

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MAUREEN TOFFOLONI, as)
Administrator and Personal)
Representative of the Estate)
of Nancy E. Benoit,)
)
Plaintiff,)

-vs-

LFP PUBLISHING GROUP, LLC,)
doing business as Hustler)
Magazine,)
)
Defendant.)

) Docket No. 1:08-CV-421-TWT
)
) June 14, 2011
) Atlanta, Georgia
) 9:29 a.m.
)
)
)

TRANSCRIPT OF THE JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE, AND A JURY

VOLUME II

APPEARANCES OF COUNSEL:

On behalf of the Plaintiff: Richard Decker
Francis Edwin Hallman, Jr.
HALLMAN & WINGATE

On behalf of the Defendant: Derek Bauer
Barry Armstrong
MCKENNA, LONG & ALDRIDGE

*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*

SUSAN C. BAKER, RMR, CRR
2194 U.S. COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GA 30303
(404) 215-1558

I N D E X

	<i>Page</i>
1	
2	
3	<i>Witness on Behalf of the Plaintiff:</i>
4	MARK JOHNSON - BY VIDEO DEPOSITION 175
5	JAMES MICHAEL DAUS
6	Direct (By Mr. Decker) 189
7	Cross (By Mr. Bauer) 200
8	Redirect (By Mr. Decker) 221
9	Recross (By Mr. Bauer) 221
10	LARRY FLYNT - BY VIDEO DEPOSITION 223
11	
12	<i>Witness on Behalf of the Defendant:</i>
13	CHRISTOPHER HELTON - BY VIDEO DEPOSITION 238
14	TYLER DOWNEY - BY VIDEO DEPOSITION 257
15	WILLIAM OTTEN - BY VIDEO DEPOSITION 310
16	DONNA HAHNER
17	Direct (By Mr. Bauer) 349
18	Cross (By Mr. Decker) 354
19	
20	
21	
22	
23	
24	
25	

1 (Proceedings held in Atlanta, Georgia, June 14, 2011,
2 9:29 a.m., in open court.)

3 THE COURT: Good morning, counsel.

4 MR. DECKER: Good morning, Judge.

5 MR. BAUER: Good morning, Your Honor.

6 THE COURT: Are you ready, Mr. Decker?

7 MR. DECKER: Yes, Your Honor. I have one point of
8 clarification about one of my witnesses this morning. It'll
9 take about five minutes of my time.

10 THE COURT: Okay.

11 MR. DECKER: If I may go forward?

12 THE COURT: All right.

13 MR. DECKER: Judge, I am asking for clarification of
14 the Court's ruling on the Plaintiff's motion in limine this
15 past Friday, namely, the Court's ruling for which I am
16 absolutely unclear on any testimony or argument concerning a
17 second videotape that may have been made at or about the time
18 of the videotape from which the Hustler images were extracted.
19 This is another videotape that everyone concedes was destroyed
20 on or about the day it was made. And, apparently, it was a
21 videotape of Nancy Benoit and her then husband who is my
22 witness this morning engaged in sexual activity.

23 It was, as I say, immediately destroyed. No one
24 except Mr. Daus has ever seen it. No one who is going to be
25 testifying in this case has ever seen it, seen the videotape.

1 No one knows exactly what it depicted because it has been --
2 it's been gone for 23, 24 years.

3 It is not the tape from which the images were
4 extracted that we are involved in in this lawsuit. It is
5 completely irrelevant to this case, and the only possible
6 purpose for injecting it into the case would be to try to
7 somehow damage or sully Mrs. Benoit's reputation. And I am
8 unclear as to the Court's ruling on that issue, and I seek
9 clarification because Mr. Daus will testify this morning before
10 the morning break I'm sure.

11 THE COURT: Mr. Bauer, you intend to get into that?

12 MR. BAUER: Very, very minimally, Your Honor. As you
13 may recall from our opposition to Mr. Decker's motion in
14 limine, we really don't have any interest in belaboring or
15 certainly sully Ms. Benoit's reputation. We really didn't
16 think that point was going to be relevant unless Mr. Decker
17 made it an issue in the case.

18 And now here is the problem. He told the jury in his
19 opening statement that this was a one-night mistake. And he's
20 now going to bring Mr. Daus here to testify live about it, and
21 the fact is that's not -- that wasn't true. So, unfortunately,
22 the first problem with Mr. Decker's request here is that he has
23 opened this door and the jury's got to have the full context of
24 the evidence. And, you know, he can't tell the jury it's one
25 thing when it's another. And he knew when he made that

1 statement what the evidence actually shows, and I think we have
2 the right to educate the jury. We certainly won't go any
3 further with it than the bare minimum necessary to disprove
4 that assertion.

5 Second, it's relevant only to the extent that
6 Mr. Daus testified and LFP's editorial assistant, Tyler Downey,
7 will testify that that was the reason Mr. Daus first called
8 Hustler. Now, Mr. Decker's just told the Court that video was
9 supposed to be destroyed and everybody thought it was
10 destroyed. But Mr. Daus wasn't so sure because he called
11 Hustler Magazine to ask them if that's what they had. And
12 Hustler didn't even know as the evidence will show that there
13 was such a tape until Mr. Daus told them. And that's also
14 going to go to his credibility about whether, you know, he
15 called Hustler with we will say honest intentions.

16 And so we don't intend to go any further than the
17 barest minimum reference to it. We don't need to describe it.
18 All we need to do is deal with it to address what Mr. Decker
19 said in his opening and Mr. Daus's motives for calling Hustler.

20 THE COURT: Mr. Decker, I will give you the last
21 word.

22 MR. DECKER: Judge, it has nothing to do with my
23 statement to the jury. I said that these photographs at issue
24 were a mistake and that she immediately tried to have it
25 rectified. I made no reference to the so-called sex tape

1 whatsoever because I thought and hoped that that matter had
2 been dealt with. Now I'm not so sure, and I'm glad I raised
3 the subject because they clearly intend to raise it with
4 Mr. Daus.

5 It is completely irrelevant. No one has seen it in
6 25 years. No one who is alive even knows what's on it except
7 for Mr. Daus. It has nothing to do with his credibility. It's
8 something that happened unrelated to the issues in this case,
9 and it's only for the purpose of sullyng her reputation. And
10 the Court has said this case is not about pornography; it's
11 about the value of these images that were used without
12 permission. And this videotape certainly has nothing to do
13 with that.

14 THE COURT: All right. I'll grant the Plaintiff's
15 motion in limine. I think any relevance of the existence,
16 making, content of the second videotape is outweighed by the
17 danger of unfair prejudice. And I will order you not to get
18 into that, Mr. Bauer.

19 MR. BAUER: Your Honor, as a point of clarification
20 on your order, do I understand that we cannot ask Mr. Daus if
21 there was a second encounter?

22 THE COURT: That's correct. That's correct.

23 MR. BAUER: So the jury can't even hear that she
24 posed twice in front of Mr. Samansky within a three-to-four-day
25 period?

1 THE COURT: No, sir.

2 MR. BAUER: Okay.

3 THE COURT: Are you ready, Mr. Decker?

4 MR. DECKER: Judge, my first witness is going to be a
5 videotaped deposition of Mark Johnson. In view of the judge's
6 rulings yesterday concerning the DVDs that were sold with each
7 issue, I have redacted that information from the videotape; and
8 I provided Mr. Bauer with a redacted transcript. And so with
9 that announcement, I'm ready to play.

10 I call Mr. Mark Johnson as an agent of the opposite
11 party for purpose of cross-examination, and he will appear by
12 video deposition which has been redacted in accordance with the
13 Court's order.

14 THE COURT: All right. So you are taking out the
15 discussion on page 8 through 9 about the DVD?

16 MR. DECKER: Yes, sir.

17 THE COURT: All right. Are you satisfied, Mr. Bauer?

18 MR. BAUER: Yes, Your Honor.

19 THE COURT: All right. We are ready for the jury.

20 (Jury entered the courtroom.)

21 THE COURT: Good morning, Ladies and Gentlemen.

22 Thank you for all being here on time so we could resume the
23 trial promptly this morning.

24 All right. Mr. Decker, call your next witness.

25 MR. DECKER: Your Honor, at this time the Plaintiff

1 would call for purpose of cross-examination an employee of
2 Hustler Magazine, name of Mark Johnson who is a resident at the
3 time of his deposition of California and will, therefore,
4 appear by video deposition.

5 THE COURT: Ladies and Gentlemen, in a civil case
6 like this, some witnesses' testimony may be presented in the
7 form of a deposition. What this means is that the witness
8 appears in the presence of a court reporter. The witness is
9 sworn just like they would be if they were sitting in the
10 witness stand. The lawyers may be present in the same room
11 with the witness or they may be in some other location.

12 Anyway, the lawyers question the witness just as the
13 witness would be questioned here in court; and that deposition
14 testimony is then presented to the jury. That can be done in
15 different forms. The transcript can be read to the jury. The
16 deposition can be videotaped, and that videotape can be shown
17 to the jury.

18 In any event, however it's presented, you are to
19 consider that testimony to the extent you are able to do so
20 just as if the witness was here in court testifying in your
21 presence here today. So that's what's about to happen, I think
22 a videotape deposition.

23 Mr. Decker?

24 MR. DECKER: Thank you, Your Honor.

25 (Videotaped deposition played in open court as

1 follows.)

2 - - -

3 VIDEOTAPED DEPOSITION OF MARK JOHNSON

4 - - -

5 THE VIDEOGRAPHER: Good morning. This is the
6 videotaped deposition of Mark Johnson. Today's date is April
7 13th, 2010. The time is 9:11 a.m.. This is the case of
8 Maureen Toffoloni as administratrix and personal representative
9 of the estate of Nancy Benoit versus LFP Publishing Group, LLC,
10 et al., case number of which is 1:08-CV-0421-TWT.

11 Counsel, please identify yourselves for the record.

12 MR. DECKER: Richard Decker for the Plaintiff,
13 Maureen Toffoloni.

14 MR. BAUER: Derek Bauer for Defendant LFP Publishing
15 Group, LLC.

16 MR. REINA: Jeffrey Reina, Lipsitz, Green, Scime,
17 Cambria for the Defendant.

18 THE VIDEOGRAPHER: And will the court reporter please
19 swear the witness.

20 (Witness placed under oath by the court reporter.)

21 BY MR. DECKER:

22 Q. Good morning.

23 A. Good morning.

24 Q. Give us your name, please.

25 A. My name is Mark Johnson.

1 Q. Mr. Johnson, my name is Richard Decker. I represent the
2 Plaintiff in this case, Maureen Toffoloni.

3 The deposition today is being taken pursuant to the
4 Federal Rules. All objections except as to the form of the
5 question and the responsiveness of the answer will be reserved.

6 MR. BAUER: Including relevance.

7 MR. DECKER: Including relevance.

8 BY MR. DECKER:

9 Q. Mr. Johnson, where do you live?

10 A. I currently live in Los Angeles, California.

11 Q. What is your educational background?

12 A. My educational background is after graduating from high
13 school I went to New York University for a few years in New
14 York, and then I transferred to an art school in Germany; and I
15 finished there. And that's the extent of it.

16 Q. Did you take a degree?

17 A. Not at NYU, but at the art school in Germany there was a
18 certificate. It's roughly the equivalent of a Bachelor of Arts
19 degree.

20 Q. And what did you do employment-wise after your certificate
21 from the art institute?

22 A. I worked at various jobs, primarily video editing, news
23 editing, writing, translating. All of this was in Germany.
24 And then when I moved -- I moved to Brussels, I did some
25 acting, I did some directing, more writing, translating and

1 journalism. And then I moved here and continued with my
2 journalism.

3 Q. What kind of films did you act in?

4 A. They were stage productions actually.

5 Q. Are you currently employed by LFP Publishing Group, LLC?

6 A. Yes, I am.

7 Q. When did you take that job?

8 A. I took that job, I believe, in June 2004.

9 Q. And what was your position then?

10 A. I was hired as research director.

11 Q. What were you called upon to do?

12 A. Fact check all content and find photographs to go with
13 copy if there were no photographs.

14 Q. And are you currently employed by LFP?

15 A. Yes, I am.

16 Q. And LFP does business as Hustler Magazine?

17 A. Yes.

18 Q. Okay. And what are your current duties?

19 A. I am still research director with the duties that
20 originally came with that position, and I'm also assistant
21 managing editor.

22 Q. What do you do as assistant managing director?

23 A. Assistant managing editor.

24 Q. I'm sorry.

25 A. That's okay.

1 With that I monitor deadlines. I monitor the flow of
2 content. It's roughly an editorial job to make sure everything
3 is coming in on time and that things move in a timely fashion
4 and things are completed.

5 Q. How many people do you supervise?

6 A. I don't supervise any personally.

7 Q. How do you describe the content of the genre -- you
8 understand that word, genre --

9 A. Yes, I do.

10 Q. -- how do you describe the content or genre of Hustler
11 Magazine?

12 A. It's a mixture of news articles and erotic content.

13 Q. Do you know what the word pornography means?

14 A. Yes, I do.

15 Q. What does that mean to you?

16 A. It generally means content that is explicit in nature,
17 sexually explicit.

18 Q. Would you describe Hustler Magazine as a pornographic
19 magazine?

20 A. It publishes -- it includes pornography, yes, but not
21 solely.

22 Q. Primarily pornography or primarily news, or how would you
23 describe it?

24 MR. BAUER: Object to form.

25 You can answer.

1 THE WITNESS: I tell you it's roughly half, half.
2 Half pornography, half other types of content -- feature
3 articles, articles about political matters, popular culture,
4 things like that.

5 BY MR. DECKER:

6 Q. Are you familiar with the March 2008 edition of Hustler
7 Magazine which contained images of a woman by the name of Nancy
8 Benoit?

9 A. Yes, I am.

10 Q. Mr. Johnson, did you give an interview to something called
11 The Sun on or about January the 30th, 2008, concerning the
12 March 2008 edition of Hustler Magazine?

13 A. I don't recall specifically giving an interview to The
14 Sun.

15 Q. Let me show you what I have marked as Plaintiff's Exhibit
16 1 to your deposition and ask you to --

17 MR. BAUER: Can I have copies of that by any chance?

18 MR. DECKER: I'm sorry. That's it. I don't have one
19 for myself. I don't know how that happened, but I don't. You
20 can take a look at it.

21 MR. BAUER: Yeah, I'd like to see it when you've had
22 a chance to look at it.

23 THE WITNESS: Okay.

24 BY MR. DECKER:

25 Q. Let me direct your attention to the highlighted portion of

1 the clipping which I will represent to you is a clipping that
2 I'm extracting myself from The Sun website and provided to you
3 in the deposition today and ask you to look at and read the
4 quote attributed to you out loud.

5 A. Do you want me to read it right now?

6 Q. Please.

7 A. Publishing the photos of Nancy Benoit was a no-brainer.
8 She was beautiful and popular. We knew millions of people
9 would want to see these pictures. The feedback has been huge
10 and overwhelmingly positive. Some questioned our decision.
11 But the piece was presented in a tasteful, respectful fashion;
12 and people recognize that.

13 Q. Did you say those words in words or substance?

14 A. I vaguely recall those words, yes. I vaguely recall that.
15 I don't know if I said it or if it was in an e-mail.

16 Q. But those are your words in words or substance to the best
17 of your recollection?

18 A. I'm not authorized as part of my job to give -- to speak
19 on behalf of the magazine. So if those words are attributed to
20 me, they would have been approved by my supervisor.

21 Q. I don't follow.

22 A. At the time we were doing some marketing efforts related
23 to this and other stories in Hustler Magazine, so we were
24 sending out press releases. And those would have been done in
25 conjunction with Bruce David, the editorial director, who would

1 have supervised all content that went out to the press. It's
2 not specifically part of my job to speak to the press. And as
3 such, I believe that this was something that was approved by
4 Bruce David and then sent to the journalist that was requesting
5 the quote.

6 Q. So did you say it or write it or not?

7 A. I don't recall specifically if I said it or if I wrote it.
8 I believe that the content was written together with Bruce
9 David at any rate, approved and revised by him. And it's
10 possible that it was then sent by me in an e-mail.

11 Q. So it represents your work product approved by your boss
12 that was sent to The Sun?

13 A. I -- as I said, I don't specifically recall. But it is
14 vaguely familiar. So I would say it is entirely possible, yes.

15 Q. Do you know John Roth or Simon Rothstein?

16 A. No, I don't recall those names.

17 Q. Have you ever spoken to them before or since this quote
18 that's attributed to you in The Sun?

19 A. I don't know. I don't think so.

20 Q. Do you know that they are the authors of that piece, the
21 clipping in which I have identified as Exhibit 1?

22 A. Yes.

23 Q. And you don't know the fellas?

24 A. No, I don't know them.

25 Q. What did you mean when you said or wrote that publishing

1 the photographs of Nancy Benoit was a no-brainer?

2 MR. BAUER: Object to form.

3 THE WITNESS: Well, I can surmise that I meant that
4 it wasn't necessarily the controversial opinion on our part.
5 It seemed like good content for the magazine. I would put it
6 that way.

7 BY MR. DECKER:

8 Q. That it was something that was appropriate and good for
9 Hustler to publish; is that the no-brainer part?

10 A. Yes, I think so.

11 Q. Who were the millions of people who you thought would want
12 to see the pictures of Nancy Benoit? Would these have been
13 regular Hustler customers, or were you thinking there was a
14 wider audience?

15 MR. BAUER: Object to form.

16 THE WITNESS: Well, I don't think that I was thinking
17 either one of those things at the time. As I said, I don't
18 know specifically that I wrote the word millions in there. If
19 I did, then it would be just a general term to refer to Hustler
20 readers and anyone else who would be exposed to the content
21 once it was published.

22 BY MR. DECKER:

23 Q. Are you familiar with Hustler Magazine's circulation
24 numbers?

25 A. Vaguely familiar, yes.

1 Q. Well, in round figures, what are they per month?

2 And I'm not going to hold you to it. You know, in your
3 position as managing editor, I'm just wondering if you know.

4 A. Right. Well, the last numbers that I'm familiar with
5 which I'm not very familiar with to be honest because it's not
6 part of my position but maybe roughly 300,000.

7 Q. 300,000 per month?

8 A. I believe so. But, again, I'm not -- I don't wish to be
9 quoted or commit to those numbers as that's not part of my
10 responsibility.

11 Q. Well, as you sit here today in your thinking of 300,000,
12 is that subscribers or total sales or what?

13 A. I couldn't say.

14 Q. Okay.

15 A. I don't --

16 Q. You just don't know?

17 A. Yeah.

18 Q. All right. You also said or wrote in that quote that's
19 attributed to you in connection with it being a no-brainer --
20 did you or anyone to your knowledge ever seek permission from
21 Nancy's family or her estate to publish those photographs?

22 MR. BAUER: Object to form.

23 THE WITNESS: I never did.

24 BY MR. DECKER:

25 Q. Do you know anybody in Hustler Magazine who did?

1 A. I can't say for certain if anyone did, but I don't know
2 anyone who did.

3 Q. Okay. Did you think about that at all, you personally as
4 managing -- assistant managing editor?

5 MR. BAUER: Object to form.

6 THE WITNESS: I don't believe so. I mean, generally
7 we try to think about all possibilities as far as printing
8 photographs and what we need to do to do so.

9 BY MR. DECKER:

10 Q. Right.

11 A. So if it appears to be necessary, yes. But as I
12 mentioned, I'm not -- I wasn't directly involved with the
13 acquisition of these photographs.

14 Q. Okay. Well, at what point in the process did you engage
15 your brain or not engage your brain in the decision to publish
16 the photographs?

17 A. I don't believe I ever engaged my brain in the decision to
18 publish the photographs as I don't make the decision to publish
19 the photographs.

20 Q. Well, you told me earlier as the fact checker you try to
21 acquire photographs to be published?

22 A. Yes, I do.

23 Q. But not these?

24 A. Not these. I was not involved in this.

25 Q. Okay. So the decision not to seek permission to publish

1 these photographs was not part of your process?

2 A. Not part of my personal or professional process, no.

3 Q. All right. Did you ever think it was unlikely that her
4 estate, that Nancy's estate would give permission to photograph
5 -- publish these photographs? Did it ever enter your mind?

6 MR. BAUER: Object to form.

7 THE WITNESS: I don't recall it ever entering my
8 mind. It's possible.

9 BY MR. DECKER:

10 Q. Okay. Did you ever see a letter from me as the lawyer for
11 Maureen Toffoloni who is Nancy's mother and the administrator
12 of her estate -- did you ever see a letter from me on or about
13 January the 16th, 2008, which in substance said, Don't do it,
14 don't publish those photographs?

15 MR. BAUER: Object to form.

16 THE WITNESS: No, I never saw --

17 BY MR. DECKER:

18 Q. You never saw that?

19 A. I don't recall such a letter, no.

20 Q. Okay. Do you know in your position when this -- when this
21 edition, March the 2008 edition would have been available to
22 the public?

23 A. I knew it at the time. I don't know the exact date now.

24 Q. You forgot?

25 A. Yes.

1 Q. Okay. Is there a general rule as to when a magazine is
2 available in the monthly sequence like when is the April 2008
3 edition?

4 MR. BAUER: Object to form.

5 THE WITNESS: It's -- there's generally lead time of
6 a few months.

7 BY MR. DECKER:

8 Q. A few months?

9 A. (Witness nods head.)

10 Q. Explain that to me.

11 A. Well, we produce the magazine. And then it's printed, and
12 then it's shipped out to distributors, and then it goes on
13 sale. And there's at least two months, I believe, from the
14 time that we finish it here editorially to the time when it
15 goes on sale. But that's not part of my job to really monitor
16 that.

17 Q. Okay. So you --

18 A. Once the magazine is finished at the editorial level and
19 it goes into actual production and printing, I don't really
20 have anything to do with it anymore.

21 Q. So you don't have any information for me today about when
22 the March 2008 edition would have been available to customers?

23 A. I can't give you any -- I can't give you exact
24 information. Like I said, it would have been probably a couple
25 of months after we had finished it here editorially.

1 Q. And when was that?

2 A. Well, that would have been two months before it went on
3 sale which is probably a couple of months, maybe a few months
4 before the on-sale date. But I don't want to commit to exact
5 -- exact dates because I just don't have them in my head right
6 now.

7 Q. Okay. Do you know if there was any effort by anyone
8 within Hustler Magazine to stop magazine sales of the edition
9 that had the Nancy Benoit images after the magazine got a
10 letter from me?

11 A. I don't know when the magazine got a letter from you. I'm
12 not familiar with your letter.

13 Q. But you don't know of any effort -- apart from when they
14 got the letter, you don't know of any scuttlebutt or activity,
15 any effort by Hustler to stop sales of this particular edition
16 after they got a letter from a lawyer?

17 A. I do know that there were certain -- distribution was
18 stopped, yes.

19 Q. Well, tell me about that.

20 A. I don't really know anything about that. I think that it
21 had -- it possibly had to do with not sending it to foreign
22 licensees. But, again, that's simply what I heard. But I
23 wasn't directly involved in any of that, so...

24 MR. DECKER: Thank you. Nothing further.

25 MR. BAUER: Nothing for me. Thanks, Mark.

1 (Deposition of Mark Johnson concluded.)

2 THE COURT: Call your next witness.

3 MR. DECKER: Your Honor, at this time Plaintiff calls
4 Jim Daus who I believe is in the witness room or in the
5 hallway.

6 Your Honor, while my assistant is fetching the
7 witness, I would offer Plaintiff's Exhibit 16 which was
8 Plaintiff's Exhibit 1 in the video deposition. It's the
9 article containing the quote that was discussed by the witness.

10 MR. BAUER: Your Honor, we will object to the
11 admission of that exhibit. It's hearsay on multiple levels.
12 To the extent any part of it's admissible because it's an
13 admission of Mr. Johnson from his time as an employee of
14 Defendant, the jury's heard that testimony. There's no contest
15 to that. But the actual article itself contains a lot more
16 extraneous information that's all hearsay. Nobody from The Sun
17 is here to testify. We don't believe this is an admissible
18 document.

19 THE COURT: All right. I sustain the objection to
20 Plaintiff's Exhibit Number 16. The admissible portion of it's
21 already been admitted through the testimony of the witness.
22 Admission of the article itself would be merely cumulative as
23 to the admissible portions.

24 THE CLERK: Sir, if you will raise your right hand,
25 please.

1 (Witness placed under oath by the clerk.)

2 THE CLERK: Please have a seat. State your name for
3 the record.

4 THE WITNESS: James Michael Daus.

5 - - -

6 JAMES MICHAEL DAUS,

7 having been first duly sworn, was examined and testified as
8 follows:

9 DIRECT EXAMINATION

10 BY MR. DECKER:

11 Q. Good morning, Mr. Daus.

12 A. Good morning.

13 Q. As I think you know, my name is Rick Decker; and I
14 represent Maureen Toffoloni who is the lady seated there at
15 counsel table.

16 You know Mrs. Toffoloni, don't you?

17 A. Yes, I do.

18 Q. First of all, Mr. Daus, tell us where you live, not your
19 address but where you live.

20 A. In Deland, Florida.

21 Q. All right, sir. And what is your occupation?

22 A. I am a retail sales manager for Tri-State Distributors.

23 Q. What do you do in that job?

24 A. We distribute natural and propane gas products across the
25 southeast United States.

1 Q. How long have you been with that company?

2 A. Between 13 and 14 years.

3 Q. Are you married, sir?

4 A. Yes, I am for 22 years.

5 Q. And do you have children?

6 A. I have one son Jacob. He is 14.

7 Q. All right. Were you once married to Nancy Benoit?

8 A. Yes, I was.

9 Q. And when was that marriage?

10 A. 1980 through '85 approximately.

11 Q. All right, sir. And how old were you and how old was she
12 at the time you got married?

13 A. 18 and 17. I was 18.

14 Q. At some point in your marriage to Nancy, did you and she
15 decide that she might become a model or be involved in some
16 aspect of entertainment or show business?

17 A. Yes, sir.

18 Q. All right. What kinds of things did you and -- well,
19 first of all, what was your role in that relationship with
20 respect to her career?

21 A. I was her husband and, I guess, her manager.

22 Q. All right. What are the kinds of things that you and she
23 got involved in in efforts to advance her career?

24 A. Beauty contests such as bikini contests, stuff like that.

25 Q. Where did that happen?

1 A. Hawaiian Tropic in Florida, places like that, some of the
2 local nightclubs, things like that.

3 Q. At some point did you and she become acquainted with a
4 person by the name of Mark Samansky?

5 A. Yes, we did.

6 Q. And what do you recall Mr. Samansky's job being at the
7 time?

8 A. He was a radio deejay in Orlando.

9 Q. All right. How did you and Nancy come to know him?

10 A. He was an emcee of a beauty contest at a club in Orlando.

11 Q. At any point in your relationship with Mr. Samansky, did
12 he make a proposal to you and/or Nancy about a career move for
13 her?

14 A. After we got to know him, yes.

15 Q. And what generally was that?

16 A. He said that he had connections at Penthouse and Nancy may
17 want to consider being a nude model.

18 Q. And what was your and Nancy's reaction to that?

19 A. The first couple times he mentioned it we said we are not
20 interested.

21 Q. And what was Nancy's reaction?

22 A. Definitely not interested.

23 Q. So how did this process advance?

24 A. After a while, we ended up going out to dinner with Mark
25 Samansky and his wife in Altamonte Springs right near his

1 condo. And from there we went to Mark's condo right after
2 dinner.

3 Q. And what happened on this occasion?

4 A. We drank a little too much, and we ended up making love on
5 the floor of his condo.

6 Q. All right. Were some photographs taken of Nancy at some
7 point?

8 A. He videoed the incident.

9 Q. Have you seen the edition of Hustler Magazine containing
10 images of Nancy Benoit?

11 A. Yes, sir, I have.

12 Q. Let me show you what has been marked as Plaintiff's
13 Exhibit 2 and ask you if you can identify it.

14 A. Yes, I can.

15 Q. And what is that document, sir?

16 A. That is the issue of Hustler Magazine that was published
17 in March of 2008.

18 Q. And does it contain images of Nancy Benoit?

19 A. Yes, it does.

20 Q. Were these images taken by or on behalf of Mark Samansky?

21 A. They were taken by Mark Samansky as far as I know.

22 Q. Was there any other photographer present on this occasion
23 as far as you know?

24 A. No, sir, not at that occasion.

25 Q. All right. The photographs that are Plaintiff's Exhibit

1 2, you think -- you are saying these extracts from a videotape
2 were taken by Mark Samansky?

3 A. They were definitely taken by Mark Samansky.

4 Q. Okay. Do you recall what you and Nancy did or said after
5 this photo shoot at which this videotape from which these
6 extracts were taken said or did? Do you recall that?

7 A. Yes. We both felt we did something really, really dumb.
8 We were young and immature and didn't know any better, and we
9 didn't even talk most of the way home. And when we got home,
10 we finally decided that we better call Mark and tell him to
11 make sure he destroys the videotape.

12 Q. All right. Did you talk to him about any photographs that
13 might have been taken during this occasion?

14 A. Yeah, we wanted him to destroy everything.

15 Q. What did you say? What are the words that you used if you
16 can recall?

17 A. We said, We think we made a mistake; we shouldn't have
18 done that, and we want to make sure that everything is
19 destroyed. And he said it was.

20 Q. Did you know on this occasion when you left his home that
21 a videotape had been made in addition to still photographs?

22 A. Yes, I did.

23 Q. And do you recognize in Plaintiff's Exhibit 2 scenes from
24 -- that would have been captured on videotape?

25 A. Yes.

1 Q. So when you and Nancy left Mr. Samansky's home on that
2 occasion, you were aware that a videotape had been made in
3 addition to whatever photographs had been made?

4 A. That's correct, yes.

5 Q. And did you have any specific instructions to Mr. Samansky
6 about the videotape itself?

7 A. That it needs to be destroyed immediately.

8 Q. All right. Did you as her manager or to your knowledge
9 she ever give anyone permission to use images from that photo
10 shoot in any way?

11 A. No, sir, definitely not.

12 Q. Did you as her manager or she to your knowledge ever sign
13 a release or a consent?

14 A. We definitely neither one of us did, no. No, sir.

15 Q. All right. When did you find out that Mark Samansky had
16 not destroyed or apparently had not destroyed the videotape
17 that was being made at the same time the photographs were being
18 taken and had kept it for some 20-something years and then sold
19 extracts of it to Hustler Magazine? When did you find that
20 out?

21 A. Approximately, January 1st for the first week of January
22 in 2008.

23 Q. What did you do?

24 A. What I tried to do is -- I didn't know what to do. I had
25 Bill Otten, a friend of mine and acquaintance, called me and

1 said, You better look at this what I found on the internet. He
2 found where there was a story about Nancy's pictures would be
3 published nude, and I knew right what it was right away because
4 that's the only time she would ever do anything like that or we
5 did anything like that. And so I didn't know what to do, so I
6 looked up on the internet when -- after I found the article.
7 And I found a phone number for Hustler, and I called Hustler
8 Magazine.

9 Q. And do you recall again when, at or about what time this
10 was, not time of day but month and day?

11 A. It might have been -- I think it was actually late
12 December, not January 1st, late December because I know that
13 they did end up mailing me two copies of the magazine; and
14 that, I think, was postmarked on January 2nd. So it had to be
15 in late December.

16 Q. So when you found Hustler's telephone number on the
17 internet and you made this call, who did you talk to?

18 A. A receptionist. I told her who I was. And I didn't know
19 what I was doing or who to call, talk to. I was very upset,
20 and I asked for Larry Flynt. And they said, Hold on, please.
21 And they came back and, He's not available right now. Can I
22 take a name and number?

23 Not that I knew what I would even tell Mr. Flynt, but I
24 gave him my name and phone number. And within 30 seconds,
25 somebody named Tyler called me back like 30 seconds later

1 'cause he knew who I was right away.

2 Q. So Mr. Tyler, this person by the name of Tyler called you
3 back on the day in which you initiated this call to Hustler
4 Magazine?

5 A. Yes, immediately.

6 Q. All right. And did he identify himself or his position at
7 Hustler?

8 A. I don't remember what his position was. I think maybe --
9 no, I don't remember. I don't know what he said about the
10 position.

11 Q. What did he say to you when he called you back on this
12 day?

13 A. He did know who I was right away. He knew what I was
14 calling about, and he wanted to know what I needed.

15 Q. Was this conversation to the best of your knowledge,
16 Mr. Daus, before the March 2008 edition had hit the newsstand?

17 A. He told me it would be ten days to two weeks before it
18 would be released.

19 Q. So what was the substance of your conversation with this
20 Tyler person?

21 A. I was trying to protect Nancy and myself 'cause I knew
22 what the videos were, and I was trying to find out if there's
23 any way possible that I can take care of the situation. I was
24 trying to -- I knew where it came from. I knew it came from
25 Mark Samansky. So I asked Tyler, I said, I know where you got

1 it from. He said, Yes, you do. I said, You got it from Mark
2 Samansky. He said, Yes, we did.

3 And I asked him, Is there any way I can get ahold of Mark
4 Samansky? He kind of laughed and said, Oh, I'm not going to
5 give you that information. Why? Are you going to go after
6 him? I said, No.

7 What I was trying to do is hopefully save the
8 situation and maybe purchase the videos and pictures from
9 Samansky before he sold them. I didn't know how far it was or
10 it was too late or whatever. They said it would be a couple
11 weeks. It was evidently too late, but it was a slim hope. So
12 that's what I was trying to do from Tyler.

13 And I would have paid Samansky probably five times
14 what Hustler paid him to get -- destroy that and to protect the
15 Toffolonis and Nancy, God rest her soul, and myself.

16 Q. At the end of your conversation with this Tyler person,
17 did you in words or substance tell him not to publish
18 photographs of Nancy Benoit?

19 A. Yes. I told him it was illegal. We never signed a
20 release or we never gave anybody permission.

21 Q. Did he --

22 A. He said that they checked with their legal department. It
23 was all legal 'cause it was newsworthy is what he told me.

24 Q. Did you pretend, Mr. Daus, to be interested in selling
25 photographs of Nancy to Hustler Magazine?

1 A. Yes, I did. I said I was trying to get the amount that he
2 sold or purchased the photographs from Mark Samansky 'cause I
3 was trying in any way possible to get this stopped, and I was
4 going to try to get ahold of Mark Samansky and purchase the
5 photographs myself. And I didn't know what they paid. I
6 figured maybe if he gave me some indication I would know what
7 to offer Mark Samansky.

8 Q. Did you really ever intend to sell anything concerning
9 Nancy to Hustler Magazine?

10 A. There's no way on Earth I would ever do anything like that
11 to Nancy and disrespect her that way. I don't have authority
12 or permission to use her images or pictures. You know, and
13 alls I had in my possession were a few family pictures, a
14 couple wedding pictures and some for professional pictures
15 which were fully dressed. And one -- I did have one picture
16 that survived that photo shoot, and that's it. I didn't even
17 have anything to sell.

18 Q. Did you ever -- have you ever sold any photographs
19 containing an image of Nancy Benoit?

20 A. No, sir.

21 Q. I have asked you to look at Plaintiff's Exhibit 2. And
22 having done so, are these the images that you asked this Tyler
23 person at Hustler Magazine to destroy?

24 A. Yes, I did.

25 Q. Mr. Daus, you understand that the Court has ruled

1 conclusively that Hustler Magazine by publishing these images
2 as set forth in Plaintiff's Exhibit 2 violated Nancy's and her
3 estate's right of publicity?

4 Do you understand that?

5 A. Yes, sir.

6 Q. Do you understand that that's what this lawsuit is all
7 about?

8 A. Yes, sir.

9 Q. Do you have anything personally to gain from this lawsuit?

10 A. No, sir.

11 Q. Do you have any interest in this lawsuit at all?

12 A. No, sir.

13 MR. DECKER: Thank you, Your Honor.

14 THE COURT: Mr. Bauer, you take the position that the
15 door's been opened on a certain subject matter?

16 MR. BAUER: We'll be very respectfully limited.
17 There are some confusion issues that now need to be cleared up
18 about what session those images came from because I do not
19 believe the testimony that was given was accurate on that fact.
20 But we don't need to go into details.

21 THE COURT: All right. I reverse my ruling earlier
22 this morning. The door's been opened.

23 Cross-examination, Mr. Bauer?

24 MR. BAUER: Yes, Your Honor.

25

- - -

CROSS-EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MR. BAUER:

Q. Good morning, Mr. Daus.

A. Good morning, sir.

Q. We have met before. My name's Derek Bauer. You remember we met at your deposition over a year ago in Deland?

A. Yes, sir.

Q. My colleague, Darrell Solomon, took most of the questioning.

Do you remember that?

A. Yes, sir.

Q. I asked you a few questions.

You remember those?

A. Yes, sir.

Q. And you were under oath?

A. Yes, sir.

Q. You were telling the truth?

A. Yes, sir.

Q. Good. Because I am a little confused about some of the testimony that you just gave us that I'd like to ask you about.

One of the questions that Mr. Decker asked you was about whether Ms. Benoit had ever posed nude other than these incidents. You told us that that was the only time she would ever do anything like that. That was your testimony, right?

MR. DECKER: Objection, Your Honor. That was not a

1 question that I asked. That's misstating the question.

2 THE COURT: Overruled.

3 BY MR. BAUER:

4 Q. I will rephrase it.

5 Mr. Daus, you told the jury that you knew immediately that
6 the images that Hustler published of Nancy when you heard there
7 were going to be nude and partially nude images of Nancy
8 published, you knew immediately what those came from because
9 that was the only time in her life she would ever do anything
10 like that. I think that's the quote.

11 Is that your testimony?

12 A. Yes. But it was twice. That's what you are getting to.

13 Q. No, sir. I'll tell you when I am getting to something.

14 A. Okay.

15 Q. My point is you don't know anything about what Nancy
16 Benoit did in her private life or in her career after you got
17 divorced, and that's what you told us in your deposition?

18 A. That is correct, yes, sir.

19 Q. So when you tell the jury you knew that was the only time
20 in her life she would ever do anything like that, that's
21 entirely speculative and you don't know that for a fact?

22 Let's just clarify that.

23 A. I know up until we were divorced.

24 Q. And that was in 1985?

25 A. Yes, sir.

1 Q. Okay. Thank you.

2 Now, after Ms. Benoit's death, there was intense media
3 interest in her life and career, was there not?

4 A. Yes, sir.

5 Q. And you hadn't been a part of her life at that point for
6 25 years?

7 A. That is correct.

8 Q. But you got so many calls from the media, from various
9 media outlets that you had to turn off your phone?

10 A. That is correct.

11 Q. You got calls from ESPN?

12 A. Yes, sir.

13 Q. Your sister got calls from ESPN?

14 A. Yes, sir.

15 Q. You got calls from CNN?

16 A. Uh-huh.

17 Q. Time Magazine?

18 A. (Witness nods head.)

19 Q. Is that right?

20 A. Yes, sir.

21 Q. Life Magazine?

22 A. Yes.

23 Q. People Magazine?

24 A. Yes.

25 Q. The Daytona News Journal?

1 A. Yes.

2 Q. The Orlando Sentinel?

3 A. Correct.

4 Q. And more?

5 A. Yes.

6 Q. And you gave an interview to the Daytona News Journal?

7 A. Yes, I did.

8 Q. And you gave an interview to ESPN?

9 A. Yes, I did.

10 Q. And you talked to ESPN about Nancy Benoit's early career
11 choices before she ever became a wrestler?

12 A. Yes.

13 Q. And ESPN wrote about that part of her life in a news
14 article?

15 A. Correct.

16 Q. And you talked to ESPN about how she dropped out of high
17 school to marry you?

18 A. Yes, sir.

19 Q. And how on the weekends you would go watch wrestling
20 matches?

21 MR. DECKER: Your Honor, I'm going to object to this
22 line of questioning as irrelevant and immaterial to any issue
23 in the case.

24 THE COURT: Overruled.

25 BY MR. BAUER:

1 Q. You talked to ESPN about how on the weekends you and Nancy
2 would go watch wrestling matches?

3 A. Correct.

4 Q. How you called her becoming a celebrity wrestler, quote --
5 your words -- fate 'cause she was in the right place at the
6 right time to meet Bill Otten and Kevin Sullivan, and they
7 helped launch her career?

8 A. Correct.

9 Q. You talked about how her burgeoning wrestling career
10 caused you to suggest a divorce?

11 A. Yes, I did.

12 Q. And that ESPN story was posted on ESPN's website?

13 A. Correct.

14 Q. It's still there?

15 A. Correct.

16 Q. And you have read the article?

17 A. Yes, sir.

18 Q. You actually brought a copy of it to the deposition we
19 took of you?

20 A. Correct.

21 Q. And you remember the article?

22 A. Yes, sir.

23 Q. You remember it well, and you were quoted extensively?

24 A. Yes.

25 Q. And Mr. Decker here was also quoted in that article,

1 wasn't he?

2 A. I don't remember that.

3 Q. You don't remember.

4 You don't remember that Mr. Decker was quoted discussing
5 the Toffolonis' relationship with Chris Benoit? You don't
6 recall that?

7 A. I don't recall that part of the article, no. I haven't
8 read the article, sir, in probably a couple years or at least
9 since the deposition.

10 Q. Since the deposition a year ago?

11 A. Yes.

12 Q. But you do recall the article had pictures published with
13 it?

14 A. Yes.

15 Q. Pictures of the house?

16 A. Yes, yes.

17 Q. Pictures of Chris Benoit?

18 A. Correct.

19 Q. Okay. Now, I do want to talk to you a little bit about
20 the photo shoot; and I want to make sure we are clear on which
21 photo shoot the images that are in Exhibit 2 came from because
22 there were two different sessions at Mark Samansky's house?

23 A. That's correct.

24 Q. And the first session is, I think, the one that you
25 described to the jury?

1 A. That's correct.

2 Q. And there was a videotape made?

3 A. Correct.

4 Q. And the only people present if I understand it from your
5 deposition testimony were you and Nancy Benoit, Mark Samansky
6 and his wife?

7 A. That is correct.

8 Q. And Mark Samansky videotaped an encounter?

9 A. Correct.

10 Q. And then it was that videotape that you contacted him very
11 quickly afterwards and said, We want that destroyed, don't do
12 anything with that videotape?

13 A. Correct.

14 Q. And then there was another session the next day?

15 A. No. It was between three and four days and a week later.

16 Q. So three or four days after that first encounter you had
17 the second session at Mr. Samansky's house?

18 A. Correct.

19 Q. And that's the session where you and Nancy were to --
20 well, Nancy, excuse me -- was to pose nude and partially nude
21 for photographs that were ultimately going to be considered for
22 publication in Penthouse Magazine or the like?

23 A. Correct.

24 Q. Okay. And at that second shoot there was a professional
25 photographer present, Chris Helton?

1 A. Correct.

2 Q. And you and Nancy were also present. Obviously, Nancy
3 was; but you were there too?

4 A. Yes.

5 Q. And you and Nancy brought your friend, Bill Otten?

6 A. That is correct.

7 Q. And he was a professional wrestling photographer?

8 A. Correct.

9 Q. He also took some pictures --

10 A. Yes, sir.

11 Q. -- at that shoot?

12 And Mr. Samansky and his wife were also there?

13 A. Correct.

14 Q. And at that shoot --

15 A. I'm not sure if his wife was there. I don't think she was
16 there.

17 Q. Okay. Mr. Samansky was there certainly?

18 A. Yeah.

19 Q. No question.

20 And Mr. Helton and Mr. Otten were taking still photographs
21 with their camera?

22 A. Yes.

23 Q. And Mr. Samansky was videotaping the photo shoot?

24 A. Correct.

25 Q. And it was from that photo shoot, that second session

1 where both Mr. Otten and Mr. Helton, the two professional
2 photographers, were present that those images that were
3 captured on that videotape that Hustler ultimately obtained
4 images from, that's where those images derived?

5 A. Definitely all the pictures on page -- I guess that would
6 be 3 or page 41, the page before that possibly are from the
7 first one. It's hard to tell.

8 Q. Okay.

9 A. They are so grainy and old that I don't know for sure
10 after 30 years.

11 Q. Understood.

12 A. But either way, he was told to destroy everything.

13 Q. We will get there.

14 All but one of those images you are certain came from the
15 videotape from the second shoot where the professional
16 photographers were present?

17 A. All but two.

18 Q. All but two.

19 And you are just not sure about the other two?

20 A. You know, they could be from -- all from the second photo
21 shoot. I'm not sure.

22 Q. Okay. Thank you.

23 Now, I think you explained that at the time of the photo
24 shoot you and Nancy had been traveling around Florida. She was
25 -- you called them beauty contests and bikini contests. She

1 was also participating in wet T-shirt contests?

2 A. Yes, she did one or two of those.

3 Q. Well, if you recall at your deposition, I think you told
4 us she had done 15 to 18?

5 A. Total contests, yes.

6 Q. So that included wet T-shirt and bikini contests?

7 A. And beauty contests, yes.

8 Q. And, of course, you both thought she had talent?

9 A. Yes.

10 Q. You both wanted her to break into the modeling business?

11 A. Correct.

12 Q. And you didn't know what kind of model she could be; you
13 thought she might be a nude model?

14 A. We had no idea either way. We were young and didn't have
15 a clue.

16 Q. But you certainly considered the possibility that she
17 might become a nude model?

18 A. Correct.

19 Q. And that is what led to the Samansky photo shoot -- we
20 don't need to talk about the first incident anymore -- the
21 second one where the professional photographers were present?

22 A. Right.

23 Q. Three to four days later you went back and you posed for
24 those or she did?

25 A. Correct.

1 Q. And it was the desire to become at that point a nude model
2 that was the instigation for that photo shoot?

3 A. It was a trial to see if she would like it and if the
4 photos would come out decent enough for us to be able to or
5 want to send them to Mark Samansky's supposed ties with
6 Penthouse.

7 Q. Now, Mr. Decker in his opening statement told the jury
8 that Nancy had to be talked into that photo shoot; and I think
9 you told the jury that Mr. Samansky made the proposal. But you
10 told us in your deposition that it was both your and Nancy's
11 idea.

12 Do you remember that?

13 A. It wasn't our idea. We were talked into it by Samansky.
14 It was his idea. But we did talk about it, and we figured we'd
15 give it a shot and see how the pictures came out.

16 Q. Well, we asked you all sorts of questions about whose idea
17 it was to pose in those photographs in your deposition. I
18 think you remember that?

19 A. Yes.

20 Q. And if you'd like, I can show you a clip from your
21 deposition to help you remember.

22 A. It's no problem. If I made a mistake, sir, I made a
23 mistake.

24 Q. So if you told us in your deposition that it was your idea
25 and Nancy's idea together, that you both talked about it quite

1 a bit, that was a mistake, that testimony?

2 A. We did talk about it quite a bit, but the idea would come
3 from Mark Samansky.

4 Q. Okay. Now, Nancy participated in the photo shoot
5 voluntarily, nobody suggesting she was coerced, right?

6 A. That's correct.

7 Q. And she was enthusiastic about it, as were you?

8 A. Yes. Apprehensive.

9 Q. But enthusiastic?

10 A. Yes.

11 Q. I think you told us both Chris Helton and Bill Otten took
12 pictures at that photo shoot?

13 A. Yes. We took Bill Otten with us. He wasn't invited.
14 Bill Otten was a good friend of ours from wrestling, wrestling
15 photographer. And we were scared. We were scared after what
16 happened the nights earlier that something bad might happen,
17 and we wanted someone there to protect us and to watch out for
18 us.

19 Q. And you thought that if those pictures produced perhaps
20 down the road a centerfold in Penthouse for Nancy she might
21 make as much as \$10,000 for those pictures?

22 A. That's what Mark Samansky told us.

23 Q. Now, you told the jury that you and Nancy Benoit wanted
24 all of those images destroyed?

25 A. Yes, we did.

1 Q. And please refresh my recollection. When did you ask or
2 Nancy ask to your knowledge Mark Samansky to destroy the images
3 taken not from the first event, from the second one, the
4 professionally shot photo shoot?

5 A. We did it twice, approximately twice. I think it was
6 twice. A few days later and then a couple weeks later.

7 Q. Okay. And you understood that Mr. Samansky had the
8 videotape from that photo shoot?

9 A. Yes.

10 Q. And you understood that your friend, Bill Otten, had his
11 images that he took from that photo shoot?

12 A. Correct.

13 Q. And you understood that another professional photographer,
14 Chris Helton, had his photographs that he took from that photo
15 shoot?

16 A. Correct. Mark Samansky said that he had everything from
17 Chris Helton.

18 Q. Oh, he did?

19 Okay. And you never followed up with Mr. Samansky after
20 that second conversation two, three weeks later to confirm they
21 were destroyed?

22 A. That was the last time.

23 Q. That was the last time you saw him for years and years and
24 years?

25 A. That's correct.

1 Q. And you never mentioned it to him again?

2 A. No, sir.

3 Q. Now, you never asked Chris Helton to destroy his pictures?

4 A. I didn't know Chris Helton. No, I did not.

5 Q. And you never asked him to destroy his negatives?

6 A. No, I did not.

7 Q. And, of course, you and Nancy let Bill Otten keep some of
8 his images?

9 A. Yes, we did.

10 Q. And, of course, you let Chris Helton keep all of those
11 that he had?

12 A. We didn't know Chris Helton, didn't know how to get ahold
13 of him.

14 Q. Well, you knew how to get ahold of him, didn't you? You
15 knew you could go right through your friend, Mark Samansky?

16 A. Mark Samansky changed his phone number as far as I know,
17 so we never could get ahold of him again.

18 Q. So it didn't occur to you to try to find him?

19 He was a deejay?

20 A. No, we didn't. We were very young and immature, didn't
21 know what we were doing. We made a mistake. Again, we were
22 very young. And we never thought that 25 to 30 years later I
23 would be sitting here on the stand with something like this in
24 front of me.

25 Q. Fair enough.

1 But let's also be fair. You made one mistake, and then
2 three or four days later you made another; is that what your
3 testimony is?

4 A. That's correct.

5 Q. Okay. Now, so we know that you let Chris Helton keep his
6 photographs. We know you let your friend, Bill Otten, keep
7 some of his. We understand you asked Mr. Samansky according to
8 your testimony to destroy the videotape. And you kept some of
9 those images for yourself?

10 A. I have one.

11 Q. Even after your divorce?

12 A. Yeah. It was up in the attic, yes.

13 Q. And you still have it?

14 A. Yes. It was returned back to me. And, yes, I still have
15 it.

16 Q. And that is the image -- that is an image from the same
17 photo shoot that was professionally shot by Chris Helton and
18 Bill Otten?

19 A. Yes.

20 Q. A nude image of Nancy Benoit?

21 A. Yes, it is.

22 Q. And that is the image that you offered to sell to Hustler
23 Magazine in the conversation with Tyler that you just described
24 to the jury?

25 A. I did not offer to sell anything to Tyler.

1 Q. Well, if I understood your testimony, you said you
2 pretended to offer to sell it to Tyler?

3 A. Basically, yes. But I had no intention of selling
4 anything to anybody.

5 Q. I understand.

6 But you don't contend and it's not your testimony that
7 Hustler knew you were pretending to offer to sell that image to
8 Hustler?

9 A. That's correct.

10 Q. And you called Hustler 'cause you thought they might have
11 images from that first event?

12 A. Correct.

13 Q. That's what prompted your call to Hustler?

14 A. Correct.

15 Q. Okay.

16 A. Well, for both events because I was worried about Nancy
17 also. It was both.

18 Q. In that conversation with Tyler, you asked him if you were
19 entitled to any money for the images that Hustler had
20 published?

21 A. Absolutely not.

22 Q. And you told Hustler that you had more pictures?

23 A. Yes, in an attempt to try to get photos from Mark
24 Samansky.

25 Q. And you asked him if they wanted to buy them from you?

1 A. I did not. That never came out of my mouth to actually
2 buy them from me. I asked him what they were worth because I
3 was trying to get the amount, the money amount that they paid
4 Mark Samansky.

5 Q. Because you wanted to go to Mark Samansky and buy what
6 other images he had, so that was your motivation for asking
7 Hustler how much they would pay?

8 A. Yes. I wanted everything destroyed and finished.

9 Q. You never offered to buy Hustler's pictures?

10 A. No. They wouldn't sell them to me.

11 Q. But you didn't ask?

12 A. No.

13 Q. And you never contacted Mark Samansky to ask if you could
14 buy them from him as you have testified was your reason for
15 asking Hustler?

16 A. Couldn't find him.

17 Q. Well --

18 A. I found out he was in Denver, Colorado. That's as far as
19 I got. And by then the magazines were published.

20 Q. Mr. Daus, you know that Mr. Samansky was sued in this
21 lawsuit by Mrs. Toffoloni, Mr. Decker too? You know that?

22 A. Yes.

23 Q. And you know Mr. Decker here?

24 A. Yes.

25 Q. You talked with him before the lawsuit was filed because

1 you gave him an affidavit to attach to the lawsuit?

2 A. Correct.

3 Q. So you do know that Mr. Decker here knows how to find Mark
4 Samansky?

5 A. At that point Mr. Decker was taking care of the Mark
6 Samansky thing by suing him. It was already too late. He had
7 already sold everything to Hustler, and there was absolutely
8 nothing I could do. If I came up with an amount of money for
9 Mark Samansky, I wouldn't have been able to do anything. He
10 was being sued.

11 Q. Understood.

12 But you never tried to find him?

13 A. I did try to find him. I looked on the internet and
14 everything else over the first two weeks, never did find him.
15 It was well after that when Mr. Decker called me. It was too
16 late. It was published. I dropped it.

17 Q. Well, after -- I mean, three weeks later?

18 A. I would say that, yeah. After it was published, yeah.

19 Q. And as far as you know, whatever images Mark Samansky's
20 kept are still in his personal possessions and affairs? Three
21 years you have not tried to go find out what he still has or
22 had?

23 A. Oh, Mark Samansky supposedly gave everything to Hustler.
24 I was under the assumption he sold the whole thing to Hustler,
25 everything.

1 Q. But you never sought to confirm that assumption? You
2 never sought him out? You never asked him yourself?

3 A. Tried to sought him out. Never asked him, no.

4 Q. You never asked Mr. Decker after the lawsuit was filed,
5 Hey, how can I get in touch with him so I can find out how to
6 get those images back?

7 A. I didn't think it was my right to do that.

8 Q. Now, I think you did testify that you asked Tyler from
9 Hustler on the phone, Hey, what right do you have to publish
10 these because we didn't tell you you could do it?

11 A. Correct.

12 Q. And he told you, This is legal because it's newsworthy?

13 A. That's what was his answer, yes.

14 Q. Those were his words?

15 A. Yes, sir.

16 Q. Newsworthy, that's a pretty remarkable word. You remember
17 it well?

18 A. Yes.

19 Q. Now, while you were married to Nancy Benoit, she posed for
20 a lot of pictures?

21 A. Correct.

22 Q. And she posed at bikini contests?

23 A. Correct.

24 Q. She posed at wet T-shirt contests?

25 A. Yes.

1 Q. And she posed in your words many, many, many times as part
2 of her wrestling career?

3 A. Yes.

4 Q. Her image showed up in lots of wrestling magazines even
5 while you were still married to her?

6 A. Yes, sir.

7 Q. But the only time she ever got paid for the use of her
8 image to your knowledge and while you were married to her was
9 for one apartment wrestling photo shoot that Bill Otten took?

10 MR. DECKER: Objection, Your Honor. Irrelevant and
11 immaterial.

12 THE COURT: Overruled.

13 MR. DECKER: That's not the measure of damage.

14 THE COURT: Overruled.

15 BY MR. BAUER:

16 Q. Do you need me to repeat the question?

17 A. Yes, please.

18 Q. The only time to your knowledge in her entire career while
19 she was married to you that Nancy got compensated for any of
20 those images that you just described was for the use of her
21 image in a, quote, apartment wrestling photo shoot that your
22 friend, Bill Otten, took?

23 A. That's correct.

24 Q. And you remember what she got paid for that, don't you?

25 A. \$75.

1 Q. That was it the entire time you were married until 1985
2 from wet T-shirt contests; bikini contests; other beauty
3 contests; many, many, many, many wrestling photo shoots, \$75,
4 that was it?

5 A. She won a couple bikini contests and won cash, but that's
6 not posing for pictures.

7 Q. Right.

8 And as you put it in your deposition, you didn't expect
9 her to get compensated and she didn't expect to be compensated
10 for those pictures because it's like sports; if you are a
11 baseball player on the Atlanta Braves and the newspaper takes
12 your picture, they don't pay for it, right?

13 A. That's correct. Just like there was no cell phones back
14 then. There was no internet back then. Every wrestling area
15 was wrestling at its own particular place. And there was
16 people like Bill Otten who would take the pictures, send them
17 to wrestling magazines.

18 And if you go to another area, we were working -- or not
19 working -- we were trying to break into the wrestling at
20 Championship Wrestling of Florida, and Nancy was getting
21 pictures taken while she was in the ring. Bill Otten would
22 send them to the magazines. They'd send them all over the
23 world. And that way we could possibly some day get a job or
24 get jobs in other places 'cause they knew who she is, and
25 that's how you break into the business.

1 MR. BAUER: Thank you, Mr. Daus.

2 THE COURT: Redirect, Mr. Decker?

3 MR. DECKER: Yes, Your Honor, one question.

4 - - -

5 REDIRECT EXAMINATION

6 BY MR. DECKER:

7 Q. Mr. Daus, you characterized what happened during these
8 three and four days in Orlando, Florida, back in 1984 as a
9 mistake?

10 A. Yes, sir.

11 Q. What did you and Nancy do to rectify that mistake?

12 A. We asked Mark Samansky on a total of four occasions, twice
13 after each shoot, to destroy everything and not let anybody see
14 anything, get rid of all the videos and all the pictures.

15 Q. And you now know he did not do that, don't you?

16 A. That is correct, yes.

17 MR. DECKER: Thank you.

18 MR. BAUER: Your Honor, one quick follow-up.

19 THE COURT: Strictly limited to the scope of the
20 redirect.

21 MR. BAUER: I understand.

22 - - -

23 RECROSS-EXAMINATION

24 BY MR. BAUER:

25 Q. You said you asked Mr. Samansky on two different occasions

1 after each of those shoots that took place within --

2 A. Correct.

3 Q. -- three or four days to destroy all of the images.

4 And the second -- I think you testified before me that the
5 second session when you asked him twice, the second time was
6 two to three weeks after the photo shoot?

7 A. Yeah. That was the last time I asked him was two to three
8 weeks after the second photo shoot.

9 Q. And that was when you met with Mr. Samansky to look at the
10 photos that had come from the photo shoot, right?

11 A. No. We never even looked at them.

12 Q. You never looked at them? You didn't ever have a meeting
13 with Mr. Samansky and Chris Helton to look at the photos that
14 Chris Helton took?

15 A. We never looked at those photos. We looked at Bill
16 Otten's photos.

17 Q. You never met with Chris Helton?

18 A. No.

19 MR. BAUER: Thank you.

20 MR. DECKER: Nothing further, Your Honor.

21 THE COURT: All right. Mr. Daus, you may be excused.

22 THE WITNESS: Thank you.

23 THE COURT: Call your next witness.

24 MR. DECKER: Your Honor, at this time the Plaintiff
25 calls for purpose of cross-examination Larry Flynt; and he will

1 appear by video deposition.

2 THE COURT: All right. Mr. Decker, it appears to me
3 that some of the testimony is subject to my earlier rulings in
4 the case, specifically on page 18 and page 20.

5 Are you going to redact that, or we are going to have
6 to talk about that?

7 MR. DECKER: That has been done, Judge.

8 THE COURT: Are you satisfied, Mr. Bauer?

9 MR. BAUER: Those appear to be the redactions that
10 were made in the transcript that was supplied to me this
11 morning. If that's what the deposition looks like, we have no
12 problem.

13 THE COURT: All right. Go ahead, Mr. Decker.

14 (Videotaped deposition of Larry Flynt played in open
15 court.)

16 - - -

17 VIDEOTAPED DEPOSITION OF LARRY FLYNT

18 - - -

19 THE VIDEOGRAPHER: Good afternoon. We are on the
20 record. This is the videotaped deposition of Larry Flynt.
21 Today's date is April 13th, 2010. The time is 1:31 p.m.. This
22 is the case of Toffoloni versus LFP Publishing Group, LLC, et
23 al.. My name is Scott McNair. I am the legal videographer
24 representing Tiffany Alley/Global Connex.

25 Will counsel please identify themselves for the

1 record.

2 MR. DECKER: Richard Decker for the Plaintiff,
3 Maureen Toffoloni.

4 MR. BAUER: Derek Bauer for Defendant LFP Publishing
5 Group.

6 MR. REINA: Jeff Reina for Defendant LFP.

7 THE VIDEOGRAPHER: And will the court reporter please
8 swear in the witness.

9 THE WITNESS: I'll offer my testimony under
10 affirmation.

11 (Witness placed under oath by the court reporter.)

12 BY MR. DECKER:

13 Q. Good afternoon, Mr. Flynt. As I said earlier, my name is
14 Richard Decker. I'm from Atlanta. I represent the Plaintiff
15 in this case, Maureen Toffoloni, who is the personal
16 representative of the estate of Nancy Benoit. And I'd like to
17 ask you some questions today about your knowledge about that
18 case. If at any time you don't understand or don't know the
19 answer, just tell me and I will move on.

20 A. Okay.

21 Q. Can you give us for the record your name.

22 A. Larry Claxton Flynt.

23 Q. And do you live in Los Angeles County, California?

24 A. Yes.

25 Q. If this case has a trial before a judge and a jury, do you

1 anticipate that you might testify in that trial live?

2 A. I don't know.

3 Q. All right. Are you currently employed, sir?

4 A. Yes.

5 Q. And what is your employment?

6 A. I am CEO of Larry Flynt Publications.

7 Q. Do you have a position with LFP Publishing, LLC, doing
8 business as Hustler Magazine?

9 A. Yes.

10 First of all, I want to clarify that by saying that we
11 have or there are about 30 entities. I'm not necessarily an
12 officer in all of those entities. I couldn't keep them
13 straight in my word if I were. I don't mean to be flippant
14 with that answer. I just know I am CEO of the company. But a
15 lot of people do many things, you know, in the course of
16 exercising their duties and responsibilities.

17 Q. Right.

18 Can you give me briefly your educational background.

19 A. Not much.

20 Q. Did you go to high school?

21 A. No.

22 Q. Okay. And you founded and started the company that one of
23 which does business as Hustler Magazine?

24 A. Yes.

25 Q. And that's still an ongoing concern as we sit here today?

1 A. Yes.

2 Q. All right. Do you know the ownership structure of LFP
3 Publishing Group, LLC, in other words, who owns the interest or
4 the shares in that company?

5 A. I own the company. The point I was trying to make earlier
6 is I'm not necessarily an officer that would be responsible on
7 signing off on various matters or committing the entity to
8 various business endeavors, you know. I mean, I'm trying to
9 separate the two so you'll understand it.

10 Q. I understand completely.

11 A. Okay.

12 Q. And my point is that is that ultimately you own the
13 company?

14 A. Yes.

15 Q. Although, you are not necessarily the operating officer of
16 the company?

17 A. Yes.

18 Q. All right. And that would be true for the one that we are
19 here today about; and that is LFP Publishing Group, LLC. You
20 ultimately own that company?

21 A. Yes.

22 Q. And nobody else?

23 A. No.

24 Q. All right. And one of the titles through which LFP
25 Publishing Group, LLC, operates is Hustler Magazine?

1 A. Yes.

2 Q. Would it be fair to say that's the biggest or best known
3 of its titles?

4 A. Yes.

5 Q. All right. We had a witness here earlier today, I
6 believe, who is Ms. Hahner who couldn't tell me the net worth
7 of LFP Publishing Group, LLC, for any year, particularly 2009,
8 2008, 2007.

9 Do you happen to know those numbers?

10 A. I don't have a clue. I always thought that a man who
11 knows exactly what he is worth is not worth very much.

12 Q. I agree with you. I happen to know exactly how much I'm
13 worth.

14 But you as you sit here today can't tell me what the net
15 worth of LFP Publishing Group, LLC, is for any year?

16 A. No. We are a private company.

17 Q. Right.

18 A. All that is subjective in terms of the company. You know,
19 if you have a company on the Stock Exchange, it might sell at
20 anywhere from ten times multiple up to a hundred times
21 multiple. But if you are talking about a company in the
22 private sector that's not a public company and also involved in
23 the pornography business, those multiples will be pulled all
24 the way down. And you are not going to have the same ratio
25 that you would if you were in IBM.

1 Q. But is there somewhere within the company with the
2 controller or financial officer's office some numbers that
3 would reflect the net worth of LFP Publishing Group?

4 A. No. Because you'd have to take all those factors into
5 consideration. It's -- we kinda got a feel what different
6 entities might be worth. But we have never placed one of them
7 on the market, so we don't know --

8 Q. Right.

9 A. -- what would it bring on the market.

10 Q. Well, do you have a feel for what LFP Publishing Group,
11 LLC, is worth?

12 A. Not very much because publishing has been hit hard in the
13 last 20 years. And we're one of the survivors, but we don't
14 know how long we can hold on.

15 Q. You don't know what the assets of LFP Publishing Group,
16 LLC, are?

17 A. Not offhand, no.

18 Q. And you don't know what the liabilities of that same
19 company are?

20 A. No.

21 Q. If you were to subtract liabilities from assets, that
22 would be the net worth, right?

23 A. No. Because then you are talking about book value. But,
24 you know, if you are talking about what that entity is worth
25 and what somebody is willing to pay for it, it's totally

1 different --

2 Q. Yes, I understand.

3 A. -- than subtracting the liabilities from the assets.

4 Q. All right. Do I understand correctly that you ultimately
5 made the decision to publish the images of Nancy Benoit which
6 appeared in the March 2008 edition of Hustler Magazine?

7 A. I didn't make that decision, but I'm aware that it was
8 made.

9 Q. Okay. So you personally did not make that decision?

10 A. No.

11 Q. Do you know who did?

12 A. It would have been the editorial staff.

13 Q. Including Mr. David?

14 A. Yes.

15 Q. All right. But if -- as I sit here today if I ask you if
16 Mr. Flynt made that decision, you would say no?

17 A. That's true.

18 Q. All right. Is it accurate to say, Mr. Flynt, that you and
19 no one within the Hustler Magazine organization sought the
20 permission of Maureen Toffoloni to publish the images of Nancy
21 Benoit?

22 A. We thought it was clearly under -- what's the term -- not
23 just fair usage, but there's another term as well.

24 Q. Newsworthy?

25 A. Yeah, news -- thank you.

1 COURT REPORTER: What did you say?

2 MR. DECKER: I said newsworthy.

3 THE WITNESS: Yeah. Both of those factors, you know,
4 came into play. We felt that they were newsworthy, you know;
5 and we went and published them.

6 BY MR. DECKER:

7 Q. Yes, sir.

8 So my point is, my question is you did not seek the
9 permission of Maureen Toffoloni to publish the Nancy Benoit
10 images?

11 A. Well, I don't think in that particular situation you would
12 be seeking permission of anybody. If there's celebrities here
13 in Beverly Hills and they decided to have a face-off and kill
14 each other, you don't go around trying to get permission from
15 the next of kin before you decide to publish something. That's
16 a crime scene that all my life I always felt was protected by
17 the First Amendment.

18 Q. Yes, sir. And I think I understand what your position is.

19 But for the record that I'm making today, it is true that
20 you did not for the reasons you've stated seek the permission
21 of Maureen Toffoloni to publish those images of Nancy Benoit?

22 A. No. But we didn't do it out of arrogance. If we felt it
23 would've been necessary, we would have done it.

24 Q. You did not think it was necessary, and you didn't do it?

25 A. No.

1 Q. All right. Mr. Flynt, have you or anyone within the
2 organization that you know of attempted to put a value on the
3 publication of the images of Nancy Benoit in Hustler Magazine?

4 A. Well, those type of photographs over the years we have
5 paid anywhere from \$2,500 up to \$10,000. None that I can
6 recall we ever paid more than \$10,000.

7 Q. So is that the ballpark that you would assign to the Nancy
8 Benoit images if you had gone out and bought them or tried to
9 buy them?

10 A. Well, I don't know what we would have assigned. We would
11 probably not have exceeded that figure.

12 Q. So as you sit here today, you don't know what you would
13 have paid for those -- if you felt that you needed to pay for
14 them, you don't know what value you would have put on them as a
15 publisher?

16 A. Yes, I do. We would not have gone -- in looking at the
17 article and the subject matter and the nature of publicity
18 surrounding it, it's still a small item for a magazine; and we
19 would not have exceeded \$10,000. So it would have been below
20 that number.

21 Q. Do you recall that the Hustler Magazine organization got a
22 letter from me in mid-January of 2008 concerning the
23 publication of the Nancy Benoit images?

24 A. No, I don't recall receiving a letter.

25 Q. Do you know what, if any, efforts were made by the company

1 to stop distribution or minimize distribution of the magazine
2 that contained the Nancy Benoit images after receipt of the
3 letter from me in mid-January?

4 A. Once a magazine is printed regardless if you've got an
5 injunction or whatever, once a magazine is printed it's almost
6 virtually impossible to stop the distribution of it.

7 Q. And so do you recall what, if any, efforts were made in
8 that regard?

9 A. No.

10 Q. You would not have been involved in those?

11 A. No.

12 Q. In your career as a magazine publisher, have you ever
13 tried to recall an edition once it went to the distributor?

14 A. Yes, there has been some cases where there's been concern.
15 And I believe there was one that involved an injunction; but
16 neither one of those really affected distribution because, as I
17 say, once you are printed you are already in the pipeline. So
18 it's almost impossible to prevent the distribution.

19 Q. And your use of the word "almost" intrigues me and makes
20 me want to ask, you know, what you mean by that.

21 A. Well, it's just what I said, you know. Let's make it even
22 more profound. Your situation, you are just a lawyer writing a
23 letter. But say you got an injunction from a judge. You know,
24 even if he is a federal judge, I don't see that much the judge
25 can do if the magazine has been printed, you know. It's just

1 it's left up to the individual retailers if they decide they
2 want to distribute it.

3 Q. Can you, for example -- and I don't know anything about
4 the magazine business; I defer to you -- but can you, for
5 example, contact your distributor and say, If you have got any,
6 don't put them out there?

7 A. We have never been faced with that issue because most of
8 the time we feel we have been right in those cases.

9 Q. You say you have never had that come up?

10 A. Not really.

11 Q. You said that -- you alluded to an injunction or situation
12 where there was an injunction. Can you tell me about that?

13 A. It's been years ago and involved a Farah Fawcett poster.
14 This happened like over 30 years ago. There was a long,
15 protracted battle on that which we, by the way, did win. But
16 they sought injunctive relief and were granted it. But, you
17 know, we never published it after that issue anyway. But it
18 really didn't affect the issue going out.

19 Q. So that I can be clear before we leave this topic, are you
20 saying unequivocally that there's nothing that you as a
21 publisher can do to minimize the distribution once it leaves
22 your printing facilities and gets on the trucks?

23 A. Not really. You know, I mean, you can call, you know,
24 certain wholesalers and ask them, you know, not to distribute
25 it. But I find that that's not very effective.

1 Q. And do you know whether or not that effort was made in
2 this case with respect to the Nancy Benoit issue images?

3 A. No, I do not.

4 Q. Is there any way of knowing internally how many copies of
5 the March 2008 edition were sold or otherwise distributed after
6 the middle of January 2008?

7 A. I do not know. But the circulation department should be
8 able to provide you with those figures.

9 Q. So would it be broken out that way, I mean, a number for
10 every day of sales in the month of January --

11 A. No.

12 Q. -- and February?

13 A. No, it would not be broken out that way. It would be
14 broken out by month.

15 Q. By month.

16 So you couldn't tell how many copies were sold after, say,
17 the midpoint of January versus the first of January?

18 A. No. It would be by month.

19 Q. All right. When in the sequence of events would the March
20 2008 edition of Hustler Magazine have stopped being available
21 for purchase?

22 A. I'm not sure. That has to do with on-sale dates. And,
23 once again, you know, the circulation department should be able
24 to give you those numbers.

25 Q. Is there a date after which you simply cannot buy a March

1 2008 copy?

2 A. Well, we are distributed all over the country. Okay?
3 Each wholesaler has a different on-sale date regardless of the
4 on-sale date that we recommend. So it is impossible to know an
5 answer to the question that you are asking because we don't
6 know when the wholesaler puts that issue on sale.

7 Q. And, again, if you don't know, just tell me that and I'll
8 accept it. But, for example, could you have purchased a March
9 2008 edition of Hustler Magazine in February of 2008?

10 A. I don't know.

11 Q. You don't know --

12 A. I don't know because we'd have to know the on-sale dates,
13 you know. You are asking me something that I can't answer.

14 Q. I have been told earlier again by Ms. Hahner, I believe,
15 that the on-sale date for this particular issue was January the
16 8th, 2008.

17 A. Uh-huh.

18 Q. So then with that information, would it in your experience
19 be possible to have purchased -- a person to have purchased a
20 March 2008 edition in February of 2008?

21 A. Ninety percent of magazines that you are going to sell
22 sell in the first few weeks.

23 Q. Right.

24 A. So --

25 (Videotape stopped.)

1 THE COURT: Mr. Decker, stop the tape, please. Stop
2 the tape.

3 Ladies and Gentlemen, we are going to take our
4 morning break at this time. During the break, remember my
5 instructions to you not to discuss the case with anyone, not to
6 allow anyone to discuss the case in your presence. Don't even
7 begin discussing the case among yourselves yet. And you are
8 excused until 11:15, and we will resume the trial at that time.

9 Court's in recess until 11:15.

10 (A short recess was taken.)

11 THE COURT: Counsel, here's my verdict form that I am
12 contemplating.

13 Ready, Mr. Decker?

14 MR. DECKER: Yes, Your Honor.

15 THE COURT: We're ready for the jury.

16 (Jury entered the courtroom.)

17 THE COURT: All right, Mr. Decker.

18 (Videotaped deposition continued playing in open
19 court as follows.)

20 THE WITNESS: Sold in the end of January or end of
21 February or March; is that what you are talking about? About
22 what's the latest you can buy a copy; is that what you want me
23 to answer?

24 BY MR. DECKER:

25 Q. That's one part of the question, yes.

1 A. Well, when it comes off sale, you know, after it comes off
2 sale you can't buy a copy of the magazine.

3 Q. And based on your experience, with an on sale of January
4 the 8th, 2008, what would the off-sale date be for such a
5 magazine?

6 A. Well, it would be on sale for 30 days.

7 Q. 30 days.

8 So through February the 8th of 2008?

9 A. Yes.

10 Q. Theoretically?

11 A. Yes.

12 Q. All right. And do you -- and, once again, do you know if
13 any effort was made to stop those sales after receipt of the
14 Decker letter in mid-January of 2008?

15 A. No.

16 (Videotape concluded.)

17 THE COURT: All right. Mr. Decker, call your next
18 witness.

19 MR. DECKER: Your Honor, at this time the Plaintiff
20 would hand up the document that had been identified and
21 received in evidence. And Plaintiff rests.

22 THE COURT: All right. Mr. Bauer, call your first
23 witness.

24 MR. BAUER: Your Honor, at this time we would like to
25 make a motion.

1 THE COURT: Motion for judgment as a matter of law?

2 MR. BAUER: Yes, Your Honor.

3 THE COURT: All right. You have made it. I'll hear
4 argument at a break.

5 MR. BAUER: Okay. On behalf of the Defendant, we
6 will call by videotape from his deposition for use at trial
7 Christopher Helton.

8 And let me go ahead and apologize in advance for the
9 audio quality of this video you are about to see. It was taken
10 remotely, and we will do our best to mitigate the static.

11 (Videotaped deposition of Christopher Helton played
12 as follows in open court.)

13 - - -

14 VIDEOTAPED DEPOSITION OF CHRISTOPHER HELTON

15 - - -

16 THE VIDEOGRAPHER: We are going on the record, and
17 this begins Tape Number 1 of the video deposition of
18 Christopher Lee Helton. This is in the matter of Toffoloni
19 versus LFP Publishing, et al. This is in the court of the U.S.
20 District Court of the Northern District of Georgia. The cause
21 number is 1:08-CV-00421-TWT. This deposition is being held at
22 Stewart Richardson Court Reporting Agency, One Indiana Square,
23 Suite 2425, in Indianapolis, Indiana. Today's date is April
24 22nd, 2011. It is 2:34 in the afternoon.

25 My name is Michael Canny. I am with TSG Reporting,

1 Incorporated. I am the legal video specialist. The court
2 reporter today is Maria Collier. She is also in association
3 with TSG Reporting.

4 Will counsel please state their appearance for the
5 record, and will the court reporter please swear in the
6 witness.

7 Thank you very much.

8 MR. DECKER: Richard Decker for the Plaintiff,
9 Maureen Toffoloni.

10 MR. BAUER: Derek Bauer for Defendant LFP Publishing.

11 MR. SOLOMON: Darrell Solomon for Defendant LFP
12 Publishing Group.

13 (Witness placed under oath by the court reporter.)

14 BY MR. BAUER:

15 Q. Mr. Helton, good afternoon. As you know, my name is Derek
16 Bauer; and I am a lawyer for Hustler Magazine in the case
17 involving the publication of images of Nancy Benoit. Thank you
18 for being here today and agreeing to testify to the jury
19 remotely by videotape.

20 Please go ahead and introduce yourself to the jury.

21 A. My name is Christopher Lee Helton. I am a professional
22 photographer.

23 Q. And where do you presently live and work, sir?

24 A. In Indiana at the moment. I used to reside in Orlando,
25 Florida.

1 Q. Could you tell the jury a little bit about your
2 professional background.

3 A. I've been shooting professionally since 1974. In the '80s
4 I started shooting a lot of fashion for swimwear magazines and
5 modeling agencies. That's how I ran across Sandy actually.

6 MR. DECKER: I don't know what he said.

7 THE WITNESS: Yeah. I realize what I said. It's
8 like, wait a second, they don't care about that.

9 BY MR. BAUER:

10 Q. How much would you say you've had with respect to
11 professional experience photographing models for magazines?

12 A. Hundreds and hundreds.

13 Q. And, in your experience, how are professional
14 photographers generally paid for the photos they take with
15 respect to models?

16 A. Sometimes you get a flat fee -- you give them a flat fee.
17 Other times it's per shot. If there's a lot of shots, then
18 it's just a bulk. They pay just a flat fee for, say, ten
19 shots. They'll pay a flat fee as opposed to paying for every
20 shot.

21 Q. And what are the basic ranges of those payments in your
22 experience?

23 A. Anywhere from 50 dollars to 200 basically.

24 Q. And is that how you have been paid generally for your
25 efforts to photograph models throughout your career?

1 A. Yes.

2 Q. Mr. Helton, are you familiar with an article and the
3 images of Nancy Benoit that were published in the March 2008
4 issue of Hustler Magazine?

5 A. Yes, I am.

6 Q. And were you present for the photo shoot described in that
7 article and in which the images published with the article were
8 recorded?

9 A. Yes, sir.

10 Q. And how was it that you came to be present at that photo
11 shoot?

12 A. I was talking to Mark Samansky on the phone. And he said
13 he was going to video this girl, that her and her husband
14 wanted some pictures and would I come and shoot the pictures.
15 And I said yes.

16 Q. And who was Mark Samansky?

17 A. Mark Samansky --

18 Q. How do you know him?

19 A. Through the radio station. I was a photographer for WDIZ,
20 and he was a morning personality on WDIZ.

21 Q. And Mr. Samansky recently passed; is that correct?

22 A. Yes, he did.

23 Q. Who else was present at the photo shoot?

24 A. There was another guy named Bill Otten. He is a wrestler
25 photographer.

1 Q. So Mr. Samansky, yourself, another photographer named Bill
2 Otten and obviously Nancy Benoit. Anybody else?

3 A. Her husband. I don't remember his name.

4 Q. Were you paid for your participation in that photo shoot?

5 A. No, I wasn't.

6 Q. And was anybody other than you taking photographs or
7 images during that shoot?

8 A. Mark was shooting it with video, and I was shooting
9 stills, and Bill shot a couple shots.

10 Q. How did Nancy Benoit and her then husband whose name, by
11 the way, is Jim Daus, how did they behave during the photo
12 shoot? Did they seem reluctant?

13 A. No. They were excited about it actually. It was their
14 idea.

15 Q. Did they express any concerns or reservations to you or
16 anybody else in your presence about participating in the photo
17 shoot?

18 A. No.

19 Q. At any time?

20 A. No.

21 Q. After the shoot, did you ever meet with Nancy or her
22 husband again?

23 A. Yes, at one time to show them the photos.

24 Q. Please tell the jury what you can recall about that
25 meeting and specifically when it occurred and who was present.

1 A. It was about a week later after we shot the photos. And I
2 came over to Mark's, and I showed them the photos, and they
3 loved them.

4 Q. So who all was present for that meeting?

5 A. I know Mark was. Nancy and her husband were. I think
6 that was all that was there.

7 Q. Did you retain the negatives from that photo shoot?

8 A. Yes, I did.

9 Q. And were Nancy and her husband Jim aware that you had
10 retained the negatives?

11 A. Yes.

12 Q. At any time did either of them ask you to destroy either
13 the images that you took or the negatives?

14 A. No.

15 Q. Do you know whether they asked Bill Otten, the other
16 photographer, to destroy the images he had taken?

17 A. No, they didn't.

18 Q. Have you ever been asked by Nancy Benoit, her mother or
19 Jim Daus or anyone else to destroy those images or the
20 negatives --

21 A. No, I haven't.

22 Q. -- in your possession from that photo shoot?

23 A. No, I haven't.

24 Q. So I understand, so Ms. Toffoloni has never asked you to
25 destroy those images?

1 A. Never talked to her in my life, if you're talking about
2 her mother.

3 Q. Correct.

4 A. Yeah.

5 Q. The images that you took of Nancy Benoit that day were of
6 professional quality?

7 A. Yes.

8 Q. How would you describe the images that were published with
9 the Hustler article about Nancy?

10 A. The images were similar except the quality was -- from my
11 stuff was way higher than the quality they had. What they had
12 was kind of grainy. My stuff wasn't grainy. But, basically --

13 Q. If today --

14 A. -- it's the same -- the shoot from what representation is
15 in the magazine is basically a representation of what my photos
16 would look like.

17 Q. If today you were to sell the professional-quality images
18 that you took of Nancy Benoit for publication in a national
19 magazine, what would you expect to be paid for them?

20 A. Average, 75 bucks per photo.

21 Q. For all of your photos or just one?

22 A. Per photo.

23 Q. Per photo?

24 A. Yeah.

25 Q. How about if you sold them a few months after Ms. Benoit's

1 murder?

2 A. It drops down. It can be 50 bucks.

3 Q. So the \$75 per photo would be if you sold them immediately
4 after the murder in your opinion?

5 A. If I sold it, you know, within days after it, I might have
6 got a hundred dollars apiece if I was lucky.

7 Q. Given the substantial difference in the quality between
8 the images you took and the images published by Hustler of
9 Nancy Benoit, would you expect that the Hustler images would be
10 valued even less than the --

11 A. Oh, yeah.

12 Q. -- professional-quality images you took?

13 A. Yes, it would be, way less.

14 Q. And based on your more than 30 years as a professional
15 celebrity photographer, how much do celebrity photos sold to
16 national magazines generally go for?

17 A. An average is 35 dollars to 75.

18 Q. Per photo?

19 A. Right.

20 Q. What's the most you've ever been paid for a celebrity
21 photo?

22 A. For a single photo was \$525.

23 Q. And who was that photo of?

24 A. That was of a girl named Sandee Rozzo that was murdered,
25 and it was for the TV show 48 Hours. And theirs is just a flat

1 fee. They basically pay \$500. You know, if you have a
2 thousand pictures, it's the same thing. They just have a flat
3 fee for anything.

4 Q. Was Ms. Rozzo a celebrity?

5 A. Not really. She was a model but -- you know, she was in
6 national magazines because I put her there. So she's a
7 celebrity with her friends. But she isn't a national
8 celebrity, per se.

9 Q. Who would be the most famous celebrity that you've sold
10 images of?

11 A. Good question. Rolling Stones, Bon Jovi, Ozzy, depends on
12 what you consider big, but --

13 Q. Well, how much do those photos go for?

14 A. Rolling Stones.

15 Q. How much did your photos of the Rolling Stones go for?

16 A. It was the same thing. It was basically \$50 a shot. I'm
17 trying to remember. It might have been only 35 because a lot
18 of the times it's a lot less than people assume, and most
19 magazines do not pay what people think they do.

20 Q. In your experience, where on the celebrity spectrum, so to
21 speak, would Nancy Benoit fall with respect to public interest
22 in images of her?

23 A. If it was on a scale of one to a hundred, one, as if not
24 really much of a celebrity.

25 Q. And were you surprised to learn that Hustler paid Mark

1 Samansky as much as a thousand dollars for the images and
2 background on Nancy Benoit's career?

3 A. Yeah, actually, it really surprised me they paid that
4 much.

5 Q. Does that seem high to you given your experience?

6 A. Yeah. I would expect for that it would have been a flat
7 fee of probably \$400 is what I would expect to have got.

8 Q. Mr. Helton, in your experience, have the celebrities whose
9 images appeared in magazines like People or In Touch or
10 Entertainment Weekly been paid for the use of their images in
11 those publications?

12 A. No, they're not.

13 Q. Who does get paid?

14 A. The photographer. The person who pushes the button owns
15 all rights to the photo.

16 Q. And what is your understanding about why the pictured
17 celebrities are not paid for the use of their images?

18 A. For the simple reason the photographer owns it. When
19 you're a celebrity, you give up your rights basically to be
20 published. You can publish a picture of anybody basically in
21 anything as long as it's not representing a commercial product.
22 Say, I cannot use your picture -- take your picture and then
23 use it in a picture next to Windex in their ad. I cannot do
24 that without written consent. Anything else is called
25 editorial. You do not need written consent for editorial.

1 Q. And that's how you have operated throughout your 30-plus
2 year professional career?

3 A. Yeah.

4 Q. Would that be how -- your understanding of how the
5 national celebrity news magazine industry operates?

6 A. Yeah, I'm exactly sure how it operates.

7 Q. Well, thank you very much, Mr. Helton. That's all I have
8 for now. Mr. Decker has got some questions for you.

9 A. Okay.

10 (Videotape concluded.)

11 THE COURT: Are you going to do any cross now,
12 Mr. Decker?

13 MR. DECKER: Yes. I would like for it to continue to
14 be played.

15 THE COURT: That's fine. Have you got it available
16 to play, Mr. Bauer?

17 MR. BAUER: I don't know if we do or not, Your Honor.
18 All we prepared, I believe, is for our case. I don't have a
19 problem with -- I don't have a problem playing it for the jury
20 if we have it. We certainly don't have it edited, and there is
21 objections and colloquy and extraneous material in Mr. Decker's
22 cross that I didn't make any effort to try to excise.

23 MR. DECKER: Well, Judge, there are no objections in
24 the cross-examination; and that cross-examination is part of
25 the process.

1 THE COURT: Fine. You play it if you've got it. If
2 you don't have it on videotape, you can read it, Mr. Decker.

3 MR. BAUER: He is right. We didn't have any
4 objections in his cross.

5 MR. DECKER: Judge, I didn't anticipate that they
6 were not going to play the cross. It'll take me a minute to
7 locate it and gear it up.

8 THE COURT: Fine. Clock is running.

9 MR. DECKER: All right. Judge, if they don't have
10 the cross-examination on their video, then I will simply read
11 the transcript to the jury.

12 THE COURT: That's fine.

13 Ladies and Gentlemen, that's a perfectly acceptable
14 way of presenting deposition testimony is to have the lawyer --
15 usually the way they do it is the lawyer reads the questions
16 and a paralegal or somebody else sits in the witness stand and
17 reads the answers that the witness gave.

18 MR. BAUER: I think we can actually make a clip for
19 you, but it might take a little while. You need to tell us
20 exactly what you want.

21 MR. DECKER: Well, I want the cross-examination
22 beginning on page 14 through page 20.

23 MR. BAUER: We can do it.

24 (Pause.)

25 MR. BAUER: It's ready.

1 MR. DECKER: Go ahead.

2 MR. BAUER: Please play it.

3 (Videotaped deposition continued playing in open
4 court as follows.)

5 BY MR. DECKER:

6 Q. Mr. Helton, as I said, my name is Richard Decker. I
7 represent Maureen Toffoloni who is Nancy Benoit's mother and
8 the administrator of her estate.

9 You do understand that Nancy Benoit is deceased?

10 A. Yes, I do.

11 Q. You stated that you took some photographs of Nancy Benoit
12 on the day that Mark Samansky made the video but that no one
13 has ever published those photographs; is that correct?

14 A. Right. I've never tried to sell them.

15 Q. You've never tried to sell them, and no one has ever
16 published them?

17 A. Right.

18 Q. Is that true?

19 A. Right.

20 Q. And you just testified that you still have those images,
21 correct?

22 A. Good question. I am not sure. I have hundreds of
23 thousands of images. And one of the studios I had caught on
24 fire, so a bunch of stuff burnt. So I really don't know if I
25 still have the negatives and stuff. I've got probably a half a

1 million photos.

2 Q. So your testimony earlier that you have the negatives is
3 not exactly correct?

4 A. I didn't testify I had the negatives. I said I shot the
5 stuff and that I retain everything. I didn't say whether it
6 had been destroyed or not. I'm not really sure.

7 Q. So you don't know if you have them or not?

8 A. I'm not sure.

9 Q. All right.

10 A. I was --

11 Q. One thing is sure, Mr. Helton, isn't it, that you never
12 obtained a release from Nancy Benoit or her estate to publish
13 any images of her?

14 A. You don't need a release to publish images.

15 Q. I didn't ask you that.

16 I asked you did you ever obtain a release from Nancy
17 Benoit or her estate --

18 A. No, I didn't.

19 Q. -- after her death?

20 A. No, I didn't.

21 Q. All right. And your testimony is that you don't need a
22 release?

23 A. No, you don't.

24 Q. Let me take this opportunity on this record, Mr. Helton,
25 to advise you that you do not have any authority to publish any

1 images of Nancy Benoit.

2 Do you understand that?

3 A. You're wrong. Look at the copyright laws.

4 Q. But you understand my instruction?

5 A. You're wrong. I have the right to publish anything.

6 Q. Well, whether you heed my instructions or not, you hear me
7 loud and clear, don't you?

8 A. Yeah.

9 Q. And let me also advise you that if you do publish any
10 images of Nancy Benoit you will be sued in a court of law.

11 Do you hear that?

12 A. I hear that.

13 Q. All right. The fact of the matter is you've never
14 published any images of Nancy Benoit?

15 A. No, I haven't.

16 Q. And you do not intend to publish any images of Nancy
17 Benoit?

18 A. Hadn't thought about it whatsoever.

19 Q. You had nothing to do with Hustler Magazine publishing
20 images of Nancy Benoit?

21 A. No.

22 Q. You did not encourage or assist Mark Samansky in selling
23 images of Nancy Benoit to Hustler Magazine?

24 A. No, I did not.

25 Q. To your knowledge, did Nancy Benoit or her estate ever

1 give a release to Hustler Magazine to publish images of her?

2 A. Not that I know of.

3 Q. Have you ever sold any material to Hustler Magazine?

4 A. Not that I know of. I work through an agency in New York,
5 so not to my knowledge.

6 Q. Have you ever done any work for Hustler Magazine in any
7 capacity?

8 A. No, I haven't.

9 Q. Or any other company owned by Larry Flynt?

10 A. Not to my knowledge. I don't know what all he owns, but
11 not to my knowledge. Through my agency in New York, I could
12 have.

13 Q. Ever work for --

14 A. Huh?

15 Q. Ever work for any other pornographic magazine in any
16 capacity?

17 A. No.

18 Q. Are you aware, Mr. Helton, that in this case the courts
19 have ruled that Hustler Magazine violated Nancy Benoit's right
20 of publicity in publishing images of her without her consent?

21 A. Yeah, I heard that. They're wrong.

22 Q. Do you have any information about the value realized by
23 Hustler Magazine in publishing images of Nancy Benoit?

24 A. Very little. It would be worth very little.

25 Q. Do you have any information about the value received by

1 Hustler Magazine in publishing the images of Nancy Benoit?

2 A. No.

3 Q. Do you have any information about how much money Hustler
4 Magazine made in connection with its publishing images of Nancy
5 Benoit?

6 A. No, I don't. But it would have been very little.

7 Q. Do you have any information concerning the decision-making
8 process at Hustler Magazine concerning their publication of the
9 images of Nancy Benoit?

10 A. No, I do not.

11 Q. Are you receiving any compensation for your testimony
12 today?

13 A. No, except gasoline.

14 Q. You're receiving gasoline?

15 A. Gasoline, yeah. They're paying for my gasoline to come.

16 Q. You got your witness fee and your mileage?

17 A. Just mileage, I believe. I didn't pay that close
18 attention to it. It said, Here's some money. We pay for your
19 mileage. And that's all I paid attention to.

20 Q. You got a check in the mail for some amount of money; you
21 don't know how much it was?

22 A. It was \$50. Actually, I think it was \$58 with tax, I
23 believe. Yeah, I believe it was \$58. It was 50 to 58 dollars.

24 Q. And that was for your gas?

25 A. Right.

1 Q. And did you talk to anybody associated with Hustler
2 Magazine about your testimony today?

3 A. Just the lawyers.

4 Q. Which lawyers would that be?

5 A. Both those gentlemen.

6 Q. Mr. Solomon and Mr. Bauer?

7 A. Yes, sir.

8 Q. When did you talk to them?

9 A. They approached me a couple months back and asked me about
10 the situation and the photographs and the photo session.

11 Q. Is it your testimony that Nancy Benoit did not ask Mark
12 Samansky to destroy the photographs, or you did not hear her do
13 that?

14 A. No, she did not ask him.

15 Q. You were with her every day after the photo shoot up until
16 the day she was killed?

17 A. You know, no, I wasn't. So, yes, there's a chance she
18 could have said it to him sometime. But she didn't ask me, so
19 I'd assume she wouldn't ask him.

20 Q. That's an assumption by you?

21 A. Yes, it is.

22 MR. DECKER: All right. Nothing further.

23 MR. BAUER: Thank you, Mr. Helton. That's it.

24 THE WITNESS: My pleasure, gentlemen. Y'all have a
25 good day, I hope.

1 (Videotape concluded.)

2 THE COURT: All right. Mr. Bauer, call your next
3 witness.

4 MR. BAUER: Your Honor, we'll call former LFP
5 employee, Tyler Downey, again by videotape. And let me go
6 ahead and tell Mr. Decker and the Court we will not be prepared
7 to play the cross-examination or any part of the
8 cross-examination of Mr. Downey.

9 THE COURT: How long is your direct?

10 MR. BAUER: It is -- I believe it's an hour.

11 THE COURT: Well, we'll take a lunch break. And
12 during the lunch break, let me ask you to prepare a clip -- not
13 now. We will start.

14 MR. BAUER: We won't be able to do that, Your Honor.
15 And particularly this cross-examination does contain
16 substantive objections by defense counsel as well as material
17 that the Court has already excluded from this case, and we're
18 not in a position to excise portions of the cross-examination
19 for Mr. Decker.

20 THE COURT: All right. Mr. Decker, if you want to
21 play your cross on videotape, you need to prepare a tape during
22 the lunch break that'll be consistent with my rulings in the
23 case. Otherwise, you can read your cross.

24 Go ahead, Mr. Bauer. And be prepared to stop the
25 tape at about 12:15, Mr. Bauer.

1 (Videotaped deposition of Tyler Downey played in open
2 court as follows.)

3 - - -

4 VIDEOTAPED DEPOSITION OF TYLER DOWNEY

5 - - -

6 THE VIDEOGRAPHER: We are on the record. This is the
7 start of tape labeled Number 1 of the videotaped deposition of
8 Tyler Downey in the matter of Maureen Toffoloni, Plaintiff,
9 versus LFP Publishing Group, LLC, et al., in the United States
10 District Court for the Northern District of Georgia. The case
11 number is 1:08-CV-00421-TWT.

12 This deposition is being held at the offices of
13 Midwest Litigation located at 1301 Oak Street, Kansas City,
14 Missouri, 64106. The date is April 21st, 2011; and the time is
15 approximately 1:47 p.m.. My name is Mike DiNitto from TSG
16 Reporting, Incorporated. Our court reporter is Chuck Motter in
17 association with TSG Reporting.

18 Will counsel please introduce yourselves for the
19 record.

20 MR. DECKER: Richard Decker for the Plaintiff,
21 Maureen Toffoloni.

22 MR. BAUER: Derek Bauer for Defendant LFP Publishing
23 Group.

24 MR. SOLOMON: Darrell Solomon for Defendant LFP
25 Publishing Group.

1 THE VIDEOGRAPHER: Thank you.

2 Will the court reporter please swear the witness, and
3 we will proceed.

4 (Witness placed under oath by the court reporter.)

5 BY MR. BAUER:

6 Q. Mr. Downey, my name is Derek Bauer; and I am a lawyer for
7 LFP Publishing Group which does business as Hustler Magazine as
8 you know. Thank you for making yourself available for this
9 deposition. Your testimony is being preserved here for the
10 benefit of the jury.

11 I want to note that we are taking this remotely to
12 accommodate all parties' requests to keep expenses down and
13 minimize travel of counsel, so please forgive us any
14 technologically -- technological awkwardness that this format
15 may result in. But we'll do our best and appreciate your
16 patience.

17 A. Not a problem.

18 Q. Please go ahead and introduce yourself to the jury.

19 A. My name is Tyler Downey. I was editorial assistant for
20 Hustler Magazine from February 2006 to February 2008.

21 Q. And where do you presently live and work, Mr. Downey?

22 A. I live in Kansas City, Missouri. And I work as a
23 freelance writer, and I stay at home with my six-month-old
24 daughter.

25 Q. Are you married?

1 A. I am married, yes.

2 Q. And could you tell the jury briefly about your education
3 and professional background obviously up 'til what you
4 described as your employment by Hustler Magazine starting in
5 February of 2006.

6 A. Sure.

7 Born and raised Joplin, Missouri, went to Joplin High
8 School. On graduation I went to the University of Missouri,
9 was a history major. I attended school there for about
10 three-and-a-half years. I did not graduate. I wrote for the
11 school newspaper, The Maneater, there. I wrote an
12 entertainment column and kind of decided to move to Los Angeles
13 and try and make it as a screenwriter or -- to be honest, I
14 wanted to write for Hustler. So that's kind of what -- why I
15 moved out there.

16 I was out there maybe four years, five years doing odd
17 jobs. I worked at a tanning salon. I did mortgage
18 refinance -- you know, basically what people do out in L.A.
19 when they're trying to write or act. And then Hustler had an
20 opening for editorial assistant, so I forwarded my resumé and
21 writing samples and got the job.

22 Q. Why were you interested in writing for Hustler Magazine?

23 A. I liked Hustler Magazine because I liked the politics of
24 the magazine. I liked the First Amendment kind of rights of
25 the magazine. Larry Flynt -- just the idea of writing for

1 Hustler Magazine, it just seemed like someplace where I could
2 -- where I belonged.

3 Q. And once you began working for Hustler Magazine, what did
4 you do for them?

5 A. I was the editorial assistant. It's kind of a catch-all
6 phrase or catch-all job description. I was -- I acted as Bruce
7 David's, the editorial director, his assistant. I was in
8 charge of all of the 2257 which is like the adult recording
9 requirements that the Government says. So for the magazine, I
10 would compile all of those and give them to the compliance
11 department. And I was kind of like the liaison between the
12 compliance department and the magazine.

13 And then, you know, I had general duties of making sure
14 the magazine got published on time, meeting deadlines, you
15 know. I was not intimately involved with every aspect of the
16 magazine, but I was -- I was involved with most of the things
17 that went on with the magazine. I helped all the editors. I
18 helped all the production team, that kind of stuff.

19 Q. Did your job responsibilities include taking photographs
20 of nude models?

21 A. No. No. I never took photos of nude models. I never was
22 on sets of a photo shoot. I never did anything like that.
23 Now, I did have -- I worked freelance. I did the Girls of
24 MySpace section for the magazine, so I did procure nude
25 photographs for the magazine. But I was never onset. I never

1 operated a camera or lighting or anything like that.

2 Q. What about writing articles?

3 A. I as -- in a freelance capacity, yes, I wrote articles.

4 Q. Mr. Downey, when and why did you leave the employ of
5 Hustler Magazine?

6 A. Well, there's a lot of -- a lot of reasons I left. (A),
7 my girlfriend at the time had moved back to Missouri. She
8 wanted to be close to family. We wanted to -- you know, we
9 wanted to start a family. We didn't want to do it in
10 Los Angeles. It was too expensive.

11 And then I got in -- I got in an argument with Bruce
12 David, some personality conflicts. So it was probably time for
13 me to leave. I was kind of burnt out working there. It's a
14 high-stress job. So, you know --

15 Q. Why --

16 A. I'm sorry.

17 Q. No, no, please continue.

18 A. You know, Bruce and I, he had written an e-mail and it
19 upset me. And so, you know, I just -- I guess like a lot of
20 employees I didn't feel appreciated. I knew I did -- I
21 contributed a lot to that magazine. And, you know, it was just
22 time to go.

23 Q. While you were employed at Hustler, what kinds of
24 magazines and media outlets did Hustler view as its
25 competition?

1 A. Its main competition -- and you got to understand that
2 there's different people that view different things in the
3 building as the competition. You know, some people viewed
4 Playboy as the main competition -- Playboy, Penthouse. You
5 know, and then there was also like the -- the lower-quality
6 pornographic magazines that really didn't have any reporting in
7 them.

8 Celebrity magazines were definitely considered something
9 that we competed with, news magazines. You know, most people
10 don't realize it; but there's a lot of news articles, like
11 really political articles in Hustler Magazine. So, you know,
12 Rolling Stone has great political coverage. So, you know, I
13 personally was like, man, it would be really cool if we could
14 do this quality of reporting. Newsweek and Time, you know,
15 Bruce David would read those and say, you know, these news
16 stories are what we need to be reporting on too.

17 Q. How about gossip and entertainment news websites?

18 A. Yeah. Like -- well, like TMZ. TMZ was something. We had
19 a lot of celebrity stuff in here with the Nip Slips, with the
20 Bits and Pieces section, it's kind of celebrity geared. In
21 Touch, those kind of magazines.

22 Q. Was pursuing celebrity and entertainment news articles a
23 strategic focus of the magazine while you were working there?

24 A. Yeah. We had an editor -- or yes. Sorry. We had an
25 editor, Keith Valcourt; like I said, his Bits and Pieces

1 section, the Nip Slips section. We would have celebrity
2 interviews. We would have celebrity news. The celebrity stuff
3 was good because it makes a good cover line on the cover of the
4 magazine. People were interested in that.

5 Q. Were those regular features of Hustler content?

6 A. Yeah, Bits and Pieces and Nip Slips is a monthly --
7 monthly standard. So it's in the magazine every single issue.
8 We tried to get as much celebrity --

9 Q. How --

10 A. I'm sorry. We tried to get as much celebrity stuff in the
11 magazine as we could to be honest with you.

12 Q. And why is that?

13 A. Well, honestly, because people have like an insatiable
14 appetite for celebrity gossip it seems like. I don't know any
15 numbers or anything like that, but I honestly -- I think the
16 only magazines that are really profitable right now are those
17 gossip magazines. You know, I know that the adult magazines
18 are hurting. Newspapers are obviously hurting. So it seems
19 like the celebrity stuff is kind of what you have to do if you
20 want to stay competitive.

21 Q. How did Hustler Magazine keep up with what kind of
22 celebrity and entertainment news reporting its competitors were
23 doing?

24 A. Well, Keith Valcourt, I know he's got like deals with
25 Mr. Skin on celebrity nudity for the Nip Slips and movies. We

1 would have like a section, oh, you know the stars of True Blood
2 have been nude in these movies before we would show. The
3 interviews, it was just the individual reporter's contacts.

4 And then people come to Hustler too which is kind of like this.

5 Q. Did people on Hustler's editorial staff actually monitor
6 what competitors were reporting in the celebrity news genre?

7 A. Yeah. Yeah. I mean, you pretty much have to for the Bits
8 and Pieces section, I think. And for also the -- there's two
9 like parody ads in the magazine, one of which is always like a
10 political and then one of which is kind of an entertainment.
11 Once again, this is Keith Valcourt. So, you know, when he's
12 doing the -- the parodies, he kind of parodies off of what's in
13 the celebrity news a lot of times.

14 Q. Was it part of your job responsibilities to monitor what
15 celebrity entertainment news media was reporting?

16 A. I don't know if it was -- you know, it wasn't like --
17 nobody ever said go to TMZ and monitor this, but it's something
18 that I did on my own just to stay informed. I did that for
19 political sites, celebrity sites, news sites, porn sites, adult
20 sites, adult publications. You know, anything that would
21 relate to the magazine I tried to stay up on just because I
22 felt it would make me better at my job.

23 Q. You were the author of that news article about Nancy
24 Benoit and the images of her that were published in the March
25 2008 issue of Hustler Magazine?

1 A. Yes, I was.

2 Q. And please tell the jury how it was that you came to write
3 that article for Hustler Magazine.

4 A. Sure.

5 I actually think it was mostly by accident because as the
6 editorial assistant, you know, calls that came into the
7 magazine department -- the magazine I answered. And the
8 photographer, the guy that possessed the videotape, Mark
9 Samansky, called into Hustler. I answered it; and he mentioned
10 what he had and said, you know, would you guys be interested in
11 this.

12 Now, usually this kind of thing would, like I said, go to
13 Keith Valcourt. And I think that Keith Valcourt was out on
14 vacation when this happened. And so I -- I took it to Bruce
15 David. I said, Here's a guy that says he has screen grabs of
16 this -- you know, I wasn't -- I knew who she was, but I wasn't
17 a really big follower of wrestling or anything like that. I
18 knew who she was because of the -- because of the murder to be
19 honest with you. I probably wouldn't know who she was if it
20 wasn't for that. A lot of other people did, but I didn't.

21 So I went to Bruce and I said, you know, this is that
22 wrestler, his wife. And since it was more of a news story
23 instead of just a celebrity nip slip, you know, he -- he gave
24 it to me. If it was just a celebrity kind of everyday nip
25 slip, kind of like that, it would have been probably put on

1 hold until Keith Valcourt got back. But since this was like a,
2 Oh, this will be a good -- this will be a good story, we don't
3 want to lose this, you handle it, that's how I came to work on
4 it.

5 Q. So what was Hustler Magazine's interest in the story?

6 A. She at the time -- you know, and I don't -- I'm trying to
7 remember exactly when Mr. Samansky called and when it related
8 to her death. But, I mean, it was really big in the news. You
9 know, this was a big, big story. It was a national story. I
10 imagine, at least I understood that -- I imagine that a lot of
11 Hustler subscribers are wrestling fans. So I think the idea
12 was this would be the exact kind of story that Hustler would be
13 interested in publishing.

14 Q. Was the information that Mr. Samansky gave you exclusive?
15 In other words, did any other magazine or media outlet have
16 that story?

17 A. No. No. You know, and that's the --

18 Q. And how did you obtain --

19 A. Oh, I'm sorry.

20 Q. No, no.

21 A. I was going to say that, you know, a lot of times that's
22 why these people come to Hustler because there's a lot of
23 stories that Hustler will -- will go with that, you know, maybe
24 other places won't. You know, that's kind of like Larry
25 Flynt's -- Larry -- you know, Larry Flynt doesn't bow down to

1 advertisers or that kind of thing. So Hustler has always kind
2 of prided itself on publishing stories that other people won't
3 publish.

4 Now, I think people would have been interested in this
5 story no matter what. But I think that's why he came to us,
6 and I think that's why he offered us the exclusive.

7 Q. How did you obtain the information that you used to write
8 the article?

9 A. I interviewed him over the phone. We arranged the sale of
10 the --

11 Q. Was that --

12 A. We arranged the sale of the photographs --

13 Q. Was that --

14 A. Excuse me?

15 Q. I'm sorry. The time lag does create --

16 A. Yeah.

17 Q. -- a little bit of a technological difficulty.

18 But my question was was it a substantial interview that
19 you conducted with Mr. Samansky?

20 A. It was probably 45 minutes to an hour I'd say. Half an
21 hour to an hour, something like that.

22 Q. And how much did --

23 A. It wasn't --

24 Q. Did Hustler Magazine -- go ahead.

25 A. It wasn't -- it wasn't a very -- I mean, I didn't -- I

1 wasn't really interested in Mark Samansky's history of what he
2 was doing, you know. I pretty much asked him how did the
3 screen grabs come into existence, how did you know her, what
4 was your relationship with her. And I asked her what was she
5 -- I asked him what she was like. You know, that's what I was
6 looking for.

7 Q. And how much did Hustler Magazine pay for the images and
8 the information obtained from Mr. Samansky?

9 A. A thousand dollars.

10 Q. How did the quality of the images acquired impact the
11 amount Hustler Magazine was willing to pay for them if it did
12 at all?

13 A. I don't know. I don't know. I showed the photos to Bruce
14 David who took them, I believe, to Larry -- I don't know if --
15 actually, I don't know if he took them to Larry Flynt or not.
16 But that was the number that was -- that came back to me. I
17 didn't come up with that thousand dollar number. That was the
18 number that was told to me.

19 Q. How would you -- how would you describe the quality of the
20 images acquired from Mr. Samansky compared to the typical
21 quality of celebrity images published in Hustler Magazine?

22 A. Okay. When you say the typical images, are you talking
23 about the typical images in like a pictorial or the typical
24 celebrity images in the Nip Slips or the Bits and Pieces
25 section?

1 Q. Well, how did the images compare to both of those
2 categories?

3 A. Okay. The images are -- if you have seen them, they're
4 pretty substandard. They're 30-year-old screen grabs. They're
5 not even really photographs. They're screen grabs from a VHS
6 tape.

7 Hustler's pictorials, I mean, you can -- you can see those
8 are done by world-class photographers with lighting, makeup,
9 hair. They're professionally-produced images. So in that
10 regard, there's really no comparison between the images of the
11 article and the images in like a typical Hustler pictorial.

12 Now, the Bits and Pieces images, usually those are
13 paparazzi photographs, once again, professional photographers,
14 so much better quality, much better quality than the article.

15 The Nip Slips or the Movie Mammaries is what it's called
16 when they run, now, those are screen grabs, you know. If you
17 say, Oh, she appeared topless in this, then they'll grab a
18 screen -- then they'll take a screen grab from the movie. So
19 those are kind of comparable. They're not quite as old as
20 these.

21 Excuse me.

22 But either one -- either one you're talking about the
23 images in the article are -- I mean, they're not images that
24 would be in the magazine if it wasn't for the article.

25 Q. How did the payment to Mr. Samansky compare to other

1 payments that you're aware of that Hustler Magazine made for
2 celebrity images and information in other articles or aspects
3 of the publication?

4 A. Once again, not really my area of expertise with the
5 celebrity stuff. I'm trying to think of other celebrity...

6 I'll be honest. This is the only article that I really
7 did anything with celebrities by -- well, no, actually, that's
8 not true because I did do -- I did do the Obama girl. I did an
9 Obama girl article. And I think we paid a similar amount of
10 money, around a thousand dollars, for swimsuit photos of her
11 from a photographer.

12 Q. Are you aware of any instance in which Hustler Magazine
13 paid as much as \$10,000 for celebrity images alone?

14 A. No. Well, we had Carmen Electra -- that was before I
15 started working there -- was in the magazine. I imagine they
16 paid quite a bit for that. We had the -- the David Vitter, the
17 prostitute. She got paid quite a bit of money, I believe, to
18 appear in the magazine. But that wasn't just a pictorial.
19 That was because she was coming out and saying, I had sex with
20 a U.S. senator.

21 I don't think -- obviously, the Nip Slips and the Movie
22 Mammaries, we don't pay those people. But I think Keith
23 Valcourt has an arrangement with Mr. Skin or maybe -- maybe
24 some paparazzi. I don't know.

25 I do know that people have come in with celebrity images

1 asking for a lot of money, and they have been denied. They
2 were very disappointed at what we offered them.

3 Q. Based on your publishing experience with Hustler Magazine
4 --

5 A. Uh-huh.

6 Q. -- is it your opinion that other celebrity and
7 entertainment news outlets would have been interested in the
8 Benoit story had it been brought to them first?

9 A. I think without a doubt they would have been interested.
10 And I can say that because when our -- the month before this
11 came out, we have a, you know, coming out next month. When
12 that -- when it became public knowledge that we were going to
13 run this, it was -- it received quite a lot of press, quite a
14 lot of press.

15 Q. So are you aware of whether other outlets, in fact, did
16 run the Benoit images?

17 A. I know that other websites did. I think they covered up
18 with, you know, like a black graphic over the nipples and maybe
19 the pubic hair. But, yeah, people -- people ran the images and
20 people, you know, quoted the story; and, yeah, people reported
21 on it.

22 (Videotape stopped.)

23 THE COURT: All right, Mr. Bauer.

24 Ladies and Gentlemen, we are going to take our lunch
25 break at this time. During the lunch break, remember my

1 instructions not to discuss the case with anyone, not to allow
2 anyone to discuss the case in your presence. Don't even begin
3 discussing the case among yourselves yet. And you are excused
4 until 1:30 for lunch, and we will resume the trial at that
5 time.

6 Court's in recess until 1:30 for lunch.

7 (A lunch recess was taken.)

8 THE COURT: Ready, Mr. Bauer?

9 MR. BAUER: Yes, Your Honor.

10 THE COURT: We're ready for the jury.

11 (Jury entered the courtroom.)

12 THE COURT: All right, Mr. Bauer.

13 MR. BAUER: I will take the opportunity to resume the
14 deposition of Tyler Downey.

15 (Videotaped deposition continued playing in open
16 court as follows.)

17 A. I mean other entities -- I mean other celebrity. I know
18 for a fact some of the -- I know for a fact some of the
19 wrestling websites and some of the wrestling publications
20 reported on it.

21 Q. Mr. Downey, how did Hustler Magazine make the decision to
22 publish the Benoit article and images?

23 A. In like in -- in an instance like this, there's a lot of
24 things that have to be considered: One, are the photos worthy
25 of being published? Are they good enough? Can you see?

1 So in that regard, we have to look -- we have to see the
2 photos before we buy them. In this instance, it was pretty
3 quickly decided that these would be good for the magazine.
4 Then you have to agree on a price, if the price is agreeable.

5 Once all that is taken care of, then it goes to, you know,
6 we have our discussions with the legal department whether it
7 would --

8 Q. And we're not going to talk about --

9 A. Okay.

10 Q. We're not going to talk about what lawyers said to you.

11 A. Right. I'm just going through the process.

12 So that would -- that would be the next step in the
13 process is the -- is the legal situation. And then after that
14 I did the -- I did the interview and I wrote the -- I wrote the
15 article. And it goes to -- it goes to our editors to design
16 the page and copyright and all that kind of stuff.

17 Q. Was the decision to publish the Benoit article and images
18 in this case the typical process, or was there anything
19 extraordinary about it in this particular case?

20 A. Without going too much in depth on the detail, we --
21 before we ever agreed to purchase the -- the photos, we did the
22 legal issue. Now, on most articles -- most articles like that
23 or most -- most articles like this, like the feature articles
24 have already been slated for the magazine; and so when they're
25 done we send them to the lawyers for approval. In this one, we

1 spoke to them before the article was even laid out, anything
2 like that. So that was a little bit out of the ordinary, at
3 least on my mind, on the -- that had never happened in any of
4 the articles I had ever written before.

5 Q. Without getting into advice that Hustler's outside counsel
6 or inside counsel may have given --

7 A. Uh-huh.

8 Q. -- about this particular article, tell the jury why you
9 and Hustler Magazine believed that the publication of the
10 Benoit images was legal without needing to get permission from
11 her estate.

12 A. Sure. I mean, she was a major -- this was a major news
13 story. And, you know, the simple fact that -- the simple fact
14 that she had been in the news so much was something that really
15 -- you know, was really attractive about the article for us in
16 that, you know, it's in addition to the current reporting going
17 on with her. So we thought we would be good on that grounds.

18 She was deceased which, you know, right to privacy and
19 that kind of thing becomes a little bit different once a person
20 is not living anymore. And, second of all, you know, 2257 if
21 you -- I'm going to take a look at the images here.

22 You know, my concern -- without telling what the lawyer
23 said, my concern was, you know, we didn't have IDs on her to
24 prove she was over 18 at the time which is what -- you know,
25 with my -- when I was working with the compliance department,

1 you know, I would have to provide IDs to them; and there was no
2 way we were going to get IDs with these photos. So that was
3 one of the concerns I had.

4 But if you look at the images, they're mostly topless
5 images. There's some -- there's some pubic hair there, but
6 there's not really any vaginal images, I guess. So the 2257 --
7 -- and plus this was in the '80s, you know, another thing which
8 there's a time limit on the 2257 and what you have to do. So
9 going in -- before we even spoke to the wrestlers, I felt that
10 we would be standing on pretty solid ground with it.

11 Did I say speaking to the wrestlers?

12 I meant speaking to the lawyers.

13 Q. For purposes of planning the March 2008 issue, how did
14 Hustler Magazine internally treat or characterize the Benoit
15 article and images?

16 A. For the March issue, it was -- honestly, this may sound
17 surprising; but it was just another article to be honest with
18 you. It was an article that I was writing, so it was important
19 to me. But it wasn't like the whole staff was, Oh, we've got
20 Chris Benoit's wife. You know, everybody had their own
21 articles.

22 I mean, you can see even on the -- the exhibit here, the
23 cover of the magazine that the Barbi twins interview with an
24 animal rights terrorist is above it. Howard Stern's favorite
25 comic Lisa Lampanelli, is right here. You know, these are the

1 two -- these are the two important ones because a lot of times
2 the thing cuts it off right there when you've got plastic wrap
3 on it, so you can only see the first couple.

4 So I always got the impression that it was just -- it was
5 another article. It was another news article in the magazine.

6 Q. And the document that you were just referencing --

7 A. Uh-huh.

8 Q. -- is the cover of the March 2008 issue?

9 A. Yes.

10 Now, when that --

11 Q. And is --

12 A. When the Coming Next page came out on the previous issue,
13 you know, and we started to get a lot of press, things changed
14 because Donna Hahner sent out an e-mail saying this is a great
15 article, this is going to be a big seller, look at all the
16 press we're getting. You know, this is -- this is the kind of
17 celebrity stuff, the kind of celebrity news that we should try
18 and get more of.

19 Q. So how was the Benoit article and images characterized for
20 the internal pagination report purpose?

21 A. Nancy Benoit was a features piece, that is to say a --

22 Q. Does that mean it's editorial?

23 A. Editorial, a news -- news and entertainment.

24 Q. And you've got the full copy of the March 2008 Hustler
25 Magazine issue in front of you. How is the Benoit article

1 treated both on the cover and inside that magazine with respect
2 to its characterization as editorial?

3 A. Sure.

4 Well, as you can see here, most of the cover lines on here
5 are feature pieces, Barbi twins article, Lisa Lampanelli
6 interview, global warming, Chris Benoit. You know, a lot --
7 most of the times we would put the features' cover lines on the
8 cover or we would put the feature articles on the cover. You
9 know, we obviously say who is on the cover, the girl here,
10 Victoria Valmer. But for the most part, you know, you've got
11 the features right there.

12 Now, as far as being treated for the magazine, I mean, you
13 can pretty much see there's two pages here. So, you know, all
14 of our pictorials are six to eight pages. There's a big block
15 of text, the actual news article. I mean, if you were to go
16 through this magazine, it would be very easy to tell the
17 difference between a pictorial and a features article like
18 this.

19 Q. Mr. Downey, would you have been involved in the
20 publication of this article and its images if Hustler Magazine
21 had not considered it a news feature?

22 A. I didn't -- I didn't understand.

23 Q. Would you have had any involvement in the drafting of this
24 article and the publication of the article and the images --

25 A. I would have -- yeah.

1 Q. -- if Hustler Magazine hadn't treated it as a news
2 feature?

3 A. I would have had -- well, I don't want to say nothing to
4 do with the article, but I wouldn't -- I would never have had
5 the involvement that I did. The only involvement I had with
6 the pictorials was the rounding up the IDs and releases to give
7 to compliance at the end. That was my -- the extent of my
8 involvement.

9 The creative director and -- what did we call that editor
10 -- you know, the creative director and the design -- the design
11 department worked exclusively with the pictorials and the
12 talent department, not something I -- not something I would do.
13 And if it wasn't -- and if it was just a normal -- if it was
14 just a normal celebrity piece, if this was like a normal Nip
15 Slips, it would have gone to Keith Valcourt. I wouldn't have
16 seen it.

17 Q. Would Hustler have published the images of Nancy Benoit
18 without the article you wrote?

19 A. No, they wouldn't.

20 Q. How do you know that?

21 A. Well, two things, honestly. I honestly don't believe that
22 this -- even if -- you know, and she was a celebrity in her own
23 right. But I don't know for sure if we would have published
24 these images if there wasn't the big news story accompanying it
25 of her being murdered.

1 I mean, I'll be honest with you. These images -- the
2 images are special only because they're of her at a certain
3 time in her life. If you're just looking at the images,
4 they're not images that would be in Hustler Magazine on their
5 own.

6 Q. Mr. Downey, are news articles and images illustrating news
7 articles typical content in Hustler Magazine?

8 A. Are news articles typical content? Is that what you're
9 asking?

10 Q. Yes.

11 A. Yes, absolutely.

12 Q. And are images illustrating those news articles typical
13 content?

14 A. Yes.

15 Q. Does Hustler Magazine publish news articles without
16 illustrative images?

17 A. Not that I can recall, no. I mean, pretty much that's one
18 of the most important things. You know, I've had -- when I
19 first started, the features editor was always like -- he always
20 told me, you know, my first question is: What are the images
21 like for any article? Do you have photos?

22 That's one of the first questions: Do you have photos?

23 Doesn't matter what the article is.

24 Now, there have been times -- you know, I write -- I write
25 a lot of political stuff for the magazine where, you know, I

1 don't have photos. And if that's the case, then the staff uses
2 a photo service to buy photos. And that was part of -- you
3 know, I did that some as part of my responsibilities. I would
4 search for photos for articles to accompany -- you know, to
5 accompany the articles. So you're always going to have images
6 in any article.

7 Q. Mr. Downey, do you know who Jim Daus is?

8 A. Jim Daus was Nancy Benoit's first husband.

9 Q. And how do you know of Mr. Daus?

10 A. I know of Mr. Daus -- I first heard of Mr. Daus with my
11 interview with Mark Samansky. He was discussing -- he was
12 discussing how these photos came to be. And Jim Daus -- Daus's
13 name came up.

14 Q. Have you ever spoken to Mr. Daus?

15 A. I have. I have. He called. Once again, it was when that
16 Coming Next page came out and we were receiving press. He
17 called the Hustler offices.

18 Q. And please describe for the jury the conversation that you
19 had with Mr. Daus. Specifically, what was the purpose of that
20 call?

21 A. Well, he was calling, I think, for a couple reasons.

22 Number one, I think he was concerned because there were
23 actually a few videotapes or two videotapes that -- that
24 existed at one point. And I -- I didn't realize this at the
25 time. Mark Samansky told me this later. He was asking, Am I

1 in the magazine? Am I in these images?

2 And I said, No, it's just Nancy.

3 And I come -- I came to find out later on that he was --
4 that there was another videotape that Mark Samansky had taken
5 of Jim Daus and Nancy having sex. You know, I guess they were
6 drunk and -- I don't know. I don't know all the particulars
7 about that videotape, but there -- one existed and he was
8 concerned that that is the one that we were running in Hustler.

9 So when I told him that, No, you're not in it, no, you
10 know, there's no images of you, he wanted to know if he was
11 entitled to anything, monetarily, I believe. And I told him
12 no. And then I asked him to hold on, and I went and told Bruce
13 David. I'm like, I've got her ex-husband on the phone, and
14 he's asking all these questions. And, you know, Bruce was
15 like, We don't owe him anything. Just tell him that, you know,
16 the article stands as it is.

17 I suggested to Bruce that, you know, if she had allowed
18 these images to be taken, she wanted to be in Penthouse, maybe
19 her husband had some more and that I should feel him out to see
20 that. And Bruce agreed, and he said, Feel him out, see what he
21 says.

22 So I came back to the phone and I -- I told Jim, you know,
23 if it's monetary compensation you're looking for, we would be
24 very interested in purchasing additional images. And he said
25 that he had -- he had additional images, all that we could ever

1 want, but he would have to think about it before he sold it to
2 us.

3 Q. Did he ask you what right Hustler had to publish the
4 images of Nancy Benoit?

5 A. He did. And I told him what our internal -- you know, our
6 internal discussions were. I just said it was a news story and
7 that to print a news story we don't really need permission from
8 her or the family or him since it's a news story. As a news
9 magazine, we have the right to run it.

10 Q. Did Mr. Daus ever tell you in that call that he did not
11 want the images of Nancy Benoit published?

12 A. I don't think that was ever discussed, no. He never said
13 that.

14 Q. Has he ever --

15 A. I mean, he -- I don't think he was very -- he wasn't happy
16 about it. I think his first concern was was he in the
17 magazine, were these screen grabs of him and his ex-wife having
18 sex. When I told him that, you know, he wanted to know if he
19 was entitled to anything and what right did we have.

20 But, no, it wasn't -- he never -- as far as my memory
21 goes, he never said, I don't want you to publish these.

22 Q. Did he ever demand that Hustler not publish the pictures?

23 A. No, not to my knowledge.

24 Q. Thank you, Mr. --

25 A. I mean, we ended our conversation -- we ended our

1 conversation -- we ended our conversation I was thinking he was
2 going to call me back and give me a price for additional
3 images. That's how our conversation ended.

4 MR. BAUER: Well, thank you very much. We appreciate
5 your time.

6 (Videotape concluded.)

7 THE COURT: Cross-examination, Mr. Decker?

8 MR. DECKER: Your Honor, before I begin, I would ask
9 the Court to reconsider the ruling on Plaintiff's Exhibit 2 in
10 light of the testimony of Mr. Downey at page 32, line 13, in
11 which he described the contents and the pagination report which
12 the Court has already excluded and its relationship to this
13 article at issue.

14 THE COURT: All right. I'll think about it,
15 Mr. Decker.

16 MR. DECKER: Yes, Your Honor, we'd like to --

17 MR. BAUER: Your Honor, we would like to be heard on
18 that before you decide, though.

19 THE COURT: I'll hear from you.

20 MR. DECKER: Mr. Hallman is going to read the
21 responses, Your Honor.

22 Judge, do I need to explain briefly what's going on
23 here since we don't have the video anymore?

24 THE COURT: I think I have already done that,
25 Mr. Decker.

1 MR. DECKER: Okay.

2 THE COURT: Obviously, this is not Mr. Downey. But
3 he is going to read the answers. And to the extent you are
4 able to do so, consider it as if Mr. Downey was here testifying
5 in person.

6 MR. DECKER: Beginning on page 44, line 23.

7 THE COURT: And there's nothing wrong with the
8 lawyers skipping around. They are only supposed to present
9 what's important and leave the rest out.

10 (Deposition of Tyler Downey read as follows.)

11 BY MR. DECKER:

12 Q. Mr. Downey, as I said earlier, my name is Richard Decker;
13 and I represent Maureen Toffoloni who is the administrator of
14 Nancy Benoit's estate. Let me ask you a few things for the
15 record, Mr. Downey.

16 First of all, you don't compare Hustler to Newsweek or
17 Time Magazine, do you?

18 A. In what regards? As far as like news content?

19 Q. That Hustler is a news magazine like Newsweek or Time?

20 A. I would say --

21 Q. You don't make that comparison, do you?

22 A. I would say Hustler has very good news articles.

23 Q. You are telling the jury that Newsweek, Hustler and Time
24 Magazine are all similar news magazines?

25 A. No, they're certainly not similar. They're -- I would

1 never argue that they're similar magazines. But I'd say I
2 would definitely argue that Hustler's news content, you know,
3 and not just pieces like this; but Hustler has great political
4 stuff in there.

5 You know, I've got a -- the issue on the stands right now
6 I've got an article in there on Barack Obama and Franklin
7 Roosevelt and comparisons between the two. If you look at some
8 of the writers, I mean, you've got Robert Scheer. You've got
9 Nat Hentoff. These are -- these are well-known political
10 writers and --

11 Q. So you still write some articles for Hustler?

12 A. I do.

13 Q. How many have you written since your employment was
14 terminated?

15 A. One. One has appeared.

16 Q. And is that -- is that the one that's just appeared?

17 A. Uh-huh.

18 Q. The one that is -- is that a yes?

19 A. That's -- I'm sorry. Yes, yes.

20 Q. And is that a relationship that you got after this lawsuit
21 was filed?

22 A. What do you mean relationship?

23 Q. The lawsuit being filed in March of 2008.

24 A. Well, the relationship began when I started at Hustler.

25 Q. But the contract piece that is now appearing in Hustler

1 Magazine that you just told me about --

2 A. Uh-huh.

3 Q. -- is that something that came up after this lawsuit was
4 filed?

5 A. Yes. And I -- I --

6 Q. How much are you making on that piece?

7 A. One dollar a word.

8 Q. A dollar a word.

9 How many words are you going to write?

10 A. It was -- well, it maxes out at 1,500.

11 Q. So you're going to get \$1,500 for that piece?

12 A. Yes.

13 Q. And that's the only piece you have done since you left
14 your employment?

15 A. I submitted two more, but they haven't been slated as far
16 as I know. And in -- they haven't been scheduled to appear.

17 Q. Did they pay you for those pieces?

18 A. No, not yet. No.

19 Q. But if you -- if they accept them for publication, do they
20 pay you a dollar a word?

21 A. Up to the max, yes.

22 Q. And these are things that came up after this lawsuit was
23 filed?

24 A. These came up about -- I would say a year and a half after
25 I found out after -- you know, when I found out about the

1 lawsuit I called Hustler. I called Donna Hahner, and I said --
2 you know, I was in Kansas City at the time. And I said, Wow, I
3 just -- I was Googling Hustler. I think I was looking for one
4 of the articles, and I read about it. I said -- I offered my
5 help to Donna Hahner. I had never, you know -- I had never --
6 I didn't leave on bad terms with Donna Hahner. I had a lot of
7 respect for Donna, always have. I offered my help, and she
8 accepted.

9 It kind of stood still for a long time to be honest, you
10 know. I didn't hear anything for a while. About a year and a
11 half later I'm getting ready to have a daughter, and our
12 insurance wasn't that great. So I called up Bruce David; and,
13 you know, I asked him would it be all right if I came in -- I
14 mean, if I submitted some stuff. All the discussions that I
15 have had about this case for the most part have been with Donna
16 Hahner, and all of the discussions I have had about submitting
17 articles have been with Bruce David. I mean, I can -- I can
18 honestly tell you -- I can honestly tell you that my submitting
19 articles to Hustler Magazine has absolutely nothing to do with
20 my testimony.

21 Q. You can tell me that honestly?

22 A. Without a doubt, absolutely nothing to do with my
23 testimony.

24 Q. How much have you been paid since you left Hustler?

25 A. By Hustler?

1 Q. Yes.

2 A. 1,500 for the article.

3 Q. Or any Larry Flynt company?

4 A. Nope, just the one article.

5 Q. And the two more that are in the hopper, so to speak?

6 A. The two more that are on the way. But you got to
7 understand too that I -- you know, I wrote quite a bit for the
8 magazine when I was there. It's not like, I mean, with all --
9 with all honesty, I mean, I'm pretty good. I am a pretty good
10 writer. I mean, I contribute good stuff to the magazine.

11 So I don't even know if Bruce when he agreed to -- when he
12 agreed to allow me to submit stuff to the magazine I didn't
13 even know if he was -- he didn't even know if I was giving
14 testimony or not.

15 Q. Well, you said earlier he wrote an e-mail that upset you.
16 What did he say about you in that e-mail?

17 A. He wrote in his e-mail -- it wasn't exactly what he had
18 written that upset me so much. He had written an e-mail saying
19 that he wanted to talk to me about doing a better job. What
20 really upset me is that he had two of my co-workers, he kind of
21 told them to go along with what he was saying so they wrote.

22 Q. Well, he actually terminated you, didn't he?

23 A. No. No, he didn't. I quit. I gave my two weeks as soon
24 as I read the e-mail. And then the next day I came in because
25 I had given my two weeks and let him know -- we kind of got

1 into an argument, and I was angry that he had asked these other
2 two people, my co-workers, to write stuff that I knew was not
3 true because I knew I was doing a good job.

4 You know, they -- they went through like seven or eight
5 replacements of me in less than a year after I left. And so,
6 you know, I went -- before I did that, I went up to and I spoke
7 to Donna. And I said, Donna, you know I've always been honest
8 with you. This really upsets me, and I don't -- you know, I
9 don't -- I just don't feel like dealing with this kind of stuff
10 anymore.

11 I think she understood. And I said, you know, I'm going
12 to give you my two weeks' notice. She kind of tried to talk me
13 out of it, but I was -- I was insistent.

14 Like I said, my wife had left; so I was considering moving
15 back to Missouri anyways. So it really got heated when they
16 started asking me for my MySpace information. That's where
17 most of the trouble came from because they're like, Well,
18 you've been freelancing doing the Girls of MySpace section. We
19 want all the passwords. We want all that stuff for the
20 MySpace.

21 And I said, Listen, I was doing that freelance. You guys
22 were not paying me one cent to maintain that MySpace page. You
23 know, that's a whole different thing. You guys didn't ask me
24 to do that. I was doing that on my own time.

25 And so that's when I got into it -- into it with HR and a

1 little bit with Donna, you know. We were always professional
2 then, but that's how it ended.

3 Q. And since you left employment at Hustler and since this
4 lawsuit was filed by Mrs. Toffoloni against Hustler, you have
5 been paid 1,500 for an article; and you have two more in the
6 hopper?

7 A. That's correct.

8 Q. And all this came about after the lawsuit?

9 A. All this came after the lawsuit. And the person that
10 makes the decisions on whether I'm going to be in the magazine
11 or not is Bruce David, and the discussions that Bruce David and
12 I had had about this case had mostly revolved around
13 speculating who was going to play us if this goes to the
14 Supreme Court and there's a People versus Larry Flynt 2.
15 That's been like the -- that's been the gist of what we have
16 discussed about this case.

17 Q. Let me make sure we understand each other, Mr. Downey.
18 As an employee of Hustler Magazine --

19 A. I mean, I think you're trying to --

20 Q. Excuse me?

21 A. You're trying to say, you know, it's kind of a quid pro
22 quo which I'm telling you right now is absolutely not the case.
23 The two have nothing to do with each other.

24 Q. Thank you for that.

25 A. Yeah.

1 Q. Thank you very much for that. We'll let the jury decide
2 that, though.

3 A. Okay.

4 Q. As an employee of Hustler, you never asked Maureen
5 Toffoloni for permission to publish the images of her daughter,
6 did you?

7 A. No.

8 Q. As an employee of Hustler Magazine, you never asked
9 Mrs. Toffoloni for a model's release to publish those images,
10 did you?

11 A. No.

12 Q. As an employee of Hustler Magazine, you never offered or
13 attempted to pay Maureen Toffoloni any amount of money for the
14 right to publish the images of her daughter, did you?

15 A. No. I mean, I don't think these people in any of these
16 instances right here (indicating) pay the subject of the
17 photographs either, though. You know, I don't think --

18 Q. Well, Mr. Downey, you do realize, don't you, that the
19 courts have held that Hustler did not have the right to publish
20 those images?

21 A. I -- I know that one court did, yes. The lower court
22 ruled.

23 Q. You know that --

24 A. The lower court, if I'm not mistaken, ruled the opposite,
25 though.

1 Q. Well, you know the Court of Appeals has ruled that Hustler
2 violated Nancy Benoit's right of publicity? You do know that,
3 don't you?

4 A. I do know that.

5 Q. And you know that the Supreme Court refused to take the
6 case, don't you?

7 A. I do know that.

8 Q. So you know that what you did was wrong? Don't you know
9 that?

10 A. Well, what -- according to the judge's decision, yes, what
11 Hustler did was wrong.

12 Q. All right. You simply published --

13 A. But it was -- it was very clearly an honest mistake. I
14 mean, we were operating -- we were operating under the idea
15 that we -- what we were doing was perfectly legal.

16 Q. All right. Well, we'll let the jury decide that.

17 But the point of the matter is you published the images of
18 Nancy Benoit without discussing the matter with Mrs. Toffoloni
19 at all. That's the truth, isn't it?

20 A. That is absolutely -- why can -- why would I talk to her
21 mother about this? I don't understand what your -- why would I
22 ask her mother if we could publish the image?

23 Q. I want you to verify for me on this record that you did
24 not make any attempt to discuss that with her mother.

25 A. I made absolutely zero attempt to talk to her mother about

1 showing these images.

2 Q. Prior to your work at Hustler beginning in February of
3 2006, how long had you been in the publishing business?

4 A. How often had I been published?

5 Q. How long had you been in the publishing business?

6 A. Probably since college when I wrote for the student
7 newspaper.

8 Q. So you went from writing for your student newspaper to
9 Hustler Magazine?

10 A. Yeah.

11 Q. That's your experience in the publishing business?

12 A. There was a -- there was a -- there was a time frame in
13 between there where I was writing scripts. I was submitting
14 stuff to Hustler Magazine when I was out in Los Angeles. But,
15 yeah, I went -- the only things I ever had published were --
16 before that were in the college newspaper.

17 Q. Have you obtained in your work at Hustler releases from
18 photography models in the past?

19 A. I have.

20 Q. But you did not do that in this case?

21 A. No.

22 Q. You wrote the copy of the story?

23 A. The -- the -- I'm sorry. The releases that I obtained in
24 the past?

25 Q. I'm asking the questions now.

1 A. Okay. Oh, okay.

2 Q. You just told me -- you just told me that you had -- that
3 you had, in fact, obtained models' releases in your work at
4 Hustler but that you did not do so in this case.

5 A. The model releases that I obtained for Hustler were for
6 the Girls of MySpace section. They were not celebrities. They
7 were not news articles. These were girls looking for publicity
8 in Hustler Magazine. These were just normal, everyday girls
9 that submitted nude photographs, completely different
10 situation.

11 Q. Can we agree that you did not get a release from Nancy
12 Benoit or her mother for the publication of these images?

13 A. Can we agree on that? Yes.

14 Q. All right. And we can also agree that you wrote the copy
15 for the story that appeared with the images that were published
16 in Hustler Magazine?

17 A. Yes, I wrote the copy.

18 Q. All right. Now, there's a section in the magazine article
19 that you say you wrote --

20 A. Uh-huh.

21 Q. -- that says the original print negatives were destroyed
22 at Nancy's behest?

23 A. Yes, sir.

24 Q. Do you remember that?

25 A. Yes, I do.

1 Q. So can we agree, Mr. Downey, that you knew that at least
2 insofar as the photographs are concerned she did not want those
3 published?

4 A. That's correct. And we did not publish those photographs.
5 We published -- we published -- what we published were screen
6 grabs from a video taken on a -- on a -- before the incident, I
7 believe, before the photographs were taken.

8 Q. And your logic, if I can call it that, in this situation
9 was you knew she didn't want the photographs published; but you
10 thought that it was okay to publish the video footage?

11 A. It was okay. I mean, to be honest, I mean, her -- first
12 of all, she is deceased. Second of all, it's a news story.
13 You know, I'm sure a lot of people would like images not to be
14 published if they are a news story; but they don't get to make
15 that decision.

16 Q. But you now -- but going back to my earlier line of
17 questioning, you do understand now that you were wrong about
18 that, don't you?

19 A. I know that the judge said that we were wrong.

20 Q. Okay.

21 A. I think that the -- my personal opinion is that this was
22 judged, well, more on the merits of -- of a grieving mother
23 versus Larry Flynt other than the facts of the case.

24 Q. Okay. Let's establish a few other things that I think are
25 obvious from the record.

1 You are not a lawyer, are you?

2 A. No, I'm not a lawyer.

3 Q. You have never been to law school?

4 A. No.

5 Q. Not trained in the law?

6 A. No.

7 Q. But there are --

8 MR. DECKER: That's your line.

9 MR. HALLMAN: Oh, I'm sorry.

10 (Reading of deposition continued.)

11 A. But there are -- but there are lawyers that seriously
12 disagree with what your opinion is.

13 Q. Well, it's not my opinion, Mr. Downey. It's the Court's
14 opinion.

15 A. Okay. The Court. There are serious lawyers who disagree
16 with the Court's opinion as well.

17 Q. Well, that's the law, isn't it?

18 A. I'm saying that there's -- there's different ways to view
19 the law or else the lower court wouldn't have ruled in the
20 complete opposite direction from what the Court ruled.

21 MR. DECKER: Go to the bottom of page 61.

22 Are you there?

23 MR. HALLMAN: Yes.

24 (Reading of deposition continued.)

25 BY MR. DECKER:

1 Q. As an employee of Hustler Magazine, had you or has Hustler
2 Magazine while you were employed there ever been sued by
3 someone for publishing their image without their consent?

4 A. I have never been sued and I -- I have no idea whether
5 Hustler's been sued or not. Like I said, I only found out
6 about this lawsuit because I Googled "Hustler and Tyler
7 Downey." So I -- I don't have any information on any legal
8 cases or anything like that outside of what I was witness to.

9 MR. DECKER: All right. Go to page 63, line 17.

10 (Reading of deposition continued.)

11 BY MR. DECKER:

12 Q. You left in February of 2008, right?

13 A. Yeah, yes. February, March.

14 Q. Did you leave on February the 15th, February the 28th?
15 What?

16 A. I don't remember exactly.

17 Q. While you were --

18 A. I gave my two weeks, but I didn't last two weeks.

19 Q. While you were there, did you see the original or a copy
20 of my letter to Hustler Magazine about the publication of the
21 images of Nancy Benoit in the March 2008 edition?

22 A. No, sir.

23 Q. Did you discuss the contents of that letter with anyone at
24 Hustler while you were there?

25 A. This is the first time I've ever heard about your letter,

1 so no.

2 Q. All right. So while you were at Hustler until the last
3 day you were there, and you being the author of the article, no
4 one ever came to you and said, We've gotten a letter from a
5 lawyer in Atlanta objecting to the publication of these images?

6 A. Nope. Like I said, I was -- I'm not -- I'm not privy to
7 the -- you know, to the legal. There's a whole legal
8 department. Those people are higher up on the food chain that
9 would be having the discussion, not me.

10 Q. And after you left Hustler in February of 2008 and since
11 you have re-established a relationship, a financial
12 relationship with Hustler Magazine, no one has mentioned my
13 letter to you or the contents of the letter or anything about
14 the letter?

15 A. No. I -- no, I -- I guess your letter didn't have -- your
16 letter was -- has never been mentioned in the -- prior to this
17 moment right now.

18 Q. Do you know of any -- if anyone made any effort to
19 minimize the damage to Mrs. Toffoloni by the publication of the
20 Nancy Benoit images in the March 2008 edition?

21 A. Can you -- do I know of any way to mitigate? What do you
22 mean?

23 Q. Well, did they -- anybody do anything -- that's my
24 question -- that you are aware of to mitigate the damage to
25 Mrs. Toffoloni as a result of the publication of those images?

1 A. Mrs. Toffoloni was not our concern, no. There was a news
2 story, and we were publishing the images. In our view --

3 Q. I'm quite --

4 A. And in our view, Ms. Toffoloni actually had nothing to do
5 with this.

6 Q. I'm quite willing to agree that Mrs. Toffoloni was not
7 your concern.

8 My question to you, however, is are you aware of any
9 efforts that were ever made by Hustler to minimize the damage
10 to Mrs. Toffoloni as a result of the publication of these
11 images?

12 A. Are you saying did -- did we like call and apologize to
13 her for what -- first of all, what damages are you referring
14 to?

15 Q. Let me ask you the questions my way, and answer them if
16 you can. If you say no, that you know of no such efforts, then
17 that's the answer.

18 A. Uh-huh.

19 Q. Do you?

20 A. Well, without you being more specific, I don't know. No,
21 I don't know of any. I don't know of anything we did to lessen
22 her damages according to you, whatever her damages are.

23 What are her damages?

24 Q. All right. Well, we're going to find out that at the end
25 of this case.

1 A. Okay.

2 Q. But so far as you know, Hustler didn't do anything to try
3 to mitigate those damages?

4 A. We did not try to mitigate her hurt feelings or whatever
5 it is her damages were.

6 Q. The one -- the one month that you were there after -- let
7 me represent to you that my letter was dated January the 16th,
8 2008; and you did not leave until the end of February 2008.

9 A. Uh-huh.

10 Q. Is that correct?

11 A. That's correct.

12 Q. All right. And so during that time period, you heard
13 nothing within the company about efforts to take any steps
14 whatsoever regarding the Nancy Benoit images in the March 2008
15 edition?

16 A. That's correct.

17 Q. Is that correct?

18 A. That is correct.

19 MR. DECKER: Go to page 70, please.

20 (Reading of deposition continued.)

21 BY MR. DECKER:

22 Q. The Nancy Benoit article certainly had the angle of
23 violence in it, didn't it?

24 A. Well, she was murdered; and we mention that.

25 Q. It says: "Chris Benoit Murders His Son and Wife." That's

1 the caption on the front of the magazine?

2 A. Actually, it says -- actually, it says: "Wrestler Chris
3 Benoit's Murdered Wife Nude" is what it says on the front of
4 the magazine.

5 MR. DECKER: Page 72, line 2.

6 (Reading of deposition continued.)

7 BY MR. DECKER:

8 Q. The banner headline of the article containing the Nancy
9 Benoit images says: "The Long Lost Images of Wrestler Chris
10 Benoit's Doomed Wife."

11 Who wrote that?

12 A. I don't remember to be honest with you. It might have
13 been -- I don't know. I don't know who wrote that. I don't
14 think I wrote that.

15 Q. You didn't write that?

16 A. I don't know who wrote that.

17 Q. Who else would have possibly written that?

18 A. It could have been the features editor. It could have
19 been Bruce David. It could have been Morgan Hagan, the
20 managing editor. There's a number of people who could have
21 written it.

22 Q. Would you characterize that as an angle tending toward
23 violence?

24 A. "The Long Lost Images of Wrestler Chris Benoit's Doomed
25 Wife," do I think that is an angle inclined to violence?

1 I don't think the images imply violence. I think that her
2 -- the news story of what happened to her implies violence.

3 Q. The images of her, his doomed wife, that doesn't imply
4 violence to you?

5 A. The images, no. "Doomed", yes. The images of her are of
6 her laying around naked. I don't see how that's violence.

7 Q. I'm asking you now about the caption, the banner that says
8 the images.

9 A. That's what I'm answering. I'm saying that "Chris
10 Benoit's Doomed Wife" implies violence. But the images --

11 MR. DECKER: Go to line 18 on page 73.

12 (Reading of deposition continued.)

13 BY MR. DECKER:

14 Q. Do you, Mr. Downey, believe that Nancy Benoit or her
15 mother as a representative of her estate should have had the
16 right to decide if her image was associated with something like
17 Hustler Magazine?

18 A. You know, that's a sticky situation. No, I don't. It's a
19 news story, you know. I don't -- I don't want to say -- I
20 don't want to say something that's going to come off as wrong.
21 But, you know, first of all, she had taken these images. She
22 -- nobody forced her to take these images. I know that's not
23 what we are discussing.

24 You know, second of all, she was a -- involved in a
25 professional wrestler -- in professional wrestler -- I mean, I

1 think some of the story lines that she was involved in, you
2 know, extramarital affairs, Satanism was some of the story
3 lines, compared to some of the things that she actively pursued
4 I think these images were rather tame to be perfectly honest
5 with you.

6 Q. My question -- and I will ask it again -- do you believe
7 that Nancy Benoit or her mother should have had the right to
8 decide if her image was associated with Hustler Magazine?

9 A. No. The subjects of a news story do not get to decide
10 whether their images are used or not.

11 Q. And you get to decide if it's a news story?

12 A. I don't personally; but Hustler Magazine in conjunction
13 with their legal team does, yeah. Yes.

14 Q. Hustler Magazine is just people?

15 A. That's right.

16 Q. So it's you and Bruce David and Larry Flynt who get to
17 decide if something's news so that you can put up a person's
18 image in the magazine?

19 A. Well, obviously, that's not correct. I guess some judge
20 in Georgia gets to decide that.

21 Q. But the person whose image is in question doesn't get to
22 decide?

23 A. No.

24 MR. DECKER: He goes on at line 9, page 75.

25 (Reading of deposition continued.)

1 A. Does Barack Obama get to decide which images of -- of him
2 are used in a news piece?

3 No, he doesn't.

4 Q. You are comparing the deceased, Nancy Benoit, with Barack,
5 the president of the United States?

6 A. I'm comparing that they are both news stories. The
7 content is certainly different obviously, but the -- you know,
8 the legal -- the legal justification is the same.

9 Q. Would you want for yourself or a family member the right
10 to decide if your image was associated with Hustler Magazine?

11 A. If I was a celebrity, then I should definitely. I would
12 understand that you are giving up some of your privacy in
13 pursuing being a famous celebrity.

14 Q. So Nancy Benoit forfeited her right of privacy, forfeited
15 her right to control her image in your view?

16 A. She did not forfeit the con -- to control the right of her
17 image, but she definitely forfeited some of her privacy. I
18 don't know the legal justification.

19 Q. Did she --

20 A. I don't know the legal justifications for this. But I
21 know that, you know -- I know that paparazzi can shoot
22 celebrities, and then they can put them in the In Touch
23 Magazine, and legally they are on solid ground with that. Yes.

24 Q. But it's the right to control her image that you are
25 saying Nancy Benoit lost?

1 A. When you say "control her image," I mean, we are using
2 this as a news story. We're not using this to -- I mean, I
3 don't understand. Newsweek uses images all the time of people,
4 and they -- these people don't get to control their images.

5 MR. DECKER: Go to page 77, line 6.

6 (Reading of deposition continued.)

7 BY MR. DECKER:

8 Q. Mr. Downey, do you have any knowledge whatsoever as to the
9 value that accrued to Hustler Magazine as a result of its
10 publishing the images of Nancy Benoit without her permission?

11 A. No, I do not.

12 Q. You were not privy to any of that financial information,
13 were you?

14 A. No.

15 Q. Who do you write for today as we sit here today?

16 A. I write for Hustler Magazine and I -- I work for my
17 friend's web design company here in Kansas City. So I do a lot
18 of content writing for him. That was my job until my daughter
19 was born.

20 Q. Well, tell me what publications you have had since you
21 left Hustler other than the three that you have submitted to
22 Hustler, one of which you have been paid \$1,500 for.

23 A. I haven't submitted anything -- well, I have submitted
24 screenplays. I have been writing screenplays, and I have been
25 working on a website. It's called -- it's called

1 cliffhangerfalls.com. That's what I have been working on.

2 Q. But nothing that you have received any money for?

3 A. No, not yet.

4 Q. Are you involved in the pornography business at all today?

5 A. No. No, I'm not except for writing for Hustler. I -- one
6 of the articles I submitted to Hustler was an article on a 3-D
7 pornography online.

8 Q. Did you talk to anyone at Hustler about your appearance
9 here today?

10 A. No.

11 Q. Have you talked -- ever talked to anybody about your
12 testimony in this case at Hustler?

13 A. No.

14 Q. You never said a word to Ms. Hahner about what -- about
15 what you might have to contribute on behalf of Hustler in this
16 case?

17 A. We -- when I first called her, I told her that I had
18 spoken with Jim Daus on the phone and that I had read -- I was
19 -- I was -- I told her that I was surprised that he was part of
20 this since he had called up and had asked me, you know, what he
21 was entitled to. But, no, I certainly have not had any
22 extensive conversations with anybody.

23 Like I said, Bruce and I have kind of joked around about
24 who -- who is going to play us. Bruce -- Bruce told me he's
25 like, you know, "I'm glad you remember a lot of this stuff

1 because I don't," is what he told me. Donna --

2 Q. When did he tell you that?

3 A. When I called -- well, when did he tell me that?

4 In one of our conversations about submitting to the
5 magazine.

6 Q. In one of your conversations about submitting a piece for
7 payment to Hustler, you talked to him about this case?

8 A. I said -- at the end of it I said, "Wow, this case is
9 really, really something, huh, that we got sued over?" And he
10 said, "Yeah, I -- I'm glad that you have testimony because I
11 don't really remember that much." That was the extent of the
12 conversation.

13 Q. He was glad that you were going to be able to give
14 testimony for Hustler because he didn't remember very much?

15 A. Well, I think he was glad that --

16 Q. Don't tell me what you think. Tell me what he said.

17 A. Well, I don't remember specifically what he said; so I'm
18 telling you what I think he said. Is that all right? I mean,
19 this was a year --

20 Q. What you recall.

21 A. What I recall. That's what I recall is he said. You
22 know, I said, "Wow, this case is -- it's really something.
23 That's -- that's my" -- you know, I don't know if the Supreme
24 Court has denied it then -- had denied it then. I said, "Boy,
25 if this thing goes to the Supreme Court, who's going to play --

1 who's going to play us?"

2 And he's like, "Oh, yeah." He's like, you know, "I don't
3 remember much about it. I'm glad you do."

4 Q. When was the last time you spoke with anyone about your
5 testimony in this case?

6 A. With anyone with Hustler?

7 Q. With anyone associated with Hustler, lawyers, employees,
8 whomever.

9 A. I don't remember. You know, actually, I called -- I did
10 call Donna Hahner on a separate -- on a separate incident, and
11 I said that the testimony had been delayed again. I said,
12 "Well, it doesn't seem like they are ever going to get to me --
13 get me in."

14 Q. Talking about yourself?

15 A. Yeah.

16 Q. Well, who arranged for you to be here today?

17 A. I -- I made the first contact with Hustler. I read about
18 this on Google.

19 Q. Who did you --

20 A. I read about this on Google. And I said, Oh, crap, that's
21 my article. And even though I hadn't spoken to anybody for a
22 while, you know, I felt -- I felt a little responsibility. And
23 so I called up Donna Hahner, and I said I -- and I offered my
24 assistance.

25 Q. And I remember that testimony, and now I'm asking you how

1 you happen to be sitting in that chair today.

2 A. How am I sitting in this chair today?

3 Q. How did you -- how did you know to be here? Who asked you
4 to come and give a deposition?

5 A. The people on your left.

6 Q. You talked to Mr. Bauer or Mr. Solomon?

7 A. Yes.

8 Q. Which one?

9 A. Both. I have spoken to both of them.

10 Q. What did they ask you to do?

11 A. They asked me to give testimony.

12 Q. Did they talk to you about what they were going to ask
13 you?

14 A. They told me what to expect as far as the deposition was
15 concerned.

16 Q. In what way?

17 A. That it would be video conferencing, that I would have to
18 get -- you know, I would have to have some materials supplied
19 to me, this (indicating), and, you know, a copy of the
20 magazine. They said they would ask me about a lot of how --
21 like how the process works, about how -- like the pagination,
22 how that came into existence, what it meant, what kind of
23 theme.

24 Q. Did they tell you what you might expect in questions from
25 Mrs. Toffoloni's lawyer?

1 A. Not really. They said -- they said you're going to
2 definitely ask me questions and, you know, we're going to have
3 your turn. But as far as, Hey, if he says this and reply with
4 this, absolutely, no.

5 Q. Did they tell you how to answer questions that they might
6 ask you or that I might ask you?

7 A. Absolutely not.

8 Q. Did you talk to anybody else at Hustler or who works for
9 Hustler about your testimony today other than the people you
10 have mentioned?

11 A. No, sir.

12 (Deposition reading concluded.)

13 MR. DECKER: That's the end of the cross-examination,
14 Your Honor.

15 THE COURT: All right. Mr. Bauer, call your next
16 witness.

17 MR. BAUER: Your Honor, we'd like to call by video
18 deposition Mr. Bill Otten.

19 (Videotaped deposition of William Otten played as
20 follows in open court.)

21 - - -

22 VIDEOTAPED DEPOSITION OF WILLIAM OTTEN

23 - - -

24 THE VIDEOGRAPHER: This is the videotaped deposition
25 of William Otten being taken in the matter of Toffoloni versus

1 LFP Publishing Group, LLC, et al.. The time is 2:38 p.m..

2 Will counsel please introduce themselves for the
3 record.

4 MR. DECKER: Richard Decker for the Plaintiff,
5 Maureen Toffoloni.

6 MR. SOLOMON: Darrell Solomon for the Defendant, LFP
7 Publishing Group.

8 MR. BAUER: Derek Bauer also for the Defendant.

9 THE VIDEOGRAPHER: Will the court reporter please
10 swear in the witness.

11 (Witness placed under oath by the court reporter.)

12 BY MR. SOLOMON:

13 Q. Could you state your full name, please.

14 A. William Otten.

15 Q. And what is your home address?

16 A. 701 Teal Lane, Altamonte Springs, Florida, 32701.

17 Q. And how long have you lived in Florida?

18 A. Since 1978.

19 Q. Okay. All right. What do you do for a living?

20 A. Photographer.

21 Q. What type of photographer specifically?

22 A. Wrestling. Do other weddings and things like that, but
23 mostly wrestling.

24 Q. Okay. And do you own your own photography business?

25 A. Yes.

1 Q. When did you first get into wrestling, the wrestling
2 aspect of your photography?

3 A. About 1979.

4 Q. Can you please describe your career as a professional
5 photographer during the early to mid 1980s with respect to
6 wrestling.

7 A. Okay. I might have to show you some of those magazines.
8 But I worked for wrestling magazines, started as a fan in the
9 audience, took pictures. The reason I was taking pictures was
10 because I was in a photo class -- I like wrestling, but I also
11 like photography. But I was in a photography class in Daytona
12 Community College. And I was working in a darkroom, and I
13 needed something to work on to develop in the darkroom all the
14 time.

15 And so when I was going to wrestling I started shooting
16 pictures of the matches from like the fourth row. And then I
17 would work my way -- they had weekly wrestling here, and I
18 worked my way up to the second row. That was your permanent
19 seat.

20 And when I -- after a while, I started having a stack of
21 8-by-10s of pictures that people were asking because they saw
22 me all the time. I showed the pictures to people, and
23 eventually the promoter saw it. And when the promoter saw it,
24 he talked to Eddie Graham who was the owner of the Florida
25 Championship Wrestling. And he said, We got a good

1 photographer here; we should, you know, start using him.

2 And then they put me to where I was up against the ring
3 and shooting like underneath the ring. And at the same time a
4 guy named Bill Apter who was working with these wrestling
5 magazines that you have there saw me because he happened to be
6 on tour taking pictures for one of those magazines -- saw me at
7 the ring almost the first time I was in there and asked me to
8 send him some pictures, and then that's how it started with
9 Bill Apter's London Publishing. A magazine in Japan eventually
10 contacted me, and eventually I was on every wrestling magazine.

11 At the time there was probably about a dozen -- if you
12 went into any grocery store in Florida, you would see a dozen
13 wrestling magazines or so on the shelf; and I was on all of
14 them.

15 Q. How were you compensated for the photos that you took?

16 A. I was never paid by the wrestling companies. It was
17 always by the magazines I worked for. The main one was in
18 Japan actually. It's always been. I'm still working for the
19 same company. Some of them would pay me a salary just for
20 working. Some of them would pay me by the picture. Some of
21 them would pay me by the article. It was never all that
22 lucrative for me; but it was regular, fairly regular.

23 Q. Can you give me an idea of what one picture was worth.

24 A. It depended if it was color or black and white. Anywhere
25 between -- in those magazines, again, you're not looking at

1 National Geographic here, I mean -- but I'd say anywhere
2 between 10 and 150 dollars.

3 Q. Depending on whether it was in color --

4 A. Color, by size.

5 Q. The cover, did that --

6 A. The cover was probably more. Again, it wasn't -- you
7 know, those were a long time. And these are not -- these are
8 not, you know -- they're not Life Magazine.

9 Q. Were the wrestlers compensated for your photographs?

10 A. No.

11 Q. Not by anyone?

12 A. No.

13 Q. Did the wrestlers sign a release granting permission for
14 you to use their image?

15 A. No.

16 Q. So it was common for wrestlers to allow others to use
17 their image without compensation?

18 A. Yes. The compensation they got was the publicity that
19 they would get from being in the magazine so that when they --
20 like I said, when they went to another territory everybody knew
21 who they were. It was similar to Britney Spears or any of
22 these people going in to National Inquirer even though some of
23 those stories were terrible. If you ever notice when people
24 come out on the red carpet, they're always posing for pictures.
25 It's similar to that. When you want to be in the public eye,

1 you got to be seen as much as possible.

2 Q. When did you first meet Ms. Toffoloni, Nancy Toffoloni?

3 A. I didn't meet her. I seen her. She was -- like I say,
4 they had seats reserved. The way it worked then, it was the
5 regular people every week, every week, every week the same
6 people; and the same people had the same seats that were
7 assigned. She had front row sort of in the corner. If this is
8 the ring here, I was usually shooting here. She was sitting
9 here. Okay?

10 There was some space, and then there was a barricade, and
11 they were right behind -- the first row behind the barricade.
12 And I just, you know, couldn't miss her. You know, she was --
13 everybody was wondering who this girl was in the front row.
14 And she stood out over everybody, didn't look like anybody in
15 the -- you know, in the audience was a bunch of hillbillies
16 basically. And you got this really classy-looking girl in the
17 front row that looked like Valerie Bertinelli. And everybody
18 was like, you know, Who is this girl in the front row?

19 People were asking me; and I thought I don't know who she
20 is, you know. But -- and I seen she was with Jim; and I
21 wasn't, you know -- the only reason I was interested in her was
22 to get her out -- at the time Universal Studios was getting
23 ready to come in I had some offers from some modeling agencies
24 to be a photographer for their models and their actors, and you
25 had to have something to show. You had to have a portfolio.

1 The photographer had to have a portfolio.

2 And I -- in the wrestling audience there really wasn't
3 anybody worth shooting except her. And I thought how can I ask
4 her to be in some pictures so I can have some. Maybe she'd
5 want them.

6 So there was a centerfold at one point in a Japanese
7 magazine where Terry Funk, a wrestler, was standing on the
8 apron of the ring -- you know, it was this big -- and then she
9 was in the picture on the bottom. And I thought, okay, this is
10 it. I'm going to give her this centerfold, and maybe she'll be
11 nice. I don't know. I didn't know. I'm not -- I'm shy. I
12 don't like to talk to people anyway.

13 So I went up. I said, I thought you might want this. You
14 know, you're in the picture. She said, It's Terry Funk. Wow.
15 That's my favorite wrestler.

16 She was really nice and friendly. And Jim just sat there.
17 He didn't say anything. And then I said, Here you go. That's
18 it. That's all I did.

19 And the next week her and Jim came over and started
20 talking to me, were really friendly. And we started -- every
21 week -- every week I was very obvious there. I was the only
22 photographer. Every week I was talking with them just in
23 friendly terms. And one day I asked her, you know -- Jim if it
24 would be all right if I took some pictures of her, if she
25 wanted to take the modeling pictures, you know, just -- you

1 know, I liked her look and her Valerie Bertinelli -- you know,
2 that was my favorite actress at the time. And I just thought,
3 you know, she would be perfect for my portfolio.

4 I had the ring announcer in there. I had a little --
5 couple little kids that were cute that were in the audience
6 there, and I thought she'd be a good one. I had a couple other
7 girls that didn't work out at all. And she said sure, and we
8 did these pictures.

9 Q. Approximately, what year was that?

10 A. I don't know. It was the early '80s. I am so bad with
11 years. I'm not -- I just don't know.

12 Q. Was she married to --

13 A. Yes.

14 Q. -- Jim Daus at that time?

15 A. Yes.

16 Q. When you met her, was she interested in a wrestling career
17 at that time?

18 A. No, never mentioned it.

19 Q. At that time was she interested in becoming a model?

20 A. I don't think they knew what they -- I think they didn't
21 know how -- they were young. They were just getting started,
22 and they didn't really know. They just knew she had something
23 and didn't know what to do with it.

24 Q. Did they ever discuss with you what their options might be
25 as far as doing something with it?

1 A. Jim especially was very encouraging to keep taking
2 pictures of her. You know, what else can we do?

3 I actually was not very happy with the modeling session we
4 did. She has no expression whatsoever. She looks great in one
5 picture, looks great in another picture. You put five pictures
6 together, and they're all the same.

7 She eventually went on to use that kind of same look as
8 her gimmick in wrestling. That's what made her actually famous
9 eventually. But at first I thought she has got no variety in
10 her picture. So I wasn't really that interested in doing it
11 anymore. I thought this is as much as we can do. Jim was a
12 very -- she wasn't, but he was very aggressive to what else can
13 we do.

14 Q. So Jim pushed --

15 A. A little. I mean, not terrible. Not terrible, but a
16 little, yeah. Enough to make me think what am I going to do --
17 what can I do to -- I wanted to help them, but I didn't know
18 what I could do. You know, I really didn't -- I'm not a finder
19 of talent. I just wanted somebody for my album.

20 Q. After that first session, did Nancy and/or Jim approach
21 you with the idea of doing more photo sessions?

22 A. Yeah, mostly Jim.

23 Q. Were those photos that you took -- again, we're speaking
24 of these first photos -- were they ever published anywhere?

25 A. I think maybe one of them was published in one of the

1 wrestling magazines after the tragedy that happened to her just
2 to show it was a story.

3 Q. So the first time any of those photos were published was
4 after --

5 A. I think so, maybe one.

6 Q. Do you recall what magazine that was?

7 A. No. It was one of the wrestling magazines. It might have
8 been the one in Germany. It was because they were reporting on
9 that terrible situation.

10 Q. How did it come about that the magazine published that
11 photo, the German magazine?

12 A. They called me and asked if I had an old, you know,
13 original picture.

14 Q. Did you -- did they pay for that picture?

15 A. No. I'm on a salary with them. Whatever I do is all part
16 of my job.

17 I did have some requests from People Magazine as well, but
18 I didn't give them anything.

19 Q. Do you know why they were interested in that old photo?

20 A. No. That's all I had.

21 Q. They ran it in conjunction with the story of her death?

22 A. Yeah, the story about her.

23 Q. Could you identify this what's been marked as Exhibit 2
24 for us, please.

25 A. How ?

1 Q. The name of the magazine --

2 A. It's the Sports Review Wrestling, May 1983.

3 Q. And that is the issue in which --

4 A. This is the first thing Nancy had ever been in.

5 Q. That was the first --

6 MR. BAUER: Your Honor, we'd like to at this time go
7 ahead and tender what Mr. Otten is referencing in his
8 testimony. It's our Defendant's Exhibit 10 as he has
9 identified.

10 THE COURT: What's your exhibit number, Mr. Bauer?

11 MR. BAUER: Exhibit 10, Defendant's Exhibit 10.

12 THE COURT: What do you say, Mr. Decker?

13 MR. DECKER: Judge, my -- that was the subject of my
14 earlier motion in limine which the Court heard on Friday which
15 I understand the Court's ruling.

16 THE COURT: All right. Defendant's Exhibit 10 is
17 admitted over objection.

18 MR. BAUER: And, Your Honor, could we have permission
19 to publish a copy of Defendant's Exhibit 10 to the jury?

20 THE COURT: Yes.

21 (Videotaped deposition continued playing in open
22 court as follows.)

23 Q. That was the first magazine that she was --

24 A. Ever that I know of, that I was involved in.

25 Q. Can you turn to the pictures of the apartment wrestling,

1 please.

2 You don't know the identity of the other woman in that --

3 A. I don't know, no. She brought her. Somebody from here,
4 from around here.

5 Q. How much were you paid for those photos?

6 A. These sessions paid 250 bucks.

7 Q. For the entire session?

8 A. Yeah.

9 Q. For the whole spread?

10 A. Yeah. This is a cheap publication.

11 Q. And how much was Nancy paid for that spread?

12 A. When I got the check, I told them that I'd -- I think I
13 paid each of those girls 75 each, and I got a hundred because I
14 had the film. So we basically each split it three ways, but my
15 expense of the film I took out.

16 Again, this was something to get in. This was unknown
17 girls getting into something that -- you know, to start
18 something.

19 Q. Okay. Are you familiar with other attempts by Jim and
20 Nancy to jump-start Nancy's modeling career at that time?

21 A. I just know that they did -- they did bikini contests.
22 You know, at that age you go out on the weekends; and they
23 always had these bikini contests. And it was a good little
24 extra income for them, and she always won. So that was it.

25 One picture is there from one of those. Somehow I got

1 invited to one of those contests, and I did have one picture of
2 her winning the event. And I think she tied with another girl
3 in that one.

4 Q. How often did she enter bikini contests to the best of
5 your knowledge?

6 A. Every couple of weeks maybe for a while, maybe. I only
7 went to that one, and I only heard them talk a little bit about
8 it.

9 Q. Can you describe your role in how Nancy eventually became
10 involved in professional wrestling.

11 A. This didn't do anything, this apartment wrestling. This
12 was just -- nobody knew it was her. Nobody saw it. I mean,
13 people saw it; but nobody -- it was two girls. Okay? They
14 didn't use the real name.

15 There was one more time. Again, Jim and Nancy, we always
16 talked. And a few -- maybe a couple months after this there
17 was another opportunity. There was a man named Billy Jack who
18 was a big, the good guy wrestler. His opponent was Kevin
19 Sullivan at the time. And they had, you know, programs worked
20 out, you know, where those were -- that was the match.

21 Billy Jack, I did all his publicity shots basically. I
22 put him in every magazine. Nobody knew who Billy Jack was
23 until these things started coming out. And then he got on
24 Florida Wrestling, and he was a big muscle man, and he was a
25 ladies' man. And, you know, he said to me, Do you have any

1 girls? I want to do a studio shoot. We need some girls, you
2 know, for me to look like I'm Mr. Hot Stuff, you know.

3 And so I said, I'll find something. And then the next
4 week Jim and Nancy, we were talking again. I said, I got this
5 thing that might be if you want to do it. I said, you know,
6 it's with Billy Jack. And I needed another girl as well. So a
7 girl named Linda who I knew that I didn't -- I met her at --
8 she was a -- I met her at one of those rock 'n' roll things, I
9 think, where the bands played, one of those clubs. She was one
10 of my models at the time also that I shot pictures of. And I
11 asked Nancy if she wanted to do those pictures with Billy Jack.
12 She said fine. And we -- the other girls -- Linda is this one.
13 That is Nancy.

14 Q. I'd like to introduce this as Exhibit 3, please.

15 Can you identify what's been marked as Exhibit 3 as the
16 photograph with Billy Jack and Linda?

17 A. That's the one. That's it.

18 Q. Okay.

19 MR. BAUER: Your Honor, we'd like to tender this into
20 evidence at this time as Defendant's Exhibit 11.

21 THE COURT: Defendant's Exhibit 11 is admitted over
22 objection.

23 MR. BAUER: And we'd like to publish it to the jury.

24 (Videotaped deposition continued playing in open
25 court as follows.)

1 Q. And what's been marked as Exhibit 4, can you describe what
2 that is, please.

3 A. Okay. This is a program that was published every week to
4 go to all the arenas. It was the local Florida -- am I
5 supposed to show this, or it's okay?

6 Q. Sure.

7 A. Okay. It was the local Florida program. It was hype
8 basically to build up the matches, what was going on. It was
9 building up the feuds. I shot pictures for this also
10 occasionally, not all of them. This picture, the Nancy photo,
11 I don't have it. Like I say, that went on the front cover of
12 the Florida program. That's what start -- this is the thing
13 that started the whole thing.

14 Q. And how much were you paid for that photo?

15 A. Zero.

16 Q. Was Nancy paid for that photo?

17 A. Zero.

18 I was friends with the guy who published this, so I helped
19 him out with it.

20 Q. You say that photo on the cover of The Grapevine started
21 it all, so to speak.

22 A. The reason --

23 Q. Could you describe how it did so.

24 A. The reason it started it was because when it was on the
25 front cover all the wrestlers as well get this and they read

1 this, and a lot of their promotion was done through this. This
2 was immediate. It wasn't waiting for a month or two for the
3 magazine to come out. This was right away. It was published
4 every week. It was distributed to all the arenas here, and it
5 was sold at the arenas.

6 When Kevin Sullivan who was wrestling Billy Jack at the
7 time seen this picture, he's a mastermind of ideas and he's
8 really good. He was one of the booker, booking committee, or
9 he was the one who would come up with a lot of the ideas that
10 they had in wrestling.

11 He sent somebody to get me, and he called -- I didn't know
12 what he wanted, and I was a little worried because he was in
13 charge -- he said, Can you get me these girls? And I thought,
14 Why do you want them? He said, Because I'm going to kidnap
15 them -- not really -- but kidnap them and then I'm going to
16 steal them away from Billy Jack since they're obviously related
17 to Billy Jack, and I'm going to make them my slave girls. And
18 then Billy Jack is going to come and get me and beat me up for
19 stealing his girls.

20 That's what started -- that's the premise of what, you
21 know, took off. Kevin Sullivan -- the reason Nancy had to do
22 some of these crazy things was because Kevin Sullivan was a
23 crazy guy. He had converted from a normal, regular, almost
24 like an Olympic wrestler over months' time -- it was done on a
25 TV promotion. He wasn't really this slick. He turned into a

1 Satanic -- you know, he started turning Satanic. It was really
2 good. It was probably the best thing they ever did in Florida
3 Wrestling.

4 At the end, by the time he got where he kidnapped her he
5 was totally, you know, wacky -- not really but in the show.

6 Q. And what organization, what wrestling organization was
7 Kevin Sullivan --

8 A. Florida Wrestling, Florida Championship Wrestling.

9 So when he kidnapped her supposedly, he was going to do it
10 through the magazines. Because, like I said, he was going to
11 -- it was eventually going to lead up to a TV premiere of her.
12 But in order to get her seen he says, We're going to put her in
13 the magazines with me kidnapping her.

14 And we took a lot of pictures of her and Kevin. And he
15 had all these snakes, and everything that could be demonic was
16 there. And she had to go along. She didn't believe in any of
17 that stuff, but she had to go along with it for the show.

18 Q. Did you take a lot of those pictures as --

19 A. Almost every one of them.

20 Q. -- as this --

21 A. I did it for Kevin because originally I did the Kevin
22 stuff. There was a couple other photographers around too in
23 West Palm and a couple other places. But, you know, I did the
24 Kevin stuff. And then we brought Nancy in, and we took her
25 backstage. Linda was more interested in rock 'n' roll stars,

1 and so she wound up marrying one of the Guns N' Roses guys. So
2 she was off and running somewhere, you know.

3 So she didn't show up. She no-showed for the -- I called
4 her and told her. She didn't come. She was too busy with
5 whatever current rock band was around. But Nancy was real
6 reliable and really into doing something, and she showed up.

7 Q. And during this time period when this theme of her being
8 kidnapped and becoming a member of the Satanists, during that
9 time period was she compensated for the photos in which she
10 appeared?

11 A. No. Neither was Kevin. Neither was anybody. That was
12 the way we did publicity then. I made a little bit, you know,
13 whatever the fee was for the magazine. But I never gave them
14 any -- wrestlers never got any of my little fee.

15 Q. How much money did Nancy earn as a model over the course
16 of her career if you know?

17 A. I have no idea.

18 Q. How much did she earn as a professional wrestler over the
19 course of her career?

20 A. I have no idea.

21 Q. How much money did she earn through her relationship with
22 you from photographs?

23 A. Maybe a thousand dollars. I'm guessing. It might be.
24 But that would be --

25 Q. Can you give me an idea of what time period that would

1 have covered?

2 A. Okay. The only way -- well, we had a mail-order thing
3 after she was in and she was doing it. There was a period of
4 very slow -- things were really slow, the wrestling. Wrestling
5 does that. It has waves.

6 I was over at Kevin and Nancy's condo in Daytona Beach;
7 and Kevin was saying, What can we do to make a little extra
8 business somehow until things pick up again? And I didn't
9 know, and he didn't know. And then he said, What about this
10 idea? And then he came up with this crazy idea about doing the
11 private photos of the Fallen Angel. And I said, Well, maybe we
12 can put an ad in the magazine and make it look like they're
13 getting some exclusive photos that were taken, personal stuff
14 and you couldn't get anywhere.

15 It was a big hype. And we wanted -- we didn't know if it
16 would go or not. So we put the ads in, and I traded the ad for
17 some of my work actually. They didn't pay me for some of my --
18 when I did the coverage for them, they just gave me the ad
19 instead.

20 And then we made it look like they were going to get some,
21 you know, pretty private photos. But it really was, you know,
22 just some photos we did. And the problem was we put a real
23 sizzling picture, the hottest one was in the ad. The magazine
24 got a little -- it was just her like under the sheets a little
25 bit. But they cut it down to a face shot after one issue, and

1 that pretty much killed our whole thing. Those were the
2 pictures.

3 Q. I'd like to introduce --

4 A. I don't have any of the original pictures anymore. I
5 think the lab that I had them at went out of business, and they
6 had the negatives and the original prints that I left there
7 because every time we needed more I'd call them up and they'd
8 print more. We got those from the internet.

9 Q. I'd like to introduce this as the next numbered exhibit,
10 please.

11 Let me go back. You just made mention of the fact that
12 you said we got these off the internet. Who is we?

13 A. Me and my -- Susan, my wife.

14 Q. But no one else besides you and your wife?

15 A. No, no. I asked her how are we going to -- and she said,
16 Well, get on the internet. She got on the internet. She found
17 them right away. I don't know how. They're private photos and
18 private sale, and it's all over the internet. So I don't know.
19 She gets on the internet and finds everything. I can't even
20 find, you know...

21 Q. Would you identify what's been marked as Exhibit Number 5
22 as the advertisement that was originally placed for those
23 Fallen Angel photos?

24 A. That is it.

25 MR. BAUER: Your Honor, defense will tender

1 Defendant's Exhibit 12 at this time.

2 THE COURT: Defendant's Exhibit 12 is admitted over
3 objection.

4 MR. BAUER: Permission to publish to the jury?

5 THE COURT: Go ahead.

6 (Videotaped deposition continued playing in open
7 court as follows.)

8 A. That was a very provocative ad. That's not the ad that
9 was cut down.

10 Q. Would you identify what's been marked as Exhibit Number 6
11 as the collection of photos, I guess, known as the Fallen Angel
12 photos which this advertisement that you just identified
13 promoted?

14 A. Okay. Some of these are not them.

15 Q. Can you list -- can you point out -- these photos are
16 numbered. Can you give me the numbers of the photos that were
17 part of the Fallen Angel photos.

18 A. Okay. 1, 2, 3, 4, 5, 6, 7, 8, I think 11, 17 -- maybe 19,
19 but that one I don't know.

20 MR. BAUER: Your Honor, Defendants would like to
21 tender into evidence Defendant's Exhibit 13 at this time.

22 THE COURT: It's admitted over objection.

23 MR. BAUER: May we publish to the jury?

24 (Videotaped deposition continued playing in open
25 court as follows.)

1 Q. And the numbers -- the photos that you have just
2 identified by number were provided to customers who submitted
3 \$6 to the address shown in that advertisement?

4 A. That's right. They were glossy four-by-six prints.

5 Q. What magazines did you place that advertisement in?

6 A. Main Event and -- it's one of those I can't even remember
7 the name. It's in the pile there. It's the top one, I think.

8 No. It was Wrestling Power, the next one.

9 Q. Wrestling Power?

10 A. That one for sure. Might have been the other one, but I
11 don't -- yep, that was it. It was probably -- that one was
12 published by the same company.

13 Q. Mr. Otten, going back to the photos that are contained in
14 Exhibit 6 that you -- and the numbers specifically that you
15 listed as photos that you took, what was the intention of those
16 photos?

17 A. Was to make it look like these were her personal pictures
18 that somehow got -- some company got ahold of and they got
19 released. It was all preconceived.

20 Q. Did Nancy sign a release in connection with those photos?

21 A. Yes, she did.

22 Q. Do you have a copy of that release?

23 A. No, I don't. I think it went with the negative -- I think
24 I had a box where the negatives and these original prints --
25 they were four-by-six glossies -- were at the lab.

1 Q. Do you recall the terms of that release?

2 A. Yes. That she posed for these pictures only for this
3 reason only or these pictures for selling by mail. I signed
4 it, and Nancy signed it. And we decided that we would split
5 the money, any proceeds that we made half and half, her for
6 posing and me for doing the work of advertising it and selling
7 it minus a dollar going to me for the printing expense and
8 mailing.

9 Q. A dollar out of the six dollars?

10 A. Yeah. That's why it was \$6. It was really \$5, but I
11 needed money for the pictures and the mailing.

12 Q. So \$1 went to you and \$2.50 went to --

13 A. Each, yeah --

14 Q. -- in addition to that?

15 A. 2.50 each. So, basically, I got 3.50, they got 2.50 is
16 really how it worked.

17 Q. And according to the ad, a customer received six photos in
18 exchange for the \$6 they mailed in?

19 A. That's right.

20 Q. How is it determined which six photos they received?

21 A. Okay. There was a Set A and a Set B. Set A was their
22 first -- the ad was a Set A. I couldn't tell you which ones
23 were Set A and Set B. But the Set A was the first, the first
24 thing. It wasn't advertised like that. What I would do would
25 be to after they sent for the first set I'd have a Set B set

1 aside. And when they -- when I sent the pictures, I put a
2 little piece of paper that says, If you like these, if you want
3 you can send for Set B. It's more of the same; but it's
4 another set, another \$6.

5 Q. Can you identify which photos consisted of Set A?

6 A. Set A I know was this one, this one.

7 Q. Can you read the number.

8 A. I'm sorry. 2, 3, 4, I think 6. I'm going to get this
9 wrong, though. I mean, I'm not a hundred percent sure.

10 Probably -- it was a little bit of the sheet stuff and a little
11 bit of the bikini stuff is what it was. And then Set B was a
12 little bit of the sheet stuff and a little bit of the bikini
13 stuff.

14 Q. Can you describe what you mean by the sheet stuff.

15 A. That one.

16 Q. Verbally?

17 A. Her laying under the sheets.

18 That was all more risqué stuff, I guess. And then the
19 other stuff was just, you know, nothing was -- nothing showed.

20 Q. How much money from the sales of these photos was divided
21 -- let me restart that.

22 Approximately, how much money did this advertisement
23 generate?

24 A. It was okay until the -- what happened was we had the most
25 risqué picture was in the first ad. I don't know why we picked

1 that. I picked it. I think I shouldn't have probably picked
2 such a -- you know, that was the only one that was really
3 risqué even a little bit. And we put that in the ad, and that
4 got a lot of attention. We got several hundred orders --
5 hundreds of orders. I don't know how many.

6 But the magazine a little bit objected to it and said we
7 can't -- it's a little too much for our wrestling magazine.
8 They cut the ad down to just her face, and that pretty much
9 killed the whole thing. So the whole -- we were not able to
10 really continue this the way that we wanted to.

11 Q. Prior to changing the ad --

12 A. Probably several hundred orders per month.

13 Q. Let me ask the entire question.

14 A. I'm sorry.

15 Q. Prior to changing the ad, approximately how much did that
16 advertisement generate?

17 A. Probably several hundred orders per month. Again, this is
18 20-some-odd years ago. I'm not a hundred percent sure.

19 Q. How many months did you see revenue from the
20 advertisement?

21 A. Well, right away the first time that thing -- it got
22 changed pretty quick, the ad. I got a call right away from the
23 editor, the owner of that publishing company and said this is
24 too much for our -- to put in the wrestling magazine and we're
25 going to -- you got to make it smaller, just her face.

1 Q. And how many months did the original ad run?

2 A. One or two.

3 Q. So when you say you received several hundred orders as a
4 result of that first ad per month, is that several hundred
5 orders for one or two months total?

6 A. Yes.

7 THE COURT: Mr. Bauer, stop the tape, please.

8 Ladies and Gentlemen, we are going to take our
9 afternoon break at this time. During the break, remember my
10 instructions to you not to discuss the case with anyone, not to
11 allow anyone to discuss the case in your presence. Don't even
12 begin discussing the case among yourselves yet. And you are
13 excused until 3:15, and we will resume the trial at that time.

14 Court's in recess until 3:15.

15 (A short recess was taken.)

16 THE COURT: Are you ready, Mr. Bauer?

17 MR. BAUER: Yes, Your Honor.

18 THE COURT: We're ready for the jury.

19 (Jury entered the courtroom.)

20 THE COURT: All right, Mr. Bauer.

21 (Videotaped deposition continued playing in open
22 court as follows.)

23 A. A couple more months.

24 Q. I'd like to have this marked the next numbered exhibit,
25 please.

1 Mr. Otten, will you identify Exhibit Number 7 as the ad
2 that ran once the changes were made to that photograph.

3 A. That was it.

4 Q. Can you give me an estimate of what the total sales
5 realized from the ads when you combine the original version and
6 the revised version of the advertisement?

7 A. Whatever I tell you it's not going to be accurate. I
8 don't know. I know that we had -- we wound up with a bank box
9 of orders. I have a few of them that I showed you. It was
10 about a bank box of orders, of envelopes like that is what I
11 wound up. I think I threw them out, but that's what I had.

12 Q. Okay. Can you give me a ballpark figure?

13 A. However many envelopes can fit in a bank box. I don't
14 know. I mean, I don't know. This was a long time ago.

15 Q. Was it about \$300 total?

16 A. No.

17 How much money we took in?

18 Q. Uh-huh, yes.

19 A. Well, at several hundred, \$600 each. Maybe 1,200, a
20 couple thousand. I'm guessing.

21 Q. And 10 percent of that went to Tri-Media Productions?

22 A. Yes, pulled off the top.

23 Q. And out of the remaining -- out of the remaining amount,
24 50 percent of the remaining amount went to Nancy and the other
25 50 percent to you?

1 A. Yes, yes.

2 Q. Was that considered big money?

3 A. No. We were not happy with it.

4 Q. Going back to Exhibit Number 6 if you would.

5 A. Okay.

6 Q. Image Number 2 which you stated was included among the
7 photos that were sold through that advertisement, would you
8 agree that Nancy is nude in that image but partially covered
9 with a sheet?

10 A. I came in when she was ready. I don't know.

11 Q. Does it appear that way from the --

12 A. That's what it was meant to appear to be, yeah.

13 Q. Looking at Image Number 4 which is also included in the
14 photos that were sold, would you agree that Nancy is nude in
15 that image but partially covered by a bedspread?

16 A. I believe that she had -- she had unstrapped her bikini at
17 the time. I was in there for that. She put it under the
18 sheet. I told her we got to make these hot, but they can't
19 show any -- you know. Then she's, Okay.

20 Q. Turning to Image 14 which is also included in the photos
21 that were sold through the advertisement, would you agree that
22 Nancy is nude in that image but partially covered by a sheet?

23 A. Again, I think she did. She had a bathing suit on, and
24 she just made it look that way.

25 Q. And Image Number 17 which is also included in the sale

1 advertisement, photos sold through that advertisement, is it
2 true that Nancy in that photo is topless but covered by her
3 hands?

4 A. I think so. I came in after she got like that, so I'm
5 assuming.

6 Q. I am going to show you some other images of Nancy that we
7 found on various websites, and I'd like to have this marked as
8 the next numbered exhibit.

9 I've numbered the photographs in this exhibit. And if you
10 could, please look through them and tell me if you recognize
11 any of these as photographs that you took.

12 A. 2, 4 -- we're back to Fallen Angel now.

13 Q. I'm sorry. 2?

14 A. 2 and 4, 5, 6.

15 Q. Let me go back one second.

16 So 2?

17 A. I'm sorry. Skip that. I made a mistake.

18 3 and 4.

19 Q. Thank you.

20 A. Keep going?

21 Q. Yes, please.

22 A. 5, 6, 7, 8, 10, 14, 16, possibly 18 -- that's an iffy one;
23 I'm not sure -- 25, 26, 27, 28.

24 Q. Thank you.

25 Returning to Exhibit --

1 MR. BAUER: Your Honor, we'd like to tender into
2 evidence now Defendant's Exhibit 15.

3 THE COURT: Are those the ones he identified that he
4 made, Mr. Bauer?

5 MR. BAUER: They do include the ones he identified he
6 made, and he'll clarify that in the following testimony.

7 THE COURT: All right. Defendant's Exhibit 15 is
8 admitted over objection.

9 MR. BAUER: May we publish to the jury?

10 (Videotaped deposition continued playing in open
11 court as follows.)

12 Q. Returning to Exhibit 8, the numbers that you've identified
13 those photos that you took, can you tell me which, if any, of
14 these images were taken for which Nancy was compensated?

15 A. You want me to list the numbers?

16 Q. Please.

17 A. For the Fallen Angel pictures?

18 Q. Aside from the Fallen Angel pictures, were any --

19 A. No.

20 Q. She was not compensated any by you?

21 A. No.

22 Q. Were any of these other images besides the Fallen Angel
23 pictures published in magazines?

24 A. You want the numbers?

25 Q. Please.

1 A. Okay. Some of the ones I didn't shoot, I don't know.

2 Okay?

3 Q. Sure.

4 A. Number 12.

5 Q. Let me take it one by one.

6 Number 12, what was the purpose in Kevin and Nancy posing
7 for that particular picture?

8 A. Publicity. Actually, it's in one of those magazines I
9 brought.

10 Q. So this is an example of a photo that you sold to a
11 magazine?

12 A. That's right.

13 Q. And they didn't receive any compensation?

14 A. No, they didn't.

15 Q. But you received compensation from the magazine?

16 A. Yes, I did.

17 Q. Okay. Please go on.

18 A. Number 16, same scenario.

19 Q. Can we return to 14?

20 A. I don't know if that was published. It's possible it was,
21 but I can't remember.

22 Q. You don't know if that was published?

23 A. I don't know.

24 Q. Was Nancy compensated for that image at all?

25 A. No.

1 Q. Okay. Eighteen you said you were not sure about?

2 A. Hold on.

3 Sixteen was. Eighteen -- I don't think we got up to 18
4 yet. Eighteen was obviously published, but I'm not sure if I
5 took that picture or not.

6 Q. Right.

7 Moving on to 19.

8 A. Nineteen was published.

9 Q. And you received compensation from whatever magazine it
10 appeared in?

11 A. Yeah.

12 Q. Did Nancy receive any compensation?

13 A. No.

14 Q. And Number 20?

15 A. Twenty might have been published too. I'm not sure. I
16 think it was.

17 Q. And 21?

18 A. I don't think I took that picture, but I'm not -- again,
19 we did a lot of stuff. I don't know if I took that or not.

20 Q. And 22?

21 A. Twenty-two was part of the Fallen Angel, private photos.

22 Q. 23?

23 A. Twenty-three was part of that photo set.

24 Q. And 24?

25 A. Twenty-four was, I think, part of that photo set too.

1 Q. Okay. As was 25 and 26?

2 A. I think so, yes.

3 Q. What about -- and 27 as well?

4 A. Yep.

5 Q. What about 28?

6 A. Twenty-eight was magazine stuff. That was published.

7 Q. And you received compensation?

8 A. Yes.

9 Q. And Nancy did not?

10 A. No.

11 I don't know what the other pictures are following this at
12 all. I don't know what they are.

13 Q. The images that you referenced as photos that you sold for
14 a magazine but Nancy was not compensated for, would that be an
15 example of her allowing her image to be published without
16 compensation in order to promote her career?

17 A. To promote her career, right.

18 Q. Would you characterize the media's interest in Nancy's
19 death to be intense?

20 A. I think so.

21 Q. Why do you believe that was so?

22 A. Because that was probably the worst thing that ever
23 happened in wrestling. It was definitely in the top two. I
24 don't know of anything worse.

25 Q. Would you say that the details of Nancy's life became

1 fodder for the media as a result of her death?

2 A. I think it was more of the way it happened was -- it
3 wasn't -- it was that Chris Benoit would do such a thing was
4 more. He was not known as somebody like that. It's a surprise
5 to everybody that he would do anything like that.

6 Q. Can you name some media outlets that covered the death of
7 Nancy Benoit?

8 A. People Magazine; a million internet sites, of course;
9 newspapers, different -- I guess all the newspapers had it.

10 Q. Can you list the media outlets that contacted you in
11 connection with her death?

12 A. The German wrestling magazine and People Magazine and one
13 interview I did with -- I can't -- some Canadian radio station
14 out of Winnipeg called me. That got all over the internet.

15 Q. What was the subject of those interviews?

16 A. They didn't know where -- how she got started. It was all
17 a mystery. And they wanted -- they somehow heard about me, and
18 they called me up and just wanted to find out almost what we
19 talked about on this interview. It was almost the same thing.
20 I have a copy of it somewhere.

21 Q. So those media outlets that you described, their primary
22 interest was in Nancy's career?

23 A. The beginning of Nancy's career. Remember, when this
24 happened she was basically a mom, housewife.

25 Q. When People Magazine called you, did you give People

1 Magazine photos?

2 A. No.

3 Q. Did you give an interview to People Magazine?

4 A. No. I didn't like their attitude.

5 Q. What was their attitude?

6 A. It wasn't nice.

7 Q. Can you be a little bit more descriptive?

8 A. They were very demanding and like, you know, you should be
9 blessed that People -- you know, you should bow down to them.
10 People Magazine is calling. You know, you should have -- you
11 should provide for us.

12 Q. Who contacted you from People Magazine?

13 A. Some girl. I don't know.

14 Q. And what exactly did she ask you?

15 A. They were wanting to know if I had any pictures that they
16 could put in because they were going to write about Nancy.

17 Q. Did the German wrestling magazine -- you did provide
18 photos to -- or at least one photo --

19 A. Right.

20 Q. -- to the German wrestling magazine?

21 A. Right. I always provide every month to them whatever they
22 need. That's my job.

23 Q. When you provided -- was it just one photo that you
24 provided to them?

25 A. It was one or two or three, but they used one.

1 Q. And do you recall which photos you gave to them?

2 A. It was one of -- it was probably one of -- you know, one
3 of these wrestling photos, one of these posed ones.

4 Q. What is your best guess as to the total compensation that
5 Nancy received from the sales of the Fallen Angel photo shoot?

6 A. I don't know. I mean, it was so long ago.

7 Q. I'm asking you for your best guess, sir.

8 A. Whatever I tell you is going to be wrong, but --

9 Q. That's why they call it a guess.

10 A. Yeah.

11 Q. Just give us your best guess.

12 I tell you what. You're struggling with that question, so
13 let me try to help you out.

14 Was it more than \$5,000?

15 A. Oh, no.

16 (Videotaped deposition concluded.)

17 THE COURT: Cross-examination, Mr. Decker?

18 MR. DECKER: Yes, Your Honor. Once again,

19 Mr. Hallman will read the responses.

20 Mr. Hallman, please turn to page 54.

21 MR. HALLMAN: I'm there.

22 MR. DECKER: This is a question by Defendant's
23 counsel, Mr. Solomon.

24 MR. HALLMAN: Which line?

25 MR. DECKER: Beginning at line 3.

1 (Deposition of William Otten read as follows.)

2 BY MR. SOLOMON:

3 Q. During Nancy's wrestling career, was it public knowledge
4 that she had posed nude for a photo shoot?

5 A. Only ones who saw that ad.

6 MR. DECKER: I believe on page 54 the answer is no.

7 MR. HALLMAN: Oh, I'm sorry. Yeah. Ask the question
8 again.

9 (Reading of deposition continued.)

10 BY MR. SOLOMON:

11 Q. During Nancy's career, was it public knowledge that she
12 had posed nude for a photo shoot?

13 A. No.

14 Q. To your knowledge, were wrestling fans aware she had posed
15 nude?

16 A. Only ones who saw that ad.

17 Q. Referring to the Mark Samansky photo shoot, were wrestling
18 fans aware that she had posed nude for --

19 A. No.

20 Q. -- for those images that eventually were published by LFP?

21 A. They weren't aware until they were published.

22 Q. After Nancy's death, are you aware of any publication by
23 any media outlet aside from LFP, any publication by any media
24 outlet aside from LFP of the fact Nancy had posed nude?

25 A. That put pictures of her in -- that put pictures of her

1 in?

2 Q. Did any media outlet reveal the fact that Nancy had posed
3 nude after her death?

4 A. I haven't seen one.

5 Q. So the fact of her posing nude was not publicly known
6 until LFP published the photos that are the subject of this
7 case?

8 A. When they came out, then it was known. That was the first
9 time. I didn't even know until after they were out that that
10 even happened, so I'm sure others didn't either.

11 MR. DECKER: Go to page 92, please, line 12.

12 (Reading of deposition continued.)

13 Q. Okay. Obviously, you're a commercial -- what I would
14 refer to as a commercial photographer; is that accurate?

15 A. I'm a photojournalist.

16 Q. You are a photojournalist?

17 A. A commercial photographer would take pictures of cars and
18 put it in the Toyota --

19 Q. You are a photojournalist, and your specialty is the
20 wrestling world?

21 A. In wrestling.

22 Q. In that experience as a photojournalist in the wrestling,
23 professional wrestling arena, in your opinion what value or
24 benefit, if any, did Nancy get from all the photographs that
25 you took of her?

1 A. Okay. Her compensation was the publicity all around the
2 country and probably around the world of this as a new girl in
3 wrestling and as she started progressing in her career what she
4 was doing. All the people who ever could see her on TV because
5 it was localized television back then could see, hey, who is
6 this girl. And when she came to their town, they would know
7 already who she was. It was publicity. It was total
8 publicity.

9 Q. Okay.

10 A. To buy these ads, if you considered these articles as ads,
11 it would cost a fortune for all the press she got. If she
12 wanted some people buying their press, it would cost a lot of
13 money.

14 Q. Some people pay for advertising?

15 A. Right. The way we always worked it with the magazines was
16 these were advertisements for the wrestlers to be in these
17 publications so people would know them just like when they go
18 on TV for like the TV taping. It was every Tuesday. They just
19 got gas money. They didn't care about the money because they
20 were trying to advertise themselves on the TV show to say, Hey,
21 here I am, I'm Nancy, I'm Kevin whoever, come see me this
22 Thursday in Miami or in Jacksonville at The Coliseum.

23 Q. Her compensation was the publication of her image?

24 A. Her compensation big time from these things and as well as
25 TV exposure was people would pay to see her at the arenas.

1 Q. Now, two more questions. To your knowledge, while you
2 knew her did Nancy ever pursue a nude modeling career with
3 anybody?

4 A. No.

5 Q. To your knowledge, when you knew her did Nancy ever give
6 Hustler Magazine the rights to publish her image in any way?

7 A. No.

8 MR. DECKER: That's it, Your Honor.

9 THE COURT: Mr. Bauer, call your next witness.

10 MR. BAUER: Your Honor, we would call Donna Hahner at
11 this time.

12 THE CLERK: Ma'am, I remind you you are still under
13 oath.

14 THE WITNESS: Yes.

15 - - -

16 DONNA HAHNER,

17 having been previously sworn, was examined and testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. BAUER:

21 Q. Ms. Hahner, good afternoon.

22 A. Good afternoon.

23 Q. You will recall that there's been a fair amount of
24 testimony in this case about the letter that Mr. Decker wrote
25 to your company dated January 16th, 2008?

1 A. Yes.

2 Q. You are familiar with that letter?

3 A. Yes, I am.

4 Q. Mr. Decker asked you about it and showed it to you in your
5 cross-examination that he took yesterday?

6 A. Yes.

7 Q. You recall that?

8 Let me ask you if you would identify the document that you
9 have with you that's been labeled Defendant's Exhibit 34 if you
10 can.

11 A. Yes, I can. It's a letter to Mr. Decker under the
12 letterhead of Lipsitz, Green, Scime and Cambria. It's written
13 by Paul J. Cambria, Junior, Esquire and --

14 Q. And who is he?

15 A. Excuse me?

16 Q. Who is he?

17 A. He is one of our attorneys.

18 Q. And you recognize Exhibit 34 as a letter that was sent on
19 behalf of your company to respond to Mr. Decker's January 16,
20 2008, letter?

21 A. Yes.

22 MR. BAUER: Your Honor, we'd like to tender into
23 evidence at this time Defendant's Exhibit 34.

24 THE COURT: No objection being stated in the pretrial
25 order, it's admitted without objection.

1 BY MR. BAUER:

2 Q. Ms. Hahner, same questions about Defendant's Exhibit 35
3 that you have in front of you. Do you recognize and can you
4 identify that document?

5 A. Yes, I can.

6 Q. Please do.

7 A. It's a letter from Mr. Decker to Mr. Cambria dated January
8 29th, 2008.

9 Q. And are you familiar with that letter?

10 A. Yes. I saw it.

11 MR. BAUER: Your Honor, at this time we'd like to
12 tender into evidence Defendant's Exhibit 35.

13 THE COURT: No objection being stated in the pretrial
14 order, it's admitted without objection.

15 BY MR. BAUER:

16 Q. Ms. Hahner, the same questions, please, with respect to
17 Defendant's Exhibit 36 which you have in front of you.

18 A. Yes, I do.

19 Q. Could you please tell the jury if you recognize it.

20 A. Yes, I do.

21 Q. And could you tell the jury what it is.

22 A. Yes. It is a letter from Mr. Cambria to Mr. Decker dated
23 January 30th, 2008.

24 Q. And you're familiar with this letter?

25 A. Yes, I am.

1 MR. BAUER: Your Honor, we'll have this tendered into
2 evidence as Defendant's Exhibit 36.

3 THE COURT: No objection being stated in the pretrial
4 order, it's admitted without objection.

5 BY MR. BAUER:

6 Q. Ms. Hahner, I'll ask you to please take a look at what's
7 been marked as Defendant's Exhibit 30 which you also have in
8 front of you, tell me if you recognize that document.

9 A. Yes, I do.

10 Q. Would you please tell the jury what it is.

11 A. Yes. It's a letter to Mrs. Toffoloni authored by me on
12 March 29th of this year, 2011.

13 Q. And what was the purpose of this letter?

14 A. This letter was indicating that we were enclosing the
15 check for \$10,000 plus interest accrued from November 23rd,
16 2010. And that was at the time that -- to comply with the
17 District Court's --

18 MR. DECKER: Objection, Your Honor. That goes beyond
19 identifying the document.

20 THE COURT: Overruled.

21 BY MR. BAUER:

22 Q. Continue, please.

23 A. That this check in the amount of \$10,000 plus interest was
24 intended to comply with the District Court's November 2010
25 ruling that LFP Publishing, that we were legally obligated to

1 compensate her for Nancy Benoit's images that we published.

2 MR. BAUER: Thank you.

3 Your Honor, at this time we'd like to tender into
4 evidence Defendant's Exhibit 30.

5 THE COURT: What do you say, Mr. Decker?

6 MR. DECKER: No objection, Your Honor.

7 THE COURT: It's admitted without objection.

8 BY MR. BAUER:

9 Q. And what was the date on that letter, Ms. Hahner?

10 A. March 29th of this year, 2011.

11 Q. And could you identify for the jury if you can, please,
12 what's been marked as Defendant's Exhibit 31.

13 A. Yes, I can.

14 Q. And what is that document?

15 A. It's a letter from Mr. Decker to me, Donna Hahner, dated
16 April 1st, 2011.

17 Q. And to your understanding, what was the purpose of that
18 letter?

19 A. This letter was telling me that the check was rejected.

20 MR. BAUER: Thank you.

21 Your Honor, at this time we'd like to tender
22 Defendant's Exhibit 31 into evidence.

23 MR. DECKER: No objection, Your Honor.

24 THE COURT: It's admitted without objection.

25 MR. BAUER: Ms. Hahner, thank you. That's all I

1 have.

2 THE COURT: Cross-examination, Mr. Decker?

3 Just a minute, Ms. Hahner.

4 - - -

5 CROSS-EXAMINATION

6 BY MR. DECKER:

7 Q. Ms. Hahner, good afternoon again.

8 A. Good afternoon.

9 Q. If we look back at Defendant's Exhibit 34 which was as you
10 have characterized it Mr. Cambria's letter to me in response to
11 my letter of January the 16th, 2008, in which I demanded that
12 Hustler Magazine not publish nude images of Nancy Benoit, that
13 document appears to say that it's received January the 20th,
14 2008.

15 Can you explain that date stamp to me, please.

16 A. No, I cannot.

17 Q. Do you have a date stamp of January 20th, 2008, on the
18 copy that you are looking at?

19 A. Oh, yes, I do.

20 Q. Mr. Cambria's letter appears to be dated January the 25th,
21 but somebody got it on January the 20th. Can you explain that
22 to me?

23 MR. BAUER: Your Honor, I'm going to object.

24 Mr. Decker appears to be mischaracterizing. It looks clearly
25 to be 28. Now, there's some obfuscation of the center line on

1 the 8; but it's clearly not a zero.

2 THE COURT: She is on cross-examination, Mr. Bauer.
3 Overruled.

4 MR. BAUER: Thank you, Your Honor.

5 BY MR. DECKER:

6 Q. Can you explain that to me?

7 A. No. And there's a little indentation on the zero, part of
8 the 20. So I don't -- it doesn't look like -- it does not look
9 like the zero, the two zeros in 2008. It's not as narrow as
10 the zero in the 20. So possibly that is a smudge or -- I don't
11 know.

12 So I guess what I'm saying is it might not be date stamped
13 January 20th. It might be -- as Mr. Decker said, it could be
14 the 28th; and there might have been a smudge there or something
15 on the photocopy. I don't know.

16 Q. Who was receiving this document whether it's January the
17 20th before it was written or January the 28th, 2008? Who is
18 receiving it on that date?

19 That's your copy of this document. Tell me who's getting
20 it.

21 A. I don't know.

22 Q. Do you concede, ma'am, that everything in the letter,
23 every conclusion that Mr. Cambria asserts is wrong?

24 A. I would need to read it once again. But I believe the
25 essence is that we had the right to publish those photographs.

1 And up until June 2009 when the 11th Circuit court reversed
2 Judge Thrash's rulings, that was the first time that we were
3 told we were wrong.

4 Q. Well, let me ask the question again. I'll give you the
5 chance to answer the question that I asked you, then you can
6 explain whatever you want. But I'm asking for an answer to
7 this question.

8 Do you concede that everything in Mr. Cambria's letter
9 telling me that Hustler had the right to publish those
10 photographs was wrong?

11 A. Yes, I concede that we were wrong according to the 11th
12 Circuit court in June of 2009 --

13 Q. And according to the Supreme Court of the United States
14 for that matter, but that's neither here nor there.

15 The fact is everything in this letter is wrong, correct?

16 A. That I don't know because I see there's some reference to
17 Martin Luther King. There are several paragraphs -- actually,
18 it's over two pages. And before I answer that, I would need to
19 reread it and make sure I understood it.

20 Q. Well, you have just identified this document as something
21 that Hustler wants the jury to consider. Can you tell me now
22 that everything, every conclusion, every assertion that
23 Mr. Cambria is making is wrong?

24 THE COURT: Mr. Decker, I'm going to let you ask that
25 this one last time.

1 MR. DECKER: That's the last time, Judge.

2 THE COURT: Answer the question, Ms. Hahner, to the
3 best you can.

4 THE WITNESS: To the best I can, I can say that our
5 attorney, Paul Cambria, was wrong with reference to us
6 publishing the photographs.

7 BY MR. DECKER:

8 Q. Now, have you sued Mr. Cambria for legal malpractice?

9 A. No.

10 Q. Have you taken any action against him whatsoever?

11 A. No. As I stated yesterday, we have not.

12 Q. And I then responded to Mr. Cambria, and you've identified
13 that document as Defendant's Exhibit 35. And I said to him,
14 Mr. Cambria, because of what you're saying in your letter we
15 are getting ready to file suit against Hustler Magazine.

16 Do you see that?

17 A. Yes.

18 Q. And then he responded a few days later saying in essence,
19 If your client wishes to commence a lawsuit over this matter,
20 we will accept service of summons and complaint. And, however,
21 as we previously indicated, she was a well-known public figure
22 and celebrity; and we have the legal right to do it.

23 Is that what he said?

24 A. In essence, yes.

25 Q. All right. But by the time, ma'am, these letters were

1 sent out by me and Mr. Cambria, Hustler Magazine had already
2 published these images of Nancy Benoit without permission, had
3 they not?

4 A. Yes. We didn't think we needed permission.

5 Q. And who is the we, ma'am?

6 A. The company from Tyler Downey, the editor who received the
7 first phone call, the editorial staff, the editorial director.
8 I mean, everyone in the company felt we were on firm, solid
9 legal ground that we had the right to freedom of press, that we
10 had the right to publish photographs. They were newsworthy.
11 We were writing a news article amidst a flurry of news
12 reporting about Nancy Benoit's early life.

13 Q. So you were not relying on Mr. Cambria to tell you you had
14 the right to do it even though he turns out to be wrong; you
15 were relying on your own opinion?

16 A. Well, you know, during the process of putting together a
17 news article, I mean, it's a very long process which includes
18 having the editorial director consider whether or not this is
19 something our readers may be interested in. It's discussed by
20 the editorial staff. Then it's written, proofed. Everything
21 is then passed by our attorneys. They see proofs or -- I guess
22 proofs and documents of the article. They read everything that
23 we publish and see everything before we publish it.

24 Q. My question to you, ma'am -- and thank you for that
25 answer. Now if you will answer the question I asked you.

1 You were relying on your own opinion when you published
2 these images without permission, weren't you?

3 A. In collaboration with our attorney.

4 Q. Well, which was it? Was it the lawyer's advice or your
5 own opinion?

6 MR. BAUER: Objection, Your Honor. Mr. Decker has
7 insisted that certain information not come into this case; and
8 it looks like he is purposefully trying to elicit
9 attorney-client privileged information from the witness.

10 THE COURT: I sustain the objection.

11 Rephrase your question, Mr. Decker.

12 Don't get into advice your lawyers gave you,
13 Ms. Hahner.

14 BY MR. DECKER:

15 Q. In fact, Ms. Hahner, didn't you in response to an
16 interrogatory in this case in which I asked you --

17 THE COURT: Beyond the scope of the direct,
18 Mr. Decker.

19 MR. DECKER: It goes to who they were relying on,
20 Judge.

21 THE COURT: That doesn't mean it isn't beyond the
22 scope of the direct. It's beyond the scope of the direct.
23 Move on.

24 BY MR. DECKER:

25 Q. When you sent this letter, Defendant's Exhibit 30, with a

1 check to Mrs. Toffoloni March the 29th, 2011, that wasn't even
2 three months ago, was it?

3 A. Correct.

4 Q. And you know that the 11th Circuit Court of Appeals told
5 you you were wrong in doing what you did on June the 25th,
6 2009?

7 A. That's correct.

8 Q. What took you so long?

9 A. Well, I believe it was in November that we were told that
10 we owed compensation to Mrs. Toffoloni.

11 Q. You didn't read the 11th Circuit Court of Appeals opinion?

12 A. I personally?

13 Q. Yes.

14 A. No.

15 Q. Nobody told you that, Hey, the 11th Circuit court of
16 opinion -- Court of Appeals has told us we were wrong?

17 THE COURT: Don't get into what lawyers may have told
18 you, Ms. Hahner.

19 MR. BAUER: And we will object to that question.
20 It's a mischaracterization of the court's ruling, the 11th
21 Circuit's ruling.

22 BY MR. DECKER:

23 Q. You knew in June of 2009 that you were wrong to do what
24 you did?

25 THE COURT: I'm going to let you ask that question

1 one more time, Mr. Decker.

2 MR. DECKER: Judge, I'd like to get an answer.

3 THE COURT: I said I was going to let you ask it one
4 more time. I will let you ask it one more time. Please answer
5 the question, Ms. Hahner.

6 The question is, Ms. Hahner: You knew in June of
7 2009 that you were wrong to do what you did?

8 Now, please answer that question one more time.

9 THE WITNESS: Yes, we knew that we were wrong. We
10 were told by the 11th Circuit Court of Appeals in June of 2009
11 that we did not have the right to publish those images.

12 BY MR. DECKER:

13 Q. But it was not until March of 2011 that you sent the check
14 to pay for something that wasn't for sale?

15 A. Yes, we sent the check March 29th.

16 Q. And where did you get the idea that those photographs were
17 ever for sale for any amount of money, much less \$10,000?

18 MR. BAUER: We are well beyond the scope of the
19 direct now, Your Honor.

20 THE COURT: Beyond the scope of the direct,
21 Mr. Decker.

22 MR. DECKER: That's all the questions I have, Your
23 Honor.

24 THE COURT: Redirect, Mr. Bauer?

25 MR. BAUER: No, Your Honor.

1 THE COURT: All right. Ms. Hahner, you may step
2 down.

3 THE WITNESS: Thank you.

4 THE COURT: Call your next witness, Mr. Bauer.

5 MR. BAUER: Your Honor, at this time the defense
6 rests its case; and we would like to renew our motion.

7 THE COURT: The motion is renewed.

8 Are you going to have any rebuttal, Mr. Decker?

9 MR. DECKER: May I have a moment, Your Honor?

10 THE COURT: Yes, sir.

11 Why don't we take a quick ten-minute break, Ladies
12 and Gentlemen. Court's in recess for ten minutes.

13 (A short recess was taken.)

14 THE COURT: Are you going to have any rebuttal,
15 Mr. Decker?

16 MR. DECKER: No, Your Honor.

17 THE COURT: All right. Then the evidence is closed.

18 MR. DECKER: I do, Your Honor -- I would like to at
19 this point re-offer the complete Plaintiff's Exhibit 2 from
20 which the extracts were taken in light of the Tyler Downey
21 testimony about the pagination report and the way in which this
22 Benoit article was treated vis-a-vis the other sections of the
23 magazine. The very thing that the Court ruled made Defendant's
24 Exhibit 7 not admissible unless the entire magazine was in has
25 now occurred, and I would re-urge the Court to take the entire

1 Plaintiff's Exhibit 2.

2 THE COURT: Let me see it, Mr. Decker.

3 MR. DECKER: From which the front cover and the table
4 of contents and the article in question have been removed
5 pursuant to the Court's earlier direction. That's simply the
6 remainder of the magazine which was the subject of Mr. Downey's
7 testimony.

8 MR. BAUER: Your Honor, we'd like to be heard if you
9 are inclined to admit it.

10 (The Court reviewed the document.)

11 THE COURT: Well, I haven't looked at the whole
12 thing; but I have seen all I want to see.

13 What do you say, Mr. Bauer?

14 MR. BAUER: Well, Your Honor, first of all, as I
15 understood the Court's ruling on Friday, it was we were not
16 permitted to use that pagination report as an exhibit that
17 provided a color-coded chart explaining how the magazine is
18 laid out and that if we used it as an exhibit you were going to
19 admit the magazine; so we didn't.

20 Mr. Downey's testimony which Mr. Decker never
21 objected to when we took his deposition was completely
22 non-controversial when it comes to that. It was a perfectly
23 appropriate explanation of how the Hustler editors categorized
24 the Benoit feature. It was consistent with all the other
25 testimony that we heard. Just because he used the words

1 pagination report that the jury hasn't seen doesn't change the
2 nature of that testimony. And, third, even if there's some
3 marginal relevance to it, the prejudicial value of putting that
4 information in front of the jury so far outweighs any remote
5 relevance it could have that that's what we believe.

6 THE COURT: Well, again, I don't believe the whole
7 magazine has any relevance to the issue of compensatory damages
8 in the case. There's nothing in here that would help the jury
9 make a decision about what the value of the photographs were to
10 the Defendant.

11 There's nothing in here that is relevant to the
12 question of whether they did what they did deliberately as the
13 charge that I'll give on punitive damages. There's nothing in
14 here that is relevant to the question of whether the Defendant
15 acted with bad faith. And if there is any marginal relevance
16 to the whole magazine which is just full of what can only be
17 characterized as just really hardcore pornography, it's
18 outweighed by the danger of unfair prejudice.

19 So I'll adhere to my original ruling, Mr. Decker, and
20 I'll return this magazine to you.

21 All right. You have rested.

22 Mr. Bauer, you have rested.

23 Everybody agree the evidence is closed?

24 MR. BAUER: Yes, Your Honor.

25 MR. DECKER: Yes, sir.

1 THE COURT: Bring the jury in, please.

2 (Jury entered the courtroom.)

3 THE COURT: Ladies and Gentlemen, the Plaintiff has
4 rested. The defense has rested. And there will be no
5 rebuttal, so the evidence is closed. The next stage of the
6 trial that you will be involved in will be the arguments of the
7 attorneys. Before they can give their closing arguments, I
8 have to meet with them and tell them what I'm going to give you
9 as far as your instructions on the law. That'll probably take
10 the rest of the afternoon, and we don't have time to do closing
11 arguments anyway this afternoon. So I'm going to excuse you
12 for the evening.

13 And I hope what'll happen is that we'll start the
14 closing arguments at 9:30 in the morning. I will then give you
15 your instructions on the law, and sometime tomorrow you will
16 start to begin your deliberations. And what happens after that
17 will be up to you. So you are excused. We will resume the
18 trial at 9:30 tomorrow morning.

19 Again, it is very important, particularly in this
20 case, that you follow my instructions not to discuss the case
21 with anyone, not to allow anyone to discuss the case in your
22 presence. Don't even begin discussing the case among
23 yourselves. Don't do any research about this case. Don't get
24 on the internet and try to find out anything about this case or
25 the law or any of the parties involved. Don't do anything

1 about this case until you come back into the courtroom tomorrow
2 morning at 9:30. And you are excused until 9:30 tomorrow
3 morning.

4 (Jury exited the courtroom.)

5 THE COURT: All right. Y'all ready for the charge
6 conference?

7 MR. DECKER: Your Honor, may I excuse the Toffolonis
8 from the charge conference?

9 THE COURT: Yes, sir.

10 MR. DECKER: Thank you, Judge.

11 THE COURT: All right. Like I said, the way I do the
12 charge conference first is to go through my proposed charge.

13 Any objection to Pattern Jury Charge Number 1?

14 MR. DECKER: No objection, Your Honor.

15 MR. BAUER: None, Your Honor.

16 THE COURT: Any objection to Pattern Jury Charge 2.2?

17 MR. DECKER: No objection, Your Honor.

18 MR. BAUER: No objection.

19 MR. DECKER: Judge, I seem to be missing Number 1
20 unless it's just the first page.

21 THE COURT: It's the first page.

22 MR. DECKER: Okay.

23 THE COURT: Any objection to Pattern Jury Charge 3?

24 MR. DECKER: No objection, Your Honor.

25 MR. BAUER: None.

1 MR. DECKER: Your Honor, did the rules say we can
2 remain seated during the charge conference?

3 THE COURT: That's fine.

4 Any objection to Pattern Jury Charge 4.1?

5 MR. DECKER: No objection.

6 MR. BAUER: None.

7 THE COURT: Any objection to Pattern Jury Charge 6.1?

8 MR. DECKER: No objection.

9 MR. BAUER: None.

10 THE COURT: Any objection to Plaintiff's proposed
11 jury instruction as modified?

12 MR. DECKER: Your Honor, I would request only that
13 the Court insert a phrase to this charge to again instruct the
14 jury that liability for any appropriation has already been
15 established as a matter of law.

16 THE COURT: What do you say, Mr. Bauer?

17 MR. BAUER: I think that point has been belabored to
18 the jury and no further charge to that effect is necessary.

19 MR. DECKER: I have not heard it from the Court, Your
20 Honor. They heard it from me, but I think it's appropriate for
21 you to say it in the final instructions to the jury.

22 MR. BAUER: And I believe they actually have heard it
23 from you, Your Honor.

24 THE COURT: I think I did say that when I gave them
25 those little preliminary instructions, but I'm going to tell

1 them again.

2 All right. After the first sentence, I'm going to
3 insert or I'm considering inserting this sentence: "It has
4 been determined as a matter of law in this case that the
5 Defendant is liable to the Plaintiff for compensatory damages
6 for such a misappropriation of the images of Nancy Benoit."

7 MR. DECKER: That's acceptable, Your Honor.

8 MR. BAUER: That's fine, Your Honor.

9 THE COURT: Any objection to Defendant's Request to
10 Charge Number 8 as modified?

11 MR. DECKER: Yes, Your Honor.

12 The second sentence is not a correct statement of the
13 law. The concept -- this sentence contemplates, articulates
14 cost to the Defendant, not value to the Defendant which is the
15 correct measure of damage. And so I would object to the second
16 sentence.

17 THE COURT: Have you got any case law saying I should
18 charge this, Mr. Bauer?

19 MR. BAUER: Yes, Your Honor. That's what the Whisper
20 Wear case says and what the Cabaniss cases say.

21 THE COURT: I don't think Whisper Wear really comes
22 right out and says that.

23 MR. DECKER: It absolutely does not, Judge.

24 MR. BAUER: What it says is that it was an
25 appropriate measure of damages for Whisper Wear to pay for the

1 unauthorized use of the model's image for the time and manner
2 in which it was used which was in certain specific advertising
3 mediums and what the going rate is for models in such mediums.
4 That's what the expert testimony for the Plaintiff in that case
5 consisted of.

6 THE COURT: Well, I don't think there's any doubt but
7 that you are entitled to introduce that evidence and entitled
8 to argue it. The question is whether I have to say anything
9 about that in my charge, and I don't believe Whisper Wear does
10 that. So I'm going to take out the second sentence. Certainly
11 you are entitled to argue that to the jury, Mr. Bauer.

12 Any objection to Defendant's Request to Charge Number
13 12 on punitive damages?

14 MR. DECKER: Yes, Your Honor.

15 In the second paragraph, the word "only" is
16 inappropriate and should be taken out. Under Georgia law,
17 punitive damages may be awarded for the violation of her right
18 of publicity if you find by clear and convincing evidence. The
19 word "only" is editorial and should not be inserted.

20 THE COURT: What do you say, Mr. Bauer?

21 MR. BAUER: Well, it's accurate.

22 THE COURT: I'm going to leave it in.

23 Any objection to Defendant's Request to Charge Number
24 13 on clear and convincing evidence?

25 MR. DECKER: No objection.

1 THE COURT: Any objection to Defendant's Request to
2 Charge Number 16 on punitive damages?

3 MR. DECKER: Yes, Your Honor.

4 It's a completely incorrect statement of the law.
5 Your Honor, it has already been held by the 11th Circuit and
6 this Court that the photos were not newsworthy. It's not clear
7 in this charge, Judge -- in fact, it insinuates and implies
8 otherwise -- that the jury is being allowed to reconsider the
9 issue of newsworthiness. The last sentence is completely
10 wrong. In other words, where the publication is newsworthy,
11 the right of publicity gives way to freedom of the press.
12 That, Your Honor, has been -- that has been rejected by the
13 11th Circuit and this Court. And so this charge is completely
14 wrong and inappropriate.

15 THE COURT: Well, I think I definitely need to change
16 the first sentence to say: "If you find that the Defendant
17 actually and reasonably believed that its publication of the
18 Benoit images was lawful and protected by the First Amendment
19 to the United States Constitution, you may not award punitive
20 damages."

21 Certainly you're right, Mr. Decker, that the Court of
22 Appeals held that the newsworthiness exception did not apply.
23 But I don't think that prevents the jury from considering the
24 Defendant's actual and reasonable belief in deciding whether or
25 not they should award punitive damages.

1 You disagree with that, Mr. Bauer?

2 MR. BAUER: No. I think it's correct.

3 THE COURT: Are you going to get me affirmed if this
4 case goes up to the 11th Circuit again on that issue?

5 MR. BAUER: Your Honor, I just hope we get the
6 chance.

7 MR. DECKER: Judge, I think it's injecting error into
8 the case. I respectfully suggest that -- you know, that it is
9 absolutely wrong. It has already been held that newsworthiness
10 is not an issue in this case --

11 THE COURT: That's simply not true, Mr. Decker. They
12 didn't say anything about what could be considered on your
13 punitive damages claim.

14 MR. DECKER: No, sir, they did not. They said these
15 photographs do not comply with the newsworthiness exception.

16 The Georgia -- underlying Georgia law on punitive
17 damages in an appropriation case is if the Defendant knew that
18 they did not have permission, that it wasn't an accidental
19 appropriation or one in a case of mistaken identity. There's
20 no Georgia law to support this charge. This is a Georgia case,
21 Georgia right of publicity. Newsworthiness does not apply.

22 THE COURT: That's just simply wrong in my opinion,
23 so I'm going to give the charge as modified.

24 Do you disagree, Mr. Bauer?

25 MR. BAUER: No, Your Honor.

1 THE COURT: All right. Any objection to Defendant's
2 Request to Charge Number 21?

3 MR. DECKER: No objection.

4 THE COURT: Now, if you want to take out your
5 punitive damages claim, I agree. That's what's driving this
6 whole train.

7 MR. DECKER: Well, because I have never seen a case
8 where punitive damages were more appropriate.

9 THE COURT: Well, I'm going to give what I feel is an
10 appropriate charge on punitive damages.

11 MR. DECKER: And I respectfully object.

12 THE COURT: All right. Any objection to Defendant's
13 Request to Charge Number 21?

14 MR. DECKER: No objection.

15 THE COURT: Any objection to Defendant's Request to
16 Charge Number 23?

17 MR. DECKER: The second paragraph is an incorrect
18 statement of the law. The verdict form that the Court has
19 suggested is the -- has the correct language. But the second
20 paragraph is completely wrong. And, again, I suggest and
21 respectfully suggest it's injecting error in the case.

22 THE COURT: Okay. I'm going to change the second
23 paragraph so it says: "Attorneys' fees may not be awarded if
24 you find that the Defendant actually and reasonably believed
25 that it had the right to publish the Benoit images without

1 first seeking the Plaintiff's permission."

2 Are you comfortable with that, Mr. Bauer?

3 MR. BAUER: Yes, Your Honor.

4 MR. DECKER: Same objection, Your Honor.

5 THE COURT: Any objection to Defendant's Request to
6 Charge Number 24 on attorneys' fees?

7 MR. DECKER: No objection, Your Honor.

8 THE COURT: There is one typo near the end of the
9 first sentence where it says: "Of interest of ill will." That
10 should be "of interest or ill will."

11 Any objection to Pattern Jury Charge 7.1?

12 MR. DECKER: No objection, Your Honor.

13 THE COURT: Mr. Bauer?

14 MR. BAUER: None.

15 THE COURT: Any objection to Pattern Jury Charge 8?

16 MR. DECKER: No objection.

17 THE COURT: Mr. Decker, any objection to my failure
18 to give any of your other requests to charge?

19 MR. DECKER: I'm sorry, Judge. I don't have that in
20 front of me. If I can have a minute.

21 (Pause.)

22 THE COURT: Any objection, Mr. Decker?

23 MR. DECKER: Judge, I can't lay my hands on them; so
24 I'll say we -- let me look one more place.

25 I can't lay my hands on the requests that we made, so

1 I don't have any objection.

2 THE COURT: Mr. Bauer, any objection to my failure to
3 give any of your other requests?

4 MR. BAUER: Yes, Your Honor.

5 We would request that our Requests to Charge Number 9
6 and Number 10 be reinstated. Request to Charge Number 9 is, of
7 course, a correct statement of the law with respect to the
8 measure of damages in a right of publicity case; and it does
9 correctly state that what Plaintiff would have demanded for the
10 use of the images is not relevant to the jury's measurement of
11 damages. It is, of course, the value to Defendant and not to
12 Plaintiff.

13 THE COURT: I think that's adequately covered by what
14 I have got in the charge already, Mr. Bauer.

15 MR. BAUER: I'm not sure that it's that clear, but I
16 respect the Court's ruling.

17 Charge Number 10 is a direct statement taken from the
18 Georgia Pattern Jury Instructions and I think is particularly
19 appropriate in this case where lawyers' arguments in a case
20 like this are naturally going to drift towards the sympathy and
21 emotional angle that really don't have a place in this business
22 case. And we do think it's important to remind the jury that
23 -- and I don't know that saying that the claim isn't one for
24 injury to feelings or reputation is clear enough that the jury
25 should not be guided by sympathy for the Plaintiff's emotional

1 reaction to the issues in the case, and we would ask that it be
2 reinstated. That's taken directly from the Georgia statute and
3 the Georgia pattern jury charges, and we think it's
4 particularly appropriate in this case.

5 THE COURT: All right. I think that's adequately
6 covered by the combination of Pattern Jury Charge 2.2 and what
7 I'm going to say about the measure of damages, Mr. Bauer.

8 MR. BAUER: Thank you, Your Honor.

9 THE COURT: Any others?

10 MR. BAUER: No.

11 THE COURT: All right. What about the verdict form,
12 Mr. Decker?

13 MR. DECKER: No objection.

14 THE COURT: What about the verdict form, Mr. Bauer?

15 MR. BAUER: No objection, Your Honor.

16 THE COURT: All right. How much time you think you
17 need for closing argument, Mr. Decker?

18 MR. DECKER: I'd like a total of an hour, Your Honor.

19 THE COURT: What do you say, Mr. Bauer?

20 MR. BAUER: I think that's excessive, Your Honor. We
21 all discussed having a total of an hour for each side for
22 argument when we had our pretrial conference. We all thought
23 that would be sufficient. We each took 20 minutes for our
24 openings or less. I think 40 minutes for the closing maximum
25 is more than enough to cover the issues in a two-day trial, day

1 and a half really. I'm not sure what we can talk about for an
2 hour.

3 THE COURT: All right. I'll give each side 45
4 minutes for closing argument.

5 Anything else we need to talk about before we adjourn
6 for the day?

7 MR. DECKER: Nothing for the Plaintiffs, Judge.

8 THE COURT: All right. Plaintiff has used three
9 hours and 21 minutes of her time. The Defendant has used two
10 hours and 22 minutes of its time.

11 Mr. Bauer, you want to be heard on your motion for
12 judgment as a matter of law?

13 MR. BAUER: We'd love to, Your Honor, yes.

14 THE COURT: Pardon me?

15 MR. BAUER: Yes, we'd like to be heard.

16 THE COURT: All right.

17 MR. BAUER: Should we be heard now?

18 THE COURT: Yes.

19 MR. BAUER: Your Honor, the only evidence of intent
20 that has come into this case -- and our motion, let me tell you
21 now, is limited to the punitive damages claim. We're not
22 moving for judgment as a matter of law on the compensatory
23 damages award.

24 And there's not been any piece of evidence in this
25 court to support an assertion that the editors of Hustler

1 Magazine knew unequivocally by clear and convincing evidence
2 which is the standard the jury is required to find in order to
3 find a punitive damages award is appropriate that Hustler knew
4 by that standard it was unlawful. It was not our burden to
5 prove that they knew, but I think that -- that they knew it was
6 unlawful. But I do think we have proven beyond a shadow of a
7 doubt, much less clear and convincing evidence, that they were
8 reasonable, that they, in fact, believed it was lawful and that
9 that belief was reasonable.

10 Now, Mr. Decker in his case in chief did not even
11 show testimony of the primary decision maker when it came to
12 the issue of the decision to publish these images which was the
13 editorial director, Bruce David. It certainly was not our
14 burden to prove that. But his testimony came from Ms. Hahner
15 who is the corporate vice president who testified she was not
16 involved in the decision to publish -- she was aware of it but
17 not involved in it -- and from Tyler Downey who is our witness
18 who testified that he is the one who wrote it, but he didn't
19 make the decision to publish this.

20 The testimony from Mr. Flynt was clear that he might
21 approve final content, but he wasn't involved in the
22 decision-making process with the specific matter of this
23 article. Although, he was aware of it.

24 So we would submit on the testimony that Mr. Decker
25 has to work from in this case he could not as a matter of law

1 reach the clear and convincing which for the Court's charge
2 means unequivocal evidence that the editors of Hustler Magazine
3 knew what they were doing was unlawful. I submit the evidence,
4 Your Honor, unequivocally goes the other way.

5 Now, of course, the only testimony in the case is
6 from LFP witnesses all saying that they thought it was lawful.
7 There's no testimony contradicting their testimony at all. So
8 I'm not sure how, you know, even if the Court didn't want to
9 credit the testimony of the LFP witnesses how Mr. Decker can
10 reach the clear-and-convincing, unequivocal hurdle when he has
11 got no evidence from anybody to show that they knew it was
12 unlawful. There's nothing.

13 And then, of course, the Court's orders which
14 Mr. Decker has brought into evidence repeatedly, including the
15 11th Circuit's finding reversing this Court's dismissal order
16 but finding that the news article itself was constitutionally
17 protected but the images were not, no reasonable jury can
18 conclude based on the evidence that this Court has heard that
19 the editors of a news magazine, a news and entertainment and
20 adult-content magazine could have known and did, in fact,
21 unequivocally know that the article they published was
22 constitutionally protected but the images that the article was
23 actually about were not.

24 And I think that the testimony that Mr. Decker
25 elicited in the very last few minutes of the case really go to

1 the heart of the point. He cross-examined Ms. Hahner over and
2 over and over again on the same points to the point where you
3 told him he couldn't ask the question anymore which is you knew
4 on June 25th, 2009, that you were wrong. And that's the point
5 that the evidence shows, Judge. They didn't know until 2009
6 that what they had done was unlawful, and the evidence shows
7 that up until that point they had every reason to believe that
8 they were on as Ms. Hahner testified solid legal footing.

9 And I don't want to beat this dead horse; but this
10 Court's rulings early in the case prove the reasonableness of
11 that belief, that belief which again is uncontradicted by any
12 evidence in the case.

13 Now, Mr. Decker must have more to overcome the
14 evidentiary hurdle. And we're prepared to send the
15 compensation issue to the jury right now. And, frankly, Your
16 Honor, the point of our motion is that's the only claim that
17 could arguably have sufficient evidence to even be decided by
18 this jury.

19 Mr. Decker's got to prove that Hustler's editors knew
20 it was wrong and acted maliciously anyway; and he could not
21 point to any evidence, of course, that that occurred or that
22 any Hustler employee believed differently, sincerely or
23 otherwise. For those reasons, we would ask that the Court
24 grant the motions for judgment as a matter of law and dismiss
25 Plaintiff's punitive damages claim.

1 Thank you.

2 THE COURT: Mr. Decker?

3 MR. DECKER: Judge, here are the elements that are
4 present supporting the claim for punitive damages. The
5 evidence is clear that Hustler knew that Nancy Benoit did not
6 want the photographs in question published and asked them to be
7 destroyed. So they knew what her desires were with respect to
8 these photographs.

9 Hustler Magazine through Mark Johnson knew that it
10 would be a financial windfall to publish the images for Hustler
11 Magazine, that it was a no-brainer for them to publish, that it
12 was not accidental on the part of Hustler Magazine or under the
13 mistaken belief that they had permission or consent. Hustler
14 knew that they did not have permission or consent from Nancy
15 Benoit's estate. Hustler failed to take any action whatsoever
16 to mitigate the damages after it received legal notice from the
17 Benoit estate that these -- this publication violated her
18 rights.

19 The question of Hustler subjecting belief, its intent
20 as to whether it was a situation where we are going to put this
21 out there and see what happens and if we draw a lawsuit we'll
22 defend it, that question of intent is always a question for the
23 jury. If under all the circumstances the jury finds that
24 Hustler did not really and actually believe that they had the
25 legal authority, then punitive damages are appropriate.

1 Georgia law, Your Honor, on an appropriation -- a
2 misappropriation of image case says very clearly that the
3 justification for this intentional tort is mistake or a
4 situation where the Defendant or the appropriator believed,
5 mistakenly believed that he had permission. Neither of those
6 situations occurred in this case.

7 It is a jury question, and there's plenty of evidence
8 in the record for the jury to conclude that Hustler did not
9 actually believe that they had permission.

10 THE COURT: All right. I'm going to take the motion
11 under advisement, but I'm going to go back and revisit the
12 question of what we do about this newsworthiness in
13 relationship to the punitive damages claim.

14 All right. On page 11, I'm going to add two
15 sentences at the beginning. I'm going to say: "As you heard
16 during the trial, the United States Court of Appeals for this
17 circuit has held in this case that the photographs published by
18 the Defendant do not qualify for the newsworthiness exception
19 to the right of publicity. That is the law that governs this
20 case. However, if you find that the Defendant actually and
21 reasonably," et cetera, et cetera.

22 Anybody have a problem with that?

23 MR. BAUER: No, Your Honor.

24 THE COURT: Okay. We will have a clean copy of the
25 charge available for you in the morning before argument. But I

1 think we resolved all the issues about the charge.

2 MR. DECKER: Judge, I need to go on the record about
3 Number 16. I have listened carefully to what you are proposing
4 to add to it; and I still believe that it does not cure the
5 defects in the first paragraph, first sentence, second
6 sentence, third sentence. And so I respectfully object to the
7 Charge Number 16 as modified by the Court.

8 THE COURT: All right.

9 Are you ready to defend that, Mr. Bauer?

10 MR. BAUER: Absolutely, Your Honor.

11 THE COURT: All right. We will be in recess until
12 9:30 tomorrow morning.

13 (Proceedings adjourned at 4:46 p.m.)
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT:
NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 167 through 382, are a true and correct copy of the proceedings in the case aforesaid.

This the 6th day of July, 2011.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court