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

REPLY TO PLAINTIFF'S RESPONSE TO LFP'S
MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a *Hustler* Magazine, et al. ("LFP") and respectfully files this Reply to Plaintiff's Response to LFP's Motion for Summary Judgment, Docket Index ("D.I.") 158 (hereinafter the "Response").

I. Introduction

LFP's Motion for Summary Judgment is rooted in the simple and irrefutable legal principle that the merits of both Plaintiff's claims, and LFP's defenses, may only be resolved on a complete and contextual factual record; and that now, with the benefit of a fully developed record, it is clear that on the merits, LFP's

"newsworthiness" defense entitles it to summary judgment as a matter of law. LFP also showed in its Brief why, even if it is not entitled to summary judgment on Plaintiff's underlying right of publicity claim, the record contains no evidence to justify sending Plaintiff's punitive damages claim to a jury.

In her Response, Plaintiff attempts to deal with both of these issues by continuing to ignore the applicable law and, when necessary, distorting the factual record. For example, rather than offering any evidence to contest LFP's showing that the Benoit images were, in fact, published as part of an exclusive, "newsworthy" and non-pretextual editorial article, Plaintiff invokes her oft-repeated but erroneous mantra that her right of publicity claim, and LFP's defenses thereto, were conclusively decided in her favor by the Eleventh Circuit on the pleadings alone, so that she need not "prove *Hustler*'s liability," D.I. 120-1 at 10, to succeed on her claim. Likewise, Plaintiff simply ignores the key -- and undisputed -- fact requiring summary judgment on her claim for punitive damages: because even educated minds sincerely differ about whether LFP's publication of the Benoit images was "newsworthy", no reasonable jury could find that LFP published the images with a conscious and premeditated intent to violate Plaintiff's publicity rights.

For these reasons, and those more fully described below, LFP respectfully submits that summary judgment in its favor is appropriate.

II. Argument

A. Plaintiff's Misplaced Reliance On The Eleventh Circuit's Rule 12(b)(6) Opinion Is Insufficient To Rebut The Undisputed Record Evidence Establishing LFP's "Newsworthiness" Defense

Plaintiff's opposition to LFP's motion for summary judgment on its "newsworthiness" defense rests entirely on her mistaken assertion that the Eleventh Circuit's Rule 12(b)(6) decision[1] has preclusive effect. (Response at 3-7.) Her Response cites the *Toffoloni* opinion no less than six times; but she fails even once to mention the substantial body of settled case law which precludes her reliance on it, D.I. 120-1 at 13-17 & D.I. 153 at 10-15, or to address the undisputed facts which contradict the preliminary factual assumptions made by the Eleventh Circuit in its *Toffoloni* opinion, *see* D.I. 120-1 at 16-17.[2]

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[1] *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).

[2] *E.g.*, the Eleventh Circuit's now-disproven assumptions include that (1) Ms. Benoit expressly sought to have the images published by LFP destroyed; (2) LFP's editors published the protected news article about Ms. Benoit as a pretext to publish the images; and (3) images illustrating Ms. Benoit's pursuit of nude modeling early in her career do not involve a subject-matter of interest to the public, and therefore were not suitable for entertainment news reporting. (*See* Facts ¶¶ 22-25, 59, 63, 70-74.)

Specifically, Plaintiff argues that because "[t]he Eleventh Circuit found that the matter of legitimate public interest in this case was Ms. Benoit's murder," Response at 6, and the images do not relate to Ms. Benoit's murder, the Eleventh Circuit's *Toffoloni* opinion "conclusively" determined the "newsworthiness" issue. *Id*. But as we have repeatedly shown, D.I. 120-1 & D.I. 153, settled law precludes the *Toffoloni* opinion from having such force. Of equal importance, and equally ignored by Plaintiff, is the context which the developed, undisputed factual record now provides, and which the Court now must consider: the matter of interest to LFP and the readers of *Hustler* Magazine was not merely Ms. Benoit's murder -- after all, the circumstances of the murder had been reported on *ad nauseum*, *see* D.I. 3 at 12-13 -- but also the fact that this internationally-recognized celebrity pro wrestler, who had made her career promoting her sex appeal, had for a brief period considered an alternative career path as a nude model. (Facts ¶¶ 14-20.) The record further shows that the LFP story about Ms. Benoit was not only consistent with its historical editorial (as opposed to nude model pictorial) content, but also typical of other entertainment news' outlets content. (*Id*. at ¶ 74.) In other words, the record shows that Benoit images are related to an "incident" of public concern: her remarkable career history. Plaintiff does not dispute that fact.

Accordingly, because LFP has established that its publication of the Benoit images was "newsworthy," summary judgment is appropriate on Plaintiff's claim for right of publicity.

B. Summary Judgment Is Appropriate on Plaintiff's Claim for Punitive Damages

1. Plaintiff Argues for an Inapplicable Legal Standard for Punitive Damages in a Georgia Right of Publicity Case

In an effort to argue a weaker standard of proof, Plaintiff's Response briefs outdated and incorrect legal standards that do not govern when punitive damages may be recovered in a Georgia right of publicity case.[3] First, she cites a number of Georgia cases that have nothing to do with the right of publicity or the quantum of proof required to justify punitive damages in such cases.[4] (Response at 8-9.) But the Georgia Supreme Court has made clear that the punitive damages standard on a

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[3] Plaintiff cites punitive damages language from *Brown v. Capricorn Records, Inc*., 136 Ga. App. 818, 222 S.E.2d 618 (1975), which was a right of publicity case. (Response at 9.) But subsequently in *Alonso v. Parfet*, 253 Ga. 749, 750, 325 S.E.2d 152, 154 (1985), the Georgia Supreme Court adopted the current standard for punitive damages in a right of publicity case, which requires evidence of: (1) premeditation, (2) consciousness of the appropriation and (3) continuation of the appropriation.

[4] Notably, two of the other Georgia cases cited by Plaintiff hold that where, as is the case here, the record evidence could not support a punitive damages verdict, summary judgment for defendant is appropriate. *See Keith v. Beard*, 219 Ga. App. 190, 194, 464 S.E.2d 633, 638 (1995); *Artzner v. A & A Exterminators, Inc*., 242 Ga. App. 766, 772-73, 531 S.E.2d 200, 205-06 (2000).

Georgia right of publicity claim is different than in other tort contexts such as a products liability claim. (Brief at 12; *Alonso*, 253 Ga. at 750.)

2. Plaintiff Ignores the Evidence That LFP Reasonably Believed That Publication of the Benoit Images Was Privileged

The undisputed factual record shows that LFP believed, in good faith, that its right to publish the Benoit images was protected by the First Amendment to the U.S. Constitution. (Facts at ¶¶ 79-82.) Plaintiff offers no evidence in rebuttal.

Instead, Plaintiff argues that *Douglass v. Hustler Magazine, Inc*., 769 F.2d 1128 at 1145 (7th Cir. 1985), a case that bears no resemblance to this one, somehow is evidence of LFP's knowledge that its news reporting on Ms. Benoit was unlawful.[5] (Response at 7-8.) What *Hustler* Magazine has done in other cases involving different facts, different parties, different context, etc., does not alter the undisputed fact that in this case, LFP was reasonable in its belief that the Benoit images were part of a news article that even the Eleventh Circuit agrees is constitutionally protected. *Toffoloni*, 572 F.3d at 1209.[6] This is because, as the

[5] In *Douglass*, *Hustler* had published (living) actress Robyn Douglass' images without her consent as a model pictorial, and unaccompanied by any informative news article. Thus, unlike the Benoit images, the Douglass images did not illustrate a newsworthy story about Douglass' career (much less in the wake of a notorious murder-suicide that garnered world-wide headlines).

[6] Plaintiff also argues that the decision in *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y.A.D. 1981), is somehow relevant here. Response at 13-

record shows, educated and experienced minds believed and continue to believe that the Benoit images were newsworthy and therefore their publication was constitutionally protected. This fact is born out by: (1) the testimony by LFP's publisher and editors, Facts at ¶ 82; (2) Dr. Greg Lisby's expert report and opinion that "any reasonable publisher, including *Hustler* Magazine, would have believed that both the [Benoit] photographs and the story were, each independently and standing alone, newsworthy at the time of their publication…." , D.I. 124-2 at TAB O, pp. 22-23; and (3) the fact of reasonable and sincere disagreements between the advocates and even federal judges in this Circuit about the application of the constitutional privilege in the case at bar, Facts at ¶ 88; Brief at 21.

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15. This case, too, is easily distinguished. First, *Brinkley* construes New York's Civil Rights Law, a portion of which is somewhat analogous to the right of publicity. But under that statute, a plaintiff may prevail only when the defendant's use of his likeness is "without the written consent first obtained… ." *Brinkley*, 80 A.D.2d at 432 (emphasis added). Georgia's common law right of publicity contains no such requirement of written consent. Second, the *Brinkley* court noted that the limited right of publicity contained in the Civil Rights Law is "grounded on the mental strain and distress, on the humiliation, on the disturbance of peace of mind suffered….It is the injury to the person not to the property which establishes the cause of action." *Id*. at 440-41 (citation omitted). This is in direct contrast to Georgia's right of publicity law, the focus of which is the unjust pecuniary gain of the defendant. *See, e.g., Cabaniss*, 114 Ga. App. at 381. Third, unlike here, the image at issue in *Brinkley* was not used to illustrate an news article in a magazine and was not even arguably newsworthy.

In short, Plaintiff does not -- and cannot -- contradict the evidence that LFP believed in good faith that its right to publish the images was protected by the First Amendment to the U.S. Constitution; and this fact alone precludes a finding that LFP intentionally violated Plaintiff's right of publicity and, consequently, is fatal to her claim for punitive damages.

3. Plaintiff Distorts Record Evidence in a Misplaced Effort to Show Malicious Intent and Continuation by LFP

By distorting the record, Plaintiff attempts to rectify the fact that she cannot show, by clear and convincing evidence, either a malicious intent by LFP or a continuation of the alleged appropriation.

Plaintiff's primary argument, for example, is that LFP's intent to violate Plaintiff's rights is proved by a telephone call to an LFP employee from Ms. Benoit's first husband, Jim Daus, ten to fourteen days before the March 2008 issue went on sale, in which Mr. Daus allegedly requested that LFP not publish the images. (Response at 10-11.) Of course, whether Ms. Benoit or Mr. Daus wanted the images published is irrelevant to the question of whether the images were newsworthy and therefore their publication lawful. But in any event, in the same conversation in which Mr. Daus claimes to have told LFP not to publish the images, he admits he offered to sell LFP even more nude images of Ms. Benoit. (Daus D. at 33; Facts at ¶ 45.) The Court can judge for itself the sincerity of Mr.

Daus' claim to have warned LFP against publishing the images of Ms. Benoit on the written record alone; or, of course, by viewing the video of his deposition filed with the Court. (D.I. 146 [under seal].)

Plaintiff next argues that LFP published the Benoit images despite an email from a former employee, Tyler Downey, in which Mr. Downey revealed that he did not obtain a release in connection with the images. (Response at 11-13.) Of course, this is not evidence that LFP intended to act unlawfully; instead in proves that LFP always believed a release was unnecessary because the publication of the images was protected by the First Amendment to the U.S. Constitution. In short, the Downey email is not clear and convincing proof that LFP acted with an intent to appropriate.

Plaintiff also argues, once again, that LFP published the Benoit images despite being warned by Plaintiff's counsel not to publish. (Response at 17-18.) This repeated assertion has now been disproven throughout the course of this dispute too many times to count, and Plaintiff's continued assertion of it is inexcusable. (Brief at 8 & 22; Facts at ¶¶ 83-85; D.I. 73-10; LFP's Brief in Opposition to Renewed Motion for Partial Summary Judgment, D.I. 153 at 5.)

Plaintiff also argues that punitive damages are appropriate because LFP "made absolutely no attempt" to stop the sale of the March 2008 issue after

receiving Plaintiff's January 16, 2008 demand letter (despite that by that date, the issue was already on store shelves). (Response at 18.) But Plaintiff knows this contention, too, is false. LFP's representatives testified that it would have been impossible to recall the March 2008 issue once it was already on store shelves, and this testimony is unrefuted:

> Q. …Was any effort made by the company to re-call the unsold editions of *Hustler* magazine that contained the Nancy Benoit images?
>
> A. That would have been impossible.
> …
>
> We don't have the addresses of the retailers. We wouldn't even know who to contact.

(Hahner D. at 42-43; Facts at ¶ 85);

> Q. You wouldn't be able to re-call -- if I may be able to use that word -- the edition once it's on the trucks?
>
> A. No

(David D. at 29; Facts at ¶ 85). Although she had opportunity to do so, Plaintiff conducted no discovery to rebut LFP's testimony that any attempt to recall the March 2008 from store shelves was not possible; and she offers no evidence to the contrary now. Further, LFP immediately took the steps within its power to prevent

further distribution of the Benoit images after LFP received Plaintiff's letter. *See* Facts at ¶ 86; Brief at 8-9.[7]

Moreover, Plaintiff ignores that the "continuation" element of the *Alonso* standard requires that a defendant must continue with an unlawful publication after becoming aware of plaintiff's complaint. *See, e.g., Cabaniss v. Hipsley*, 151 S.E. 2d 496, 508, 114 Ga. App. 367, 385 (1966); *Alonso*, 253 Ga. at 750.[8] Here, Plaintiff does not argue, nor can she, that LFP continued to publish the Benoit images after learning of Plaintiff's objections. (Facts at ¶ 86-87.) Instead, unable to meet the standard established by Georgia law, Plaintiff introduces her own characterization of "continuation":

> …once Ms. Benoit's image was published by *Hustler* for the world to see, these images continued to be available, to be re-viewed and republished by *Hustler* readers at will. Once a bell has been rung, it can not be un-rung, and once *Hustler* wrongfully published images of Nancy Benoit, and sold them to the public, those images can never be recovered, and they will remain in the public domain forever.

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[7] But even though *Hustler* believed it had a complete defense to Plaintiff's claim, it made sure never to republish the challenged images.

[8] By way of example, in *Alonso*, the Georgia Supreme Court held that there was a question of fact as to whether a continuation occurred where the defendants "admit[ted] that they used [plaintiff's] name on various [corporate] documents unrelated to his employment even after he complained of that use." *See Alonso*, 253 Ga. at 750 (emphasis added).

(Response at 22.) Such a broad interpretation of "continuation" would turn every publication into a continuing one for purposes of punitive damages, effectively eliminating the "continuation" element altogether. In any event, the record contains no evidence from which a jury could find clear and convincing proof that LFP continued the appropriation after learning of Plaintiff's complaint.

Finally, Plaintiff devotes a full section of her Response to the alleged damage inflicted upon Ms. Benoit's image by virtue of being associated with *Hustler* Magazine.[9] This misguided tactic is yet another "back door" effort by Plaintiff to obtain reputational damages for a decedent which she knows are foreclosed by settled Georgia law. *See, e.g., Pierson v. News Group Publ'ns, Inc*., 549 F. Supp. 635, 642 (S.D. Ga. 1982).[10]

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[9] In support of this argument, Plaintiff's counsel "reluctantly" filed with the Court a DVD which was packaged and sold with the March 2008 issue. (Response at 25.) LFP objects to the introduction of this DVD and intends to file with the court next week a Motion *In Limine* seeking to have the DVD stricken from the record. LFP will show Plaintiff learned during discovery that this DVD has **no** relevance to the Benoit images or to any of the content of any issue *Hustler* Magazine. She submitted the DVD now seemingly in order to foster an emotional reaction from the Court.

[10] Moreover, Plaintiff's arguments regarding the association of Ms. Benoit with *Hustler* is undermined by language in the article which makes clear that she never willingly posed for *Hustler*. (D.I. 124-2 at TAB C-3, p 40.)

In summary, Plaintiff offers no substantive evidence of premeditation or conscious appropriation by LFP that could justify sending her punitive damages claim to the jury. Therefore, summary judgment for LFP is appropriate on her punitive damages claim.

III. Conclusion

For all of the foregoing reasons, LFP respectfully requests that the Court grant summary judgment in its favor on Plaintiff's claim for right of publicity or, alternatively, on Plaintiff's punitive damages claim.

Respectfully submitted this 17th day of September 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 REPLY TO PLAINTIFF'S RESPONSE TO LFP'S MOTION FOR SUMMARY JUDGMENT 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.

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