

**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,

vs.

LFP PUBLISHING GROUP, LLC,  
d/b/a *Hustler* Magazine, et al.,

Defendant.

CASE NO. 1:08-cv-00421-TWT

**DEFENDANT’S OBJECTIONS TO PLAINTIFF’S RESPONSE TO  
DEFENDANT’S STATEMENT OF UNDISPUTED MATERIAL FACTS**

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a *Hustler* Magazine, et al. (“LFP”) and respectfully files this objection in reply to Plaintiff’s Response to Defendant’s Statement of Undisputed Material Facts, Docket Index 159.

In support of its Motion for Summary Judgment and in compliance with Local Rule (“L.R.”) 56.1B.(1), LFP filed its Statement of Undisputed Material Facts, Docket Index (“D.I.”) 124-3 [Under Seal]. Plaintiff responded by filing her Response to Defendant’s Statement of Undisputed Material Facts, D.I. 159 (the

“Response”). The Response, however, does not meet the requirements of L.R. 56.1B.(2)a.(2), which provides as follows:

This Court **will deem each of the movant’s facts as admitted unless the respondent**: (i) directly refutes the movant’s fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant’s fact; or (iii) points out that the movant’s citation does not support the movant’s fact or that the movant’s fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1 B.(1).

L.R. 56.1B.(2)a.(2) (emphasis added).

This Court has consistently held that responses to statements of fact that do not strictly comply with the local rule will be deemed admitted. *See Dinkins v. Leavitt*, 2008 WL 447503, at \*3 (N.D. Ga. 2008) (deeming defendant’s statement of facts admitted where plaintiff’s response did not meet the requirements of L.R. 56.1B.(2)a.(2)) (Thrash, J.); *Brandon v. Lockheed Martin Aeronautical Systems*, 393 F. Supp. 2d 1341, 1347 (N.D. Ga. 2005) (although plaintiff submitted response to movant’s statement of undisputed material facts, he “failed to provide relevant citations to any record evidence supporting the factual statements found in those responses. Under the Local Rules, that failure has consequences. . . . Therefore, the Court must deem each movant’s statement of undisputed, material facts to be admitted.”) (Vining, J.). *See also Digioia v. H. Koch & Sons, Div. of Wickes Mfg.*

Co., 944 F.2d 809, 811 n.6 (11th Cir. 1991) (“the facts as set out in [defendant’s] concise statement of facts not at issue are deemed admitted” by operation of Local Rules because they were not controverted).

As described below, Plaintiff’s Response includes numerous objections to LFP’s facts that do not comply with the unambiguous requirements of the local rule. Therefore, pursuant to L.R. 56.1B.(2)a.(2), LFP respectfully submits that this Honorable Court should deem these facts admitted.

**Specific Responses That Do Not Comply with the Local Rule and Should Be Deemed Admitted**

**LFP’S STATEMENT OF FACT NO. 20:**

*During the modeling session and photo shoot, both Bill Otten and Christopher Helton took photographs of Ms. Benoit while she stripped, posed nude and in various outfits, danced, and rubbed her skin with baby oil. Mr. Samansky took video footage of Ms. Benoit while she posed, but did not take any still photographs. (TAB M, Samansky Aff. at ¶ 8; TAB Q, Helton Aff. at ¶ 5.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 20. Plaintiff notes that nowhere in Defendant’s Statement of Undisputed Material Facts does Defendant claim that Nancy Benoit ever signed a release for the photographs and images in question, or gave anyone permission to publish such images in Hustler*

Magazine. See *Daus Deposition*, p. 18, lines 8-10, p. 42, lines 3-5; see also *Defendant's Responses to Plaintiff's Request for Production of Documents*, LFP 0039.

**OBJECTION:**

Plaintiff's response purports to deny this Statement of Fact ("SOF"), but her support of the denial does not address or relate to the subject matter of the SOF. SOF No. 20 concerns what transpired during the Nancy Benoit photo shoot, yet Plaintiff denies the SOF on the irrelevant ground that LFP's Statement of Undisputed Material Facts does not claim that Ms. Benoit ever signed a release in connection with the images in question. Further, Plaintiff fails to provide a relevant citation to evidence to support her denial.

**LFP'S STATEMENT OF FACT NO. 25:**

*Neither Ms. Benoit, Jim Daus, Mark Samansky or anyone else ever asked Mr. Helton, at any time, to destroy the photographs he took of Ms. Benoit or the negatives of those photographs. To the best of his recollection, Mr. Helton has not destroyed the photographs he took of Ms. Benoit or the negatives for the photographs. (TAB Q, Helton Aff. at ¶¶ 9-10.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 25. Plaintiff notes that nowhere in Defendant's Statement of Undisputed Material Facts does Defendant claim that Nancy Benoit ever signed a release for the photographs and images in question, or gave Mr. Helton, or anyone else, permission to publish such images in Hustler Magazine. See Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but her support of the denial does not address or relate to the subject matter of the SOF. SOF No. 25 concerns whether anyone ever asked photographer Christopher Helton to destroy the pictures he took of Ms. Benoit, yet Plaintiff denies the SOF on the irrelevant ground that LFP's Statement of Undisputed Material Facts does not claim that Ms. Benoit ever signed a release in connection with the images in question. Further, Plaintiff fails to provide a relevant citation to evidence to support her denial.

**LFP'S STATEMENT OF FACT NO. 34:**

*Until she entered the Independent Contractor Agreement with World Championship Wrestling in 1996, which contained the intellectual property license, Ms. Benoit had freely permitted the use of her image and likeness by photographers, wrestling organizations and magazines without compensation. (TAB G, Otten D. at 13:12-23, 61:17-22, 92:22 - 93:8; TAB H, Sullivan D. at 23:13-20, 30:8-23.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 34. Plaintiff contends that none of those images or likenesses consisted of nude images, and none of the wrestling organizations or magazines who used such images were Hustler Magazine or any other publication owned by Defendant. See Daus Deposition, p. 52, lines 14-17; see also Daus Affidavit, ¶ 9. In addition, Plaintiff contends that Defendant's Statement of Material Fact Number 34 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but her support of the denial does not address or relate to the subject matter of the SOF. SOF No. 34

concerns Ms. Benoit's freely allowing the use of her image prior to entering into her contract with World Championship Wrestling, yet Plaintiff denies the SOF on the irrelevant ground that none of these images were nude images. The rationale for her denial appears, in fact, to admit SOF No. 34. Further, Plaintiff fails to provide a relevant citation to evidence to support her denial.

**LFP'S STATEMENT OF FACT NO. 38:**

*After Mr. Samansky learned about the murder of Ms. Benoit, he extracted a number of images from the video footage he had taken during Ms. Benoit's modeling session and photo shoot, and on July 11, 2007, he contacted LFP via email with a proposal to sell those images to LFP for publication in Hustler Magazine, along with information to be used in an article accompanying the images. (TAB M, Samansky Aff. at ¶ 8; TAB L, Affidavit of Tyler Downey ("Downey Aff.") at ¶ 3; TAB P, LFP-0073 - LFP-0074.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 38. Plaintiff contends that neither Mr. Samansky nor Defendant ever obtained a release or permission from Ms. Benoit, or the Estate of Ms. Benoit, for the use of her image, or for her image to be sold to or published by Defendant. See Daus*

*Deposition, p. 18, lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but her support of the denial does not address or relate to the subject matter of the SOF. SOF No. 38 concerns Mark Samansky's contacting LFP with a proposal to sell the Benoit images, yet Plaintiff denies the SOF on the irrelevant ground that neither LFP nor Mr. Samansky obtained a release Ms. Benoit to publish the images. Further, Plaintiff fails to provide a relevant citation to evidence to support her denial.

**LFP'S STATEMENT OF FACT NO. 40:**

*At the time he contacted LFP regarding the proposed sale, Mr. Samansky owned (and he continues to own) the copyrights in the video footage he took of Ms. Benoit during the modeling session and photo shoot and in the images he extracted from that video. (TAB M, Samansky Aff. at ¶ 12; TAB P, LFP-0073 - LFP-0074.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 40. Plaintiff contends that Mr. Samansky never obtained a release or permission from Ms. Benoit, or the Estate of Ms. Benoit, for the use of her image, or for her image to be*



*sold to or published by Defendant. See Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but her support of the denial does not address or relate to the subject matter of the SOF. SOF No. 40 concerns Mark Samansky's copyrights in the video footage he took of Ms. Benoit, yet Plaintiff denies the SOF on the irrelevant ground that neither LFP nor Mr. Samansky obtained a release Ms. Benoit to publish the images. Further, Plaintiff fails to provide a relevant citation to evidence to support her denial.

**LFP'S STATEMENT OF FACT NO. 47:**

*Before learning of the Hustler Magazine article about Ms. Benoit, Mrs. Toffoloni was unaware of her daughter's efforts to become a professional model or of her having posed nude for photographs and on video. (TAB K, Toffoloni D. at 37:2-23.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 47. Plaintiff contends that Defendant's Statement of Material Fact Number 47 is not only*

*immaterial to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment, but is also indicative of the pain caused to Nancy Benoit's family by Defendant's actions.*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but she fails to provide a citation to evidence or any factual basis to support her denial. *See* L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347. Moreover, her denial of SOF 47 on the ground that it is "immaterial to this case and has no relevance" is undermined by her reference to the "pain caused to Ms. Benoit's family," a subject that is beyond all doubt immaterial and irrelevant.

**LFP'S STATEMENT OF FACT NO. 59:**

*LFP published the images of Ms. Benoit in spite of their lesser quality and non-explicit nature because they illustrated and were a part of an exclusive news and entertainment story about an international celebrity that had recently become the subject of substantial and intense public interest. (TAB C, David Aff. at ¶ 6; TAB G, Otten D. at 54:17 - 55:1.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 59. Plaintiff contends that the images of Ms. Benoit were not used to "illustrate ... an*

*exclusive news and entertainment story,” but instead, the small article accompanying the images were [sic] but a pretext to the images’ inclusion on the magazine. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1210 (11<sup>th</sup> Cir. 2009) (“LFP’s brief biography of Benoit’s life ... is merely incidental to its publication of her nude photographs”).*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to provide a citation to evidence or any factual basis to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347. For the reasons explained in LFP’s summary judgment briefing, D.I. 124-1 at 13-17 and D.I. 153 at 10-15, the *Toffoloni* decision may not be construed to have conclusively established any fact or binding law-of-the-case. Accordingly, this fact remains undisputed and should be deemed admitted.

**LFP’S STATEMENT OF FACT NO. 64:**

*While consequence and timeliness are primary elements of news, prominence, proximity, and human interest are also important elements of news. The emphasis of personality in news has continued – and actually accelerated – with the development of the radio, film, and television media. (TAB O, Expert Report of Gregory C. Lisby, Ph.D., J.D. (“Lisby Report”) at p. 3.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 64. Plaintiff denies that Defendant's expert's report may be relied on in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff's mistaken belief that LFP's expert's report may not be relied upon to assist the trier of fact and that the Eleventh Circuit's *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 65:**

*Today, all media focus to a greater or lesser degree (depending upon their mission) on celebrities, illustrating the shift in dominance of the news value of prominence over the news value of consequence. (TAB O, Lisby Report at p. 4.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 65. Plaintiff denies that Defendant’s expert’s report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to

support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 66:**

*In 2008, 15.8% of magazine editorial page content was devoted to “entertainment/celebrity,” and the 160 magazines measured by Hall’s Magazine Reports Company showed that the top three subject categories were: “Entertainment/Celebrity,” “Wearing Apparel/Accessories,” and “Travel/Transportation.” Further, in 2008, circulation of OK! Weekly, a tabloid gossip magazine, jumped 54%, to more than 809,000 copies an issue, and US Weekly, In Touch Weekly and Life & Style Weekly all rose 5-10%. (TAB O, Lisby Report at p. 6.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 66. Plaintiff contends that Defendant’s Statement of Material Fact Number 66 is not material to this case and has no relevance to the issues presented in Defendant’s Motion for Summary Judgment. In addition, Plaintiff denies that Defendant’s expert’s report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC,*

*572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. *See* L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 67:**

*The Star, a celebrity gossip magazine, has seen a rise in circulation from 1.3 million to 1.54 million since 2004. Another celebrity magazine, In Touch Weekly, has grown its circulation from 1 million to 1.26 million since 2004. (TAB O, Lisby Report at p. 7.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 67. Plaintiff contends that Defendant’s Statement of Material Fact Number 67 is not material to this case and has no relevance to the issues presented in Defendant’s*

*Motion for Summary Judgment. In addition, Plaintiff denies that Defendant's expert's report may be relied on in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff's mistaken belief that LFP's expert's report may not be relied upon to assist the trier of fact and that the Eleventh Circuit's *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP'S STATEMENT OF FACT NO. 68:**

*In the post-O.J. Simpson era, celebrity magazines have become more popular than general news magazines. While newsstand circulation has jumped 8.9% for celebrity magazines, industry-wide newsstand circulation has fallen 3.4%. (TAB O, Lisby Report at p. 7.)*



**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 68. Plaintiff contends that Defendant's Statement of Material Fact Number 68 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment. In addition, Plaintiff denies that Defendant's expert's report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff's mistaken belief that LFP's expert's report may not be relied upon to assist the trier of fact and that the Eleventh Circuit's *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 69:**

*With the advent of the Internet, the number of media outlets devoted to celebrity news has continued to rise, enabling an even more intensive focus on celebrities and more in-depth coverage of the minutiae of their everyday lives. With the growing prevalence of “gossip” websites, the public’s preoccupation with celebrity news has dramatically increased. (TAB O, Lisby Report at p. 7.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 69. Plaintiff contends that Defendant’s Statement of Material Fact Number 69 is not material to this case and has no relevance to the issues presented in Defendant’s Motion for Summary Judgment. In addition, Plaintiff denies that Defendant’s expert’s report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement

of Plaintiff's mistaken belief that LFP's expert's report may not be relied upon to assist the trier of fact and that the Eleventh Circuit's *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP'S STATEMENT OF FACT NO. 71:**

*Images of nudity (both celebrity and non-celebrity) are not only prevalent but almost ubiquitous on the Internet. (TAB O, Lisby Report at p. 20 & Tab B thereto at pp. 1-155.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 71. Dr. Lisby's report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement

of Plaintiff's mistaken belief that LFP's expert's report may not be relied upon to assist the trier of fact and that the Eleventh Circuit's *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP'S STATEMENT OF FACT NO. 72:**

*Words are not necessary to establish the newsworthiness of images. Images by themselves may be and often are newsworthy. (TAB O, Lisby Report at p. 18.) Much of the news and entertainment content of celebrity gossip media outlets consists of celebrity images (both clothed and nude/partially nude), alone, without accompanying informational content providing additional context to the images. (TAB O, Lisby Report at p. 17.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 72. Plaintiff denies that Defendant's expert's report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) ("We hold that these*

*photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. *See* L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 73:**

*Ms. Benoit was a celebrity and therefore her murder was newsworthy in the traditional sense to mainstream media; unpublished nude photographs would be equally newsworthy to entertainment/celebrity media outlets such as Hustler Magazine – even more so in the aftermath and context of her tragic death. (TAB O, Lisby Report at p. 21.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 73. Dr. Lisby’s report may not be relied upon in any way to assist the trier of fact in the*

*determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals, which ruled that the previously unpublished nude photographs of Ms. Benoit held no relation to the newsworthy even of her death. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1212 (11<sup>th</sup> Cir. 2009) (“The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 74:**

*The Hustler Magazine article and images of Ms. Benoit are consistent with the nature and content of entertainment/celebrity news that was not only popular*

*but also pervasive in entertainment media outlets at the time they were published in March 2008. (TAB O, Lisby Report at p. 22.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 74. Defendant’s expert’s report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 75:**

*The images of Ms. Benoit published by LFP were also newsworthy in that the pictures by themselves were “timely,” even after her death, because that is when the existence of the images first became known to the public. (TAB O, Lisby Report at p. 22.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 75. Defendant’s expert’s report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to



support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP'S STATEMENT OF FACT NO. 76:**

*The publication of the images with an accompanying magazine article did not make the images any more or any less newsworthy, in and of themselves, according to the news standards of the entertainment/celebrity media. The fact that the images were taken at some earlier point in time is irrelevant to the news value of timeliness; this concept is measured at the point of discovery of the images, which was contemporaneous with their publication. (TAB O, Lisby Report at p. 22.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 76. Defendant's expert's report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness or timeliness, as those issue [sic] have been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1212 (11<sup>th</sup> Cir. 2009) ("The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny.")*

**OBJECTION:**

Plaintiff's response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff's mistaken belief that LFP's expert's report may not be relied upon to assist the trier of fact and that the Eleventh Circuit's *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. See L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP'S STATEMENT OF FACT NO. 77:**

*Any reasonable magazine publisher, including LFP, would have believed that both the article and images of Ms. Benoit were, each independently and standing alone, newsworthy at the time of their publication. (TAB O, Lisby Report at p. 22.)*

**PLAINTIFF'S RESPONSE:**

*Plaintiff denies Defendant's Statement of Material Fact Number 77. Defendant's expert's report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009) ("We hold that these*

*photographs do not qualify for the newsworthiness exception to the right of publicity.”)*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. Rather, her support of the denial is merely a statement of Plaintiff’s mistaken belief that LFP’s expert’s report may not be relied upon to assist the trier of fact and that the Eleventh Circuit’s *Toffoloni* opinion is the law-of-the-case. Further, Plaintiff fails to provide a citation to evidence to support her denial. *See* L.R. 56.1B.(2)a.(2)(i); *Brandon*, 393 F. Supp. 2d at 1347.

**LFP’S STATEMENT OF FACT NO. 86:**

*Immediately upon receiving the January 16, 2008 demand letter, LFP took measures to prevent the Benoit images from appearing on any Hustler-affiliated website, and removed back-issues of the March 2008 issue from sale or distribution. LFP also voluntarily agreed that it would not republish the images of Ms. Benoit in any future issue of Hustler magazine, such as a “Best of Hustler” issue, and that it would not authorize their republication by any other licensees. (Affidavit of Donna Hahner, D.I. 3-1 at ¶ 6; TAB B, Hahner D. at 39:15 - 40:12; TAB D, David D. at 28:17 - 29:7.)*

**PLAINTIFF’S RESPONSE:**

*Plaintiff denies Defendant’s Statement of Material Fact Number 86. Plaintiff states that Defendant could have attempted to limit the distribution of the March 2008 issue by calling wholesalers and asking them not distribute the issue, but Defendant failed to do so in this case. See Flynt Deposition, p. 15, lines 18-21.*

**OBJECTION:**

Plaintiff’s response purports to deny this SOF, but she fails to deny the substance of the SOF. SOF No. 86 lists specific measures which, upon receiving Plaintiff’s demand letter, LFP took to limit the distribution of the Benoit images. Yet, the rationale for Plaintiff’s “denial” of SOF No. 86 consists merely of her assertion that there were other measures LFP could have taken but did not. Therefore, Plaintiff does not actually deny the SOF. Further, Plaintiff fails to provide a relevant citation to evidence to support her denial.

**Conclusion**

For the reasons stated above, LFP respectfully asks this Court to deem the following Statements of Fact admitted pursuant to L.R. 56.1B.(2)a.(2): Nos. 20, 25, 34, 38, 40, 47, 59, 64-69, 71-77 and 86.

Respectfully submitted this 17th day of September 2010.

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**CERTIFICATE OF SERVICE**

This is to certify that I have this day filed the within and foregoing DEFENDANT'S OBJECTIONS TO PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS 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 17th day of September 2010.

/s/ S. Derek Bauer  
S. Derek Bauer

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