UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF EMERGENCY MOTION FOR PROTECTIVE ORDER FOR THE DEPOSITIONS OF TYLER DOWNEY, MARK SAMANSKY AND CHRISTOPHER HELTON

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit ("Plaintiff"), through counsel, and files this her Brief in Support of Emergency Motion for Protective Order

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for the Depositions of Tyler Downey, Mark Samansky and Christopher Helton with this Court as follows: [1]

I. INTRODUCTION AND STATEMENT OF FACTS

On February 4, 2008, Plaintiff brought suit against Defendant LFP Publishing Group, LLC ("Hustler" or "Defendant"), claiming violation of the right to publicity for the unauthorized publication of nude photographs of Ms. Nancy Benoit. This Court granted Hustler's Motion to Dismiss on October 6, 2008, on the grounds that the photographs came under the "newsworthiness" exception to the right of privacy. Plaintiff appealed to the Eleventh Circuit Court of Appeals, which reversed the Court's ruling, finding that the photographs were not newsworthy, and that Ms. Benoit's and Plaintiff's right of publicity had been violated. *See* *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).

On November 23, 2010, this Court granted Plaintiff's Motion for Partial Summary Judgment with respect to liability of Defendant for publishing nude photographs of Ms. Benoit without her or her Estate's consent. The Court found that

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[1] Plaintiff files this Emergency Motion with the request that it will not delay the trial of this matter, which Plaintiff believes is the partial motive of the Defendant in issuing these Subpoenas. The pretrial conference is scheduled for February 23, 2011, and the trial is scheduled to begin on March 14, 2011.

Hustler published the subject photographs for financial gain, that the Estate of Nancy Benoit suffered damages, and that the Eleventh Circuit's ruling on the legal issue of newsworthiness in *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009) was conclusive resolution of the issue of newsworthiness in this case. *See* Order dated November 23, 2010, pp. 10-12. This Court also declined to grant Hustler's Motion for Summary Judgment as to punitive damages, ruling that the issue must be decided by a jury. *See* Order dated November 23, 2010, pp. 12-13. Therefore, the only remaining issues in this case are:

(1) the value of the photographs published by Defendant;

(2) whether punitive damages should be assessed against Defendant; and

(3) if punitive damages are awarded, the amount to be assessed for punitive damages.

This Court issued a Pretrial Order on January 3, 2011, stating that "[a]ll discovery has been completed, unless otherwise noted; and the court will not consider any further motions to compel discovery. (Refer to LR 37.1B). Provided there is no resulting delay in readiness for trial, the parties shall, however, be permitted to take

the depositions of any persons for the preservation of evidence and for use at trial." *See* January 3, 2011 Pretrial Order, pp. 1-2.

On January 19, 2011 Defendant issued a Subpoena for the deposition testimony of Mr. Tyler Downey, to be taken on February 8, 2011, in Kansas City, Missouri by video deposition. Defendant has made absolutely no showing that such deposition is required for the preservation of evidence or that the testimony to be gained can or will be used at trial. In fact, evidence indicates that the deposition of Mr. Downey will produce no relevant admissible testimony for the remaining issues in the case, and will therefore be inadmissable at trial.

Defendant previously submitted an Affidavit by Mr. Downey on July 30, 2010, that was part of the record during this Court's evaluation of, and ruling upon, the Plaintiff's Motion for Partial Summary Judgment. *See* the July 30, 2010 Affidavit of Tyler Downey, attached hereto has Exhibit A. In his Affidavit, Mr. Downey states that he and his then-boss, Mr. Bruce David, decided to purchase the photographs of Ms. Benoit from Mr. Samansky, and that, at the time, Mr. Downey believed that Hustler had the legal right to publish the photographs without seeking permission of Ms. Benoit's Estate.

On January 21, 2011, Defendant issued a Subpoena for the deposition testimony of Mr. Mark Samansky, to be taken on February 18, 2011, in Westminster, Colorado by video deposition. As with Mr. Downey, Hustler submitted an Affidavit by Mr. Samansky on July 30, 2010. *See* the July 30, 2010 Affidavit of Mark Samansky, attached hereto has Exhibit B. In his Affidavit, Mr. Samansky describes the circumstances surrounding the photo shoot of Nancy Benoit that produced the photographs eventually published by Hustler. In addition, Mr. Samansky states that he sold the photographs to Hustler for $1,000.00.

As with Mr. Downey, Defendant has made absolutely no showing that the deposition of Mr. Samansky is required for the preservation of admissible evidence or that the testimony to be gained can or will be used at trial. Mr. Samansky's prior Affidavit indicates that his deposition will produce no relevant testimony for the remaining issues in the case, which are the value of the use of Ms. Benoit's image and the appropriate amount of punitive damages. Mr. Samansky's testimony will therefore be inadmissable at trial.

In addition, on January 26, 2011, Defendant issued a Subpoena for the deposition testimony of Mr. Christopher Helton, to be taken on February 9, 2011, in Brownsburg, Indiana by video deposition. As with Mr. Downey and Mr. Samansky,

Hustler submitted an Affidavit by Mr. Helton on July 30, 2010. *See* July 30, 2010 Affidavit of Christopher Helton, attached hereto as Exhibit C. In his Affidavit, Mr. Helton also described the modeling session when the pictures of Ms. Benoit were taken, that Mr. Helton took his own independent photographs of Ms. Benoit during the modeling session, and that those photographs remain in his possession and have never been published.

There is no indication that the deposition of Mr. Helton will reveal any information relevant to the remaining issues in this case, or is required for the preservation of admissible evidence and will be used at trial by Defendant. Mr. Helton's Affidavit indicates that he cannot provide any relevant testimony whatsoever as to the value of the photographs or punitive damages in this case, and his testimony is therefore irrelevant and inadmissable.

After the Eleventh Circuit Court of Appeals' determination that the photographs were **not** newsworthy, and the case was remanded, discovery was allowed only as to matters relating to whether Ms. Benoit or her Estate had standing to bring a claim for violation of right of publicity, and whether Ms. Benoit or her Estate ever gave consent for the publication of the photographs. At that time,

> The Court denied [Plaintiff's] motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, finding that

> additional discovery could raise issues of fact as to whether Toffoloni is a party-in-interest with legal standing to assert a posthumous claim for the violation of Ms. Benoit's right of publicity and whether Ms. Benoit signed a release or otherwise authorized the publication of the images.

See Order dated November 23, 2010, p. 3.

Discovery regarding these remaining, specific issues, as allowed by the Court, ended on April 26, 2010. *See* January 22, 2010 Discovery Order. Defendant has not shown, and neither have Mr. Downey, Mr. Samansky, or Mr. Helton demonstrated through their statements in each of their Affidavits, that their testimony will in any way be relevant and admissible regarding the issues remaining in this case or will be used at trial. Because the witnesses' testimony, as shown in their Affidavits, has no relevance to the issue of damages, any such testimony is irrelevant, and therefore, inadmissible at trial.

In addition, Hustler has failed to show that the depositions of Mr. Downey, Mr. Samansky, or Mr. Helton are for preservation of admissible evidence for use at trial, and therefore, Hustler should not now be allowed to depose witnesses to which they had full access during the discovery period. Any information necessary for Hustler's defense of this case that could have been provided by these witnesses was freely available to Defendant during the entirety of the discovery period. Indeed,

Hustler even obtained Affidavits from these three men, and at that time could have sought to depose any of them, or could have requested more detailed statements for their Affidavits, and yet chose not to do so. Plaintiff's Motion for Partial Summary Judgment was granted by this Court, closing the record and limiting the only remaining issues to the amount of damages and punitive damages. As such, Plaintiff's Emergency Motion for Protective Order for the Depositions of Tyler Downey, Mark Samansky and Christopher Helton should be GRANTED.

II. ARGUMENT AND CITATION TO AUTHORITY

Federal Rule of Civil Procedure 26(c) allows a party to move for a protective order to prevent the taking of a deposition to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense."[2] In this case, taking the depositions of Mr. Downey, Mr. Samansky, and Mr. Helton when they have no relevant testimony to give and after the discovery period during which they could have been deposed has expired, would be annoying and oppressive to Plaintiff. Plaintiff would incur considerable undue burden and expense, such as having to pay counsel to prepare for and attend depositions, if these depositions are allowed, despite

[2] Plaintiff files herewith the Certification of Good Faith required for a Motion for Protective Order, detailing the effort made to resolve this issue without judicial intervention.

the fact that no admissible evidence exists in the record that the testimony of these witnesses is relevant to the remaining issues or will even be used at trial.

Neither Mr. Downey, Mr. Samansky nor Mr. Helton has ever been identified as an expert by Defendant, let alone as an expert in image-appropriation value or punitive damages, the only two issues remaining in the case. Counsel for Defendant has failed to specify the nature of the deposition questions to the witnesses, other than to say that they will relate to the statements made in their Affidavits. *See* Email exchange dated January 13 and 14, 2011, attached to Plaintiff's Certificate of Good Faith as Exhibit A. The statements in the witnesses' Affidavits in no way relate to the remaining issues, which are compensatory and punitive damages related to image-appropriation. If Defendant required further clarification of the statements in the Affidavits, Defendant could have deposed the witnesses during discovery, or attempted to move to re-open discovery. Defendant has done neither, but instead attempts to circumvent the procedural framework of this case.

Plaintiff, and this Court, must therefore assume that the statements in Mr. Downey's, Mr. Samansky's, and Mr. Helton's Affidavits represent the full extent of the witnesses' knowledge in this case. These statements, however, are not relevant to the remaining issues to be tried. Mr. Downey's and Mr. Helton's Affidavits

disclose nothing relevant regarding the amount of compensatory and punitive damages to be awarded to the Plaintiff, which are the only issues left to be considered. While Mr. Samansky's Affidavit states that he was given $1,000.00 for the photographs, Mr. Samansky can provide no further testimony or insight as to the value of the appropriation, and his deposition will therefore be fruitless. Hence, Plaintiff should not be put to the expense of preparing for and attending these depositions, because the Court must undoubtedly rule that the testimony gained therefrom is irrelevant to any remaining claim or defense. Because Mr. Downey, Mr. Samansky, and Mr. Helton cannot speak to the value of the appropriated publicity to Hustler, nor to the issue of punitive damages, making their testimony irrelevant and unusable at trial, Defendant should not be allowed to take the depositions of Mr. Downey, Mr. Samansky, and Mr. Helton and waste Plaintiff's time and money.

This Court issued an Order on January 22, 2010, extending the discovery period in this matter until April 26, 2010. During this time, several depositions were taken of several identified witnesses in the case. Since the close of discovery, and this Court's rulings on the parties' Motions for Summary Judgment, there has been no further discovery performed in this case until the current attempt to take the depositions of Mr. Downey, Mr. Samansky, and Mr. Helton.

Local Rule 26.2(B) of the District Court for the Northern District of Georgia states that:

> "Motions requesting extensions of time for discovery must be made **prior** to expiration of the existing discovery period and will be **granted only in exceptional cases** where the circumstances of the request is based did not exist or the attorney or attorneys could not have anticipated that such circumstances would arise at the time the Joint Preliminary Report and Discovery Plan was filed." (Emphasis added)

It is clear from a review of the record that Defendant has never filed a motion to extend discovery after the Court's Discovery Order setting the April 26, 2010 deadline, which expired approximately nine months ago. The Federal Rules of Civil Procedure and the Local Rules of the District Court for the Northern District of Georgia do not contemplate the taking of depositions after the deadline for discovery activities has expired. "[F]ailure to depose [witnesses] until after filing a certificate of readiness and until after a motion for summary judgment was filed was a factor considered by the Court in declining [plaintiff's] request for further discovery." *Glesenkamp v. Nationwide Mut. Ins. Co.*, 71 F.R.D. 1, 3 (N.D. Cal. 1974) *aff'd,* 540 F.2d 458 (9th Cir. 1976). While the January 3, 2011, Pretrial Order does allow for the taking of depositions "for the preservation of evidence and for use at trial," Defendant has not shown, when asserting a need to depose Mr. Downey, Mr. Samansky, and Mr.

Helton, that either of these conditions are met and that the witnesses' testimony is relevant to the only remaining issues regarding damages in this case.

Federal Rule of Civil Procedure 16(b)(4), addresses modification of a scheduling order, and states that "[a] schedule may be modified only for good cause and with the judge's consent." Defendant has not sought this Court's consent to re-open discovery, and has not shown good cause for such a modification. *See Arnold v. Krause, Inc.*, 232 F.R.D. 58, 66 (W.D. N.Y. 2004) *aff'd and adopted*, 233 F.R.D. 126 (W.D. N.Y. 2005), where the court ruled that plaintiff's attorney's neglect, even if excusable, did not warrant the re-opening of discovery after the discovery period had expired, as the identities of witnesses had been known to plaintiff's counsel for a year and a half.

Defendant was able to obtain Affidavits from all three witnesses during the discovery period. Defendant could have deposed each witness, or obtained testimony regarding any issue they desired from them, during that time. They chose, however, not to depose these witnesses, and limited their Affidavits to matters not relevant to the remaining damages issues in the case. At all times during the discovery period Mr. Downey, Mr. Samansky and Mr. Helton were available to Defendant. Hustler cannot further prolong these proceedings, causing Plaintiff to incur additional

expense, by now asking to depose witnesses that they had ample opportunity to depose at their leisure during the discovery period.

The trial date for this matter has been set. The depositions of Mr. Downey, Mr. Samansky, and Mr. Helton are not necessary to preserve evidence or for use at trial, as the witnesses' Affidavits indicate that they possesses no knowledge which is relevant to the remaining issues in the case regarding damages. It would be highly prejudicial to Plaintiff to re-open discovery in this case just weeks before trial. Defendant has presented no evidence of hardship or change of circumstances that would merit the deposition of these witnesses, nor has Defendant shown that the depositions are allowed pursuant to this Court's January 3, 2011 Pretrial Order. As the Court has stated in its own Order, "[d]iscovery is now complete." *See* Order dated November 23, 2010, p. 3. As such, Plaintiff's Emergency Motion for Protective Order should be GRANTED, and Defendant should not be permitted to depose Mr. Downey, Mr. Samansky or Mr. Helton.

III. CONCLUSION

Because the discovery period ended approximately nine months ago, because Defendant has not shown good cause or filed a motion to re-open discovery, because Defendant knew about the testimony of Mr. Downey, Mr. Samansky and Mr.

Helton at least since July of 2010, because there is no evidence that the depositions of Mr. Downey, Mr. Samansky, or Mr. Helton are relevant to the remaining issues regarding damages in the case, because the witnesses' depositions are not necessary for the preservation of evidence or for use at trial, and because Plaintiff would be unfairly prejudiced if the depositions are allowed, costing Plaintiff considerable time and expense, Plaintiff's Emergency Motion for Protective Order for the Depositions of Tyler Downey, Mark Samansky and Christopher Helton should be GRANTED.

Respectfully submitted January 27, 2011.

/s/ Richard P. Decker
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Plaintiff,	)	
v.	)	CIVIL ACTION
	)	FILE NO. 1:08-CV-0421-TWT
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Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that on January 27, 2011, I have electronically filed the foregoing Motion for Emergency Protective Order for the Depositions of Tyler Downey and Mark Samansky and Brief in Support thereof with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
S. Derek Bauer, Esq.
Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
Lipsitz, Green, Scime, Cambria, LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202

/s/ Richard P. Decker
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