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

BRIEF IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE

NOW COMES Defendant LFP Publishing Group LLC, d/b/a *Hustler* Magazine ("LFP"), and respectfully submits this Brief in support of its Motion *In Limine* seeking to exclude certain documentary and physical evidence listed by Plaintiff Maureen Toffoloni ("Plaintiff") in the Pretrial Order as items to be tendered at trial. (Docket Index ("D.I.") 187 at Attachment G-1.)

I. Introduction

LFP asks the Court to exclude the following pieces of evidence – including any reference to them by counsel or witnesses: (1) a DVD which was packaged

and sold with newsstand copies of the March 2008 issue of *Hustler* Magazine (the "DVD"); (2) a Georgia Open Records Act request submitted by LFP to the Georgia Bureau of Investigation relating to crime scene photographs of murder victim Meredith Emerson, and testimony pertaining to LFP's efforts to obtain images of Ms. Emerson (the "Emerson material"); (3) case law deciding prior legal actions filed against Hustler Magazine, Inc. (the "Prior Actions"); and (4) a January 2008 article from the British tabloid, *The Sun*, titled, "Hustler print nude Nancy pics – SHOCKING topless photos of Chris Benoit's murdered wife Nancy have appeared in an American pornographic magazine" (the "*Sun* article") (collectively, the "Contested Evidence").

LFP respectfully moves this Court to exclude the DVD, the Emerson material and the Prior Actions on the ground that they are irrelevant to the only issues to be tried in this case – the amount of compensatory damages, if any, to Plaintiff and whether punitive damages should be awarded. But even if any of them is found to have some relevance to this dispute, they should be excluded because what little probative value they arguably have is substantially outweighed by the danger of unfair prejudice.

LFP moves the Court to exclude the *Sun* article on the ground that it constitutes inadmissible hearsay within hearsay.

In the interest of preventing a mistrial and to avoid the prejudice which would be caused were the jury to hear the evidence which is the subject of this Motion, even fleetingly or by suggestion, LFP respectfully submits that the Court should rule on this Motion before the start of trial.

II. Legal Standards for the Exclusion of Evidence

A. Relevancy and Exclusion on Grounds of Prejudice

The Federal Rules of Evidence (the "Rules") define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). It is axiomatic that only relevant evidence may be admitted into the record; indeed, the Rules proscribe the introduction of irrelevant evidence: "[e]vidence which is not relevant is not admissible." (Fed. R. Evid. 402.)

The Rules also prohibit the introduction of material that, while relevant and otherwise admissible, is of such a nature that any probative value it has is substantially outweighed by the possibility of unfair prejudice. Specifically, Fed. R. Evid. 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

> the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403 (emphasis added). In the context of Rule 403, "unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note.

The Eleventh Circuit has held that where evidence could cause the jury to make "an irrational decision based on an improper basis…" then it may be excluded under Rule 403. *United States v. Saintil*, 753 F.2d 984, 989 n.7 (11th Cir. 1985). *See also U.S. v. Dean*, 2007 WL 812048, at *2 n.3 (11th Cir. 2007) (Rule 403 is used to "exclud[e] matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect") (citation omitted).

Under Rule 403, "the trial judge has broad discretion to exclude evidence…." *Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544, 547 (S.D. Ga. 1986) (quoting *Hopkins v. Britton*, 742 F.2d 1308, 1311 (11th Cir. 1984)).

B. Hearsay

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed. R. Evid. 801(c).) The Rules prohibit the admission of hearsay unless it meets one of a limited number of exceptions: "Hearsay is not

admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." (Fed. R. Evid. 802.)

"Hearsay within hearsay," too, is inadmissible unless "each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." (Fed. R. Evid. 405.)

III. Argument

A. The DVD Should Be Excluded Because It Is Not Relevant to Plaintiff's Claims and Any Probative Value Is Outweighed by the Danger of Unfair Prejudice

The DVD at issue contains no video footage or images of Ms. Benoit and, indeed, does not reference Ms. Benoit in any way. In fact, the DVD does not include any content related to any aspect of the March 2008 issue or, for that matter, of any other issue of *Hustler* Magazine. Plaintiff learned this fact during discovery and also learned that the DVD is not even a part of LFP's production of *Hustler* Magazine:

> Q. Who puts [the DVD] together?
> A. I don't know.
> Q. So that's not part of the *Hustler* magazine publication process?
> A. No.

(Deposition of Bruce David at 13.) Rather, the DVD was included only with newsstand copies (as opposed to subscribers' copies) as a way to boost retail sales of the March 2008 issue. (*Id*. at 13-14.)

Plaintiff purportedly desires to introduce the DVD as evidence of the damage to Ms. Benoit's reputation "as the result of her involuntary association with the worst form of pornography." (D.I. 158 at 25.) But reputational damages are not permitted in a Georgia right of publicity case, *see*, *e.g.*, *Cabaniss v. Hipsley*, 114 Ga. App. 367, 381, 151 S.E.2d 496, 506 (1966); *Pierson v. News Group Publ'ns, Inc*., 549 F. Supp. 635, 642 (S.D. Ga. 1982) ("…recovery is gauged solely by the unjust enrichment of the defendant…"), and therefore the DVD is completely irrelevant to Plaintiff's punitive damages claim. Neither can the DVD inform the jury concerning compensatory damages, the only other issue to be tried in this case, as it bears no relation to the amount LFP would have paid Plaintiff for permission to publish the images of Ms. Benoit.

Even if the Court finds that the DVD does have some relevance to this dispute, it should be excluded on the ground that such relevance is substantially outweighed by the danger of unfair prejudice under Rule 403. Rule 403 is appropriate to exclude material "of scant or cumulative probative force, dragged in

by the heels for the sake of its prejudicial effect," *Dean*, 2007 WL 812048 at *2 n.3, and that is precisely the case here.

Unlike the Benoit images which are the subject of this lawsuit, the content of the DVD is pornographic. LFP submits that Plaintiff filed with the Court and proposes to publish to the jury this material in order to inflame and prejudice the jury by provoking an emotional response untethered to any legitimate issue in the case. As the Advisory Committee's Note and binding case law make clear, Rule 403 is meant to deter exactly what Plaintiff seeks: an irrational decision improperly based on emotion. (*See, e.g.*, *Saintil*, 753 F.2d at 989 n.7.)

It appears that Plaintiff seeks to introduce the DVD merely "for the sake of its prejudicial effect" and whatever relevance it could possibly have is clearly and substantially outweighed by the danger of unfair prejudice. LFP respectfully submits that it should be excluded under Rule 403.

B. The Emerson Material Should Be Excluded Because It Is Irrelevant to Plaintiff's Claims and Any Probative Value Is Outweighed by the Danger of Unfair Prejudice

Plaintiff also seeks to introduce the Emerson material, which consists of documentary evidence of and, we expect references at trial to, a Georgia Open Records Act request made by a LFP freelance true crime journalist to obtain the Georgia Bureau of Investigation's closed investigative file (including crime scene

photographs) regarding Meredith Emerson, the hiker who was murdered in the North Georgia mountains in 2008.

As stated in the Pretrial Order, the issues to be put to the jury in this case are the amount of compensatory damages due to Plaintiff and whether punitive damages should be awarded. The Emerson material has no relationship whatsoever to Ms. Benoit or the images of her published by LFP; to the March 2008 issue of *Hustler* Magazine; to the amount LFP would have paid Plaintiff for the images; to the finances of LFP; or to the state of mind of LFP employees at the time they decided to publish the Benoit images. It is beyond dispute that the Emerson material cannot inform the jury as to any of the matters to be tried.

Irrelevant evidence is not admissible. Fed. R. Evid. 402. The Emerson material has no tendency to make any fact that is of consequence to the determination of Plaintiff's claims more or less probable. Because it is not relevant to Plaintiff's claims and can have no legitimate bearing on the outcome of this case, the Emerson material should be excluded.

In the event the Court does find some relevance in the Emerson material, it should be excluded on the ground that such relevance is clearly and substantially outweighed by the danger of unfair prejudice under Rule 403. The Georgia residents who will comprise the jury in this case are likely to be familiar with and,

quite possibly have strong feelings about, the gruesome murder of Meredith Emerson. It appears Plaintiff seeks to capitalize on this likelihood by using the Emerson material merely "for the sake of its prejudicial effect" and attempting, through its introduction, to inflame the passions of the jury against LFP.

Whatever relevance the Emerson material could even arguably have is clearly and substantially outweighed by the danger of unfair prejudice and LFP respectfully submits that it be excluded under Rule 403.

C. The Prior Actions Should Be Excluded Because They Are Irrelevant to Plaintiff's Claims and Any Probative Value Is Outweighed by the Danger of Unfair Prejudice

Plaintiff also intends to tender at trial five Prior Actions in which Hustler Magazine, Inc. was a defendant.[1] The most recent of the Prior Actions was decided twenty-five years ago; none is related to or even resembles the facts or legal issues in this case. Two of the Prior Actions are copyright infringement cases.

LFP submits that the Prior Actions should be excluded under Fed. R. Evid. 401 and 402 because they are in no way relevant to this action. Each of the cases

[1] The five Prior Actions are *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985); *Ashby v. Hustler Magazine, Inc*., 802 F2d. 856 (6th Cir. 1986); *Blackman v Hustler Magazine, Inc.*, 800 F.2d 1160 (D.C. Cir. 1986); *Brewer v Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984); *Wood v Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984).

involves a different set of facts; different legal issues; different claims; different jurisdictions with different laws; and different plaintiffs. The fact that, twenty-five years ago or more, LFP (or one of its predecessor entities) was sued and lost on claims which are wholly unrelated to any fact or claim asserted by Plaintiff here has no probative value to the limited and unique issues in this case.

Further, any probative value the Prior Actions may have is substantially outweighed by the risk of unfair prejudice. Indeed, it appears that the Prior Actions are being tendered so that the jury might speculate that if LFP committed a legal wrong in the past, it should be punished more severely for its conduct in this case even if the "wrongs" have no relation to one another.

Courts have routinely held that such use of prior litigation is likely to confuse the issues and unfairly prejudice the jury. *See, e.g., Williams v. Asplundh Tree Expert Co.*, 2006 WL 2868923, at *2 (M.D. Fla. 2006) ("[o]n weighing the probative value of the two lawsuits against their potential for unfair prejudice, the Court determines that the risk of unfair prejudice substantially outweighs the probity of this evidence"); *Crawford v. Muscletech Research & Dev.*, 2002 WL 31852833, at *1 (W.D. Okla. 2002) ("[t]he Court finds evidence of other lawsuits to be more prejudicial than probative"); *Stair v. Lehigh Valley Carpenters Local Union No. 600*, 813 F. Supp. 1116, 1119-20 (E.D. Pa. 1993) (excluding evidence

of prior lawsuit under Fed. R. Evid. 403); *Foster v. Berwind Corp.*, 1991 WL 83090, at *1 (E.D. Pa. 1991) (granting motion in limine to exclude evidence of other lawsuits because "they are dispositive of nothing and would confuse the complex issues").

Moreover, the Rules prohibit the introduction of the Prior Actions to the extent they are used to show that LFP's actions at issue in this case conform with prior bad acts. Fed. R. Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

LFP shows that the Prior Acts are not relevant to this case and whatever probative value the Prior Actions have is outweighed by the danger of unfair prejudice; LFP respectfully submits that they be excluded.

D. The *Sun* Article Should Be Excluded Because It Is Inadmissible Hearsay

Plaintiff seeks to introduce the *Sun* article, apparently to show the jury the content of a statement contained therein by then-LFP employee Mark Johnson. Mr. Johnson is quoted in the article concerning the public's purported interest in the Benoit images. However, Mr. Johnson's statements in the *Sun* article constitute hearsay within hearsay and are inadmissible under Fed. R. Evid. 801, 802 and 805.

First, the article is hearsay because it is an out-of-court statement offered to prove the truth of the matter asserted. This Court has held that articles contained in periodicals may not be relied upon for that purpose under the Rules. *See Rylee v. Chapman*, 2008 WL 3538559, at *4 (N.D. Ga. 2008) (Story, J.) (holding plaintiff's reliance on newspaper articles to be "insufficient because such evidence is hearsay and inadmissible to demonstrate the truth of the matters asserted therein"); *see also U.S. v. Baker*, 432 F.3d 1189, 1211-12 (11th Cir. 2005) ("The *Miami Herald* articles are also inadmissible hearsay, as they are relevant primarily to establish the truth of their contents.").

Second, the Mark Johnson quote contained within the *Sun* article is, itself, inadmissible hearsay in that it too is an out-of-court statement offered for its own truth. Thus, the *Sun* article sought to be tendered by Plaintiff constitutes hearsay within hearsay and is doubly prohibited by the Rules. *See Baker*, 432 F.3d at 1212 n.23 ("In fact, the [*Miami Herald*] articles are likely a reporter's account of what eyewitnesses reported; in other words, double hearsay forbidden by Rule 805.") This double hearsay problem is compounded by Mr. Johnson's own testimony that he does not specifically recall making the comments attributed to him in the *Sun* article, and that if he did in fact make them, they were made at the suggestion of

others at LFP and not based on his own personal knowledge of the matters commented upon. (Deposition of Mark Johnson at 11-12.)

LFP respectfully submits that the *Sun* article constitutes hearsay within hearsay, that there is no applicable hearsay exception that would cure its inadmissibility, and that it should be excluded under Fed. R. Evid. 801, 802 and 805.

IV. Conclusion

For all of the foregoing reasons, LFP respectfully requests that this Court exclude the Contested Evidence from the record and direct Plaintiff to refrain from making any reference to them, either through counsel or witnesses.

Respectfully submitted this 23th day of May 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing BRIEF IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE 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 23th day of May 2011.

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