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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio, pursuant to Fla. R. Civ. P. 1.480(b), hereby move for judgment notwithstanding the verdict ("JNOV") as a matter of law on all claims against all Defendants, on particular claims against all Defendants, on all claims against Nick Denton, and on the availability of punitive damages.

STANDARD OF REVIEW

In ordinary civil cases, when presented with a motion for judgment notwithstanding the verdict, a trial court must "view all of the evidence in a light most favorable to the non-movant" and grant the motion "only where there is no evidence upon which a jury could properly rely, in finding for the plaintiff." *Irven v. Dep't of Health and Rehabilitative Services*, 790 So. 2d 403, 406 n.2 (Fla. 2001) (quoting *Stokes v. Ruttger*, 610 So. 2d 711, 713 (Fla. 4th DCA 1992)). However, that is not the standard that applies to this motion for JNOV in this case. Rather, a far stricter standard is applied to cases involving speech.

In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984), the U.S. Supreme Court stated that "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation 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'" (citations omitted). In other words, "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . ." *Id.* at 511; *see also Miami Herald Publ'g Co. v. Ane,* 458 So. 2d 239, 242 (Fla. 1984) (citing *Bose* in support of the court's "[h]aving independently examined the whole record"). The U.S. Supreme Court has since extended the independent review requirement to invasion of privacy cases as well. *See Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (applying independent review and concluding that "the First Amendment bars [plaintiff] from recovery for intentional infliction of emotional distress or intrusion upon seclusion").

While the doctrine of independent review was first articulated in the appellate context, trial courts have the same obligation, and have consistently applied it when considering post-trial motions in cases raising First Amendment issues. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1355 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996) ("This duty appears to apply to trial courts reviewing post-trial motions"); *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1245-46 (N.D. Ill. 1986), *rev'd in part on other grounds*, 827 F.2d 1119 (7th Cir. 1987); *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313, 317 (S.D.N.Y. 1986), *rev'd on other grounds*, 800 F.2d 298 (2d Cir. 1986), *Reveley v. Berg Publ'ns, Inc.*, 601 F. Supp. 44, 46 (W.D. Tex. 1984). Thus, in considering this JNOV motion, the doctrine of independent review mandates that the evidence at trial is *not* simply to be viewed in the light most favorable to Plaintiff. *Bose*, 466 U.S. at 510-11; *Newton v. NBC*, 930 F.2d 662, 671 (9th Cir. 1990). Rather, the Court itself is required to review the record evidence as a whole to determine if the verdict can constitutionally be sustained. *Id.* A court may grant deference to a jury's pure credibility determinations, but must factor those into what is otherwise its own *de*

novo assessment of the totality of the evidence. *Dibella v. Hopkins*, 403 F.3d 102, 116 (2d Cir. 2005).[1]

ARGUMENT

I. Judgment Must be Entered for All Defendants on Each of Plaintiff's Claims

A. The Publication Relates to a Matter of Public Concern

As a threshold matter, Defendants are entitled to an entry of judgment in their favor as to all claims because, as a matter of law, the publication, including the challenged video excerpts, related to a matter of public concern. Whether a specific publication related to a matter of public concern presents a legal question, properly decided by a court, including at the post-trial motion stage. *See, e.g.*, *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377-78 (Fla. 1989) (deciding public concern issue 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); *see also Snyder*, 562 U.S. at 458-60 (setting aside jury verdict for intentional infliction of emotional distress and intrusion upon seclusion based on conclusion that speech giving rise to claims related to matter of public concern); *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (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").

That the public concern issue is dispositive of each of Plaintiff's claims was conceded by Plaintiff at the summary judgment stage. *See* Pl.'s Opp. to Defs.' Mot. for Summ. J. at 27, May 11, 2015. In brief, this is so because:

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[1] To be sure, Defendants would prevail anyway on each of the claims and issues raised in this motion even if the Court were to apply the default JNOV standard of review.

(1) Plaintiff was required to prove, as an element of his claim for publication of private facts, that the publication did not relate to a matter of public concern, *see Hitchner*, 549 So. 2d at 1377;

(2) the First Amendment provides a complete bar to liability on Plaintiff's claims of intrusion upon seclusion, misappropriation, and intentional infliction of emotional distress so long as the publication at issue relates to a matter of public concern, *see Snyder*, 562 U.S. 443; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Bridges*, 423 So. 2d at 427; and

(3) under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the publication of truthful information, lawfully obtained, about a matter of public concern cannot give rise to liability regardless of whether someone else initially obtained the information illegally – including, as was the case in *Bartnicki*, under a wiretap statute.[2]

As the evidence adduced at trial confirmed, there can be no doubt that the video excerpts related to a matter of public concern. Indeed, the Second District Court of Appeal has already so held with respect to the very publication at issue, concluding 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).

And that conclusion is independently correct under well-established legal principles. As discussed in greater detail in Defendants' Motion for Summary Judgment and its supporting documents – which Defendants incorporate by reference here along with the trial record – there

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[2] As previously explained in Defendants' Bench Memorandum Regarding the Burden of Proof and the Element of Fault Required to Establish that Speech is Not About a Matter of Public Concern – which Defendants incorporate by reference here – Plaintiff was required to demonstrate, by *clear and convincing evidence*, that the publication did not relate to a matter of public concern. He did not do so; indeed, the record confirms that, as a matter of law, the publication *did* relate to a matter of public concern.

are four aspects of the public concern doctrine that compel entry of judgment notwithstanding the verdict for Defendants on all of Plaintiff's claims.

First, at its core, the public concern doctrine recognizes that publications relating to things of interest to the public are constitutionally protected. As the U.S. Supreme Court has emphasized, what constitutes a matter of public concern must be construed broadly to include any "subject of general interest," lest "courts themselves . . . become inadvertent censors." *Snyder*, 562 U.S. at 452-53. 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 (1977).

Second, the mere fact that a publication contains arguably inappropriate content does not remove it from the realm of legitimate public interest. *See Gawker Media, LLC*, 129 So. 3d at 1202; *see also Snyder*, 562 at 453, 458 (citation omitted).

Third, 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 applied 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. Ct. 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).

Applying these same principles, courts have regularly found that images of sex or nudity, when connected to an ongoing public discussion or controversy, relate to matters of public concern even though they involve conduct that in other circumstances would generally be considered 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*, 15 F.3d at 1338 (video footage of molestation of young men by private figure priest).

Fourth, the public concern analysis asks 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 or juries may not take out their red pen to edit individual passages or images from speech about a topic of public concern. In *Michaels II*, the court made exactly that point in rejecting the plaintiff's argument that there was a jury 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; *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").

Applying these principles, the court in *Lee*, 1997 WL 33384309, at *4-5, for example, 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 Plaintiff 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.* 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.

Properly applying this analysis of the public concern test to the trial record, Plaintiff could not have prevailed on any of his claims against any of the Defendants. The evidence showed that Plaintiff openly made an issue of his sex life, including but not limited to boasting about his penis size, *see* Trial Tr. ("Tr.") at 1628:11 – 1630:13,[3] his performance in the bedroom, *see* Tr. at 3607:13 – 3608:17, his daughter's virginity, *see* Tr. at 1640:13 – 1641:1, and even his sexual performance on the tape at issue, *see* Tr. at 1561:15-24. In fact, in a 2011 interview with Howard Stern, Plaintiff stated that he would never have sex with Heather Clem (even though he had already done so). *See* Tr. at 1563:14-15 & Defs.' Trial Ex. 302G. Moreover, the evidence showed that, prior to the publication at issue in this case, there was widespread discussion of the sexual encounter and video at issue, Tr. at 3615:18-21, 3655:6-15, 3755:15 – 3756:11 & Defs. Trial Ex. 829, including by Plaintiff himself. *See, e.g.*, Tr. at 1499:24 – 1505:14 & Defs.' Trial Exs. 214C & 214D (clips of March 7, 2012 interview with TMZ in which Plaintiff discusses the appearance of his naked body in still images published from the sex tape and states that he "stay[ed] drunk and crazy" and had sexual encounters with "several brunettes" following his divorce); Ex. 1 (Defs.' Trial Ex. 160 (March 7, 2012 TMZ article entitled "Hulk Hogan: I Have No Idea Who My Sex Tape Partner Is")).

Moreover, Plaintiff did not dispute that he lacked privacy in any of those matters, but rather he contended that the lifestyle at issue was "Hulk Hogan's," a fictional "character," not "Terry Bollea," and so when he is "in character" he is free to talk about anything – to the point of

[3] Citations to "Tr." can be found in the attached Excerpts of the Trial Proceedings.

going on Howard Stern and TMZ to supposedly comment as "Hulk Hogan" on "Terry Bollea's" performance on the sex tape. *See, e.g.*, Tr. at 1561:15 – 1562:17. Strikingly, there was no evidence in the record that Plaintiff ever informed the public that when he spoke to them as "Hulk Hogan" about his personal life, they should not believe a word he says or should understand that he was somehow drawing such a distinction. Plaintiff's self-perception of this artificial, dual reality is not one that is recognized by the First Amendment, precisely because it would allow a public figure to thrust himself into the public eye, invite discussion of a topic, and then allow him to unilaterally declare some aspect of that topic off limits. Even if that were somehow permitted, the text of the commentary and the subtitles included in the video excerpts make clear that Gawker's publication focused expressly on Hulk Hogan. *See* Defs.' Trial Ex. 310 (video excerpts).

Throughout these proceedings, Plaintiff has attempted to counter this conclusion by pointing to the supposed tension between this analysis of why the video excerpts related to a matter of public concern and the explanation Mr. Daulerio provided about his thought process. However, such a "tension," even assuming it exists, is irrelevant. The public concern analysis is fundamentally objective: It does not matter whether every one of the reasons the video excerpts were of interest to the public was also inside Mr. Daulerio's head when he wrote the commentary, or whether a different journalist might have decided not to publish or to publish in a different way. As one court has explained:

> [T]he argument that an individual's *personal* motives for speaking may dispositively determine whether that individual's speech addresses a matter of *public* concern is plainly illogical and contrary to the broader purposes of the First Amendment. Matters of public concern are those that may be "fairly characterize[d] . . . as relating to any matter of political, social, or other *concern to the community.*" Speech on such matters is protected because the First Amendment is concerned not only with a

> speaker's interest in speaking, but also with the public's interest in receiving information.

Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1, 131 F.3d 564, 574 (6th Cir. 1997) (internal citation omitted). This is also clear from the *Restatement* account of the publication of private facts tort, which states that, as a categorical matter, "[w]hen the ***subject-matter*** of the publicity is of legitimate public concern, there is no invasion of privacy." RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) (emphasis added). Indeed, the public concern test is necessarily objective, as it presents a threshold legal issue that is regularly decided at the motion-to-dismiss stage, in advance of any testimony from the publication's author. *See, e.g.*, *Doe v. Sarasota-Bradenton Fla. Television Co.*, 436 So. 2d 328, 329-30 (Fla. 2d DCA 1983) (holding that publication involved a matter of public concern, and affirming order granting motion to dismiss claims for invasion of privacy and intentional infliction of emotional distress on that basis); *Loft v. Fuller*, 408 So. 2d 619, 620 (Fla. 4th DCA 1981) (concluding that book involved matter of public concern and affirming order dismissing right of publicity claim on that basis); *Walker v. Fla. Dep't of Law Enf't*, 845 So. 2d 339, 340 (Fla. 3d DCA 2003) (affirming dismissal where "claimant could not state a cause of action for invasion of privacy, as a matter of law, because the information allegedly disseminated . . . constituted a matter of legitimate public interest or concern").

In short, the Court should enter judgment notwithstanding the verdict for Defendants on all of Plaintiff's claims because as a matter of law their publication addressed a matter of public concern.

B. Defendants Neither Knew nor Believed that the Publication *Did Not* Relate to a Matter of Public Concern

As explained in greater detail in Defendants' Bench Memorandum Regarding the Burden of Proof and the Element of Fault Required to Establish that Speech is Not About a Matter of Public Concern – which Defendants incorporate by reference here – to prevail on any of his claims, Plaintiff was required under the First Amendment to establish, by clear and convincing evidence, that Defendants knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but nevertheless published the video excerpts despite those doubts. *See, e.g.*, *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 379 (Colo. 1997) (requiring that "the defendant acted with reckless disregard of the private nature of the fact or facts disclosed"); *Purzel Video GmbH v. St. Pierre*, 10 F. Supp. 3d 1158, 1167 (D. Colo. 2014) (same); *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984, 988 (Idaho 1974) (reversing jury verdict for failure to require proof of knowing scienter or reckless disregard in a private facts case); *Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 555 (Wis. 1989) (requiring reckless disregard "as to whether there was a legitimate public interest in the matter"); *Roshto v. Hebert*, 439 So. 2d 428, 432 (La. 1983) ("more than insensitivity or simple carelessness is required for the imposition of liability for damages when the publication is truthful, accurate and non-malicious"); *see generally Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (imposing this subjective state of mind requirement on claim for intentional infliction of emotional distress). This element is separate and distinct from whether the publication objectively related to a matter of public concern. *See* Part I.A. *supra*.

Yet Mr. Daulerio and Ms. Carmichael both testified unambiguously that they believed the video excerpts, in the context of Mr. Daulerio's commentary, were newsworthy. *See, e.g.*, Tr. at 1888:14-16 (testimony of Mr. Daulerio that he "thought it was newsworthy and it was something

that was worth discussing and putting up on the site"); Tr. at 2746:3-5 (testimony of Mr. Daulerio that he knew "the tape had already been discussed in the public sphere"); Tr. at 2748:2-5 (testimony of Mr. Daulerio that he knew Plaintiff "had already commented on the tape in question on TMZ"); Tr. at 2785:22 – 2786:2 (same); Tr. at 2863:3-13 (testimony of Ms. Carmichael that she thought the publication, taken as a whole, was newsworthy). Similarly, even crediting Plaintiff's version of the facts that Mr. Denton was aware of the sex tape before it was published, there is no evidence that he ever doubted that the tape was newsworthy, as long as it was excerpted. *See, e.g.*, Tr. at 2041:7-16 (testimony of Mr. Denton to the effect that, if he spoke to Mr. Daulerio prior to the publication, he would have told Mr. Daulerio he should not publish anything gratuitous and should check with the company's counsel). Plaintiff offered no evidence to the contrary at any point during trial, let alone clear and convincing evidence.[4] This, too, requires entry of judgment notwithstanding the verdict for Defendants on all of Plaintiff's claims.

C. Bubba Clem's Motion to Quash Required Dismissal of this Case

When Bubba Clem successfully quashed his subpoena on the basis of the Fifth Amendment, *see* Tr. at 2825:23-24; 2831:25 – 2832:3, Defendants were deprived of evidence that was of central importance to their defenses in this action. Most importantly, Defendants were deprived of the opportunity to present evidence on a variety of key points – including that Plaintiff knew he was being taped, knew of the tape's existence, and was complicit in the tape's distribution – from one of the only witnesses who had personal knowledge of those facts and had

[4] As discussed in Part IV.B. *infra*, for his part Mr. Denton testified that he had not read the commentary or viewed the video excerpts prior to publication, so he could not have formed any belief as to the newsworthiness of the publication at that time – let alone known or believed that the publication did not relate to a matter of public concern. *See, e.g.*, Tr. at 2964:7-13. In any event, having viewed them since, Mr. Denton testified that he believes the excerpts were newsworthy, and there is no evidence to the contrary. *See* Tr. at 2970:2-5.

made statements about each which the jury should have been entitled to consider. If Plaintiff was aware he was being taped, at a minimum his wiretap and intrusion claims would necessarily fail because they are predicated on unconsented recording, and his claims that the recording depicted "private facts" and that he suffered emotional injuries would be seriously called into question. Moreover, Mr. Clem's testimony was pivotal on other issues, including whether Plaintiff's sex life was a matter of public concern and whether Plaintiff and Heather Clem's testimony was accurate and credible.

Case law is clear the action should have been dismissed once Mr. Clem was permitted to avoid testifying at all through a blanket assertion of the Fifth Amendment privilege, as previously argued in Defendants' opposition to Mr. Clem's motion to quash the trial subpoena. For instance, in *Trulock v. Lee*, 66 F. App'x 472, 476 (4th Cir. 2003) (per curiam), plaintiff, an official at the Department of Energy, sued nuclear scientist Dr. Wen Ho Lee for defamation after Lee made statements to the press that plaintiff focused an investigation on him because of his ethnicity. During discovery, the government refused to produce key documents on privilege grounds – there, the state secrets privilege – and the district court subsequently granted the government's request as an intervenor to dismiss the case. The Fourth Circuit affirmed, explaining that "basic questions about truth, falsity, and malice" could not be answered without access to information that a third party (there, the government) would not provide. Likewise, in *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 2015 WL 1344479 (S.D.N.Y. Mar. 23, 2015), the district court dismissed a defamation action where a third party (the government, again acting as intervenor) asserted the same privilege to prevent access to information that would be key to establishing plaintiff's claims. The court wrote that while it "recognizes that dismissal is a 'harsh sanction,'" it is "nonetheless appropriate" where "there is no intermediate solution that

would allow this litigation to proceed while also safeguarding the secrets at issue." *Id.* at *8. That was the situation here as well: when Mr. Clem was permitted to avoid testifying at trial, Defendants were irreparably prejudiced because they had no means to rebut Plaintiff's self-serving testimony, including about his alleged expectation of privacy in his encounter with Heather Clem. The Court was required to dismiss the action at that time and, as a result, should now enter judgment notwithstanding the verdict in Defendants' favor on all of Plaintiff's claims.

II. Plaintiff Lacked a Reasonable Expectation of Privacy in His Sexual Encounters with Heather Clem

Three of Plaintiff's causes of action must be dismissed for yet another, independent reason. They required a finding, among other elements of those claims, that Plaintiff had a reasonable expectation of privacy in his encounter with Heather Clem – or, to put it more precisely, his sexual encounter with Ms. Clem in the presence of Bubba Clem. However, the trial record contained no such evidence, and therefore Defendants are entitled to JNOV as a matter of law on those claims.

Specifically, to establish that the Wiretap Act applies to the video excerpts in the first place, Plaintiff was required to show that he had "'an actual subjective expectation of privacy' in his oral communication, and society [is] prepared to recognize the expectation as reasonable under the circumstances." *Stevenson v. State*, 667 So. 2d 410, 412 (Fla. 1st DCA 1996) (quoting *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994)). Similarly, his claim for intrusion upon seclusion required a finding that Defendants intruded into some physical "'place' in which there is a reasonable expectation of privacy." *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003); *see also* Jury Instruction No. 23 (reciting same). Finally, Plaintiff's claim for the publication of private facts required a finding that the facts about his encounter with Ms. Clem, including the video excerpts, were actually private. *Hitchner*, 549 So. 2d at 1374.

The evidence in this case showed that the encounter depicted in the video excerpts was one in which (a) Plaintiff engaged in an adulterous sexual encounter in someone else's home, (b) at the invitation of a media personality (Bubba Clem) who liked to publicly boast about such escapades, including on his then-nationally syndicated radio show, (c) while Plaintiff knew that both of the Clems were present, (d) even though Plaintiff knew that Mr. Clem had cameras in his house, and (e) was one of three or four similar encounters. Plaintiff, as well as the former Ms. Clem, also testified that both Bubba and Heather Clem boasted on the radio about the details of their sex life, and that Bubba Clem openly discussed their "open marriage" and parties they held in their home for others to come and engage in sexual encounters with them. Tr. at 1391:5-6; 1476:3-20; 3465:6-15.

Plaintiff himself appeared as a guest on Mr. Clem's radio show dozens of times, often to talk about his personal life – including even boasting about his penis size. Tr. at 1439:5 – 1441:16; 1628:11 – 1630:13. One of Plaintiff's sexual encounters with Ms. Clem even occurred at the radio station, while Mr. Clem was also at the station. Tr. at 3478:5-15. Plaintiff also recognized there was at least a possibility that Mr. Clem might have a practice of filming Ms. Clem's sexual encounters with other men with security cameras, because Plaintiff's first thought at the time was to ask Mr. Clem just that, a thought not doubt influenced by Plaintiff's knowledge of the security cameras in Mr. Clem's house. Tr. at 1402:9-14; 1455:5-15, 1460:19 – 1461:2. And, as discussed above, Plaintiff had long made public the details of his sex life.

Under these circumstances, Plaintiff plainly lacked any reasonable expectation of privacy in this particular encounter with Ms. Clem. Indeed, even in ordinary circumstances, Justice Overton wrote in his concurrence in *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985), that "when an individual enters someone else's home or business, he has no expectation of privacy in what

he says or does there, and chapter 934 does not apply. It is a different question, however, when the individual whose conversation is being recorded is in his own home or office." *Id.* at 1276 (Overton, J., concurring). Here, Plaintiff's encounters with a couple outside of his home, at their invitation, whom he knew openly publicized their sexual escapades and often joined them in doing that, plainly lacked a reasonable expectation of privacy regardless of whether he had actual knowledge that he was being recorded. Judgment as a matter of law is therefore required on the claims for publication of private facts, intrusion, and violation of the Wiretap Act.

III. Judgment Must be Entered for All Defendants on Particular Claims For Additional Reasons

Finally, judgment as a matter of law should be also entered on particular claims for the following additional reasons:

A. Intrusion Upon Seclusion

Florida law is clear that, to prevail on a claim of intrusion upon seclusion, Plaintiff was required to prove that Defendants engaged in conduct actually consisting of "physically or electronically intruding into one's private quarters." *Allstate*, 863 So. 2d at 162. In other words, the relevant intrusion must be intrusion into some physical "'place' in which there is a reasonable expectation of privacy," not an abstract or merely metaphorical intrusion entailed in publishing information obtained from some physical space. *Id.*; *see also* Jury Instruction No. 23 (reciting same); *see also Pearson v. Dodd*, 410 F.2d 701, 703-06 (D.C. Cir. 1969) (holding that journalists who had received and published excerpts of documents stolen from a United States Senator's office were not liable for intrusion upon seclusion, and noting that "in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate"); *Doe v. Peterson*, 784 F. Supp. 2d 831, 843 (E.D. Mich. 2011) (website that

published nude photographs of plaintiff could not be held liable for intrusion upon seclusion because website "merely received images already obtained by non-parties to this case").

Thus, regardless of whether Plaintiff had an expectation of privacy in the Clems' home, the trial record contains no evidence whatsoever that Defendants intruded, physically or electronically, into Plaintiff's "private quarters" or any other private space. Indeed, in their testimony Plaintiff and his counsel, David Houston, consistently maintained that Bubba Clem was solely responsible for recording Plaintiff's encounter with Heather Clem, and no facts adduced at trial even suggested that Defendants had anything to do with the taping. *See* Tr. at 1993:3-20 (testimony of Mr. Houston); *see also* First Am. Compl. ¶¶ 1, 26, June 18, 2015. Accordingly, Defendants are entitled to entry of JNOV on the intrusion claim.

B. Commercial Misappropriation of the Right of Publicity

1. The evidence failed to establish a claim under both Florida law and the First Amendment

Florida law provides that, to prevail on a claim for commercial misappropriation of the right of publicity, plaintiff was required to show that his or her name or likeness was used without authorization specifically for a "commercial purpose." *See Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 805 (Fla. 2005); *Loft*, 408 So. 2d at 622-23; Fla. Stat. § 540.08.[5]

[5] Plaintiff asserted a common law, rather than statutory, claim for commercial misappropriation of his right of publicity, but that makes no difference. In *Loft*, the court explained that the only effect of the statute is to "amplif[y] the *remedies* available for" a right of publicity claim. *Loft*, 408 So. 2d at 622 (emphasis added). Since that time, courts in Florida have consistently found that the common law right of publicity is "substantially identical" to the statutory right under Fla. Stat. § 540.08. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1257-60 (S.D. Fla. 2010) (employing § 540.08 analysis to reject common law right of publicity claim); *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1212-15 (M.D. Fla. 2002) (same); 19A Fla. Jur. 2d, Defamation & Privacy § 225 (2015) ("The elements of common law invasion of privacy based on the commercial misappropriation of a person's likeness coincide with the elements of

Significantly, "commercial purpose" is a legal term of art that is *not* equivalent simply to obtaining some kind of economic benefit from the use of the name or likeness. Rather, for a misappropriation claim, an unauthorized use of another's name or likeness is for a "commercial purpose" only when the name or likeness is used "to directly promote a product or service" *distinct from* the publication in which the name or likeness appears. *Tyne*, 901 So. 2d at 808.

Unauthorized use of a plaintiff's name or likeness in news reporting, commentary, entertainment, films, works of fiction or nonfiction, or even advertising incidental to such uses is not a "commercial purpose" and is not actionable – even though such works are for profit and therefore provide a benefit to the publisher. *Id.* at 806-08; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995) (the term does "not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses") (emphasis added). Indeed, if the term "commercial purpose" were otherwise applied to this case, the jury verdict would violate the First Amendment, which protects the ability of publishers to publish stories about individuals – and to use their names and likenesses – without first seeking the individuals' permission. *Tyne*, 901 So. 2d at 810; *Loft*, 408 So. 2d at 623.

The trial record contains no evidence whatsoever that Defendants used Plaintiff's name or likeness for such a "commercial purpose," as that term is defined under applicable law. All the evidence confirms the opposite – the video excerpts were part of a post that was not used to promote anything except the Gawker site. In addition, regardless of whether it involves a matter

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the unauthorized publication of a name or likeness in violation of the statute, and are substantially identical.").

of public concern, the misappropriation verdict violates the First Amendment for additional reasons.[6] Judgment should thus be entered for Defendants on this claim.

2. The evidence did not support any damages that are potentially compensable for this cause of action

Even if judgment is not entered in its entirety on Plaintiff's misappropriation claim, the verdict for $55 million in economic damages must be dismissed as a matter of law because there was no evidence that could support it. As an initial matter, economic damages of any type were only available for Plaintiff's claim for misappropriation of his right of publicity, the only one of Plaintiff's causes of action that protects a specifically economic interest. The other claims are limited to emotional distress damages.[7]

For the right of publicity claim in particular, Plaintiff put forth no evidence at trial to support the only economic damages that are actually recoverable. Florida law is clear that recovery on such a claim is limited to "damages for *any loss or injury* sustained" by the plaintiff

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[6] The misappropriation tort Plaintiff asserted is triggered solely by the use of his name and image, and is therefore a content-based regulation of speech. *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 971 (10th Cir. 1996) ("Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech."). "'Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Sarver*, 813 F.3d at 903 (quoting *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015)). Because the record shows that Defendants simply conveyed accurate facts, there is no compelling interest in restricting Defendants' speech in this instance, and so entry of judgment notwithstanding the verdict in favor of Defendants is required on Plaintiff's claim of commercial misappropriation.

[7] *See, e.g.*, 19A Fla. Jur. 2d Defamation and Privacy § 232 ("an invasion of the right of privacy by a publication confers no right on the plaintiff to share in the proceeds of the publication"); *Doe v. Beasley Broad. Grp., Inc.*, 105 So. 3d 1, 2 (Fla. 2d DCA 2012) (holding that a plaintiff may recover damages for emotional distress on invasion of privacy claim); 32 Fla. Jur. 2d Interference § 19 (plaintiff suing for intentional infliction of emotional distress through outrageous conduct is limited to damages "for mental pain and anguish"); Fla. Stat. § 934.10(1)(b) (Florida Wiretap Act provides for statutory damages). The only other possible type of damage arising from the privacy claims is damage to reputation, but Plaintiff repeatedly conceded that he was not seeking reputational damages.

"by reason" of an unauthorized use of his name or likeness, "including an amount which would have been *a reasonable royalty*." Fla. Stat. § 540.08(2) (emphases added); *see also Cason v. Baskin*, 20 So. 2d 243, 254 (Fla. 1944) ("the publication of a book containing a biographical sketch of a person does not legally entitle[] such person to share whatever profit is realized from the sale of such book"). In other words, recovery on such a claim is limited to loss or injury to the plaintiff, not benefit to the defendant. Accordingly, the $15 million Plaintiff asked the jury to award him in order to disgorge the "benefit" Defendants supposedly received from posting the video excerpts was, at matter of law, not recoverable.

The same goes for the other economic damages Plaintiff sought, which were based on the amount that the leading seller of subscription access to entire catalogues of celebrity sex tapes charges for such access. Tr. 3733:25 – 3736:11, 3743:17 – 3744:17. Plaintiff did not prove such damages, but, even if he did, evidence regarding the amount in *gross receipts* that a party other than the Plaintiff might have obtained by adding his sex tape to an entire catalogue of celebrity sex tapes is not evidence of Plaintiff's lost licensing fee, which is the only thing he can recover for his commercial misappropriation claim.

Because Plaintiff offered no evidence that would allow an award of damages for commercial misappropriation (even assuming that he separately satisfied the "commercial purpose" requirement of the commercial misappropriation tort), Defendants are entitled to JNOV with respect to this claim.

C. Intentional Infliction of Emotional Distress

1. Plaintiff Did Not Suffer "Severe Emotional Distress"

Florida law is clear that, to prevail on a claim of intentional infliction of emotional distress, Plaintiff needed to establish that he suffered "severe" emotional distress. *See Clemente*

v. Horne, 707 So. 2d 865, 866-67 (Fla. 3d DCA 1998) (an intentional infliction of emotional distress claim requires emotional distress that is "severe"); *see also Kraeer Funeral Homes, Inc. v. Noble*, 521 So. 2d 324, 325 (Fla. 4th DCA 1988) (a plaintiff can only establish this tort by proving "emotional distress of such a substantial quality or enduring quality, that no reasonable person in a civilized society should be expected to endure it"). The trial record did not establish that level of *severe* emotional distress as a matter of law for two reasons.

First, in his sworn interrogatory responses, Plaintiff expressly limited his claim of emotional distress to a claim for "'garden variety' emotional distress." Plaintiff's concession was memorialized in an Order by this Court, having been offered by him to limit Defendants' discovery. *See* Order re: Mots. Of Pl. for Protective Order and Mot. of Defs. To Compel at ¶ 4, Feb. 26, 2014 (limiting discovery that could be taken by Defendants as to Plaintiff's claims for emotional distress and indicating that "[t]his portion of the Court's ruling is based on the representations of [Plaintiff's] counsel at the hearing that . . . [Plaintiff] is not asserting claims for any physical injury and is limiting claims for emotional injuries to 'garden variety emotional distress damages'"). This concession precluded him as a matter of law from establishing that he suffered "severe" emotional distress, which is a required element of his intentional infliction of emotional distress claim. *See Chase v. Nova Se. Univ., Inc.*, 2012 WL 1936082, at *3-4 (S.D. Fla. May. 29, 2012) ("[g]arden-variety" emotional distress is defined as "ordinary or commonplace emotional distress," and "simple or usual," and does not rise to the level of severe emotional distress) (internal quotation marks and citations omitted); *Wheeler v. City of Orlando*, 2007 WL 4247889, at *3 (M.D. Fla. Nov. 30, 2007) (claim for intentional infliction of emotional distress requires asserting more than "garden variety claim of emotional distress") (internal

quotation marks omitted). Simply put, Plaintiff's concession alone requires judgment as a matter of law to Defendants on his emotional distress claim.

Second, the trial record did not in any event include evidence of severe emotional distress of the type required to establish this claim. Plaintiff's trial testimony was limited to loss of sleep, loss of appetite, and one instance where he became teary-eyed when talking to the host of a television program. *See* Tr. at 1661:13-19; 1719:15 – 1720:12. Indeed, Plaintiff conceded that he did not seek medical or psychiatric treatment, or any sort of counseling, as a result of the publication at issue, which, on its own, takes his asserted "emotional distress" out of the "severe" category. *See* Tr. at 1607:3-19 (testimony of Plaintiff); *see also Mixon v. K Mart Corp.*, 1994 WL 462449, at *3 (M.D. Fla. Aug. 2, 1994) (granting summary judgment on intentional infliction of emotional distress claim where plaintiff claimed to have suffered emotional problems, but offered no evidence of medical or psychiatric treatment for his condition); *Murdock v. L.A. Fitness Int'l, LLC*, 2012 WL 5331224, at *4 n.8 (D. Minn. Oct. 29, 2012) (dismissing intentional emotional distress claim where all that was claimed was "'garden variety' emotional distress" supported by plaintiff's testimony that he suffered from, *inter alia*, "[d]epression, chronic fatigue, irritability, sleep abnormalities, insomnia, tiredness throughout the day, [and] malaise").

In sum, as a matter of law, the trial record did not establish that Plaintiff suffered *severe* emotional distress, and thus judgment should be entered notwithstanding the verdict on this claim.

2. Defendants Did Not Cause Severe Emotional Distress

Even if the trial record had established that Plaintiff suffered "severe" emotional distress, it contains no evidence that Defendants *caused* that severe distress by the conduct complained of.

On the contrary, Plaintiff had no first-hand knowledge of what the video excerpts contained, as he admitted that he never viewed the video excerpts posted on Gawker.com and only knew what other people told him. *See, e.g.*, Tr. at 1468:11-22. The content of those excerpts, therefore, cannot be the cause of any emotional distress he has suffered. In addition, Plaintiff testified that he has been distressed since July 2007 – when the sex tape was recorded – which was more than five years *before* Defendants engaged in the conduct complained of. *See* Tr. at1595:1-25. Finally, Plaintiff's own testimony established that the principal cause of any distress he suffered in October 2012 was not the publication of the video excerpts, but rather the revelation that Bubba Clem – the person Plaintiff had thought of as his best friend – was responsible for recording the sex tape. *See, e.g.*, Tr. at 1582:21 – 1586:13. The record is therefore clear that Defendants did not as a matter of law cause Plaintiff any severe emotional distress that he may have suffered, and so judgment should be entered notwithstanding the verdict on this claim for that reason as well.

3. Defendants Did Not Engage in "Extreme and Outrageous" Conduct

The trial record does not contain any evidence showing that Defendants engaged in "extreme and outrageous" conduct, which Plaintiff was also required to prove to prevail on his claim of intentional infliction of emotional distress. *See LeGrande v. Emmanuel*, 889 So. 2d 991, 995 (Fla. 3d DCA 2004) (stating that "extreme and outrageous conduct" is required to satisfy element of intentional infliction of emotional distress claim); *see also* Jury Instruction No. 25 (reciting same). For one, the publication of the video excerpts in the context of a concededly protected post cannot qualify as "extreme and outrageous," particularly in light of plaintiff's expansive public discussions of his sex life. *See, e.g.*, Tr. at 1623:7 – 1624:8 (testimony of Plaintiff as to portion of his autobiography describing affair); *see supra* Section I.A. at pp. 7-8;

see also Cape Publications, Inc. v. Bridges, 423 So. 2d at 427-28 (even though the publication of photograph of private figure crime victim "clutching a dish towel to her body in order to conceal her nudity" was in "bad taste," the "publication of the story and photograph does not meet the test of outrageousness as required for the independent tort of intentional infliction of emotional distress"); *Moore v. Wendy's Int'l, Inc.*, 1994 WL 874973, at *3-4 (M.D. Fla. Aug. 25, 1994) (granting motion to dismiss based on finding that, although allegations of extreme sexual harassment were "totally inexcusable and unacceptable," they did not qualify as "outrageous" conduct required to establish intentional infliction of emotional distress). For another, Defendants' conduct – posting a commentary accompanied by video excerpts – mirrored conduct approved by the court in *Michaels II*, 1998 WL 882848, (as well as the other cases cited at p. 6 *supra* in which the use of sexually explicit images or video footage was approved), so such conduct is not "extreme and outrageous" as a matter of law. For this reason as well, the court should enter judgment notwithstanding the verdict on the intentional infliction of emotional distress claim.

4. Defendants Did Not Engage in "Intentional or Reckless" Conduct With Respect to Plaintiff's Alleged Emotional Distress

The trial record further contains no evidence to establish that Defendants' conduct was "intentional or reckless" with respect to his alleged emotional distress, which is an element of Plaintiff's intentional infliction of emotional distress claim. *See Gallogly v. Rodriguez*, 970 So. 2d 470, 471 (Fla. 2d DCA 2007); *see also* Jury Instruction No. 25 (reciting this requirement). Indeed, none of the conduct that Defendants engaged in here comes anywhere close to the kind of conduct that Florida courts have found to qualify as intentionally or recklessly causing severe

emotional distress.[8] To the contrary, the record evidence instead demonstrated that Defendants did not set out to cause Plaintiff emotional distress and did not even consider that possibility. *See, e.g.*, Tr. at 1888:21 – 1889:11 (testimony of Mr. Daulerio); Tr. at 2865:1-19 (testimony of Ms. Carmichael). The Court should enter judgment in favor of Defendants notwithstanding the verdict on the intentional infliction claim for this reason as well.

D. Florida's Security of Communications Act

In addition to the fact, as discussed above, that plaintiff had no reasonable expectation of privacy, the Florida Wiretap Act, Fla. Stat. § 934, also provides a "complete defense" based on a "good faith reliance" on a "good faith determination that Florida or federal law . . . permitted the conduct complained of." *Id.* § 934.10(2)(c); *see also Brillinger v. City of Lake Worth*, 978 So. 2d 265, 268 (Fla. 4th DCA 2008) (describing good-faith defense under statute). The record conclusively establishes that Defendants had a good-faith belief that the publication addressed a matter of public concern, and that the publication could therefore not give rise to liability. *See, e.g.*, Tr. at 1888:14-16 (testimony of Mr. Daulerio that he "thought it was newsworthy and it was something that was worth discussing and putting up on the site"). That Defendants held this belief in good faith is further confirmed by the fact that both Judge Whittemore and a unanimous panel of the Court of Appeal subsequently came to the same belief, with both courts expressly invoking the U.S. Supreme Court's decision in *Bartnicki* invalidating the use of a wiretap act in these circumstances. *See Gawker Media, LLC*, 129 So. 3d at 1203 ("As the speech in question here is indeed a matter of legitimate public concern, the holding in *Bartnicki* applies."); *Bollea v.*

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[8] *See, e.g.*, *Nims v. Harrison*, 768 So. 2d 1198, 1200-01 (Fla. 1st DCA 2000) (defendant threatened to kill teacher and rape her children in student newsletter); *Williams v. City of Minneola*, 575 So. 2d 683, 686, 690 (Fla. 5th DCA 1991) (police officers viewed videotape of autopsy of man who died of an apparent drug overdose at officer's home in a "party atmosphere").

Gawker Media, LLC, 2012 WL 5509624, at *4 (M.D. Fla. Nov. 14, 2012) (citing *Bartnicki* for its "holding that First Amendment interest in publishing matters of public importance outweighed . . . privacy rights given fact that media outlet had played no part in illegal reception"); *see also Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1328-29 (M.D. Fla. 2012) (reiterating that publication addressed a matter of public concern).

Given that the trial record reflects that Defendants reached the conclusion ultimately reached by four distinguished jurists, Defendants are entitled to entry of judgment notwithstanding the verdict on Plaintiff's Wiretap Act claim.

IV. Judgment Must be Entered for Defendant Nick Denton on All of Plaintiff's Claims

A. Nick Denton Did Not Participate in the Publication

At the time of the publication at issue in this case, Nick Denton was President and CEO of Gawker. *See* Tr. at 2019:8-13 (testimony of Mr. Denton). It is well settled that "officers or agents of corporations may be individually liable in tort if they commit or participate in a tort . . . ." *White v. Wal-Mart Stores, Inc.*, 918 So. 2d 357, 358 (Fla. 1st DCA [redacted]) (citations omitted). However, such liability must be based on "***personal*** (as opposed to technical or vicarious) fault" on the part of "the officer or agent." *Id.* (emphasis added). Indeed, "an officer or agent may not be held personally liable simply because of his general administrative responsibility for performance of some function of his [or her] employment." *Id.*

Yet the trial record contains no evidence at all to establish that Mr. Denton had any personal involvement in posting the allegedly tortious publication at issue in this case. To the contrary, the evidence showed unambiguously that Mr. Denton never watched any portion of the sex tape or reviewed the accompanying commentary before they were published. *At most*, if plaintiff's arguments about the testimony are credited, Mr. Denton was merely aware of

Gawker's receiving a tape and his involvement was limited to suggesting that, if Mr. Daulerio were to publish anything, he not be gratuitous and check with the company's counsel. *See, e.g.*, Tr. at 2040:22-25 (testimony of Mr. Denton that he has never viewed the sex tape in whole or part); *id.* 2041:7-16; *id.* 2042:8-17 (testimony of Mr. Denton that he did not read the commentary before its publication).

Nor does the record establish that Mr. Denton could be vicariously liable through the doctrine of respondeat superior: as the U.S. Supreme Court has explained, setting aside special circumstances not present here, "it is the corporation, ***not its owner or officer***, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (emphasis added); *see also id.* ("A corporate employee typically acts on behalf of the corporation, not its owner or officer."). Because the trial record contains no evidence that Mr. Denton was personally responsible for the publication in any way, he cannot be found liable on any of Plaintiff's claims, and entry of judgment in his favor notwithstanding the verdict is warranted. *See Della-Donna v. Nova Univ., Inc.*, 512 So. 2d 1051, 1056 (Fla. 4th DCA 1987) (affirming entry of judgment for defendant where "the record revealed no proof" that defendant "took part in the [allegedly tortious] publication or in procuring the publication").

B. Nick Denton Did Not Have a Culpable State of Mind

The trial record likewise contains no evidence at all of a culpable state of mind on the part of Mr. Denton. Rather, the evidence brought out at trial confirmed that Mr. Denton had *no* state of mind as to the publication at issue, because he did not participate in it in any way. *See, e.g.*, Tr. at 2040:22-25; Tr. at 2042:8-17. Yet to impose liability for truthful speech about a concededly public figure in a manner consistent with the First Amendment, Plaintiff must have

shown, by clear and convincing evidence, that Mr. Denton knew that Gawker was publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but nevertheless published the video excerpts despite those doubts. *See, e.g.*, *Robert C. Ozer*, 940 P.2d at 379; *Purzel Video GmbH*, 10 F. Supp. 3d at 1167; *Taylor*, 525 P.2d at 988; *Zinda*, 440 N.W.2d at 555; *Roshto*, 439 So. 2d at 432. Since the trial record contains no evidence whatsoever that Mr. Denton had any such state of mind, he is entitled to entry of judgment notwithstanding the verdict on all of Plaintiff's claims.

V. The Record Does Not Support an Award of Punitive Damages as a Matter of Law

As set forth in the Jury Instructions, to establish an entitlement to punitive damages, Plaintiff was required to show that Defendants engaged in the conduct complained of with a state of mind consisting of "intentional misconduct." Jury Instruction No. 34. That means there must be clear and convincing evidence that each Defendant had "actual knowledge" that both (1) their conduct was wrongful and (2) that there was a high probability of injury or damage to Plaintiff. *Id.* The evidence at trial cannot possibly satisfy this standard.

First, Plaintiff was required to show – by clear and convincing evidence – that Defendants published the video excerpts at issue knowing that they *did not* relate to a matter of public concern. *See Toffoloni v. LFP Publ'g Grp., LLC*, 483 F. App'x 561 (11th Cir. 2012) (even though publication of nude photographs of deceased model in *Hustler* magazine was actionable, award of punitive damages was vacated because defendants subjectively believed photographs were newsworthy).[9] However, the trial record reflects only that Defendants had a

[9] *See, e.g.*, *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d at 428 (overturning award of punitive damages based on invasion of privacy claim for publishing nearly nude photograph of private figure plaintiff, when photograph was newsworthy); *Genesis Publ'ns, Inc. v. Goss*, 437

genuine belief in the publication's newsworthiness. *See, e.g.*, Tr. at 1888:14-16 (testimony of Mr. Daulerio that he "thought it was newsworthy and it was something that was worth discussing and putting up on the site."); Tr. at 2863:3-13 (testimony of Ms. Carmichael that she thought the publication, taken as a whole, was newsworthy). There is no evidence in the record – much less the required clear and convincing evidence – that Defendants in any way doubted that.

Indeed, Plaintiff did not attempt to prove otherwise. Plaintiff's entire pitch to the jury at closing was that Defendants have an insupportably expansive conception of what is newsworthy and an insupportably crabbed conception of the right to privacy. *See, e.g.*, Tr. at 3692:5-8 (describing Gawker as a "place . . . run by a guy who literally believes we don't have privacy rights"); Tr. at 3699:7-16 (criticizing Mr. Denton's test for newsworthiness as showing insufficient deference to privacy); Tr. at 3702:14 – 3703:17 (discussing Mr. Denton's view that "supposed invasion of privacy has incredibly positive effects on society"). Plaintiff cannot have it both ways, by *both* criticizing Defendants for believing they have a right to publish things like the excerpts at issue, *and* asking for punitive damages on the ground that Defendants subjectively knew that they did not have a right to publish them and did so anyway.

Second, Plaintiffs was required to show – by clear and convincing evidence – that Defendants actually knew that Plaintiff had an expectation of privacy in the video excerpts when they were posted. However, here too there is no evidence at all of that; to the contrary, the evidence showed that Mr. Daulerio suspected that the sex tape was a publicity stunt in which Plaintiff was involved, *see* Tr. at 2751:7-18; indeed, many others in the media suspected the same thing because Plaintiff was repeatedly asked about that in interviews after the commentary

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So. 2d 169, 170 (Fla. 3d DCA 1983) (publishing nude photograph of plaintiff with belief that it was lawful did not support claim for punitive damages because "plaintiff must show more than an intent to commit a tort or violate a statute to justify punitive damages").

was posted. Nor did the evidence show that any of the Defendants knew there was a high probability of injury to Plaintiff. Rather, the evidence showed they did not consider that question, and in any event could not have reached that conclusion because no one thought there was a high probability that Plaintiff was unaware he was taped or that he would be bothered by Defendants' publication given his own repeated participation in the public discussion of the tape. Under these circumstances, the record does not establish at all – let alone by clear and convincing evidence – that Defendants published with the requisite state of mind as required to establish a claim for punitive damages. (For the same reasons, there is no evidence that would support a finding that Defendants acted with specific intent to harm Plaintiff in a manner that would relieve him of the cap imposed by Fla. Stat. § 768.73(1)(a).) Accordingly, Plaintiff was not entitled to an award of punitive damages from any Defendant in this action as a matter of law, and judgment should be entered notwithstanding the verdict on those grounds.

Finally, the record evidence additionally failed to show any entitlement to punitive damages against Mr. Denton. As explained above, Mr. Denton had *no* state of mind with respect to the publication of the excerpts, let alone one of intentional misconduct. Accordingly, even if punitive damages could be charged against Mr. Daulerio, and – by extension – Gawker, they certainly could not be charged against Mr. Denton.

CONCLUSION

For the foregoing reasons, Defendants respectfully request entry of judgment in their favor notwithstanding the verdict as to all of the claims and issues raised in this motion.

April 4, 2016

Respectfully submitted,

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