at issue by seven months), placed the emerging controversy within the context of prior public controversies about Hogan's sexual and romantic life. Thus, on March 7, 2012, *The New York Post* published an article on its website *PageSix.com* entitled "Hulk Hogan sex tape being shopped around: report," which, in reporting about the sex-tape revelation, noted Hogan's life in the public eye, including his family's appearance in the *Hogan Knows Best* series, his divorce from ex-wife Linda following allegations of an extra-marital affair, and his remarriage to Jennifer McDaniel. Ex. 23.

92. On March 12, 2012, *TMZ* published an article on its website entitled "Linda Hogan: I Want to See Hulk's Sex Tape!," reporting that Hogan's ex-wife was eager to see the tape to bolster her allegations of infidelity against him, in part to strengthen her position in the then-pending defamation lawsuit that Hogan had filed against her. Ex. 73.

93. That article was followed three days later by an article by *Digital Spy* entitled "Hulk Hogan ex-wife Linda 'wants sex tape to be released,'" which noted that Hogan's ex-wife Linda wanted to introduce the tape as evidence of infidelity in defending against Hogan's defamation suit against her for stating in her book that he was abusive and engaged in extra-marital affairs. Ex. 74.

94. Roughly a month after the initial wave of reporting and commentary about the sex tape, on April 19, 2012, and still more than five months before the Publication at issue was published by Gawker, the story received renewed attention when the website *The Dirty* published screen shots purporting to be from a Hulk Hogan sex tape. Ex. 75.

95. A few days later, *The Dirty* published a second batch of stills purporting to be from a Hulk Hogan sex tape. Ex. 76. The screen shots published by *The Dirty*, although grainy, appeared to show Hogan and Heather Clem in various states of sexual activity. *Id.*

96. Peirce, Bubba Clem's former employee, explained that, "before the screen caps came out, I started hearing that there was a sex tape that she [Heather] was in. And the when they came out, I was like, Okay, it's true." Peirce Dep. (Ex. 8) at 77:3-14.

97. This led to still more press coverage of the story – all five-plus months before Gawker's Publication. For example, on April 23, 2012, the website *In Flex We Trust* published an article entitled "WWE: Hulk Hogan Sex-Tape Images Leaked Online," which noted that screen shots from the tape had been published online, reproduced a selection of the screen shots, and stated: "I have a feeling we may see that sex tape sometime soon." Ex. 77.

98. Also on April 23, 2012, the *Wrestle Zone* website published an article entitled "Photos Released From Alleged Hulk Hogan Sex Tape," which hyperlinked to the screen shots of the sex tape. Ex. 78.

99. Two days later, on April 26, 2012, and still more than five months before Gawker's Publication, *The National Enquirer* published an article on its website entitled "Hulk Hogan Sex Tape War," which noted that Hogan was "fighting mad over a website that posted highly graphic XXX B&W stills from a sex tape said to be of [Hogan] doing the sleeper hold on a bodacious babe in a highly *RAW* manner." Ex. 79.

100. Also on April 26, 2012, *The Examiner* published an article entitled "Hulk Hogan alleged sex tape pictures are still online despite his demands," which noted that Hogan's attorney had sent a cease-and-desist letter to *The Dirty* and that its founder Nik Richie had "no intention" of removing the photos. Ex. 80.

101. The next day, on April 27, 2012, *The Christian Post* published an article on its website entitled “Hulk Hogan Nude Photos Must Be Taken Down, Says Wrestler,” which noted that Hogan’s lawyer’s “veiled threat” to *The Dirty* “never confirmed that [Hogan] was in the sex tape.” Ex. 81.

102. A week later, on May 3, 2012, and still five months before Gawker’s Publication, the sports website *Bleacher Report* published an article on its website entitled “Hulk Hogan Sex Tape: If It Gets Out, Will It Help or Hurt His Image?,” which noted that “[s]creen shots of an alleged Hulk Hogan sex tape had surfaced and the entire video might soon follow” and opined that release of the tape would have no effect on his reputation. Ex. 82.

103. The publication of the screen shots in *The Dirty* added a new wrinkle to the public controversy over the sex tape – speculation that the tape was filmed in the home of Hogan’s best friend, Bubba the Love Sponge Clem, and that the woman in the tape was Bubba Clem’s ex-wife, Heather Clem. For example, on April 24, 2012, more than five months before Gawker’s Publication, *The Dirty* published a posting entitled “Hulk Hogan Porn Video Revealed To Be Shot At Bubba The Love Sponge’s Bedroom,” which noted that after “some detective work” a group of readers had concluded “that the Hogan sex tape was filmed inside Bubba’s bedroom.” Ex. 83. The article included previously published photographs of the Clems’ bedroom in order to make the case. *Id.*

104. Other publications followed suit in speculating about the connection between the sex tape and the Clems. For example, on April 23, 2012, *eWrestlingNews.com* published an article entitled “Shocking Details on the Hulk Hogan Sex-tape Revealed,” which noted that “several people close to the tape” reported that the woman in the tape is Bubba the Love Sponge’s ex-wife, Heather Clem. Ex. 84.

105. Also on April 23, 2012, the wrestling site *TWNPnews.com* published an article entitled “Images Leak from Hulk Hogan’s Sextape – Woman Identified?,” which addressed speculation about whether the woman in the tape is Heather Clem, noting that “Bubba has said on his radio show that when he and Heather were still married, he would ‘offer her’ to his close personal friends, which Hulk happens to be” and that wrestler Ultimate Warrior had made similar allegations about Hogan, claiming he would let other wrestlers “party” with his then-wife Linda. Ex. 85.

106. Also on April 23, 2012, *TNA Wrestling News* published an article entitled “Linda Hogan Addresses the Hulk Hogan Sex Tape,” which noted that Linda Hogan had stated on a radio show three weeks prior that it would be “impossible” for the woman on the tape to be Heather Clem because Hogan and Bubba were “best friends.” Ex. 86.

107. Three days later, on April 26, 2012, *The Daily Telegraph* published an article on its website entitled “Hulk Hogan and Bubba the Love Sponge’s Ex-wife Heather Clem: Is This the Infamous Musclemans Sex Tape?,” which noted speculation that the woman in the tape is Heather Clem. Ex. 87.

108. Also on April 26, 2012, *The Blemish* published an article on its website entitled “Hulk Hogan Wants Sex Tape Stills Off Internet,” which noted the “strong consensus” that the woman in the tape is Bubba Clem’s ex-wife Heather Clem and the location is Bubba’s “very own bedroom” and also noted that, “[a]s is always the case,” Hogan was threatening to sue. Ex. 88.

109. In May 2012, the possible connection between the sex tape and the Clems was the subject of a lengthy article published in the *National Enquirer*, entitled “Hulk Hogan Sex Tape Shocker: Mysterious woman in video was his best friend’s wife.” Ex. 89. The article stated that “insiders told the Enquirer that the scandalous tape was the secret reason behind Heather and

Bubba's February divorce." *Id.* The article cited a source "who ha[d] seen stills from the video and confirmed that the woman was Heather Clem," and who reportedly contended that the recording equipment used to make the video had been set up by Bubba Clem because he suspected that Hogan and Mrs. Clem were having an affair and wanted to catch them in the act. *Id.* The article stated that Hogan and his attorney, Houston, "declined to confirm that it was Heather in the video, but they did acknowledge that they knew the woman's identity." *Id.* The article also quoted Bubba Clem as saying that he would not comment until "Terry (Hulk) talks about it in public," adding that "Hulk is still my friend. We're friends forever, man." *Id.*

110. Later that month, on May 15, 2012, Howard Stern pressed Bubba Clem about what had been reported in the *National Enquirer*, during a radio show that was simultaneously broadcast on the *Howard Stern Show* and the *Bubba the Love Sponge Show*. Ex. 90. Once again, Mr. Clem declined to discuss the details of the sex tape, but did reiterate that he was still best friends with Hogan. *Id.* at 24:30 – 26:25, 34:30 – 35:11, 41:40 – 42:26.

111. On July 18, 2012, during a broadcast of the *Bubba the Love Sponge Show*, Hogan and Bubba Clem appeared to joke about the sex-tape controversy. Specifically, when Hogan asked about Bubba Clem's new girlfriend, he responded, "Stop talking about my significant others. It has already gotten us in enough trouble, ok?" Ex. 91 at 13:08 – 13:35. After Bubba Clem described his new girlfriend, Hogan repeatedly implored him to "Make sure everything is cool, make 'em pass the initiation," to which Bubba Clem responded by saying: "I know Hogan is not going to be any overnight guest at my house." *Id.* at 17:13 – 18:59.

112. All of this national (and often international) coverage of the sex tape, including speculation over the identity of the woman in the tape and including Hogan's own participation

in the ongoing public discussion, occurred before the Publication at issue was published by Gawker.

VI. UNDISPUTED FACT NO. 6: After all this prior media coverage, Gawker published its news report and commentary, accompanied by one minute and 41 seconds of heavily-edited footage from the full 30 minute Video Recording.

113. In the wake of the substantial public discussion of both (a) Hogan’s romantic affairs and sexual practices generally and (b) the specific reports about the existence of a sex tape and speculation over the identity of the woman appearing in the video, Gawker received a 30-minute DVD depicting a sexual encounter between Hogan and Mrs. Clem. Gawker has provided to Hogan’s counsel a copy of the 30-minute DVD footage it received, and if requested, will make that footage available to the Court.

114. On or about September 27, 2012, defendant Daulerio was contacted by Tony Burton, an agent with Don Buchwald & Associates, Inc. (the “Buchwald Agency”). Daulerio Dep. (Ex. 11) at 136:18-22; *see also* Conf. SUMF ¶ 114. The Buchwald Agency serves as the agent for a number of radio and television personalities, including Howard Stern. Peirce Dep. (Ex. 8) at 110:3-15.

115. In that communication, Burton advised that a client had contacted him to obtain a suitable address to send a significant DVD anonymously, which Daulerio subsequently learned related to the “Hulk Hogan sex tape story.” Daulerio Dep. (Ex. 11) at 139:9-17. *See also* Conf. SUMF ¶ 115.

116. A package containing the DVD was thereafter sent to Daulerio’s attention at Gawker sometime between September 27, 2012, and October 2, 2012. Daulerio Dep. (Ex. 11) at 114:8 – 115:24; Ex. 16 (Gawker’s Resp. to Interrogatory No. 5). Although the package

contained no return address, Gawker does not believe the Video was sent to Gawker by Burton.
Id.

117. Daulerio viewed the Video Recording he received and made a determination to publish a post about it. Daulerio Dep. (Ex. 11) at 116:14-22, 118:9-13.

118. Daulerio decided that he would “write [a] commentary about both the Hogan tape and celebrity sex tapes in general, . . . using the Hogan tape as kind of the catalyst for that commentary.” *Id.* at 118:25 – 119:4.

119. Daulerio decided that the post would also include short excerpts from the Video Recording to support the commentary. *Id.* at 118:9-21. In keeping with the commentary’s emphasis on the public’s fascination with celebrity sex tapes, Daulerio wanted the excerpts to include examples of “the innocuous back and forth between [Hogan] and the woman in the tape that was supposed to be Heather Clem, his best friend’s wife at the time, and some of the substance of the conversation in showing how not sexy it was.” *Id.* at 120:9-17. Daulerio also wanted the excerpts to include “small snippets” of sex so as “to verify the fact that they were actually having sex.” *Id.* at 120:18-24.

120. Gawker posted the Publication on October 4, 2012. Ex. 12 (copy of Publication at issue).

121. The written commentary referenced and hyperlinked to some of the prior coverage of the Hulk Hogan sex tape and explained the circumstances under which a copy ended up in Gawker’s possession. *See id.* at 1 (including the hyperlinks as originally published: “This footage was stealthily circulated last April. [TMZ reported its existence.](#) [The Dirty showed some screen shots](#), and Hulk lawyered up because he claims [he was ‘secretly filmed.’](#) Last week, a

burned DVD copy of Hulk having sex with a woman rumored to be Heather Clem (Bubba's ex-wife), was delivered to us.”).

122. The written commentary also provided a description of some of what appeared on the Video Recording. *Id.* at 1-3. That description highlighted the previously unreported detail that Bubba Clem appeared to have consented to Hogan's encounter with his then-wife: “Because the woman closely resembles Mrs. Clem, some have suggested that the voice of the mystery man [in the Video Recording] is, in fact, Bubba the Love Sponge. If this is true, Bubba has no problem sharing his wife with his best friend. ‘You guys do your thing, this man says. ‘I’ll be in the office if you need me.’” *Id.* at 1. This was in stark contrast to, for instance, how the story had previously been reported elsewhere including that Bubba Clem had set up cameras to catch Hogan and Heather Clem in a clandestine affair that served as the reason that Clems later divorced. *See* ¶ 109 *supra*; Ex. 89 (*National Enquirer* article).

123. The written commentary also attempted to use the Hulk Hogan sex tape and the controversy generated by it as a springboard for commenting generally on the public's fascination with both celebrity and celebrity sex tapes, and the unglamorous nature of them. *See* Ex. 12 at 1 (when we see celebrity sex tapes “we come away satisfied that when famous people have sex it's closer to the sex we as civilians have from time to time. Meaning: it's hardly ever sexy the way we expect it to be sexy”); *id.* (“celebrity sex is still incredibly dull”).

124. The written commentary was accompanied by brief and heavily edited video excerpts, in grainy black-and-white footage. *Id.*; Ex. 92 (video excerpts that originally accompanied written article). The posted excerpts lasted one minute and forty seconds in total. *Id.* Those 101 seconds included fewer than nine seconds of sexual activity. *Id.* The rest of the excerpts consisted of conversation between Hogan and Mrs. Clem. *Id.*

125. No advertising was displayed on the Publication. Ex. 93 (Gawker’s Supplemental Resp. to Interrogatory No. 13) at 3; Kidder Dep. (Ex. 94) at 175:6-15 (explaining that no ads were run on the Publication because it was “tagged” NSFW or “not safe for work,” and Gawker does not run ads on such posts).

126. The Publisher Defendants did not sell copies of, or access to, either the complete video they received or the brief excerpts that accompanied Gawker’s post. Ex. 16 (Gawker’s Resp. to Interrogatory No. 5).

VII. UNDISPUTED FACT NO. 7: The Publisher Defendants believed that the Publication addressed a matter of public concern.

127. Each of Gawker’s witnesses testified, consistently, that they believed the Publication, including the brief video excerpts accompanying it, to be newsworthy, including because the video was the subject of an ongoing public controversy.

128. For example, defendant Daulerio, who authored the Publication and was the editor of *gawker.com* at the time, testified that the existence of video was matter of “public record” and had “news value,” Daulerio Dep. (Ex. 11) at 123:10-11, and he “thought it was newsworthy and it was something that was worth discussing and putting up on the site,” *id.* at 159:5-7. In reaching that conclusion, he noted that the “sex tape . . . had already been talked about publicly,” *id.* at 122:7-8, and that he had discussed with Tony Burton the fact that that the video “had been talked about on *TMZ* and other sites,” *id.* at 114:2-7.

129. Daulerio also explained that he viewed the video excerpts to be newsworthy, because “it would give a little more insight into the stuff that was already in the public record and also show some inconsistencies in what Hulk had stated publicly and what there was as visual evidence,” *id.* at 124:14-22; *see also id.* at 181:19-21 (“the tape was actually part of the

story”), 182:9-12 (point of the story was to address existence of the tape and provide commentary), 120:6-8 (aim “was just to give a brief overview of the content to both verify its existence and to also just tie into the commentary”). He explained that, consistent with this purpose, he “turned the [DVD] over to our video editor and . . . selected various spots of the tape” that Daulerio “considered both newsworthy in the context of [the] story, and had her [whittle] it down” to under two minutes. *Id.* at 118:15-21. Ultimately, Daulerio testified, while he found parts of the tape amusing, *id.* at 158:12 – 159:7, its overall “newsworthiness at that point was both with the existence of the tape and verifying its existence and then my own personal commentary about celebrity sex tapes and the one in particular involving Hulk Hogan and Heather Clem.” *Id.* at 214:24 – 215:8.

130. Emma Carmichael, who was the Managing Editor of *gawker.com* at the time, similarly testified that the story concerned “a public figure who had contextual stories related to this incident that were already out in the public and we had information related to those contextual stories.” Carmichael Dep. (Ex. 95) at 60:6-12. Carmichael further explained that, as a result, she “was very comfortable with the way we framed the story and the context we gave the story.” *Id.* at 55:11-16.

131. Defendant Nick Denton, the CEO of Gawker, testified that he was consulted briefly about the subject before the Publication was posted, but that he otherwise did not participate in editing it, and did not review its text or the video prior to publication. *See* Denton Dep. (Ex. 96) at 100:22-25 (confirming that he was “made aware of the Hulk Hogan story, the sex tape story before it was published,” but not testifying to any editorial involvement); 103:2-5, 103:23 – 104:25 (testifying that, although he cannot recall specifically, he believes that his only connection to the post before publication was a very brief conversation with Daulerio, in which

he “encouraged [Daulerio] to avoid gratuitous[ness]” and to “mak[e] a point”); 106:11-16 (testifying that he first read the text of the Publication in September 2013, roughly a year after it was published, in preparation for his deposition). He also explained that the story had “as much detail as . . . needed,” *id.* at 107:6-7, and that in his view the video excerpts were “an essential part of the whole story,” *id.* at 224:19-21. In sum, he “continued to believe in its newsworthiness.” *Id.* at 243:16-17.

132. Gawker’s corporate designee, Chief Operating Officer Scott Kidder, testified on behalf of the company that Gawker “felt that . . . the video along with the narrative was extremely newsworthy and that was the primary motivation in publishing it.” Kidder Dep. (Ex. 94) at 235:17-20. Kidder further explained:

The video, when taken with the post looked at a well-known American celebrity who had put himself out there by appearing in television shows, showing himself as a 1950s-style father, had written at length in a book about, about his marriage, contemplating suicide, cheating . . . on his wife. The video had been rumored online, but there was no . . . evidence that it . . . truly exist[ed]. And in addition to that A.J.’s narrative described how celebrity sex at the end of the day is rather boring and pedestrian

Id. at 235:23 – 236:13.

VIII. UNDISPUTED FACT NO. 8: Following the Publication, there continued to be widespread public discussion About the Video Recording of the Sexual Affair, including by Hogan himself.

133. The posting of the Publication spurred continued public discussion of the sex-tape story, especially in light of the Publication’s revelation that Hogan’s sexual encounter with Heather Clem appeared to have taken place with the blessing of Bubba Clem. As had been the case throughout the life of the story, Hogan continued to discuss it publicly. *See* Daulerio Dep. (Ex. 11) at 220:21-25 (testimony from Daulerio observing that the story “became more

newsworthy after our publication, after Hulk Hogan talked about it on many different talk shows, and the relationship between he and his best friend’s wife became a news story on its own”).

134. At the time that the Publication came out, Hogan was scheduled to embark on a media tour to promote “Bound for Glory,” the flagship event for TNA Wrestling (“TNA”), the organization with which he was affiliated at the time. Hogan Dep. (Ex. 3) at 389:13 – 390:12; Ex. 97. *See also* Conf. SUMF ¶ 134.

135. During that tour, he appeared on the *Today* show on NBC, *Piers Morgan Tonight* on CNN, *The Howard Stern Show* and other programs on Sirius Satellite Radio, *Huff Post Live*, *TMZ Live*, VH-1’s *Big Morning Buzz Live* and *Showbiz Tonight*. He also gave an interview to Tim Ryan of *USA Today*. *See* Conf. SUMF ¶ 135.

136. During that tour, Hogan responded addressed the details of his sexual encounter with Mrs. Clem, the nature of the Clems’ marriage, and speculation that Bubba Clem was responsible for the taping. For instance, during an October 9, 2012 appearance on the *Howard Stern Show*, Hogan explained that Bubba Clem was “cool” with him having sex with his wife, and that Heather Clem, for her part, had been “relentless” in pursuing him, repeatedly saying to him: “I want to see your thing. I want to F. you.” Ex. 13 at 26:00 – 26:21.

137. During that broadcast, Stern and Hogan also repeatedly joked together about the sex tape as well. For instance, Stern said he was not sorry for Hogan because there is a video of an attractive woman telling him “you were hung like a beer can” and “you were ‘thick, girthy and long,’” adding that Hogan is strong enough to recover from having had “a woman put her mouth on [his] penis.” *Id.* at 1:05:35 – 1:06:04. Hogan joined in this exchange:

STERN: Do you think they’re going to put this into the storyline? Are the other bad wrestlers going to be, like, f--king with you, going, hey, Mr. Big Shot, Big C--k, blah, blah, blah? You know, not c--k – but you know, they’re going to – do you think they’re going to work it into the storyline?

HOGAN: Maybe instead of dropping the leg on people's neck, I'll start dropping something else on them.

STERN: Drop those loads. That's right.

HOGAN: Drop the tripod. (Laughter.)

Id. at 44:19 – 44:40.

138. During that same broadcast, Hogan explained that the sexual performance depicted on the sex tape was not him at his most impressive: “I’m not trying to be a really pompous ass but . . . the situation I was in, I didn’t want to be overly aggressive” because he was with his “friend’s girl.” *Id.* at 17:25 – 17:51.

139. During that media tour, Hogan made nearly identical comments during appearances on the *Sway in the Morning Show* and *Huff Post Live* about the sexual encounter at issue. See Ex. 14 (*Sway in the Morning*) at 5:37 – 6:05 (explaining that Bubba Clem’s “wife . . . kept saying, I want to get with you. I want to do this and that and the other stuff and I want to have sex with you.”); Ex. 15 (*HuffPost Live*) at 11:14 – 12:00 (explaining that the “husband and wife, they had kind of, like, an alternative lifestyle,” and “[t]he chick was always hitting me. Hey, man, I’d love to party with you. . . . And you know, the – my buddy, you know, who’s a radio DJ, you know, was like, cool, hey, don’t worry about it. You know, Heather’s got this crush on you and this and that and the other and all. But she was just relentless. I want to see this and I want to do that with you.”).

140. During Hogan’s appearance on *Huff Post Live* on the same day as the appearance on the *Howard Stern Show*, Hogan continued to joke with the host, as he had with Howard Stern. The host observed that “some people were talking about the performance, but some people wondered if the 24 – I mean, is that what the 24-inch python was really about all those years?” While Hogan protested that “it’s a serious thing,” he also joked about the events depicted on the

sex tape, referring to tweets saying he was “not a two-pump chump” and “it’s Hulk Hogan with an Andre the Giant package.” Ex. 15 at 18:30 – 19:57.

141. On October 9, 2012, while in the midst of this media tour, Hogan appeared once again on the program *TMZ Live*, specifically to address the sex-tape controversy. Hogan Dep. (Ex. 3) at 476: 4 – 483:16; Ex 98 at 23:15 – 32:44. *See also* Conf. SUMF ¶ 141.

142. During that interview, *TMZ* advanced the sex-tape story further, disclosing evidence that Bubba Clem deliberately recorded the sex tape. Ex. 98 at 24:50 – 25:50. Specifically, in the interview, Mike Walters of *TMZ* informed Hogan that he “actually saw the tape,” and that, on the tape, “[y]ou leave, and Bubba comes back in the room, and Heather’s on the bed. And Bubba says – I quote – ‘if we ever did want to retire, all we’d have to do is use this footage of him.’ So I just kind of want your reaction to that. I know you know that this might be in one of the tapes. I can tell you 100 percent that is what Bubba says when you leave the room.” *Id.*

143. When Hogan subsequently named Bubba Clem in the lawsuit, that led to a public feud, in which Bubba Clem took to the airwaves to denounce his former friend. For example, on his radio program on October 16, 2012 (the day after the lawsuit was filed), Bubba Clem told his listeners that Hogan “has known about the tape from the time it was made. Period.” Ex. 99 (Hour 2, Track 1 from Oct. 16, 2012 broadcast) at 6:54 – 6:56. Bubba Clem also stated that Hogan:

knew of everything going on. Don’t play like you don’t know now, Hogan, just to cover your ass. . . . You know – you lived in my home for three months. You know I have surveillance. You knew of everything going on. But now that your feelings are hurt and you’re trying to cover your ass with your wife and your jobs and your social standing[.] . . . Hogan, you fired the first shot, buddy. I told you not to open your mouth on the courthouse steps and that we could deal with this. And you didn’t because you’re selfish. This is my opinion. You’re selfish and you’re all – you don’t care about Heather and what this has caused her. You

don't care about what this has caused me. You don't care about what this has caused your son, your daughter, my son, Heather's daughter.

Ex. 100 (Hour 2, Track 2 from Oct. 16, 2012 broadcast) at 13:15 – 15:01. Bubba Clem also stated that Hogan is “the ultimate, lying, working showman” and that this “is a pro-wrestling script” in which Hogan has “been able to, in my opinion, turn this all around to make everybody but himself look like the bad guy,” instigated by “a bunch of . . . fee-churning lawyers that have thoughts of grandeur.” *Id.* at 47:00 – 47:06, 15:20-15:23, 22:55 – 23:10.

144. On October 29, 2012, after the press release announcing that Hogan's claims against Bubba Clem had been settled, *see* ¶ 15 *supra*, Bubba Clem issued an on-the-air apology to Hogan stating that, “[a]fter further investigation,” he is “now convinced that Hulk Hogan was unaware of the presence of the recording device in my bedroom,” and that “he had no knowledge that he was being taped,” adding that, “when Hulk filed the lawsuit against me, I instinctively went on the offensive. The things that I said about him and his children were not true.” Ex. 101 at 0:17 – 1:00. *See also* Conf. SUMF ¶ 144.

145. For purposes of this motion, this ongoing public discussion after the Publication, in which additional aspects of the story continued to be revealed, further illustrates that the subject was newsworthy.

IX. UNIDSPUTED FACT NO. 9: By his own admission, Hogan has suffered at most only “garden variety” emotional distress.

146. Hogan has expressly limited his claim of emotional distress in this lawsuit to a claim for “‘garden variety’ emotional distress.” Ex. 102 (Hogan's Resp. to Gawker Interrogatory No. 19 (Aug. 21, 2013)).

147. This concession was memorialized in an Order by this Court, having been offered by Hogan to limit the Publisher Defendants' discovery. *See* Ex. 103 (Feb. 26, 2014 Order Re:

Motions of Plaintiff for Protective Order and Motion of Gawker Media, LLC and A.J. Daulerio to Compel Further Responses to Written Discovery) at ¶ 4. Specifically, the Court limited discovery that could be undertaken by the Publisher Defendants and indicated that “[t]his portion of the Court’s ruling is based on the representations of [Hogan’s] counsel at the hearing that . . . [Hogan] is not asserting claims for any physical injury and is limiting claims for emotional injuries to ‘garden variety emotional distress damages’”).

148. Hogan did not go “to the hospital, or have to consult with doctors, or anything similar” as a result of the Publication. Ex. 104 (Plaintiff’s Opposition to Gawker’s and Daulerio’s Motion to Compel, filed Oct. 23, 2013); Ex. 105 (Oct. 29, 2013 Hrg. Tr.) at 10 (Hogan’s Counsel: Hogan “is not saying that . . . he had to seek medical treatment” or “take medication”). *See also* Conf. SUMF ¶ 148.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

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