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.

GAWKER MEDIA, LLC aka GAWKER MEDIA; NICK DENTON; and A.J. DAULERIO,

Defendants.
_____/

Case No. 12012447 CI-011

PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT AND PERMANENT INJUNCTION

Plaintiff, Terry Gene Bollea professionally known as Hulk Hogan ("Mr. Bollea"), moves this Court for entry of a Final Judgment in his favor for the money damages assessed by the jury, as well as a permanent injunction against Defendants, Nick Denton ("Denton"), A.J. Daulerio ("Daulerio") and Gawker Media, LLC ("Gawker"), and their officers, agents, servants, employees, attorneys, and those in active concert or participation with them (collectively, "Gawker Defendants"). That permanent injunction would enjoin Gawker Defendants from publicly disclosing, posting, publishing, exhibiting, or broadcasting any of the contents of the surreptitious video recordings of Mr. Bollea that were at issue in this case and are within their custody, possession or control. Specifically, that injunction would prohibit, and be limited to, the public disclosure of any and all excerpts, clips, still images and audio derived from these video recordings which that Mr. Bollea naked or engaged in sexual activity, as well as any and all audio derived from these recordings that does not relate to a matter of legitimate public

concern. The grounds upon which this motion is based and the reasons it should be granted follow.

I. Introduction

In the summer of 2007, Mr. Bollea was illegally recorded with a hidden camera as he engaged in consensual sexual activity and private conversations in a private bedroom. The secretly recorded footage, which includes images of Mr. Bollea naked and engaging in consensual sexual activity, as well as audio recording of him engaged in this activity and his private conversations in a private bedroom, was created in violation of Florida's Video Voyeurism and Security of Communications laws. Gawker Defendants never should have publicly disclosed, and the public should never be permitted to see or hear, Mr. Bollea engaged in these intimate activities.

In September 2012, under suspicious circumstances, a DVD containing 30 minutes of the illegally recorded footage was "anonymously" delivered to Gawker Defendants (the "30-Minute Video"). Without obscuring or censoring any of the explicit visual or audio content, without asking Mr. Bollea whether he had consented to the recording, without conducting any investigation as to the identity of the supplier of the footage and the supplier's motives, and in violation of Florida law, Gawker Defendants posted a one minute forty-one second (1:41) "highlighted reel" of the recording (the "Gawker Video").

Gawker Defendants knew the footage was secretly recorded. But that was of no concern to them, because they knew that they could use the "exclusive" footage to lure millions of visitors to their websites. They also knew that using Mr. Bollea's name and likeness would help virally market the Gawker brand and generate tremendous profits. Consequently, Daulerio posted the Gawker Video on Gawker's website with Denton's approval under the headline:

"Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work But Watch It Anyway." That headline was an invitation to the world to visit Gawker.com to invade Mr. Bollea's privacy and watch him and having sex.

When Mr. Bollea learned that the Gawker Video had been posted, he immediately demanded that Gawker Defendants take it down. He expressly told Gawker Defendants what they already knew from viewing the footage—that Mr. Bollea did not know of or consent to the recording of his private sexual encounter. Mr. Bollea's plea fell on deaf ears. Without even bothering to first view the Gawker Video, Gawker's CEO, Denton, concluded that Mr. Bollea's request was not "persuasive" and allowed the footage to run on Gawker's website for another 6-1/2 months.

Gawker Defendants' exposure of Mr. Bollea's private conversations and naked body on the Internet was not to report news. Rather, Gawker Defendants sought to appeal to the morbid and sensational curiosity of the public as "voyeurs" and "deviants" by giving them an opportunity to pry into the most intimate details of Mr. Bollea's private life. At Denton's instruction, Gawker Defendants' business model and success were built upon obtaining and posting explicit images of people's most private moments without their consent under the guise of "news." These salacious images (and not the salacious stories that accompanied them) drove traffic to Gawker's websites and revenue to Denton's companies.

Denton even boasted that the Gawker Video (along with another Gawker.com story that posted topless photographs of Kate Middleton) "pushed daily US audience over 1m [one million] – for the first time ever. . . . [which] bring[s] [gawker.com] to new readers." Daulerio was so proud of posting the Gawker Video that he believed the posting of it defined Gawker.com.

Gawker Defendants were not acting as legitimate journalists when they posted the "pornographic" Gawker Video online. They were instead using illegally recorded footage of Mr. Bollea to attack him, inflict harm upon him because of his celebrity status, and to use his celebrity to market their brand and websites. In the first paragraph of Daulerio's incidental, graphic, "play-by-play" narrative that accompanied the Gawker Video, the site's editor-in-chief stated: "[T]he internet has made it easier for all of us to be shameless **voyeurs** and **deviants** . . . we love to watch famous people have sex . . . . We watch this footage because **it's something we're not supposed to see**." Gawker's promotion of such prurient content is easily juxtaposed with "news," which is something the public is **supposed** to see. "An individual, and more pertinently perhaps the community, is most offended by the publication of the intimate personal facts when the community has no interest in them beyond the **voyeuristic** thrill of penetrating the wall of privacy that surrounds a stranger." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) (emphasis added).

The evidence at trial overwhelmingly established, clearly and convincingly, that this case had very little to do with journalism. Even Gawker Defendants conceded that they only "inadvertently commit journalism." Instead, this case is about Gawker Defendants' pursuit and promotion of exclusive images of people naked or having sexual intercourse because they lure large audiences to view things that they are not supposed to see. Gawker Defendants covet such content because it is what Denton wants and asks for. Sex drives traffic, traffic drives advertising, and advertising drives revenue.

The evidence also overwhelmingly established that Gawker Defendants had no right under the First Amendment to post the illegally recorded footage of Mr. Bollea on the Internet. Consequently, they have no right to publicly disclose such material in the future.

Following a three-week trial, the jury agreed with Mr. Bollea that his privacy had been invaded, that Gawker Defendants had intentionally inflicted emotional distress upon him, and that Gawker Defendants violated Florida's Security of Communications Act. The jury found by clear and convincing evidence that Gawker Defendants acted with malice and a specific intent to harm. It found that Mr. Bollea had been secretly recorded. It found that the Gawker Video was not newsworthy. Accordingly, the jury awarded $115 million in compensatory damages and $25.1 million in punitive damages.

The jury's findings, coupled with the evidence presented at trial, establish that Mr. Bollea is entitled to permanent injunctive relief against Gawker Defendants. Specifically, and for the reasons below, Mr. Bollea is entitled to an injunction permanently prohibiting Gawker Defendants from publicly disclosing in any manner the audio and visual content of any and all surreptitious footage of Mr. Bollea in their possession which depicts Mr. Bollea naked or engaged in sexual activity.

First, Gawker Defendants' conduct is a clear violation of Mr. Bollea's rights. It has now been established, clearly and convincingly, that the Gawker Video was not newsworthy and that Gawker Defendants violated Florida law and engaged in the public disclosure of private facts; intentional intrusion upon seclusion; unauthorized use of Mr. Bollea's name and likeness for commercial gain; intentional infliction of emotional distress; and violation of the Security of Communications Act.

Second, Mr. Bollea has no adequate remedy at law. While money damages are available for certain violations of Mr. Bollea's rights, no amount of money can restore his privacy or overcome the ongoing and continuing threat that the Gawker Defendants will post more footage

on the Internet. Denton confirmed the existence of that threat after trial. Only a permanent injunction can eliminate this threat.

Further, the evidence showed that other websites and content distributors obtained the footage Gawker Defendants intentionally distributed, which resulted in further illegal use and disclosure. Gawker Defendants also prepared a second sex video of Mr. Bollea that contains additional surreptitious content. Gawker Defendants still possess the 30-Minute Video from which they could extract additional audio and visual footage that has never been disseminated to the public. (*See* Trans. pp 2871-73.)

Third, Mr. Bollea is highly likely to suffer irreparable harm if the permanent injunction is not granted. As the jury found, Mr. Bollea already suffered a grievous invasion of his privacy. Absent an injunction, the threat of additional invasions of his privacy will always hang over Mr. Bollea's head. In fact, Gawker Defendants continue to claim that the surreptitious footage is newsworthy and that they would post it again. As of now, no order is in place prohibiting them from doing so. There is a substantial likelihood that Gawker Defendants will release additional footage of Mr. Bollea naked and engaged in sexual activity.

Fourth, the injunctive relief requested by Mr. Bollea would not be contrary to the interest of the public. Rather, the injunction supports the public interest by prohibiting the public disclosure of materials which the facts conclusively established the public has no legitimate interest in seeing.

II. The Fully Supported Verdict

On March 18, 2016, the jury awarded Mr. Bollea $115 million in compensatory damages against Gawker Defendants, and determined that Mr. Bollea was entitled to recover punitive

damages. In the March 18, 2016 verdict, the jury also determined that the Gawker Defendants acted with a specific intent to harm Mr. Bollea.

Ample evidence supports the jury's verdict. Denton and Daulerio's own testimony proved clearly and convincingly that every after-the-fact reason Gawker Defendants invented in an attempt to portray the video as "newsworthy" was pretextual and did not afford First Amendment protection. Daulerio admitted that no matter of legitimate public concern justified posting the Gawker Video. (3/14/16 Trans. pp. 2785-86; 2790-92) In fact, Daulerio refuted every *pretrial* reason the federal court[1] and the Second District Court of Appeal[2] mention when suggesting the Gawker Video could be "newsworthy." He admitted that Gawker Defendants' posting had **nothing** to do with Mr. Bollea's wrestling career, his autobiography, his wife's autobiography, his statements about his sex life on shock jock shows, his "reality" show, his affair with Heather Clem, his penis and sexual positions, and even the existence of the tape. (3/14/16 Trans. pp. 2785-86; 2790-92). The Second District and the federal district court did not have the benefit of Daulerio's testimony when deciding whether temporary injunctive relief was appropriate in this case, and so the rulings denying that relief were not and could not be, at that stage, based on all of the evidence.

At trial, Daulerio conceded that the only reason he posted the Gawker Video was the morbid and sensational desire to publish the footage so that the public could watch Mr. Bollea naked and engaged in sexual activity and hear his private conversations. (3/14/16 Trans. pp. 2793, 2784-86) Daulerio admitted that his accompanying narrative was essentially a play-by-play of the illegal footage, nothing more. Not surprisingly, the tactic of manufacturing stories

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[1] *Bollea v. Gawker Media, LLC*, 2012 WL 5509624 at *3 (M.D. Fla. Nov. 14, 2012).

[2] *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1201 (Fla. 2d DCA 2014).

support images so the images can be posted came directly from Denton. (Trial Ex. 59; 3/15/16 Trans. pp. 3018-19)

Again, the federal district court and Second District did not have this and other evidence when they ruled against a temporary injunction. Indeed, the lack of a full record is a reason why decisions on temporary injunctions generally have no collateral estoppel effect. *Whitby v. Infinity Radio, Inc.*, 951 So.2d 890, 896 (Fla. 4th DCA 2007); *Belair v. City of Treasure Island*, 611 So.2d 1285, 1289 (Fla. 2d DCA 1992); *Gawker Media, LLC*, 129 So.3d 1196, 1203-04 (Fla. 2d DCA 2014). Further, and importantly, when the Second District and the federal district court ruled, they had to apply the strict standards for review of a prior restraint—standards that are not applicable to an injunction after a full trial on the merits.

Gawker Defendants agreed to the jury instruction which incorporated the following public concern test set forth in *Toffoloni v. LFB Publ'g Group*, 572 F.3d 1201, 1211 (11th Cir. 2009) (citing the Restatement (Second) of Torts § 652D):

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, which a reasonable member of the public, with decent standards, would say that he had no concern.

This standard for public concern balances freedom of the press with the right of privacy. It recognizes the import of public standards of decency. The evidence, including the nature of the contents of the Gawker Video, the illegal manner in which it was recorded, and the context of the post, supports the jury's finding that the Gawker Video was **not** a matter of public concern.

Gawker Defendants' invitation to the public to watch Mr. Bollea naked and engaged in sexual activity drew over 5 million unique visitors to Gawker's website. Mr. Bollea's internet expert on video view counters, Shanti Shunn, confirmed the accuracy of multiple such counters,[3]

[3] Regardless, Gawker Defendants stipulated to the authenticity and admissibility of the web

which showed that over 7 million people watched the video of Mr. Bollea naked and engaged in sexual activity and having private conversations in a private bedroom.

III. Gawker Defendants Post-Trial Conduct

Despite representing to the jury in closing argument that they "heard" the verdict and would be "deterred," Gawker Defendants immediately reversed course upon returning to New York. As before, they maintained that they had done nothing wrong, and that they would post the Gawker Video again.

Gawker Defendants' post-trial public statements confirm that they have no intention of honoring the representations they made at trial. On March 22, 2016, Denton posted a story titled "The Verdict," in which he states that "we now know that the trial was a sham from the start." *See* **Exhibit A** [Denton article]. In his article, Denton goes on to assert that Mr. Bollea's attorneys "played" the trial as a popularity contest and guarantees that Gawker Defendants "will be vindicated" on appeal. In subsequent interviews, Denton reasserted his belief that the Gawker Defendants acted appropriately:

A. During a March 24, 2016 interview on *The View*, Denton stated:

> A Federal Judge and the appeals court down in Florida have all deemed the story complete with the video excerpt, which, let's be honest, had nine seconds of very very murky sex, this was not a porn video.
>
> * * *
>
> The story was newsworthy. I wish I'd known how litigious Hulk Hogan was, and, but the story was newsworthy, a judge has found it newsworthy.

See **Exhibit B** [Video of interview, at 2:28-2:40; 8:27-8:34][4]

B. During a March 24, 2016 interview for *Nightline*, Denton stated:

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pages upon which these view counters appeared. (See Trial Ex. 5)

[4] Provided on compact disc to the Court

> I'm confident that this decision will be reversed or radically reduced.
>
> This has got nothing to do with privacy. This is all about publicity. The sex tape had been talked about. He didn't like our story.
>
> Hulk Hogan is very charming on the stand, but he has been shown to have lied on the stand as much as he is charming liar and we were a bunch of honest jerks.

See fn. 5

C. During an interview with ABC News on that same date, Denton stated:

> Reporter: Do you feel any **remorse** over the sex tape release?
>
> Denton: **No, you know I don't.** We didn't post the sex tape. We posted 9 seconds of sexual activity in an excerpt of a much, much longer tape. It was in a context of a story. The story has been found newsworthy by a federal judge. By the appeals court on repeated occasions. I believe it was newsworthy. Those judges agreed it was newsworthy and so it is a story that we would do again.

See **Exhibit C** [Video of interview, at 2:59-3:24][6] (Emphasis added.)

For his part, Daulerio was even more blunt. Having begged the jury for mercy only days before, Daulerio reaffirmed his loyalty to Denton and Gawker and attacked the trial process. *See* **Exhibit D** [3/23/16 *Daily Beast* article]. He referred to his deposition as "basically a nonsense and completely ludicrous formal deposition over something we had already won." He also claimed the verdict resulted from Mr. Bollea's "side" being "better liars."

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[5] Plaintiff was unable to obtain a copy of the video of this interview and is unaware of a verbatim copy of the words used being published. The video of the interview is available online at http://abcnews.go.com/Nightline/video/hulk-hogan-trial-jurors-gawkers-nick-denton-respond-37920027.

[6] Provided on compact disc to the Court

These comments establish a clear and imminent threat that Gawker Defendants will disclose additional footage of Mr. Bollea.

IV. Argument

A. Permanent Injunctive Relief

Permanent injunctive relief is proper when the plaintiff establishes three elements: (1) the act or conduct to be enjoined violates a clear legal right; (2) there is no adequate remedy at law; and (3) injunctive relief is necessary to prevent and irreparable injury. *Legakis v. Loumpos*, 40 So. 3d 901, 903 (Fla. 2d DCA 2010); *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 786 (Fla. 4th DCA 2010). The public interest should also be considered. *Shaw v. Tampa Elec. Co.,* 949 So.2d 1066, 1069 (Fla. 2d DCA 2007). The equities must also be balanced, including whether the potential harm to the defending party outweighs the benefit to the plaintiff. *Liza Danielle, Inc. v. Jamko, Inc.*, 480 So. 2d 735 (Fla. 3d DCA 1982). In this case, all of these elements have been established by competent, substantial[7] evidence supporting permanent injunctive relief.[8]

The Court must consider the totality of circumstances and determine whether injunctive relief is necessary to achieve justice between the parties. *Davis v. Joyner*, 409 So.2d 1193, 1195 (Fla. 4th DCA 1982). The appropriateness of an injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors: (a) the nature of the interest to be protected; (b) the relative adequacy to the plaintiff of

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[7] "Competent, substantial evidence means 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or]… such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" *Holden v. Holden*, 667 So.2d 867, 869 (Fla. 1st DCA 1996) (citing *Duval Utility Co. v. Florida Public Service Comm.*, 380 So.2d 1028, 1031 (Fla. 1980).

[8] *Connors v. Lake Dexter Woods Homeowners Assoc., Inc.*, 50 So.3d 1212, 1214 (Fla. 2d DCA 2010); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)

injunction and of other remedies; (c) any unreasonable delay by the plaintiff in bringing suit; (d) any related misconduct on the part of a plaintiff; (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied; (f) the interests of third persons and of the public; and (g) the practicability of framing and enforcing the order or judgment. *Id.* (citing with approval Section 936 Restatement (Second) of Torts (1979)).

B. Permanent Injunctions Are Proper When Publications Do Not Involve Matters of Legitimate Public Concern.

An injunction prohibiting expression, imposed after a trial, is not a prior restraint. For that reason, it is not subject to the heightened burden of proof that applies to a pretrial injunction.

After a full trial on the merits, it has been established by competent, substantial evidence that Gawker Defendants' conduct invaded Mr. Bollea's privacy and was not protected by the First Amendment. Mr. Bollea was illegally recorded without his knowledge or consent. The Gawker Video was not posted to address a matter of legitimate public concern. Accordingly, an injunction prohibiting any future public dissemination of the Gawker Video or 30-Minute Video is not an unconstitutional prior restraint. *Advanced Training Systems, Inc. v. Caswell Equipment Co.,* 352 N.W.2d 1, 11 (Minn. 1984) ("…the special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment") (*citing Pittsburgh Press Co. v. Commission on Human Relations*, 413 U.S. 376, 390 (1973)); *Balboa Island Village Inn v. Lemen*, 156 P.3d 339, 349 (Cal. 2007) ("[A]n order based on a continuing course of repetitive conduct, following a final judicial determination the enjoined speech is unprotected by the First Amendment, has been held to not be a prior restraint if it is clear and sweeps no more broadly than necessary."); *see also Connors*, 50 So.3d 1212, 1214 (Fla. 2d DCA 2010).

C. The Broadcast of Illegally Recorded Conversations and Sexual Activity Is Not and Should Not be Protected by the First Amendment.

The First Amendment does not protect the surreptitious, illegal, uncensored recordings of pornographic sexual activity and private conversations (accompanied by an incidental, graphic narrative of the encounter) that masquerade as news. That is especially true here, as it was admitted that the recording did not report any matter of legitimate public concern.

The cases upholding First Amendment protection for public disclosure of intimate images have either involved material that was necessary to tell a story, accidentally depicted, or already exposed to public view. Further, while the publication of illegal recordings has been permitted in cases involving journalists reporting official misconduct, the broadcast of an illegal recording of the sexual activity of a celebrity purely for prurient purposes has never been held protected under the First Amendment.

As explained, First Amendment protections must yield when members of the press publish salacious material for its own sake. Efforts to cloak the publication of such unprotected materials by labeling them "newsworthy" or by attaching incidental "articles" to them have failed.

The United States Supreme Court has declined to extend the legal principles that protect journalists to illegally made recordings of gossip. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) ("We need not decide whether [the First Amendment] interest is strong enough to justify the application of [the Wiretap Act] to disclosures of . . . domestic gossip or other areas of purely private concern."). In addition, two justices approvingly cited *Michaels I*, the Pamela Anderson sex tape case, as an example of the media broadcasting "truly private matters" and there being no First Amendment protection for the broadcast. *Id.* at 540 (Breyer, J., concurring). A majority of five justices on the *Michaels I* panel would have held that broadcasting an illegally recorded

celebrity sex tape is not protected by the First Amendment. The Court was unanimous on the principle that matters of mere gossip do not constitute the sort of "matter of public concern" that permit journalists to take the extraordinary step of publishing illegally recorded material. In this case, the Gawker Video did not even rise to the level of mere gossip. Denton himself admitted the Gawker Video was "pornography."

Denton's admission is critical. The Supreme Court has already held that the content of a sex tape is not a matter of public concern in *City of San Diego v. Roe*, 543 U.S. 77 (2004). *Roe* denied First Amendment protection to video broadcasts of a police officer masturbating because the broadcasts were not matters of public concern. *Id.* at 84.

Consistent with these United States Supreme Court cases, the Eleventh Circuit holds that private nude photographs of a celebrity are not newsworthy even if they accompany a biographical article that would otherwise qualify as news. Rejecting the same argument Gawker Defendants made here, the Eleventh Circuit reversed a district court's dismissal of a complaint for invasion of privacy based on a pornographic magazine's publication of nude photographs in *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009). The *Toffoloni* Court stated that if it accepted such an argument, "LFP [and anyone with a blog] would be free to publish any nude photographs of almost anyone without permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.'" *Id.* at 1212. The Gawker Defendants are taking the same position the *Toffoloni* court rejected.

Only last February, Utah's Supreme Court addressed an analogous situation in *Judge v. Saltz Plastic Surgery, P.C.*, 2016 WL 562866 (Utah Feb. 4, 2016). In *Judge*, a patient brought invasion of privacy claims against her plastic surgeon who disclosed before and after photos of her breast augmentation surgery. The patient agreed to be interviewed on television in a news

report about her procedure. Subsequently, redacted photographs (including black bars placed over the patient's breasts) aired with the news broadcast. The trial court ruled on summary judgment that the photos were a matter of legitimate public concern. The Utah Supreme Court disagreed. It held that the issue of whether the redacted photos were a matter of legitimate public concern presented a jury question because "the dispute as to whether there was legitimate public interest in the photographs based on Ms. Judge's participation in the broadcast or whether the inclusion of those photographs was gratuitous or overly intrusive made summary judgment inappropriate in this case." 2016 WL 562866 at *6 (emphasis added). The Utah Supreme Court followed *Toffoloni*'s "newsworthiness" test and adopted the test in section 652D of the *Restatement (Second) of Torts*; the test used in the jury instructions in this case. *Id.* at *4-5. The facts here are even more compelling than the facts in *Judge*. Unlike the Gawker Video, the *Judge* case involved the publication of nude images that were censored.

Judge recognizes that the existence of an underlying news story does not give the press *carte blanche* to publish any images it sees fit. *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. 1996) reached the same conclusion. *Green* involved a newspaper that published photos of a mother speaking to her dying son, a homicide victim, as well as her last words to him. Ruling in favor of the plaintiff, the Court held that such facts stated a claim for impermissible public disclosure of private facts. "A jury could find that a reasonable member of the public has no concern with the statements a grieving mother makes to her dead son, or with what he looked like lying dead in the hospital, even though he died as the result of a gang shooting." *Id.* at 256. *Green* is also analogous to this case—that there is an underlying news story (Mr. Bollea having consensual sexual relations with Heather Clem) does not justify publishing or broadcasting purely sensationalistic and invasive content (Mr. Bollea in the nude

engaged in sexual activity). Again, here the facts are even more compelling than the analogous cases, as Gawker Defendants admitted that the underlying news story was **not the reason** the Gawker Video was published.

In *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998), the California Supreme Court struck a balance between protection of privacy and First Amendment concerns. It held that a television producer defendant was not entitled to summary judgment on an intrusion upon seclusion claim based on the recording and broadcast of conversations between accident victims and emergency workers on a helicopter transporting them to a hospital. The Court also addressed the public disclosure tort. "[T]he analysis of newsworthiness does involve courts to some degree in a normative assessment of the 'social value' of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest." *Id.* at 483–84 (emphasis in original). This holding, like *Toffoloni* and *Judge*, rejects Gawker Defendants' proposed editorial litmus test: "Is it true, and is it interesting." Whether members of the public may be "interested" in **seeing** Mr. Bollea naked and having sex and hearing his private conversations is not the test. The material at issue must be of "**legitimate** public interest" to warrant First Amendment protection. *Shulman* is persuasive authority that material does not satisfy the legitimate public interest test merely because members of the public may be interested in viewing it. *See also Bonome v. Kaysen*, Case No. 032767, 2004 WL 1194731, at *5 (Mass. Super. March 3, 2004) (publications concerning author's relationship with her boyfriend that were "morbid and sensational" and "pr[ied] into [the plaintiff's] private life for its own sake" would not be matters of legitimate public concern and would be actionable).

In sum, Gawker Defendants' argument that they should not be prohibited from publicly disclosing the content of the surreptitious footage of Mr. Bollea because its existence is a matter of legitimate public concern is unsupported by both the facts and the law.

D. Gawker's Publication of the Surreptitious Recording of Mr. Bollea May Also Be Enjoined Under the Wiretap and Video Voyeurism Statutes.

Both the audio and visual portions of the secretly recorded video of Mr. Bollea were recorded in violation of Florida law. Unlawful "video voyeurism" is committed when any person, "[f]or his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy." § 810.145(2)(a), Fla. Stat. Further, the audio portion of the recording was illegal as well under Florida's Security of Communications Act. That law prohibits the intentional interception of an oral communication unless all parties to the conversation consent. § 934.03(1)(a) & (2)(d), Fla. Stat.

Mr. Bollea had a reasonable expectation of privacy when he engaged in sexual activity and conversations in the bedroom of a private residence. He did not know of or consent to any recording. Both parties were naked, privately exposing their bodies and engaged in sexual intercourse and other sexual activity. The unlawful intention (amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading another person) is proven by the circumstances of the recording and its preservation. The video recording was illegal.

Both the video voyeurism statute and Florida's Security of Communications Act prohibit dissemination of illegal recordings. § 810.145(3), Fla. Stat. ("A person commits the offense of video voyeurism dissemination if that person, knowing or having reason to believe that an image

was created in a manner described in this section, intentionally disseminates, distributes, or transfers the image to another person for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person."); § 934.03(1)(c), Fla. Stat. (a person violates the two-party consent statute if he or she "[i]ntentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection"); § 934.03(1)(d), Fla. Stat. (a person violates the two-party consent statute if he or she "[i]ntentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection").

Gawker Defendants violated these statutes, yet continue to express the belief that their actions were appropriate. There is a real threat of future violations and additional irreparable harm to Mr. Bollea unless a permanent injunction is issued.

E. Injunctive Relief is Available to Enjoin Violations of Florida Criminal Law.

Florida law permits courts to enjoin violations of criminal laws. "[W]here intervention of equity is warranted to protect civil rights or property interests and where criminal prosecution is inadequate to effect this purpose, a crime or statutory offense may be enjoined." *Mid-American Waste Systems v. City of Jacksonville*, 596 So.2d 1187, 1189 (Fla. 1st DCA 1992) (quoting *Syfo Water Co. v. Chakoff*, 182 So.2d 17 (Fla. 3d DCA 1965)). The threat of Gawker Defendants'

continued violation and future violations of the video voyeurism and Florida's Security of Communications Act[9] are independent grounds for issuing a permanent injunction.

V. CONCLUSION

For the above reasons, the Court should grant a permanent injunction in favor of Mr. Bollea. It should enjoin Gawker Defendants from publicly disclosing, posting, publishing, exhibiting, distributing, and broadcasting the Gawker Video, as well as any portion of the 30-Minute Video, or any other surreptitious audio and visual footage of Mr. Bollea naked or engaged in sexual activity, and any audio surreptitious recordings of Mr. Bollea having private conversations that are not a matter of legitimate public concern.

WHEREFORE, Plaintiff, Terry Bollea, respectfully requests that the Court enter:

A. A Final Judgment awarding monetary damages, in the form attached hereto as **Exhibit 1**;

B. A Permanent Injunction, a proposed form of which is attached hereto as **Exhibit 2**; and

C. such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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[9] Section 934.10(1)(a), Fla. Stat., expressly provides for "equitable… relief as may be appropriate."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 11th day of May, 2016 to the following:

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