IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	CASE NO. 1:08-cv-00421-TWT
vs.	)	
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, et al,	)	
Defendant.	)	

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL RESPONSE

NOW COMES Defendant LFP Publishing Group, LLC d/b/a Hustler Magazine, et al. ("LFP") and hereby respectfully submits this Brief in Opposition to Plaintiff's Emergency Motion to Compel Discovery Response ("Plaintiff's Motion"), Docket Index ("D.I.") 101, and shows this Honorable Court as follows:

I. Introduction

Even though it lacks relevance to any issue in this case, LFP has already shared with Plaintiff its known history of litigating right of publicity claims and the fact that *Hustler* Magazine has never settled such a claim either before or without

litigation.[1] The issue thus presented by Plaintiff's latest motion to compel is whether she is entitled to discovery of, and whether LFP should be put through the significant trouble and considerable expense of researching and gathering, *Hustler* Magazine's more than 35-year history of litigated and non-litigated claims and settlements in cases and controversies which had nothing to do with a right of publicity claim -- the only claim in this case -- and could not possibly be probative of any relevant issue, including Plaintiff's punitive damages claim. We respectfully submit the answer should be "No".

Plaintiff argues that *Hustler* Magazine's litigation and settlement history is relevant "evidence of similar transactions . . admissible to show notice or knowledge, or to demonstrate a routine practice." (Plaintiff's Brief ("Pl. Br.") at 6.) This argument is mistaken for several reasons.

First, we are unaware of any holding by any court that a defendant's litigation history is relevant to prove notice, knowledge, or routine.

Second, the torts of defamation, intrusion, false light, and public disclosure of private facts are fundamentally distinct from the right of publicity.

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[1] *See* D.I. 101-2, Exhibit C, LFP Discovery Responses at 4 (identifying right of publicity litigation) and 6-7 ("Subject to and without waiving the foregoing objections, LFP states that it is unaware of any claim for right of publicity made against Hustler Magazine which was settled before or without litigation of the claim.").

Third, as Plaintiff, through her counsel, admits, whether the First Amendment protects a publication is a fact-intensive, case-specific inquiry. Whether *Hustler* Magazine successfully or unsuccessfully asserted a "newsworthiness" defense in a different publicity case is of no probative value in this case; and the assertion of such a defense in non-publicity cases is even more obviously irrelevant.

Fourth, notwithstanding the lack of any factual or legal connection to the issues in this case, confidential settlements in other contested matters, should they exist, would be per se irrelevant to prove liability under the Federal Rules of Evidence, and thus not a proper subject of discovery.

Finally, the requests are vastly overbroad and tremendously burdensome. Because they are devoid of probative value, whatever need Plaintiff contends she has for the requested discovery is far outweighed by the burden of requiring LFP to research and gather more than 35 years' worth of litigation history on claims with no connection to Plaintiff's Complaint.

LFP respectfully submits Plaintiff's Motion should be denied.

II. Plaintiff's Discovery Requests

Plaintiff seeks to compel LFP to identify and produce files relating to "all litigation in which [*Hustler* Magazine] has been sued" for invasion of privacy,

false light in the public eye, public disclosure of private facts, slander or defamation "since the beginning of the publication of *Hustler*," including "all [such] claims against *Hustler* which did not result in litigation." *See* Plaintiff's Second Continuing Interrogatories to Defendant ("Interrogatories") at Nos. 1 & 2 and Plaintiff's Second Request for Production of Documents to Defendant. Plaintiff also asks for LFP to identify and produce files relating to the "damages paid by *Hustler* by way of judgment or settlement[] of all claims and/or litigation in which *Hustler* has asserted as a defense that its conduct . . . was privileged or protected by the First Amendment . . . and/or . . . the doctrine of 'newsworthiness.'" Interrogatories at No. 3.

Although LFP contends that it is completely irrelevant to any claim or defense in this case, LFP has already identified to Plaintiff all right of publicity cases brought against *Hustler* Magazine that LFP and its counsel have been able to identify. As explained more fully below, LFP continues to object to Plaintiff's requests for information regarding *Hustler* Magazine's history of litigating or settling non-right of publicity claims because such information is irrelevant to any issue in this case; inadmissible; and, in varying degrees, subject to the attorney-client and work product privileges, unduly burdensome, confidential, or equally available to Plaintiff through public sources.

III. Legal Standard

The scope of discovery is limited to "nonprivileged matter[s] . . . relevant to any party's claim or defense"; "relevant" matters are those "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

A motion to compel discovery may be granted only upon a showing of "good cause" and where the discovery sought is "relevant to the subject matter involved in the action." *Id*. (Emphasis added.)

Rule 26 also directs that the Court "must limit" the extent of discovery permitted by the rules if it determines that the discovery sought "can be obtained from some other source that is more convenient, less burdensome, or less expensive" or "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(c) (i) and (iii).

IV. Argument and Citation of Authority

A. *Hustler* Magazine's History Of Litigating Or Settling Non-Publicity Claims Is Not Properly Discoverable

Plaintiff contends, Pl. Br. at 6, that *Hustler* Magazine's "previous litigation experiences on the subjects of not only . . . the right of publicity, but also of the closely related causes of action of invasion of privacy, false light in the public eye, public disclosure of private facts, slander, defamation and other similar claims of invasion of right to privacy" were "similar transactions" or "routine practices" that placed LFP on notice that its publication of the images of Ms. Benoit in this case was a clear violation of her right of publicity.[2] As explained below, Plaintiff's position is incorrect, and unsupported by established law, for several reasons.

1. A Defendant's History Of Unrelated Litigation Is Not Accepted Proof Of Notice Or Intent

First, although Plaintiff makes no mention of it in her brief, Fed. R. Evid. 404(b) governs the admissibility of "other crimes, wrongs, or acts." Courts applying Rule 404(b) have generally held that a defendant's litigation history is not discoverable (much less admissible evidence). *See*, *e.g.*, *Johnson Matthey, Inc. v.*

[2] In her March 4, 2010 letter to LFP counsel, D.I. 101-2, Exhibit A, Plaintiff argued this information is relevant because "this case deals in part with the invasion of the right of publicity, which is a closely related cause of action to the right of privacy, as well as the other [non-publicity] causes of action listed" in Plaintiff's discovery requests. (Emphasis added.) Of course, this case deals only with the right of publicity, and no other alleged tort.

Research Corp., 2002 WL 31235717, at *2 (S.D.N.Y. 2002) (prohibiting discovery of complaint from prior litigation involving defendant because "it concerned matters which are in no way relevant to a claim or defense at issue here."); *Marker v. Union Fidelity Life Ins. Co*., 125 F.R.D. 121, 124-25 (M.D.N.C. 1989) ("plaintiff is not entitled to an order compelling defendant to produce detailed information about prior lawsuits filed against it."); *McLeod v. Parsons Corp*., 73 Fed. Appx. 846, 854, 2003 WL 22097841 at *7 (6th Cir. 2003) ("it is not apparent that evidence concerning the other employment discrimination lawsuits filed against Parsons was relevant, because there was no clear nexus between these lawsuits and this case"); *Warner Bros., Inc. v. Dae Rim Trading, Inc*., 677 F. Supp. 740, 764 (S.D.N.Y. 1988) (trademark infringement suit against defendant not relevant to copyright infringement case).

Indeed, Plaintiff does not offer, nor have we found, a single case permitting use of a defendant's litigation and settlement history in cases unrelated to the instant litigation, involving fundamentally distinct claims, to prove notice, knowledge or routine practice.[3] Instead, Plaintiff cites two Georgia state court

[3] Indeed, such evidence is generally excluded by the courts as highly prejudicial. *See, e.g., McLeod*, 73 Fed. Appx. at 854, 2003 WL 22097841 at *7 (excluding prior litigation evidence because "the potential for prejudice that would have accompanied this evidence would have substantially outweighed its probative value, and this evidence would have misled the jury.").

cases applying the Georgia rules of evidence to facts and circumstances which clearly do not apply here. (Pl. Br. at 6-7, citing *Conyers Toyota, Inc. v. Southern Bell Tel. & Tel. Co*., 198 Ga. App. 90, 400 S.E.2d 662 (1990) and *McIntyre v. Balkcom*, 229 Ga. 81, 189 S.E.2d 445 (1972).)[4]

Neither such case remotely supports Plaintiff's position. Evidence of defendant's litigation and settlement history was not even at issue in *Conyers Toyota*; rather, the court examined whether defendant's knowledge of previous accidents caused by the presence of the same, pre-existing dangerous physical condition on its property was admissible. Here is what the *Conyers Toyota* court held:

> Ordinarily, evidence of similar acts or omissions is not admissible to establish that an alleged tortfeasor was negligent on another, wholly separate occasion. However, [w]here evidence of a prior similar accident tends to show condition and knowledge of that condition, the evidence is admissible.

Conyers Toyota, 198 Ga. App. at 93 (citations and quotations omitted) (emphasis added). In other words, evidence that *Hustler* Magazine was sued by someone else, in the past, for conduct unrelated to the publication of Ms. Benoit's image,

[4] Of course it is the Federal Rules of Evidence that apply in this Court, not Georgia's. *See, e.g., Burrage v. Harrell*, 537 F.2d 837, 839 n.1 (5th Cir. 1976) ("Appellant's citation of state 'golden rule' cases is interesting, but irrelevant. Federal law controls federal trial procedure.")

and for a non-publicity tort, is not admissible evidence that LFP knew it was violating Ms. Benoit's publicity rights "on another, wholly separate occasion."

Plaintiff's reliance on *McIntyre* is inexplicable. Plaintiff cites this case for the proposition that "evidence of [past] litigation may also be used by Plaintiff to demonstrate a routine practice which was followed by LFP in this particular instance." (Pl. Br. at 7.) But no party's prior litigation history was at issue in *McIntyre*; instead, the Georgia Supreme Court decided whether the fact that certain statements were commonly contained in the certificate of the court reporter in connection with criminal defendants' guilty pleas could be "admissible as tending to show that the custom was followed in a particular instance." *McIntyre*, 229 Ga. at 81. This case presents no issue on which the *McIntyre* case could possibly touch.

Simply put, the non-publicity litigation and settlement history Plaintiff seeks is not probative of whether LFP intentionally violated Ms. Benoit's right of publicity. Even if Plaintiff had identified an applicable rule or legal authority that permitted discovery of such evidence, the potential prejudicial effect of such evidence on the jury is self-evident, and outweighs whatever probative value it could possibly have. *McLeod*, 73 Fed. Appx. at 854, 2003 WL 22097841 at *7. Plaintiff's Motion should be denied.

2. Because The Right Of Publicity Is Fundamentally Distinct From Non-Publicity Torts, *Hustler* Magazine's Non-Publicity Litigation And Settlement History Could Not Be Relevant To Show A "Similar Transaction" Or "Routine"

Even if a party's history of litigating the same type of "claims" were admissible, here, Plaintiff's attempt to analogize her right of publicity claim to other torts which implicate the First Amendment is misplaced, as is her suggestion that the application of the First Amendment in one type of case may be used to impute knowledge or notice of its application in other, unrelated cases.

First, Plaintiff is wrong, Pl. Br. at 6, that her right of publicity claim is "closely related" to defamation and other causes of action falling under the "privacy" rubric: they are not analogous claims, and they do not share essential elements.[5] As the U.S. Supreme Court has recognized, the right of publicity cause of action is a "discrete kind of 'appropriation' case" that, other than also deriving from the "law of privacy . . . [has] almost nothing in common [with the other privacy-derived torts] except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'" *Zacchini v. Scripps-Howard*

[5] Plaintiff could not even assert these non-publicity torts on Ms. Benoit's behalf, as they are only available to living persons. *See Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 143, 296 S.E.2d 697, 703 (1982) (unlike the other privacy-derived torts, "the right of publicity survives the death of its owner."); *accord*, 2 J. Thomas McCarthy, *The Rights of Publicity and Privacy*, § 9.1, p.395 (2d ed. 2009) ("classic 'privacy' rights die with the person whose privacy was allegedly invaded").

Broadcasting Co., 433 U.S. 562, 572 n.7, 97 S. Ct. 2849, 2855 (1977). The differences in these claims are not immaterial; in fact, the U.S. Supreme Court has characterized them as "important," because "the State's interests in providing a cause of action in each instance are different," and likewise the function and application of the First Amendment with respect to each cause of action are different. *Zacchini*, 433 U.S. at 573, 97 S. Ct. at 2856.[6]

Further, as Plaintiff herself argued to the U.S. Supreme Court, whether and to what result *Hustler* Magazine has litigated other "First Amendment" cases in the past cannot possibly inform whether LFP could have or should have known that its conduct in this case could be a violation of Ms. Benoit's right of publicity because "[d]etermination of newsworthiness is, of necessity, dependent upon facts specific to the case." (*See* Exhibit A hereto, Brief of Respondent in Opposition to LFP Petition for Writ of Certiorari at 14.) Plaintiff has even argued that the "newsworthiness" inquiry is so "fact-dependent" that "a bright-line standard is neither feasible nor is it desirable in the best interests of the freedom of the press." *Id*. at 14-15 (citing *The Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989) ("We

[6] Notably, the Georgia Supreme Court shares this view. *See Martin Luther King, Jr. Center for Social Change, Inc.*, 250 Ga. at 142 ("Recognizing, as we do, the fundamental distinction between causes of action involving injury to feelings, sensibilities or reputation and those involving an appropriation of rights in the nature of property rights for commercial exploitation….").

continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep not more broadly than the appropriate context of the instant case.") (emphasis added)). In other words, in First Amendment cases such as this one, each case stands alone, and "bright-line" standards of First Amendment principles may not properly be derived by comparing such cases to one another.

In short, because "Rule 404(b) allows jury inferences only where the compared conduct is closely analogous to the conduct at issue in the instant suit," *Hustler* Magazine's 35-year history of litigating or settling privacy and defamation claims has no valid application to the adjudication of this Plaintiff's right of publicity claim. *Holiday Wholesale Grocery Co. v. Phillip Morris Inc.*, 231 F. Supp. 2d 1253, 1313 (N.D. Ga. 2002) (emphasis added) (Forester, J.); *see also U.S. v. Crockett*, 514 F.2d 64, 72 (5th Cir. 1975) ("important consideration" in balancing probative value of extrinsic evidence against prejudicial effects is "whether the other acts are closely connected in time and nature to the offense charged."). Accordingly, Plaintiff's Motion should be denied.

B. Plaintiff's Request To Discover Confidential Settlements Is Also Barred By Fed. R. Evid. 408

Plaintiff also seeks to discover confidential settlements spanning *Hustler* Magazine's more than 35 years in print. (*See* Interrogatories at Nos. 1-3.) In

addition to the reasons described above, discovery of such information is also prohibited by Fed. R. Evid. 408(a), which provides in relevant part that settlement and compromise information:

> is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction.

Fed. R. Evid. 408(a).

Plaintiff's argument, Pl. Br. at 10, that Rule 408 is inapplicable because evidence of *Hustler* Magazine's confidential settlements "would not be admitted to prove liability as to [LFP's] acts in *this case*" (emphasis in original) is linguistic legerdemain, and is contradicted by her admission that she wishes to use such evidence to "show [LFP's] notice and knowledge of the law," *id*. In other words, Plaintiff seeks to use such evidence to prove LFP's liability for her punitive damages claim. Such use is prohibited by the plain terms of Fed. R. Evid. 408. *See Nomo Agroindustrial SA DE CV v. Enza Zaden North America, Inc*., 2009 WL 211085, at *2, *4 (D. Ariz. 2009) (excluding confidential settlement communications sought by plaintiff "to help prove punitive damages").[7]

[7] Despite Plaintiff's assertion to the contrary, Pl. Br. at 10, that there exists in this case an umbrella protective order governing the exchange of confidential information in discovery does not render irrelevant, inadmissible, and therefore undiscoverable evidence suddenly discoverable.

Discoverability of confidential settlements, were they to exist, is not only contrary to the established rules governing federal civil practice but also to the strong public policies underlying those rules. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc*., 332 F.3d 976, 981 (6th Cir. 2003) ("The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in refusing to allow discovery. The fact that Rule 408 provides for exceptions to inadmissibility does not disprove the concept of a settlement privilege.").[8]

[8] Moreover, as the Eastern District of California held in *Cook v. Yellow Freight System, Inc*., given the denials of liability and mutual disclaimers inherent to such matters, confidential settlements could hardly be probative of any material issue:

> In this regard, the court finds that one consideration in precluding the discovery of documents generated in the course of settlement discussions lies in the fact that such discussions are frequently not the product of truth seeking. Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are "motivated by a desire for peace rather than from a concession of the merits of the claim." *United States v. Contra Costa County Water Dist*., [cit. omitted]. What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sort of "facts" would be highly misleading if allowed to be used for purposes other than settlement.

Plaintiff's Motion provides no basis for disregarding these fundamental principles of evidence in this case.

C. Any Conceivable Probative Value Plaintiff Contends The Requested Discovery Has Is Outweighed By The Burden It Would Impose Upon LFP

As shown above, the information requested by Plaintiff is either non-discoverable under the Federal Rules of Evidence, lacking in probative value, or both. In accordance with Fed. R. Civ. P. 26(b) and (c), Plaintiff's Motion should also be denied because the significant burden and expense required to comply with her discovery requests far outweigh any probative value the requested information could possibly have in this case. Indeed, as Plaintiff has been informed, LFP does not maintain historical litigation files in the ordinary course of business, and therefore the information sought would be enormously burdensome, and perhaps impossible to gather. Much of the information sought would have to be researched and gathered by LFP or its counsel through public sources equally available to Plaintiff, and which she may peruse if she so desires. Further, the likely benefit of the information to Plaintiff, the needs of the case, and the importance of the

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132 F.R.D. 548, 554 (E.D. Cal. 1990), *overruled on other grounds, Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996).

requested discovery in resolving the limited issues before the Court all weigh in favor of prohibiting the discovery.

Accordingly, LFP respectfully requests that Plaintiff's Motion be denied.

D. There Is No Basis For An Award Of Plaintiff's Attorneys' Fees And Costs Associated With Her Motion To Compel

As described above, Plaintiff's Motion is not well founded. Accordingly, there is no basis to grant the relief she seeks, and LFP submits her request for attorneys' fees and costs should also be denied.

IV. Conclusion

For the reasons set forth herein, LFP respectfully requests that this Court deny Plaintiff's Emergency Motion to Compel.

[Signature on following page]

Respectfully submitted this 29th day of March 2010.

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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSE via the CM/ECF system which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 29th day of March 2010.

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