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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

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

Defendants.
_____/

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

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, "Defendants"), through their undersigned counsel, hereby oppose Plaintiff's Motion for Entry of Final Judgment and Permanent Injunction ("Motion" or "Mot.") (filed May 11, 2016; Revised Proposed Injunction filed May 19, 2016). For the reasons set forth below and in Defendants' post-trial motions, Plaintiff is not entitled to entry of final judgment or permanent injunctive relief and, even if he were, the specific injunctive relieve he seeks is unconstitutionally overbroad.

I. Plaintiff Is Not Entitled To Entry Of Judgment.

Plaintiff is not entitled to entry of judgment in his favor, including in the amount requested, for the reasons set forth in (a) Defendants' Motion for Judgment Notwithstanding the Verdict ("JNOV") (filed April 4, 2016); (b) Defendants' Motion for a New Trial, or, in the Alternative, for Remittitur (filed April 4, 2016); and (c) Defendants' Renewed Motion for Dismissal for Fraud on the Court or, in the Alternative, Amended Motion for a New Trial (filed May 18, 2016), each of which Defendants hereby incorporate by reference. More specifically, it

is *Defendants* who are entitled to entry of judgment in their favor. Barring that, Defendants are, at the very least, entitled to a new trial, or a substantial remittitur of the damages award, either of which would preclude entry of judgment in the manner requested.

II. Plaintiff Is Not Entitled To Permanent Injunctive Relief.

As an initial matter, Plaintiff is not entitled to a permanent injunction for essentially the same reason he is not entitled to entry of judgment. If this Court enters judgment in favor of Defendants or grants them a new trial, then, obviously it cannot enter a permanent injunction in Plaintiff's favor. Moreover, the proposed injunction presumes that the Court may ignore the appellate opinion in this action, *see Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. 2d DCA 2014), which reversed the entry of a temporary injunction, holding that the speech at issue addressed a matter of public concern *and*, in the process, analyzing and distinguishing many of the cases that Plaintiff now wants the Court to rely upon in entering injunctive relief. *See, e.g.*, Mot. at 8, 13-16 (asking the Court to rely on *Bartnicki v. Vopper*, 532 U.S. 514 (2001), *Michaels v. Internet Entm't Grp.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) ("*Michaels I*"); *City of San Diego v. Roe*, 543 U.S. 77 (2004); and *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201 (11th Cir. 2009), even though each of them was addressed by the parties and the Court in the prior appeal).[1] Moreover, other that *Michaels I*, none of these decisions involved injunctive relief and, ironically, Plaintiff relies on *Michaels I*, a preliminary injunction decision from another jurisdiction involving different facts, to argue that this Court should disregard a temporary

[1] Plaintiff does not and cannot argue that these cases should somehow be analyzed differently now. Instead, he contends that the trial record – especially the testimony of Defendants Denton and Daulerio – somehow requires the opposite conclusion to that previously reached by the Court of Appeal. But Plaintiff significantly mischaracterizes that testimony in both his Motion and the Revised Proposed Injunction, and, in any event, it does not change the appeals court's analysis of this publication and the context in which it was disseminated, neither of which has changed in Plaintiff's favor since it ruled.

injunction decision from a superior court in Florida involving the very publication at issue. Mot. at 13-14.

In addition, while Plaintiff cites a few cases involving permanent injunctions enjoining defamatory falsehoods, numerous other decisions recognize that permanent injunctions on speech present insurmountable obstacles. Indeed, the U.S. Supreme Court reversed a permanent injunction on speech in *Tory v. Cochran*, 544 U.S. 734, 738 (2005), characterizing the permanent injunction of future speech as an "overly broad *prior restraint* upon speech, lacking plausible justification" (emphasis added). *See also Kinney v. Barnes*, 443 S.W.3d 87, 99 (Tex. 2014) (unconstitutional to "permit injunctions against future speech following an adjudication of defamation"); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1093 (C.D. Cal. 2012) (denying motion for permanent injunction and "reaffirm[ing] the longstanding rule that injunctions of speech in defamation cases are impermissible under the First Amendment"); *Kramer v. Thompson*, 947 F.2d 666, 680 (3d Cir. 1991) (rejecting permanent injunction that would have barred defendant "from repeating the statements deemed libelous" by a jury).

Indeed, Florida case law appears to align more closely with these holdings than with the few cases Plaintiff cites. *See Demby v. English*, 667 So. 2d 350, 355 (Fla. 1st DCA 1995) (noting Florida's "'well established rule that equity will not enjoin either ***an actual*** or a threatened defamation'") (emphasis added) (quoting *United Sanitation Servs., Inc. v. City of Tampa*, 302 So. 2d 435 (Fla. 2d DCA 1974)); *Saadi v. Maroun*, 2009 WL 3617788, at *2 (M.D. Fla. Nov. 2, 2009) (noting same rule and enjoining defamatory statements only because

defendant refused to remove them from the Internet following a money judgment, such that it did "not provide [plaintiff] with a complete remedy").[2]

Even apart from such constraints on permanent injunctions involving speech, Plaintiff has not demonstrated an entitlement to an injunction. As Plaintiff correctly recites, a permanent injunction is only proper where the party seeking the injunction establishes that (1) "a clear legal right has been violated," (2) "irreparable harm has been threatened," and (3) "there is a lack of an adequate remedy at law." *Legakis v. Loumpos*, 40 So. 3d 901, 903 (Fla. 2d DCA 2010). He has not made the requisite showing.

As for whether a "clear legal right has been violated," a permanent injunction, particularly one that enjoins speech, requires more than simply concluding that that Plaintiff presented the minimum quantum of evidence sufficient to permit the jury to find that Defendants' conduct was unlawful. *See Premier Lab Supply, Inc. v. Chemplex Indus., Inc.*, 10 So. 3d 202, 206-07 (Fla. 4th DCA 2009). Indeed, this Court is not bound by that finding, and can – and should – come to a different conclusion. *See, e.g.*, *Bollea*, 129 So. 3d at 1201-03 (repeatedly holding that the precise conduct complained of here was lawful).

Second, there is no basis on which to conclude that "irreparable harm has been threatened." Indeed, as this Court is aware, the Video Excerpts were removed from gawker.com

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[2] Moreover, those cases typically involve speech adjudicated to be defamatory falsehoods, a category of speech unprotected by the constitution, rather than indisputably truthful speech that a claimant contends infringes on his privacy and publicity rights, or causes emotional distress. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 451 n.3 (2011) (unconstitutional to impose liability for picketing at soldier's funeral, including for invasion of privacy and intentional infliction of emotional distress, because "there is 'no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or fighting words'"). That difference makes practical sense as well given that it is much harder for a false and defamatory statement to become true in the future than it is for allegedly private facts to become public or for circumstances to change so that they involve a matter of public concern.

in April 2013, following this Court's issuance of a temporary injunction, and were not reposted either when that order was stayed by the District Court of Appeal, or when it was subsequently reversed on the merits. Defendants thus believe that a permanent injunction is neither warranted nor appropriate. Even Plaintiff's own cases make this clear. *See, e.g.*, *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 348-49 (Cal. 2007) (entitlement to permanent injunction on speech requires "a continuing course of repetitive conduct").

Third, even if this Court does conclude that Defendants' conduct was unlawful, Plaintiff has not made the additional and necessary showing of a "lack of an adequate remedy at law." Plaintiff devotes only a single sentence in his twenty-page brief to that third prong, stating without citation that "[w]hile money damages are available for certain violations of [his] 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." Mot. at 5-6.

Plaintiff's argument that injunctive relief is necessary to *prevent* Defendants from publishing portions of the sex tape is not well taken after he argued to the jury – multiple times – that punitive damages were necessary to *deter* Defendants from engaging in that exact behavior. *See, e.g.*, Trial Tr. at 3906:14-19 (excerpts attached) ("The award should be no greater than the amount that you find necessary to punish defendants for the conduct you have concluded caused harm to plaintiff and to deter defendants and others similarly situated from engaging in such conduct in the future."); *id.* at 3906:25 – 3907:3 ("You have heard the evidence, and at this point the duty is to go ahead and assess punitives in an amount. You can deter others, you can deter Gawker."); *id.* at 3916:20-24 ("And in punitive damages, we defer to you for the specific purpose with which the law vests you, which is to deter Gawker and others similarly situated from doing this. It's just that simple."). Courts have held that it is improper *both* to award

punitive damages *and* to provide injunctive relief, precisely because of this concern over duplication. *See Facebook, Inc. v. Grunin*, 2015 WL 884035, at *3 (N.D. Cal. Feb. 19, 2015) (stating that "no punitive damages are appropriate" where "a permanent injunction has been entered"); *Snider v. City of Cape Girardeau*, 2012 WL 6553710, at *3 (E.D. Mo. Dec. 14, 2012) ("[B]ecause the Court has already entered a permanent injunction barring enforcement of the flag desecration statute, an award of punitive damages is unnecessary to deter [defendant] and other law enforcement officers from making future arrests for violation of the statute.").

Bollea's only argument for why he still fears that the video excerpts will be reposted is to point to post-trial statements by Denton and Daulerio regarding whether they now believe that it was wrong for the video excerpts to have been posted in the first place, comments which he claims "establish a clear and imminent threat that Gawker Defendants will disclose additional footage." Mot. at 9-11. Respectfully, in light of the fact that the video excerpts were removed in 2013 and not restored in the three years' since, this argument is not well-taken. All Denton and Daulerio were saying is that they still believe that the video excerpts were part of a legitimately newsworthy publication, not that they plan to repost the video excerpts, or post any additional sex-tape footage. Having successfully argued to the jury that it must award Plaintiff millions in punitive damages to deter Defendants, he should not be heard now to argue that he needs injunctive relief from this Court because the deterrence provided by the award that he requested has no effect and he has no adequate remedy at law.

III. Plaintiff's "Revised Proposed Permanent Injunction" is Fatally Overbroad.

Even if this Court were to determine that Plaintiff is entitled to *some* permanent injunctive relief, it certainly should not grant him the specific injunctive relief requested, which is blatantly overbroad. It is axiomatic that "[i]njunctions that are overbroad in application are

erroneous and may not be enforceable to the extent of their overbreadth." *Wood v. Dozier*, 529 So. 2d 1236, 1238 (Fla. 1st DCA 1988). And in particular, injunctions that "improperly burden more speech than is necessary" are "impermissibly broad" in violation of the First Amendment. *Animal Rights Found. of Florida, Inc. v. Siegel*, 867 So. 2d 451, 455-56 (Fla. 5th DCA 2004) (striking down injunction restricting animal rights group's demonstrations and protests).

Plaintiff's "Revised Proposed Permanent Injunction" (filed May 19, 2016), which restricts Defendants' speech by prohibiting them from "posting, publishing, exhibiting, broadcasting or disclosing" content other than the Video Excerpts, is clearly overbroad – even under Plaintiff's own cases – because it goes well beyond barring republication of those excerpts, which were the only materials at issue in this case. Specifically, the proposed injunction would bar Defendants from publishing "any nudity or sexual activity, whether video or audio, contained in Gawker Video, the 30-Minute Video from which the Gawker Video was excerpted and edited, and any other surreptitious video footage within their custody, possession or control, that depicts Mr. Bollea naked or engaged in sexual activity." Revised Proposed Injunction ¶ 95. But the 30-minute video (or any video footage other than the posted Video Excerpts) was not part of Plaintiff's case, not part of the causes of action he pled in his Complaint and, at Plaintiff's insistence, not received in evidence or shown to the jury for it to consider. Trial Tr. at 3636:7-24.

Thus, that portion of Plaintiff's proposed injunction seeks a classic "prior restraint." It would bar Defendants from publishing content whose lawfulness has never been adjudicated. This infirmity is not cured by Plaintiff's indefensibly expansive proposed conclusion of law that "[t]he publication of . . . ***any other surreptitious recordings of Mr. Bollea*** would constitute a gross and illegal invasion of Mr. Bollea's privacy . . . ." Revised Proposed Injunction ¶ 92.

(emphasis added). There is simply no way to reach that conclusion in the abstract, as there is no way to tell ex ante what kind of newsworthy publication could be fashioned out of the materials whose possible use Bollea seeks to enjoin.

Indeed, that the relief Bollea seeks is impermissible is made is clear by the very cases he cites in support of his motion, which state that a court can permanently enjoin only that speech that was subject to adjudication at trial. *See Balboa Island*, 156 P.3d at 346 (holding that "a court may enjoin the repetition of ***a statement that was determined at trial*** to be defamatory") (emphasis added); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984) (holding that "the injunction below, ***limited as it is to material found either libelous or disparaging after a full jury trial***, is not unconstitutional and may stand") (emphasis added). Indeed, the U.S. Supreme Court cases that those two decisions rely upon make this point even more clearly. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court explained that the injunction at issue "imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the [state] Supreme Court that the materials were constitutionally unprotected." *Id.* at 55. And in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), the Court noted that the book store in question was "enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene." *Id.* at 444. Indeed, the Court emphasized that the decision was "glaringly different" from the classic prior restraint case of *Near v. Minnesota*, 283 U.S. 697 (1931), because, "Unlike *Near* . . . [the challenged statute] studiously withholds restraint upon matters not already published and not yet found to be offensive." *Kingsley Books, Inc.*, 354 U.S. at 445.

In short, even if this Court is inclined to issue a permanent injunction, it must be limited just to the one-minute-forty-one-second video that was actually adjudicated in this case.

IV. This Court Should Reject Plaintiff's Proposed Findings.

Finally, even if this Court is inclined to grant Plaintiff all of the injunctive relief he has requested, it should nonetheless not adopt his proposed factual findings, the overwhelming majority of which are not supported by, or grossly mischaracterize, the evidence. It is ultimately unnecessary for this Court to wade into these factual disputes. While the law requires this Court to make findings in support of any injunction it might issue, it need only make findings regarding the elements of the test for injunctive relief (*i.e.*, (1) violation of a clear legal right, (2) threat of irreparable harm, and (3) lack of an adequate remedy). *See Kirkland v. PeoplesSouth Bank*, 70 So. 3d 662, 664 (Fla. 1st DCA 2011).

Nonetheless, Plaintiff asks this Court to make any number of findings that do not bear in any way on that test. For instance, he asks this Court to find facts about how *Linda Bollea* – who is neither a party, nor a witness in this case – treated Bollea toward the end of their marriage. Revised Proposed Injunction ¶ 16. He asks the Court to make various findings about the written narrative, which Bollea emphasized repeatedly he was not challenging before the jury (even while concealing that he had originally sued on it). *See, e.g.*, *id.* at ¶¶ 35, 43-44. And, he asks this Court to find extensive facts about the supposed financial benefits to Gawker of posting the video excerpts, *id.* at ¶¶ 56-70, which was one of Plaintiff's theories of *damages* and has nothing to do with any non-monetary harm Bollea is facing.[3] The proposed findings are replete with

[3] Moreover, most of the "facts" Plaintiff would have this Court find on that topic are not facts at all. Just by way of example, he would have this Court find that the excerpts accounted for 28% of the traffic increase gawker.com enjoyed during the period in which the excerpts were posted. *Id.* at ¶ 67. But the source of that number – Jeff Anderson – conceded that he arrived at that figure by switching the statistic he used to measure web traffic, a sleight of hand that permitted him to inflate the actual contribution of the video excerpts to gawker.com's web traffic by roughly ***4,000%***. *See* Trial Tr. at 2481:13-18, 2582:15-25 (testimony of Anderson, conceding that the video excerpts accounted for just 0.7% of gawker.com's unique page views, even though he assumed in his "analysis" that they accounted for 28% of its increase in unique users).

such gratuitous mischaracterizations of the record in virtually every paragraph, as set out in evidence and argument previously provided to the Court. Gawker continues to preserve its objections to such findings that are either unsupported by the record, mischaracterize it, or that are foreclosed by settled appellate authority, including appellate decisions issued in this action.

In short, if this Court is inclined to grant Plaintiff the relief requested, it should limit its factual findings only to those specifically germane to the three prongs of the test for permanent injunctive relief.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that Plaintiff's motion be denied.

Dated: May 23, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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