

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
 as Administratrix and Personal)
 Representative of the)
 ESTATE OF NANCY E. BENOIT,)
)
 Plaintiff,)
)
 v.)
)
 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.)

CIVIL ACTION
FILE NO. 1:08-CV-0421-TWT

PRETRIAL ORDER

1.

There are no motions or other matters pending for consideration by the court.

2.

All 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.

3.

Unless otherwise noted, the names of the parties as shown in the caption to this Order and the capacity in which they appear are correct and complete, and there is no question by any party as to the misjoinder or non-joinder of any parties.

4.

There is no question as to the jurisdiction of the court; jurisdiction is based upon the following code sections: 28 U.S.C.A. § 1332(c) (Diversity of Citizenship), where the amount in controversy exceeds the sum of \$75,000.00.

5.

The following individually-named attorneys are hereby designated as lead counsel for the parties:

Plaintiff:

Richard P. Decker, Esq.
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

Defendant: S. Derek Bauer, Esq.
McKenna, Long & Aldridge
303 Peachtree Street, N.E.
Suite 5300
Atlanta, Georgia 30308

Other Parties: (specify) None.

6.

The Plaintiff is entitled to open and close arguments to the jury. (Refer to LR 39.3(B)(2)(b)) State below the reasons, if any, why the Plaintiff should not be permitted to open arguments to the jury.

None.

7.

The captioned case shall be tried (X) to a jury or (___) to the court without a jury, or (___) the right to trial by jury is disputed.

8.

Plaintiff requests that the trial to a jury be bifurcated as provided by Georgia law.

Defendant's liability to Plaintiff has already been established by the Court's Order dated November 23, 2010. Plaintiff requests that the trial to a jury be bifurcated with respect the following:

(a) the amount of compensatory damages to be awarded to the Plaintiff, the amount of attorneys' fees and expenses of litigation to be awarded to the Plaintiff; and whether an award of punitive damages shall be made; and

(b) the amount of punitive damages; as provided by Georgia law, O.C.G.A. § 51-12-5.1(d)(1).

Defendant submits that, in addition to the amount of punitive damages, bifurcation should include the amount of attorneys' fees and expenses of litigation, if any, to be awarded, such that the trial of this matter would be bifurcated as follows:

(a) the amount of compensatory damages to be awarded to the Plaintiff, whether attorney' fees and expenses of litigation should be awarded to the Plaintiff; and whether an award of punitive damages shall be made; and

(b) the amount of punitive damages, if any, as provided by Georgia law, O.C.G.A. § 51-12-5.1(d)(1), and the amount of attorneys' fees and expenses of litigation, if any, as provided by Georgia law, O.C.G.A. § 13-6-11.

9.

Attached hereto as Attachment "A" and made a part of this Order by reference are the questions which the parties request that the court propound to the jurors concerning their legal qualifications to serve.

10.

Attached hereto as Attachment “B-1” are the general questions which Plaintiff wishes to be propounded to the jurors on voir dire examination.

Attached hereto as Attachment “B-2” are the general questions which Defendant wishes to be propounded to the jurors on voir dire examination.

The court, shall question the prospective jurors as to their address and occupation and as to the occupation of a spouse, if any. Counsel may be permitted to ask follow-up questions on these matters. It shall not, therefore, be necessary for counsel to submit questions regarding these matters. The determination of whether the judge or counsel will propound general voir dire questions is a matter of courtroom policy which shall be established by each judge.

11.

State any objections to Plaintiff’s voir dire questions.

Defendant objects to the following of Plaintiff’s voir dire questions:

Question #12: This question is irrelevant, prejudicial, and seeks to inflame the personal passions of the prospective jurors on an issue unrelated to the legal issues to be tried in the case. Plaintiff’s damages claim is limited to the commercial value of the images of Ms. Benoit published by LFP, not any injury to Plaintiff or her hurt feelings.

Questions #24(f)-(j): Defendant submits that these questions are appropriate for voir dire but involve highly personal and potentially embarrassing private habits of the prospective jurors. Defendant submits that these questions should be posed to the prospective jurors in writing, and the written responses maintained by the Court under seal.

Questions #24(k)-(m): These questions are irrelevant, prejudicial, and seeks to inflame the personal passions of the prospective jurors on an issue unrelated to the legal issues to be tried in the case.

Question #26: Defendant objects to the wording of this request, and asks that it be amended to include the following italicized language:

Have you heard or read anything about this case, in which Nancy Benoit's mother, Maureen Toffoloni, is suing Hustler Magazine for publishing nude *and non-nude* images of Nancy Benoit without consent? What have you heard or read?

State any objections to Defendant's voir dire questions.

Plaintiff has no objections to Defendant's voir dire questions.

State any objections to the voir dire questions of the other parties, if any.

Not applicable.

12.

All civil cases to be tried wholly or in part by jury shall be tried before a jury consisting of not less than six (6) members, unless the parties stipulate otherwise. The parties must state in the space provided below the basis for any requests for additional strikes.

Unless otherwise directed herein, each side as a group will be allowed the number of peremptory challenges as provided by 28 U.S.C. § 1870. See Fed. R. Civ. P. 47(b).

Plaintiff requests a trial jury of six persons.

Defendant requests a trial jury of twelve persons as permitted by Fed. R. Civ. P. 48.

13.

State whether there is any pending related litigation. Describe briefly, including style and civil action number.

There is no pending related litigation.

14.

Attached hereto as Attachment “C” is Plaintiff’s outline of the case which includes a succinct factual summary of Plaintiff’s cause of action and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law creating a specific legal duty relied upon by

Plaintiff shall be listed under a separate heading. In negligence cases, each and every act of negligence relied upon shall be separately listed. For each item of damage claimed, Plaintiff shall separately provide the following information: (a) a brief description of the item claimed, for example, pain and suffering; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

15.

Attached hereto as Attachment "D" is the Defendant's outline of the case which includes a succinct factual summary of all general, special, and affirmative defenses relied upon and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law relied upon as creating a defense shall be listed under a separate heading. For any counterclaim, the Defendant shall separately provide the following information for each item of damage claimed: (a) a brief description of the item claimed; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

16.

Attached hereto as Attachment “E” are the facts stipulated by the parties. No further evidence will be required as to the facts contained in the stipulation and the stipulation may be read into evidence at the beginning of the trial or at such other time as is appropriate in the trial of the case. It is the duty of counsel to cooperate fully with each other to identify all undisputed facts. A refusal to do so may result in the imposition of sanctions upon the non-cooperating counsel.

17.

The legal issues to be tried are as follows:

(a) Plaintiff contends that the measure of damages to be awarded to the Plaintiff in this case is the value of the use of the publicity appropriated by the Defendant Hustler Magazine. Martin Luther King, Jr. Ctr. For Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982).

(b) The value of the unjust enrichment, if any, to Defendant for its violation of Plaintiff’s right of publicity;

(c) Whether attorneys’ fees and expenses of litigation should be awarded to the Plaintiff;

(d) Whether punitive damages should be awarded to the Plaintiff; and

(e) If so, the amount of punitive damages to be awarded to Plaintiff.

18.

Attached hereto as Attachment “F-1” for the Plaintiff, Attachment “F-2” for the Defendant, and Attachment “F-3,” etc. for all other parties is a list of all the witnesses and their addresses for each party. The list must designate the witnesses whom the party will have present at trial and those witnesses whom the party may have present at trial. Expert (any witness who might express an opinion under Rule 702), impeachment and rebuttal witnesses whose use as a witness can be reasonably anticipated must be included. Each party shall also attach to the list a reasonably specific summary of the expected testimony of each expert witness.

All of the other parties may rely upon a representation by a designated party that a witness will be present unless notice to the contrary is given ten (10) days prior to trial to allow the other party(s) to subpoena the witness or to obtain the witness’ testimony by other means. Witnesses who are not included on the witness list (including expert, impeachment or rebuttal witnesses whose use should have been reasonably anticipated) will not be permitted to testify, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

19.

Attached hereto as Attachment “G-1” for the Plaintiff, “G-2” for the Defendant, and “G-3,” etc. for all other parties are the typed lists of all documentary and physical evidence that will be tendered at trial. Learned treatises which are expected to be used at trial shall not be admitted as exhibits. Counsel are required, however, to identify all such treatises under a separate rate heading on the party’s exhibit list.

Each party’s exhibits shall be numbered serially, beginning with 1, and without the inclusion of any alphabetical or numerical subparts. Adequate space must be left on the left margin of each party’s exhibit list for court stamping purposes. A courtesy copy of each party’s list must be submitted for use by the judge.

Prior to trial, counsel shall mark the exhibits as numbered on the attached lists by affixing numbered yellow stickers to Plaintiff’s exhibits, numbered blue stickers to Defendant’s exhibits, and numbered white stickers to joint exhibits. When there are multiple plaintiffs or defendants, the surname of the particular plaintiff or defendant shall be shown above the number on the stickers for that party’s exhibits.

Specific objections to another party’s exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised. Objections as to authenticity, privilege, competency, and, to the extent

possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by the parties and shall be admitted at trial without further proof of authenticity.

Unless otherwise noted, copies rather than originals of documentary evidence may be used at trial. Documentary or physical exhibits may not be submitted by counsel after filing of the pretrial order, except upon consent of all the parties or permission of the court. Exhibits so admitted must be numbered, inspected by counsel, and marked with stickers prior to trial.

Counsel shall familiarize themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will not be afforded time during trial to examine exhibits that are or should have been listed.

20.

The following designated portions of the testimony of the persons listed below may be introduced by deposition:

By Plaintiff:

The entire video depositions of:

Mark Johnson

Larry Clayton Flynt

Based upon representations by counsel for the Defendant that Donna Hahner and Charles Bruce David will be present at trial and will be available to be called as adverse witnesses as a part of the Plaintiff's case, it will not be necessary for Plaintiff to include, as part of her case, the video depositions of Ms. Hahner and Mr. David.

By Defendant LFP:

The designated portions of the video depositions of:

Kevin Sullivan (6:20 through 14:23; 15:7 through 17:3; 17:10 through 20:12; 21:7 through 38:8; 39:6 through 41:23; 55:24 through 56:22; 60:15 through 63:2)

James Daus (6:22 through 7:11; 8:6-11; 10:4-5, 12-19 & 24-25; 11 through 13; 14:8 through 18:21; 23:18 through 24:5; 24:19 through 25:2; 25:9 through 26:3; 28:11 through 41:24; 42:14 through 43:5; 43:20 through 46:14; 49:20 through 51:1)

William Otten (6:23 through 8:3; 12:7 through 13:23; 14:7 through 15:16; 20:11 through 24:9; 25:5 through 26:19; 27:2 through 31:12; 31:10 through 33:2; 33:13 through 57:1 through 72:21; 79:2 through 84:1; 89:9-24)

Larry Flynt (5:15 through 18:20)

The depositions of the following people which will be taken for the preservation of evidence and for use at trial are hereby designated:

Defendant Mark Samansky

Christopher Helton

Tyler Downey

Plaintiff's preliminary objections to Defendant's designations:

Plaintiff objects to any use of any portion of the deposition testimony of Kevin Sullivan, James Daus, and William Otten, as these witnesses have no knowledge of any claim by the Plaintiff (the value to the Defendant of the use of the images of Nancy Benoit) or any defense to that claim. Plaintiff further objects to the Defendant taking the depositions of Mark Samansky, Christopher Helton, and Tyler Downey for use at trial for the same reasons.

LFP preliminary objection to Plaintiff's designations:

Plaintiff's designation of the entire video transcripts of the deponents fails to designate those specific portions of the depositions relevant to the legal issues to be tried, or to omit all extraneous and unnecessary matter, including non-essential colloquy of counsel. LFP objects to Plaintiff's non-specific and blanket designation of these

depositions, and hereby requests that Plaintiff be directed to designate those specific portions of the video depositions she intends to use at trial in accordance with the directives of this Court so that LFP may object in writing to those specific questions and/or answers actually at issue. LFP also objects to the use of the video depositions of Donna Hahner and Bruce David, as these witnesses will be present to testify at trial.

Any objections to the depositions of the foregoing persons or to any questions or answers in the depositions shall be filed in writing no later than the day the case is first scheduled for trial. Objections not perfected in this manner will be deemed waived or abandoned. All depositions shall be reviewed by counsel and all extraneous and unnecessary matter, including non-essential colloquy of counsel, shall be deleted. Depositions, whether preserved by stenographic means or videotape, shall not go out with the jury.

21.

Attached hereto as Attachments “H-1” for the Plaintiff, “H-2” for the Defendant, and “H-3,” etc. for other parties, are any trial briefs which counsel may wish to file containing citations to legal authority concerning evidentiary questions and any other legal issues which counsel anticipate will arise during the trial of the case. Limitations, if any, regarding the format and length of trial briefs is a matter of individual practice which shall be established by each judge.

22.

In the event this is a case designated for trial to the court with a jury, requests for charge must be submitted no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for trial. Requests which are not timely filed and which are not otherwise in compliance with LR 51.1 will not be considered. In addition, each party should attach to the requests to charge a short (not more than one (1) page) statement of that party’s contentions, covering both claims and defenses, which the court may use in its charge to the jury.

Counsel are directed to refer to the latest edition of the Eleventh Circuit District Judges Association’s Pattern Jury Instructions and Devitt and Blackmar’s Federal Jury Practice and Instructions in preparing the requests to charge. Those charges will generally be given by the court where applicable. For those issues not

covered by the Pattern Instructions or Devitt and Blackmar, counsel are directed to extract the applicable legal principle (with minimum verbiage) from each cited authority.

23.

If counsel desire to be submitted to the jury in a manner other than upon a general verdict, the form of submission agreed to by all counsel shall be shown in Attachment "I" to this Pretrial Order. If counsel cannot agree on a special form of submission, parties will propose their separate forms for the consideration of the court.

24.

Unless otherwise authorized by the court, arguments in all jury cases shall be limited to one-half hour for each side. Should any party desire any additional time for argument, the request should be noted (and explained) herein.

The parties request one hour each for argument, to be divided between opening and concluding arguments.

25.

If the case is designated for trial to the court without a jury, counsel are directed to submit proposed findings of fact and conclusions of law not later than the opening of trial.

26.

Lead counsel and persons possessing settlement authority to bind the parties have not met in person. The court () has or (X) has not discussed settlement of this case with counsel. It appears at this time that there is:

- () A good possibility of settlement.
- () Some possibility of settlement.
- () Little possibility of settlement.
- (X) No possibility of settlement.

27.

Unless otherwise noted, the court will not consider this case for a special setting, and it will be scheduled by the clerk in accordance with the normal practice of the court.

28.

The Plaintiff estimates that it will require 3 days to present its evidence. The Defendant estimates that it will require 1 day to present its evidence. It is estimated that the total trial time is 4 days.

29.

IT IS HEREBY ORDERED that the above constitutes the pretrial order for the above captioned case (____) submitted by stipulation of the parties or (XX) approved by the court after conference with the parties.

IT IS FURTHER ORDERED that the foregoing, including the attachments thereto, constitutes the pretrial order in the above case and that it supersedes the pleadings which are hereby amended to conform hereto and that this pretrial order shall not be amended except by Order of the court to prevent manifest injustice. Any attempt to reserve a right to amend or add to any part of the pretrial order after the pretrial order has been filed shall be invalid and of no effect and shall not be binding upon any party or the Court, unless specifically authorized in writing by the Court.

IT IS SO ORDERED this 28th day of March, 2011.

/s/Thomas W. Thrash
UNITED STATES DISTRICT JUDGE

Each of the undersigned counsel for the parties hereby consents to entry of the foregoing Pretrial Order, which has been prepared in accordance with the form pretrial order adopted by this Court.

ATTACHMENT A

**Questions for the Court to propound to the jury
concerning legal qualifications**

1. Are any of you related by blood or marriage to the Plaintiff Maureen Toffoloni?
2. Are any of you related by blood or marriage to the deceased Chris and/or Nancy Benoit?
3. Are any of you stockholders, members, officers, agents or employees of the Defendant LFP Publishing Group, LLC d/b/a/ Hustler Magazine, now, or at anytime in the past?
4. Are any of you related by blood or marriage to the Defendant Mark Samansky?

ATTACHMENT B-1
Plaintiffs' voir dire questions

Background

1. Do any of you know, however slightly, any of the lawyers for the Defendant in this case, who are as follows:

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

2. What is your current job status?

<input type="checkbox"/> Working full-time	<input type="checkbox"/> Unemployed
<input type="checkbox"/> Working part-time	<input type="checkbox"/> Homemaker
<input type="checkbox"/> Retired. When?	<input type="checkbox"/> Full-time student

- 3.

- a. What company or organization do you work for?
b. What do you do at work?
c. Do you have management or supervisory responsibilities? Yes No
If Yes, please describe:
d. Over the periods of your working life, what are the typical types of jobs you have had?

4. What is the last level of education you completed?

<input type="checkbox"/> Grade school or less	<input type="checkbox"/> Some college
<input type="checkbox"/> Some high school	<input type="checkbox"/> College graduate
<input type="checkbox"/> High school graduate	<input type="checkbox"/> Post graduate work
<input type="checkbox"/> Technical or business school	

Please list any degrees you may have, the schools and colleges you attended, and your major areas of study.

5. Do you own your own home?
6. Do you have any pets?
If yes, what are they? For how long?
7. What is your marital status?
____ Single and never married
____ Currently married and have been for ____ years
____ Married in the past for ____ years
____ Single, but living with non-marital partner ____ years
____ Widowed/ widower married in the past for ____ years
____ Other
8. What is the occupation of your spouse or partner?
9. What is the educational background of your spouse or partner?
10. What is the age of your spouse or partner?
11. What are/were your parents' occupations?
Mother:
Father:
12. If you have children, please state:
 - a. Does child live w/ you?
 - b. Name
 - c. Sex
 - d. Age
 - e. Education
 - f. Occupation

13. Have you or and close family or friends ever lost a child?
14. Does any adult, besides your spouse or mate (if applicable) reside in your household? If Yes, please state:
 - a. Relationship(s) to you:
 - b. Occupation(s):
 - c. Employer(s):
15. Have you or anyone in your family ever been in the military?
Army, Marines, Air Force, Coast Guard, Navy
 - a. If Yes, who?
 - b. For how long?

16. Have you or anyone in your family ever worked for a lawyer or a law firm or in the court system? If yes, please explain:
17. Do you personally know any attorneys or judges? If Yes, who?
18. Have you or anyone close to you ever had training or been employed in psychiatry, psychology, or any mental health profession? If Yes, please explain:
19. Have you or anyone close to you ever had training or been employed in the publishing industry?
20. Have you or anyone close to you ever had training or been employed in the pornography industry?
21. Have you or anyone close to you ever been employed by Larry Flint Publications, or “LFP Publishing Group, LLC”?
22. What social, political, civic, church, professional, or other organization do you belong to or are you associated with?
 - a. Name of Organization Offices Held
 - b. How regularly do you attend church or a place of worship?
23. What are your hobbies, major interests, recreational pastimes, and spare-time activities?
24. How closely do you follow the news on either 1) radio, 2)TV, or 3) in the newspapers?
 - _____ Several times a day
 - _____ Once a day
 - _____ Several times a week
 - _____ Occasionally/Almost never
25.
 - a. What kinds of television programs do you usually watch?

- b. What newspapers and magazines do you read regularly?
 - c. Have you ever attended a professional wrestling match?
 - d. Have you ever seen professional wrestling on television?
 - e. Do you follow or consider yourself a fan of professional wrestling?
 - f. Have you ever read or looked through a Hustler Magazine?
 - g. Have you ever purchased an issue of Hustler Magazine?
 - h. Do you subscribe to Hustler Magazine or purchase Hustler Magazine on a regular basis?
 - i. Do you subscribe to Playboy Magazine or purchase Playboy Magazine on a regular basis? Do you subscribe to Penthouse Magazine or read Penthouse Magazine?
 - j. Do you subscribe to any pornographic magazine or purchase any pornographic magazine on a regular basis? Look at pornography on the internet?
 - k. Have you ever heard or read anything about the case involving the murder of a young woman named Meredith Emerson?
 - l. Did you hear or read anything about Hustler Magazine's attempt to obtain crime scene photos of Meredith Emerson's dead body in March of 2009?
 - m. Do you know the outcome of that attempt?
26. Have you heard or read anything about the incident in June of 2007 when a famous pro wrestler named Chris Benoit murdered his wife and little boy in their home in Fayette County, GA? What do you recall reading or hearing about that case?
27. Have you heard or read anything about this case, in which Nancy Benoit's mother, Maureen Toffoloni, is suing Hustler Magazine for publishing nude images of Nancy Benoit without consent? What have you heard or read?

Legal Experiences and Attitudes

28. Have you ever served as a juror in the past?
- a. If Yes, how many times:
 - i. When:
 - ii. Type of case(s):

- iii. Did the case(s) reach a verdict?
 - b. If not, was that because the jury could not agree on a verdict or because of some other reason?
Give reason:
 - c. How did you feel about your jury service?
- 29. Have you or anyone in your family ever sued or been sued by anyone? If Yes:
 - a. Who:
 - b. Why:
 - c. When:
 - d. What was the result of the claim?
 - e. Were you satisfied with the result?
- 30. Some people think that there are too many lawsuits being filed these days. What do you think about lawsuits in general?
- 31. What do you think about people who bring lawsuits?
- 32. If you thought you were injured because of the fault of someone else, would you consider bringing a lawsuit?
Please explain:
- 33. How do you feel about awarding financial compensation-money damages-to a person who claims to have sustained damages in a civil lawsuit?
- 34. Do you feel that it is okay for the plaintiff to be here, knowing she sued the defendant?
- 35. Do you think less of the plaintiff because she filed a lawsuit?
- 36. Do you believe that lawsuits are costing American society too much money?
- 37. Do you believe that jury awards are often too high? Too low?

38. Before hearing any evidence in this case, do you have a pre-set limit as to the amount of money you would award as damages?
39. Plaintiff is requesting punitive damages in this case. How do you feel about punitive damages? Would you refuse to award punitive damages regardless of the evidence?

Concluding Questions

40. Do you have any physical or medical problems that could make jury duty difficult for you?
If Yes, please explain:
41. Is there any reason whatsoever that you should not serve on this jury, would be unable to do so, or that jury duty would present a serious hardship?
If Yes, please explain:

ATTACHMENT B-2
Defendant's voir dire questions

1. Have any of you ever heard of Hustler magazine?
 - a. If "YES", what specifically have you heard about Hustler magazine?
 - b. If "YES" what is your opinion of Hustler?
2. Have any of you ever heard of or know Larry Flynt?
 - a. If "YES", what specifically have you heard about him?
 - b. If "YES" what is your opinion of him?
3. Are any of you, or have any of you ever been, a member of an organization that advocates for the elimination of obscenity or for anti-pornography laws?
4. Do any of you have any strong or religious objections to pornography or to those individuals and companies that produce pornography?
5. Do any of you believe that pornography should be abolished?
6. Do you believe that photographs of women or men posing nude are considered pornography?
7. Have any of you or anyone you know ever been negatively affected by pornography or the Adult Entertainment Industry?
8. Do any of you believe that publishers of pornography have no morals?

9. Do any of you enjoy entertainment reporting and stories?
10. Do any of you enjoy news reporting about the lives and activities of celebrities and entertainers?
11. Do any of you use the internet to get news or entertainment stories?
 - a. If “YES”, what websites do you visit for such news?
 - b. If “YES”, do you ever visit websites specializing in celebrity news or gossip? Which ones?
12. Have any of you ever heard of or did you know Nancy Benoit?
 - a. If “YES”, what specifically have you heard about her?
 - b. If “YES” what is your opinion of her?
13. Do any of you believe that celebrities have a right to control and own their image once their image appears on the Internet?
14. Do any of you object to the right of a person to subscribe to an adult magazine?
15. Do any of you object to the right of a person to read an adult magazine?
16. Do any of you have any legal training?
17. Do any of you feel that magazine publishing companies should be held to a higher standard for alleged wrongdoings than individuals?

18. Do you feel that adult magazine publishing companies should be held to a higher standard for alleged wrongdoings than other magazine publishers?
19. Have any of you ever participated in a lawsuit, whether as a plaintiff, defendant, or witness?
20. Have any of you or anyone close to you ever had their image exploited through the internet or otherwise? If “YES” please explain.
21. Do any of you believe people are too ready to sue?
22. Do any of you believe that lawsuits are costing the public too much money?
23. Do any of you believe that it is a common practice for the media to exploit the image(s) of women?
24. Do any of you have any doubt in your mind as to whether you could be a fair, objective and impartial juror in this particular case?

* * *

Defendant requests that the following questions be posed to the potential jurors in writing, and their written responses maintained by the Court under seal:

25. Have you ever watched an R-rated movie containing sexually explicit material?
 - a. If “YES”, how often have you watched such movies?

26. Have you ever watched a X-rated or pornographic film?
 - a. If “YES”, how many such films have you seen?
27. Have you ever purchased or rented a X-rated video or pornographic film?
 - a. If “YES”, how many such films or videos have you purchased in the last 10 years?
28. Do you now or have you ever had a subscription to an adult or pornographic magazine?
29. Do you now or have you ever had a subscription to a cable, satellite or other for-pay television channel offering adult/pornographic programming?
 - a. If “YES”, to which channels do you subscribe and for how long have you had each subscription?

ATTACHMENT C
Plaintiff's outline of the case

Plaintiff, Maureen Toffoloni, is the mother of Nancy Elizabeth Benoit, who is deceased. Mrs. Toffoloni is the administrator of her daughter's Estate. Earlier in her life, Nancy Benoit was a model, professional woman wrestler, and public figure. Later in life she was the manager of her husband's career, a wife, and a mother. In June of 2007, Nancy Benoit's husband, Christopher Benoit, a well-known professional wrestler, murdered Ms. Benoit and their 8 year old son, and then committed suicide.

Defendant, LFP Publishing Group, LLC, publishes *Hustler Magazine*, a pornographic magazine. In the March, 2008, issue of *Hustler*, LFP published an article about Ms. Benoit that included nude images of her that were taken approximately 20 years ago. It is undisputed that LFP did not have the consent of Ms. Benoit or her Estate to publish the pictures.

On February 4, 2008, Plaintiff filed suit in the Superior Court of Fayette County, Georgia, seeking to enjoin the publication of the nude and semi-nude images of Nancy Benoit in the March, 2008, edition of *Hustler Magazine* and seeking damages for the violation of Ms. Benoit's right of publicity. The case was removed to this Court.

On November 23, 2010, this Court conclusively determined that LFP published the photographs for financial gain, without Ms. Benoit's consent or the consent of her Estate, causing Plaintiff to suffer damages. Plaintiff is before the Court presently for a trial by jury to determine the amount of compensatory damages, punitive damages, and expenses of litigation to be awarded to her.

ATTACHMENT D
Defendant's outline of the case

Factual Summary:

Compensatory damages for the violation of Ms. Benoit's right of publicity are measured by the unjust enrichment to Defendant from the publication of the images; that is, what LFP would have paid to Plaintiff for the right to publish the images.

Compensatory damages for the violation of Ms. Benoit's right of publicity do not include compensation for Plaintiff's hurt feelings and/or any alleged damage to Ms. Benoit's reputation by virtue of the publication of the images.

Punitive damages may only be awarded to Plaintiff if Defendant acted with premeditation or knowledge *and* consciousness of the appropriation *and* continued the appropriation after learning it was improper, and where aggravating circumstances are present.

Any award of punitive damages must be consistent with the procedural and substantive constitutional limitations required by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Likewise, an award of Plaintiff's attorney's fees may only be made if Defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.

Relevant Rules and Illustrative Case Law:

Pierson v. News Group Publications, Inc., 549 F.Supp. 635, 642 (S.D. Ga. 1982)

Cabaniss v. Hipsley, 114 Ga. App. 367, 381, 151 S.E.2d 496, 506 (1966)

Alonso v. Parfet, 253 Ga. 749, 750, 325 S.E.2D 152, 154 (1985)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, S.Ct. 1513 (2003)

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996)

O.C.G.A. § 13-6-11

Lewis v. D. Hays Trucking, Inc., 701 F. Supp. 2d 1300, 1313 (N.D. Ga. 2010)

Plemons v. Weaver, 243 Ga. App. 464, 533 S.E.2d 747 (2000)

Glen Restaurant v. West, 173 Ga. App. 204, 205, 325 S.E.2d 781 (1984)

Rapid Group, Inc. v. Yellow Cab of Columbus, Inc., 253 Ga. App. 43, 49, 557 S.E.2d 420, 426 (2001)

ATTACHMENT E
Stipulated facts

Defendant's proposed stipulated facts are set forth below. Plaintiff has refused to cooperate in the identification of these or any other stipulated facts. (See email correspondence among counsel attached herewith at Exhibit 1.)

Plaintiff's response: With the exception of numbers 3 and 10, which Plaintiff will address in her case in chief in a matter of a few moments, none of the Defendant's proposed stipulated facts are uncontested facts, but are, instead, Defendant's effort to insert into the case its irrelevant contentions, arguments, and extrinsic information. Because of this, Plaintiff did not regard Defendant's list as a serious, unbiased effort to identify undisputed facts.

1. LFP Publishing Group, LLC ("LFP") is a publishing company headquartered in Beverly Hills, California that operates and publishes over thirty periodicals, including Hustler Magazine. (Larry Flynt Deposition Transcript ("Flynt D.") at 7:23 - 8:1; Donna Hahner Deposition Transcript ("Hahner D.") at 8:17-21.)
2. Hustler is a monthly gentlemen's magazine available on a subscription basis and on newsstands. It offers a variety of content including photographs of nude women, exposés and articles on news, politics, entertainment, and environmental and other issues and humor. Although it is frequently described as a "pornographic" magazine, since its inception, celebrity/entertainment news, including articles and images, has been a substantial and important component of Hustler's regular content. (Hahner D. at 10:6-16; 27:17-22; Donna Hahner Affidavit ("Hahner Aff.") at ¶ 3.)
3. Plaintiff Maureen Toffoloni ("Mrs. Toffoloni") is mother of Nancy Benoit ("Ms. Benoit") and is the duly appointed and serving personal representative of the Estate of Ms. Benoit. (Maureen Toffoloni Deposition Transcript ("Toffoloni D.") at 6:8-10, 7:24-8:1; Verified Complaint ("Complaint"), Docket Index ("D.I.") 1 at ¶1.)

4. Mrs. Toffoloni, as custodian of all records of the Benoit Estate, has no financial or business records of any kind that reflect earnings by Ms. Benoit during any part of her life, nor does Mrs. Toffoloni have knowledge of such earnings. She does not possess any of Ms. Benoit's tax returns, employment contracts, investment portfolios, or W2 forms, nor is she knowledgeable about the content of such documents. (Toffoloni D. at 15:7-16:1.)
5. In the early 1980's, shortly after high school, Nancy Benoit, then known as Nancy Toffoloni, married her high school boyfriend, Mr. James Daus. (James Daus Deposition Testimony ("Daus D.") at 10:4-19.)
6. Ms. Benoit divorced Mr. Daus; and in late-1986, she began a romantic relationship with Kevin Sullivan, a professional wrestler. Ms. Benoit and Mr. Sullivan married and remained married until their divorce in 1996. (Kevin Sullivan Deposition Testimony ("Sullivan D.") at 25:17-21.)
7. Although her wrestling career began in 1986, Ms. Benoit did not have an employment contract or any other kind of contract with any wrestling organization until she signed an independent contractor agreement with World Championship Wrestling ("WCW") in 1996. (Sullivan D. at 26:5 - 27:8; Affidavit of S. Derek Bauer ("Bauer Aff.") at ¶ 3; UWC 005 - 016.)
8. Under the Independent Contractor Agreement between Ms. Benoit and WCW, Ms. Benoit received \$85,000 per year in exchange for her services as a professional wrestler and "manager." The Agreement included an "Ownership of Work Product" provision which gave to WCW ownership of "[a]ll work product, themes, routines, characters, story lines property, data, documentation or information or materials conceived, discovered, developed or created" by Ms. Benoit during the term of the Agreement (collectively, defined in the Agreement as "Work Product") and also transferred to WCW all intellectual property rights in her "Work Product." (Bauer Aff. at ¶ 3 & UWC 005, UWC 008-009 & UWC 016.)

9. After her divorce from Mr. Sullivan, Ms. Benoit married another professional wrestler and celebrity, Chris Benoit. (Complaint, Exhibit D thereto, D.I. 1-1, at p. 20.)
10. In 2007, Chris Benoit murdered Ms. Benoit at their Fayetteville, Georgia home, and then took his own life. (Complaint, D.I. 1-1, at ¶ 1, and Exhibit D thereto at p. 20.)
11. Prior to becoming a professional wrestler, Ms. Benoit had posed naked in a modeling video taken by Mark Samansky. (Daus D. at p. 34:22 - 35:3; Mark Samansky Affidavit (“Samansky Aff.”) at ¶ 7; Christopher Lee Helton Affidavit at ¶ 4.)
12. After her death, Mark Samansky began offering information about Ms. Benoit’s life and career before she became a wrestler, including images he had taken from his video, for sale to various publishers, including LFP. (Samansky Aff. at ¶ 8; Affidavit of Tyler Downey at ¶ 3; LFP-0073 - LFP-0074.)
13. LFP paid Mark Samansky \$1,000.00 for the exclusive right to publish his information and images about Ms. Benoit’s pre-wrestling life and career in Hustler Magazine. Other than this transaction, LFP has not acquired or attempted to acquire any other information or images of Ms. Benoit for publication in Hustler Magazine or elsewhere. (Bruce David Deposition Transcript (“David D.”) at 15:10-11; Samansky Aff. at ¶ 12; Bruce David Affidavit (“David Aff.”) at ¶ 3.)
14. Neither Mark Samansky nor LFP obtained a release or permission from Ms. Benoit or Ms. Toffoloni for use of the images published by LFP. (Complaint, D.I. 1-1, at ¶¶ 17 & 19.)
15. LFP published the images with an article about the images in the context of Ms. Benoit’s life, career, and death, in the March 2008 issue of Hustler Magazine. The article and accompanying images also appeared in the March 2008 Canadian edition of Hustler. (Hahner D. at 22:14 - 23:1-18 & Plaintiff’s Exhibit 1 thereto; David Aff. at Exhibit C.)

16. LFP does not publish the Canadian edition of Hustler. (Hahner D. at 23:2-18.)
17. The article and images of Ms. Benoit did not appear in any other editions of Hustler Magazine sold in any other countries. (David D. at 28:17 - 29:7.)
18. LFP did not compensate Ms. Toffoloni, the Estate of Ms. Benoit or anyone authorized to act on behalf of Ms. Benoit for its publication of the article and accompanying images. (Complaint, D.I. 1-1, at Exhibit C thereto.)
19. Ms. Toffoloni did not suffer any physical harm as a result of LFP's publication of the Benoit images. (See generally, Complaint D.I. 1-1.)
20. The March 2008 issue of Hustler was available to the public via newsstands beginning on January 8, 2008 and was removed from shelves (and replaced by the April 2008 issue) by February 8, 2008. (Hahner D. at 40:14-20; Flynt D. at 18:7-13; Hahner Aff. at ¶ 4.)
21. The Hustler Magazine article about Ms. Benoit was the first time that any media outlet had reported the fact that, before her wrestling career, Ms. Benoit had aspired to be a nude model and in fact had posed nude. (David Aff. at ¶ 4; William Otten Deposition Testimony (“Otten D.”) at 54:17 - 55:1.)
22. 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. (Toffoloni D. at 37:2-23.)
23. Ms. Benoit was a “public figure.” (Complaint, D.I. 1-1, at ¶ 15.)
24. The story of the Benoit murder-suicide made national and international news. (Otten D. at 62:1-3, 62:20-25.)
25. There was intense worldwide media interest in Ms. Benoit after her murder. The media was particularly interested in providing the public with stories about Ms.

Benoit's career, including the beginning of her career. (Otten D. at 62:1-3, 62:20 - 63:10.)

26. Interest in the story of Ms. Benoit's life, career and murder extends beyond the wrestling community. (Otten D. at 62:1-3, 62:20 - 63:10; Daus D. at 49:25 - 50:7.)
27. Plaintiff's counsel sent a letter to LFP dated January 16, 2008 in which he demanded on behalf of Ms. Toffoloni that LFP refrain from publishing the images of Ms. Benoit. (D.I. 73-10.)
28. The March 2008 issue of Hustler had already been printed, distributed and sold to the public on newsstands for eight days before Plaintiff's counsel mailed the January 16, 2008 demand letter to LFP. (Hahner D. at 40:14-20; D.I. 73-10.)
29. 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; Hahner D. at 39:15 - 40:12; David D. at 28:17 - 29:7.)
30. LFP has not republished the Benoit images or licensed their republication by any other entity or individual. (Affidavit of Donna Hahner, D.I. 3-1 at ¶ 6; Hahner D. at 39:21 - 40:12; David D. at 28:23 - 29:4.)
31. On February 8, 2008, U.S. District Court Judge Thomas W. Thrash, Jr. denied Plaintiff's motion for a temporary restraining order seeking an injunction to prohibit publication of the Benoit images. (D.I. 4.)
32. On October 3, 2008, U.S. District Court Judge Thomas W. Thrash, Jr. entered an Order granting LFP's motion to dismiss the complaint, in which he agreed that LFP's publication of the Benoit images in connection with the story about

her life fell within the newsworthiness exception to the right of publicity. (D.I. 13.)

33. On June 25, 2009, the Eleventh Circuit Court of Appeals reversed Judge Thrash's October 3, 2008 order and held that the images of Ms. Benoit published by LFP were not, in fact, within the newsworthiness exception to the right of publicity. (D.I. 27; *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).)

ATTACHMENT F-1
Plaintiff's witness list

Plaintiff will have present at trial:

Maureen Toffoloni
c/o Richard P. Decker
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

Paul Toffoloni
c/o Richard P. Decker
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

Sandra Toffoloni
c/o Richard P. Decker
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

F. Edwin Hallman, Esq.
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

Plaintiff may have present at trial:

Jim Daus
c/o Richard P. Decker
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

ATTACHMENT F-2
Defendant's witness list

Defendant will have present at trial:

Donna Hahner
c/o S. Derek Bauer
McKenna Long & Aldridge LLP
303 Peachtree Street, N.E.
Suite 5300
Atlanta, GA 30308

Bruce David
c/o S. Derek Bauer
McKenna Long & Aldridge LLP
303 Peachtree Street, N.E.
Suite 5300
Atlanta, GA 30308

Defendant may have present at trial:

Larry Flynt
c/o S. Derek Bauer
McKenna Long & Aldridge LLP
303 Peachtree Street, N.E.
Suite 5300
Atlanta, GA 30308

ATTACHMENT G-1

Plaintiff's list of documentary and physical evidence

1	01/16/08	Letter from Richard P. Decker to LFP Internet Group, LFP Video Group, and LFP Publishing Group
2	03/2008	<i>Hustler Magazine</i> March 2008 Edition (LFP 0019)
3	03/2008	<i>Hustler Magazine</i> [Canada March 2008 Edition] (LFP 0003)
4A	11/09/07	LFP 0030
4B		Sales figures (LFP 0099)
5		LFP 0104
6		Operating Statement (LFP 0105)
7		Operating Statement (LFP 0106)
8		Operating Statement (LFP 0107)
9		Operating Statement (LFP 0108)
10		Operating Statement (LFP 0109)
11		Operating Statement (LFP 0110)
12		Operating Statement (LFP 0111)
13		Operating Statement (LFP 0112)
14		Balance Sheets (2006-2009) (LFP 0133)
15	01/30/08	Article published in <i>The Sun</i> "SHOCKING topless photos of Chris Benoit's murdered wife Nancy have appeared in an American pornographic magazine"
16	12/02/10	Open Records Request to the Georgia Bureau of Investigation by Fred Rosen on behalf of Hustler Magazine,

		consisting of 15 pages, relating to “crime scene photographs of Meredith Emerson”, and the response of the GBI thereto.
17	08/03/10	Article published in <i>The Atlanta Journal Constitution</i> “Hustler magazine photo request sparks uproar”
18A	12/16/09	Defendant LFP Publishing Group, LLC’s First Supplemental Responses to Plaintiff’s First Interrogatories
18B	11/30/09	Defendant LFP Publishing Group, LLC’s Responses to Plaintiff’s First Request for Production of Documents
18C	11/30/09	Defendant LFP Publishing Group, LLC’s Responses to Plaintiff’s First Interrogatories
19		Published opinion and judgment in <i>Douglass v. Hustler Magazine, Inc.</i> , 769 F.2d 1128 (7 th Cir. 1985)
20		Published opinion and judgment in <i>Ashby v. Hustler Magazine, Inc.</i> , 802 F2d. 856 (6 th Cir. 1986)
21		Published opinion and judgment in <i>Blackman v Hustler Magazine, Inc.</i> , 800 F.2d 1160 (C.A. D.C. 1986)
22		Published opinion and judgment in <i>Brewer v Hustler Magazine, Inc.</i> , 749 F.2d 527 (9 th Cir. 1984)
23		Published opinion and judgment in <i>Wood v Hustler Magazine, Inc.</i> , 736 F.2d 1084 (5 th Cir. 1984)
24	08/28/07	Certified copy of Letters of Administration for the Estate of Nancy Elizabeth Benoit granted to Maureen R. Toffoloni by the Probate Court of Fayette County, Georgia
25	01/2007	<i>Hustler Magazine</i> January 2007
26	02/2007	<i>Hustler Magazine</i> February 2007
27	03/2007	<i>Hustler Magazine</i> March 2007

28	01/2008	<u>Hustler Magazine</u> January 2008
29	02/2008	<u>Hustler Magazine</u> February 2008
30		Evidence of Plaintiff's attorneys' fees and expenses of litigation

Defendant LFP's Objections To Plaintiff's Exhibits (Attachment G-1):

Defendant objects to Plaintiff's exhibits numbers 2, 3, 25, 26, 27, 28 and 29 to the extent Plaintiff intends to offer into evidence the respective pornographic DVDs included with the newsstand copies of each of the magazines, as the content of the DVDs are irrelevant and immaterial to any issue to be tried in the case, and any probative value the DVDs could possibly have is clearly outweighed by the unfair prejudice the evidence would cause against Defendant. Fed. R. Evid. 402 & 403.

Defendant objects to Plaintiff's exhibits numbers 2, 3, 25, 26, 27, 28 and 29 because each exhibit is a complete copy of an issue of Hustler Magazine which contains content which is irrelevant and immaterial to any issue to be tried in the case, and any probative value such content could possibly have is clearly outweighed by the unfair prejudice the evidence would cause against Defendant. Fed. R. Evid. 402 & 403.

Defendant objects to Plaintiff's exhibit numbers 15, 16 and 17 as unauthenticated and inadmissible hearsay; and, further, with respect to exhibits numbers 16 and 17, Defendant objects that the materials are irrelevant and immaterial to any issue to be tried in the case, and any probative value the documents regarding deceased hiker Meredith Emerson could possibly have is clearly outweighed by the unfair prejudice the evidence would cause against Defendant. Fed. R. Evid. 402, 403, 801, 802 & 805.

Defendant objects to Plaintiff's exhibit number 18B as irrelevant and immaterial to any issue to be tried in the case, and any probative value Defendant's discovery response to Plaintiff's document request could possibly have is clearly outweighed by the confusion to the jury and resulting unfair prejudice the evidence would cause against Defendant. Fed. R. Evid. 402 & 403.

Defendant objects to Plaintiff's exhibit numbers 19, 20, 21, 22, and 23 as inadmissible because they are judicial opinions which are irrelevant and immaterial to any issue to be tried in the case, and any probative value such information could possibly have is clearly outweighed by the unfair prejudice the evidence would cause against Defendant. Fed. R. Evid. 402, 403, 801, 802 & 805.

ATTACHMENT G-2

Defendant's list of documentary and physical evidence

1	03/2006	<i>Hustler</i> Magazine, March 2006 (cover and article excerpt only)
2	12/2007	<i>Hustler</i> Magazine, Holiday 2007 (cover and article excerpt only) (LFP 0016)
3	01/2008	<i>Hustler</i> Magazine, January 2008 (cover and article excerpt only) (LFP 0017)
4	03/2008	<i>Hustler</i> Magazine, March 2008 (cover and article excerpt only) (LFP 0019)
5		Representative Entertainment Media Exhibit
6	10/03/08	Dismissal Order Issued by Hon. Thomas W. Thrash, Docket Index 13
7	03/2008	LFP Content and Pagination Report (LFP 134)
8	03/2008	LFP Internal Compliance Report (LFP 0035)
9	03/2008	LFP March 2008 Geographic Circulation Analysis
10	05/1983	<i>Sports Review Wrestling</i> , May 1983 (Otten Ex. 2)
11		Photo of Nancy Benoit used on the cover of <i>The Grapevine</i> (Otten Ex. 3)
12		Advertisement featuring Fallen Angel photographs (Otten Ex. 5)
13		“Fallen Angel” photographs (Otten Ex. 6)
14		Edited Advertisement featuring Fallen Angel photographs (Otten Ex. 7)

15		Nancy Benoit photographs taken from the Internet (Otten Ex. 8)
16		Composite Otten Ex. 9
17	07/11/07	Email from Mark Samansky to LFP (LFP 0073 - 0074)
18	01/22/96	Independent Contractor Agreement between Nancy Benoit and World Championship Wrestling, Inc. (UWC 005 - 016)
19	01/16/08	Letter from Richard P. Decker to LFP Internet Group, LFP Video Group, and LFP Publishing Group
20		Sales figures (LFP 0099)
21		Operating Statement (LFP 0105)
22		Operating Statement (LFP 0106)
23		Operating Statement (LFP 0107)
24		Operating Statement (LFP 0108)
25		Operating Statement (LFP 0109)
26		Operating Statement (LFP 0110)
27		Operating Statement (LFP 0111)
28		Operating Statement (LFP 0112)
29		Balance Sheets (2006-2009) (LFP 0133)
30		Certified copy of the opinion and judgment in <u><i>Toffoloni v. LFP Publishing Group, LLC</i></u> , 572 F.3d 1201 (11th Cir. 2009)

Plaintiff's Objections To Defendant's Exhibits (Attachment G-2):

Plaintiff objects to Defendant's documents numbered 1, 2, 3, and 4, for the reason that they are not complete copies of the referenced magazines. Fed. R. Evid. 402, 403, 801, 802 & 805.

Plaintiff objects to Defendant's documents numbered 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 30 for the reason that same are irrelevant, hearsay, and with, respect to Defendant's exhibit number 9, because the document was not produced by Defendant in discovery. Fed. R. Evid. 402, 403, 801, 802 & 805.

ATTACHMENT H-1
Plaintiff's trial briefs

The measure of damages to be awarded to the Plaintiff in this case is the value of the use of the publicity appropriated by the Defendant Hustler Magazine. Martin Luther King, Jr. Ctr. For Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982). The evidence shows that LFP made significant profits off the March 2008 issue. The evidence also shows that LFP neither sought the permission of Nancy Benoit's Estate (which it knew it would never get) nor tried to compensate her Estate in any way for its use of the images, despite having been informed by counsel for the Plaintiff that Defendant was acting without authority. In effect, the evidence will be that the Defendant stole the images of Nancy Benoit, used them extensively, and then tried to justify its conduct after the fact on the basis of the discredited "newsworthiness" argument. The evidence will be that because the Defendant, acting on its own, without authority, has "rung the bell", it can never be "un-rung" and the nude images of Nancy Benoit will be available to be seen by anyone who wishes to look at them, anywhere, everyday, even to this day, forever.

The evidence will also be that the Defendant (1) obviously, intentionally, and knowingly violated Plaintiff's right of publicity (i.e., it wasn't done by accident or negligence); and (2) the Defendant has a "well documented" "propensity" "to invade people's legal rights", especially the privacy rights of others. See, e.g., Douglass v Hustler Magazine, Inc., 769 F2d 1128 (7th Cir. 1986). For these reasons, and others to be shown, the jury should be entitled to consider an award of punitive damages against the Defendant, to punish and deter the Defendant in the future, and that such damages should not be subject to the cap under Georgia law. See O.C.G.A. § 51-12-5.1 et seq.; Cabaniss v. Hipsley, 114 Ga. App. 367, 387 (1966).

Finally, because every intentional tort carries with it "a specie of bad faith", Plaintiff is entitled to have the jury consider an award of attorneys' fees and expenses of litigation, based upon the evidence of same. See, e.g., DeKalb County v. McFarland, 231 Ga. 649, 203 S.E.2d 495 (1974).

ATTACHMENT H-2
Defendant's trial briefs

Recovery for Defendant's violation of Ms. Benoit's right of publicity "is gauged solely by the unjust enrichment of the defendant." *Pierson v. News Group Publications, Inc.*, 549 F.Supp. 635, 642 (S.D. Ga. 1982); *see also Cabaniss v. Hipsley*, 114 Ga. App. 367, 381, 151 S.E.2d 496, 506 (1966) ("Recovery under this theory is measured by the unjust enrichment of the defendant and not by the injury to plaintiff's feelings or reputation (and we assume, but do not decide, to plaintiff's own commercial interests."); *Alonso v. Parfet*, 253 Ga. 749, 750, 325 S.E.2D 152, 154 (1985) ("The measure of damages in an unsanctioned appropriation case . . . is the value of the benefit derived by the person appropriating the other's name and likeness.")

Punitive damages may only be awarded for Defendant's violation of Ms. Benoit's right of publicity if "the jury . . . finds 'that the acts of the defendant have been of such a character to import premeditation or knowledge and consciousness of the appropriation and its continuation.'" *Alonso*, 253 Ga. at 750, 325 S.E.2d at 154 (quoting *Cabaniss*, 114 Ga. App. at 386-87, 151 S.E.2d 496).

Any award of punitive damages against LFP in this case must be limited to the statutory cap of \$250,000.00 unless it is shown by clear and convincing evidence that LFP acted with the specific intent to harm Plaintiff. O.C.G.A. § 51-12-5.1.

Any award of punitive damages against LFP in this case must be limited by the "procedural and substantive constitutional limitations on [such] awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, S.Ct. 1513 (2003) (citations omitted).

Any award of punitive damages against LFP in this case must be in accord with the three "guideposts" established by the U.S. Supreme Court: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*, 538 U.S. at 418. "[T]he

reprehensibility of a defendant [is determined] by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident The existence of any one of these [reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.*, 538 U.S. at 419.

"[A]s a general rule, [Georgia does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.*, 538 U.S. at 421. Further, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis...." *Id.*, 538 U.S. 408 at 422-23.

If punitive damages are awarded against LFP in this case, "[the Court] must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.*, 538 U.S. at 425-26.

"The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." O.C.G.A. § 13-6-11. "Bad faith requires more than 'bad judgment' or 'negligence,' rather the statute imports a 'dishonest purpose' or some 'moral obliquity' and implies 'conscious doing of wrong' and a 'breach of known duty through some motive of interest of ill will.'" *Lewis v. D. Hays Trucking, Inc.*, 701 F. Supp. 2d 1300, 1313 (N.D. Ga. 2010) (Forrester, J.)

(“Bad faith' is 'bad faith connected with the transaction and dealings out of which the cause of action arose, rather than bad faith in defending or resisting the claim after the cause of action has already arisen.”)

Plaintiff should be precluded from offering into evidence pornographic DVDs included with certain issues of *Hustler* Magazine sold on newsstands, and evidence related to the reported efforts of a freelance *Hustler* journalist to obtain crime scene files relating the murder of Meredith Emerson because (1) the proposed evidence is irrelevant and unrelated to any question of fact or law at issue in this case, and (2) even if the proposed evidence is relevant (which it is not), any probative value such evidence could possibly have is clearly outweighed by the substantial risk of unfair prejudice to Defendant that would result from its admission. Fed. R. Evid. 402 & 403; *see also United States v. Saintil*, 753 F.2d 984, 989 n.7 (11th Cir. 1985) and *U.S. v. Dean*, 2007 WL 812048, at *2 (11th Cir. 2007) (Rule 403 is used to “exclude[e] matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect”) (citation omitted). Plaintiff’s proposed documentary evidence relating to Meredith Emerson (Plaintiff’s exhibits 16 & 17) should also be precluded as inadmissible hearsay. Fed. R. Evid. 801, 802 & 805.

Plaintiff should be precluded from offering the testimony of Paul Toffoloni and Sandra Toffoloni because (1) these witnesses were not disclosed as having factual information or knowledge relevant to any issue in this case prior to their reference in the pre-trial order; (2) these witnesses in fact lack factual information or knowledge relevant to any matter at issue for trial; and (3) any probative value these witnesses’ testimony may have is outweighed by the clear risk of unfair prejudice to Defendant that would result by admitting such testimony. Fed. R. Civ. P. 26(a)(1) & (e)(1)(A); Fed. R. Civ. P. 37(c)(1); *see also Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 699 (N.D. Ga. 2006) (Evans, J.); *Manning v. Wilson*, 2007 WL 3090969, at *1 (N.D. Ga. 2007) (Vining, Jr., J.); *Nance v. Ricoh Electronics, Inc.*, 2008 WL 926662, at *3 (N.D. Ga. 2008) (Story, J.).

Finally, Plaintiff should be precluded from offering her own testimony at trial, as she admittedly lacks factual information or knowledge relevant to any issue to be tried in this case.

ATTACHMENT I
Plaintiff's Proposed Verdict form

1. We the jury hereby award Plaintiff the amount of \$ _____ compensatory damages for Defendant's violation of Plaintiff's right of publicity.

2. We the jury hereby award Plaintiff the amount of \$ _____ attorneys' fees and \$ _____ expenses of litigation.

_____ We the jury also find by clear and convincing evidence that the Defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences, and based thereon, we find that punitive damages should be awarded to the Plaintiff.

OR

_____ We the jury find that punitive damages should not be awarded.

3. We the jury further find by clear and convincing evidence that the Defendant

_____ did

_____ did not

act with the specific intent to harm the Plaintiff.

This _____ day of _____, 2011.

Foreperson

ATTACHMENT I
Defendant's Proposed Verdict form

1. We the jury hereby award Plaintiff the amount of \$ _____ compensatory damages for Defendant's violation of Plaintiff's right of publicity.

2. _____ We the jury also find by clear and convincing evidence that "the acts of the defendant have been of a character to import premeditation or knowledge *and* consciousness of the appropriation *and* its continuation," *Cabaniss v. Hipsley*, 114 Ga. App. 367, 386-87, 151 S.E.2d 496, 509 (1966) (emphasis added); *see also Alonso v. Parfet*, 253 Ga. 749, 750, 325 S.E.2d 152, 154 (1985) (quoting *Cabaniss*), and based thereon, we find that punitive damages should be awarded to the Plaintiff.

We the jury also find by clear and convincing evidence that Defendant

_____ DID

_____ DID NOT

act with specific intent to harm Plaintiff.

OR

_____ We the jury find that punitive damages should not be awarded.

3.

We the jury also find by clear and convincing evidence that Defendant acted dishonestly or was motivated by sinister motive or ill will and based thereon, we find that Plaintiff's attorneys' fees and expenses of litigation should be awarded to the Plaintiff.

OR

We the jury find that Plaintiff's attorney's fees and expenses of litigation should not be awarded.

This _____ day of _____, 2011.

Foreperson

Bauer, Derek

From: Bauer, Derek
Sent: Wednesday, December 29, 2010 10:59 AM
To: 'Richard Decker'
Cc: Kathryn Sims; F. Edwin Hallman, Jr.; Rawls, Jim
Subject: RE: Toffoloni v LFP: draft stipulated facts

Paragraph 16 of the pre-trial requires us to work together to identify all undisputed facts. I will accept your email below as your unwillingness to do so, and reflect as much in our portion of the proposed order, which you will have in full first thing in the morning on 12/31.

Derek Bauer

From: Richard Decker [mailto:RDecker@hallmanwingate.com]
Sent: Wednesday, December 29, 2010 8:30 AM
To: Bauer, Derek
Cc: Kathryn Sims; F. Edwin Hallman, Jr.
Subject: RE: Toffoloni v LFP: draft stipulated facts

I do not have the time or inclination to work on your proposed stipulation of "facts". Your list of "facts" was, charitably put, your arguments, speculations and a wish list of your defense. I will not help you mount a defense. I will present my case, and react appropriately when you begin to present yours. I do not need or require any stipulation of facts, and neither do the Local Rules.

At the risk of repetition, I will state the following one more time: The only issue in this case is the amount of compensatory and punitive damages owed to the Plaintiff by the Defendant because of the Defendant's intentional violation of the Plaintiff's right of publicity. These damages will be arrived at by presenting information to the jury as to the value to the Defendant of the appropriated images, and the Defendant's related conduct. Reviewing your proposed stipulation of "facts" and Exhibit List, it is obvious that the Defendant harbors some hopes about being able to introduce irrelevant information, which I will object to. I certainly won't stipulate to it.

**As I said in another email, I will be out-of-town and unable to work on this project until 12/31. Please proceed to get your portion of the proposed pre-trial order ready so that I can review it in full when I get back.
Richard Decker**

From: Bauer, Derek [dbauer@mckennalong.com]
Sent: Tuesday, December 28, 2010 4:53 PM
To: Richard Decker
Cc: Rawls, Jim
Subject: RE: Toffoloni v LFP: draft stipulated facts

1/3/2011

Please identify, then, which facts I have proposed which you contend are disputed and the basis in the record for your contentions. Thank you.

Derek

From: Richard Decker [mailto:RDecker@hallmanwingate.com]
Sent: Tuesday, December 28, 2010 4:49 PM
To: Bauer, Derek
Subject: RE: Toffoloni v LFP: draft stipulated facts

I do object to most, if not all, of your proposed stipulated facts and will not agree to any of them.

Richard Decker

From: Bauer, Derek [dbauer@mckennalong.com]
Sent: Tuesday, December 28, 2010 2:12 PM
To: Richard Decker
Subject: Toffoloni v LFP: draft stipulated facts

Rick, please see attached our draft stipulated facts for the pre-trial order. Let me know your thoughts/changes.

Derek

Derek Bauer | Partner
McKenna Long & Aldridge LLP
303 Peachtree Street | Suite 5300 Atlanta, Ga 30308
Tel: 404.527.4195 | Fax: 404.527.4198 | dbauer@mckennalong.com

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