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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 16, 2011
) Atlanta, Georgia
) 2:46 p.m.
)
)
)

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

VOLUME IV

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*

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1 (Proceedings held in Atlanta, Georgia, June 16, 2011,
2 2:46 p.m., in open court.)

3 THE COURT: All right. I have received another note
4 from the jury. It says: On page 8, line 7 and 8, does "may
5 not" within the sentence "Attorneys' fees may not be awarded if
6 you find that the Defendant actually and reasonably believed
7 that it had the right to publish the Benoit images without
8 first seeking the Plaintiff's permission" mean cannot?

9 The page numbers are not going to correspond to what
10 you have because that's referring to the page of the transcript
11 that I gave them.

12 What do you say, Mr. Decker?

13 MR. DECKER: Judge, I disagree with the charge, of
14 course. I would say that it's not mandatory; it's permissive.

15 THE COURT: What do you say, Mr. Bauer?

16 MR. BAUER: Your Honor, there's no wiggle room in may
17 not. There's nothing permissive about it. If it just said
18 may, it would be permissive. But it doesn't. So I think the
19 answer to this question is that is exactly what it means. It
20 means may not means the same thing as cannot.

21 MR. DECKER: Judge, I think it's permissive; and I
22 think that if you were to respond to it I think you should do
23 it by recharging on attorneys' fees so they would get the whole
24 charge.

25 THE COURT: Well, Garner's Dictionary of Modern Legal

1 Usage said: Can/may, the distinction between these words has
2 been much discussed. Generally, "can" expresses physical
3 ability and sometimes -- "may" expresses permission or
4 authorization and sometimes possibility.

5 That's not particularly helpful to me.

6 MR. DECKER: That's my point, Judge. May is always
7 permissive, and in this context I think it is.

8 MR. BAUER: But not if the word "not" follows it, and
9 that's the modifier.

10 THE COURT: All right. I'm going to answer the
11 question by saying: "Yes, may not means cannot."

12 We're ready for the jury.

13 (Jury entered the courtroom.)

14 THE COURT: Ladies and Gentlemen, I've received your
15 note that says: On page 8, line 7 and 8, does "may not" within
16 the sentence "Attorneys' fees may not be awarded if you find
17 that the Defendant actually and reasonably believed that it had
18 the right to publish the Benoit images without first seeking
19 the Plaintiff's permission" mean cannot?

20 The answer to that is yes, may not means cannot.

21 So I'll ask you to resume your deliberations.

22 (Jury exited the courtroom.)

23 THE COURT: Any other objections, Mr. Decker?

24 MR. DECKER: Well, Judge, I would simply reiterate
25 that may is permissive and shall is mandatory. And in this

1 situation, if the instruction was meant to mean that they
2 mandatorily could not it would have used the word "shall". I,
3 of course, objected to the entire charge in any case; and I
4 object to it now.

5 THE COURT: Any objections, Mr. Bauer?

6 MR. BAUER: No, Your Honor.

7 THE COURT: We will be in recess to await the verdict
8 of the jury.

9 (A recess was taken from 2:52 p.m. to 3:41 p.m. to
10 await the verdict of the jury.)

11 (Jury entered the courtroom.)

12 THE COURT: Mr. Cooper, has the jury reached a
13 verdict?

14 THE FOREPERSON: Yes, sir, we have.

15 THE COURT: If you will hand the verdict to the court
16 security officer, he will hand it to the clerk.

17 All right. I'll ask the clerk to publish the
18 verdict.

19 - - -

20 VERDICT

21 - - -

22 THE CLERK: In the United States District Court for
23 the Northern District of Georgia, Atlanta Division, Maureen
24 Toffoloni, as administrator and personal representative of the
25 estate of Nancy E. Benoit, versus LFP Publishing Group, LLC,

1 doing business as Hustler Magazine, Civil Action File Number
2 1:08-CV-421-TWT, Verdict, compensatory damages:

3 We, the jury, award the Plaintiff the sum of \$125,000
4 in compensatory damages.

5 Punitive damages: Did the Defendant act with
6 premeditation or knowledge and consciousness of the
7 appropriation and in continuation sufficient to support an
8 award of punitive damages?

9 Yes.

10 Did the Defendant act with a specific intent to harm
11 the Plaintiff?

12 Yes.

13 Expenses of litigation: Did the Defendant act in bad
14 faith such as a dishonest person -- excuse me -- such as a
15 dishonest purpose or breach of a known duty through such motive
16 or interest or ill will?

17 No.

18 This 16th day of June, 2011; and it's signed by the
19 foreperson.

20 THE COURT: Counsel, you wish to inspect the verdict
21 form?

22 MR. DECKER: Yes, Your Honor.

23 THE COURT: All right.

24 (Counsel inspected the verdict form.)

25 THE COURT: All right. Ladies and Gentlemen, let me

1 ask you to go back to your jury room for a few minutes, please.

2 (Jury exited the courtroom.)

3 THE COURT: What do we do now, Mr. Decker?

4 MR. DECKER: Judge, I didn't anticipate that result,
5 a split like that. I just have to think about it. I don't
6 know what to do off the top of my head.

7 THE COURT: Are you going to introduce any additional
8 evidence?

9 MR. DECKER: Oh, absolutely on the punitive damages
10 phase. I thought you were asking about what may be a
11 contradiction between the two sections.

12 THE COURT: No. I'm talking about what we do with
13 the punitive damages.

14 MR. DECKER: I'm ready to go forward on that phase,
15 Your Honor.

16 THE COURT: How much evidence are you going to have?

17 MR. DECKER: Judge, I'm going to talk about the
18 finances of LFP for the year 2008, the net -- I have some net
19 worth information. And I would ask the Court to reconsider the
20 submission of the Douglass versus Hustler case on the question
21 of recidivism.

22 THE COURT: What about you, Mr. Bauer?

23 MR. BAUER: Well, we would object to the Court
24 reconsidering the Douglass v. Hustler case for the same reasons
25 that we objected to its admission in the first phase of the

1 case. We don't have any opposition to Mr. Decker putting on
2 that evidence. I don't think we can contest the relevancy of
3 that financial information on the punitive damages claim. And
4 we'll respond to his evidence accordingly. We would like to
5 renew our motion for judgment as a matter of law if it's
6 necessary.

7 THE COURT: It's considered renewed. I don't know if
8 it's necessary or not.

9 How long do you think it's going to take to present
10 your evidence, Mr. Decker?

11 MR. DECKER: I would say hour or less. I would also
12 -- well, I'm sorry. An hour or less.

13 I also have a question.

14 THE COURT: Well, are you including your argument on
15 that or you just --

16 MR. DECKER: No, sir, I'm not. That was my question.
17 Will I be permitted to make an opening and a concluding
18 argument in this phase?

19 THE COURT: No. Just a closing argument.

20 MR. DECKER: Just a closing?

21 THE COURT: Correct.

22 MR. DECKER: All right. My time estimate for the
23 financial information, Your Honor, then is approximately a half
24 an hour to 45 minutes.

25 THE COURT: You are not going to present any

1 evidence, Mr. Bauer?

2 MR. BAUER: We will probably respond. I'm sure he is
3 going to do this through our witness, Ms. Hahner; and we will
4 probably direct her afterwards briefly.

5 THE COURT: Okay. Bring the jury back in.

6 (Jury entered the courtroom.)

7 THE COURT: Ladies and Gentlemen, it will now be your
8 responsibility to determine the amount of punitive damages to
9 be awarded in the case. So the attorneys are going to present
10 some additional evidence to you, and they will have some
11 additional argument for you.

12 Mr. Decker?

13 MR. DECKER: Your Honor, at this time we would call
14 Ms. Hahner, the LFP corporate representative, for the purpose
15 of cross-examination.

16 THE CLERK: Ma'am, if you will raise your right
17 hand.

18 (Witness placed under oath by the clerk.)

19 THE CLERK: Please have a seat. State your name for
20 the record.

21 THE WITNESS: Donna Hahner.

22 - - -

23 DONNA HAHNER,

24 having been first duly sworn, was examined and testified as
25 follows:

CROSS-EXAMINATION

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BY MR. DECKER:

Q. Ma'am, we discussed this case briefly on Monday. You recall that testimony?

A. Yes.

Q. Would you tell the jury again what your position and duties at the LFP are.

A. I oversee the publishing division which includes the editorial, advertising, subscription, circulation departments and my controller's department.

Q. In that position, ma'am, were you called upon to assemble various financial documents and to verify their accuracy before they were submitted to me as the lawyer for the Plaintiff?

A. Yes.

Q. And did you do that?

A. Yes, I did, with the exception of one. There's a document I believe you are bringing in too that's the net worth that was provided by the chief financial officer.

Q. Did you familiarize yourself with that document?

A. I looked at it. I don't understand what everything means, but I did look at it.

Q. Let me ask you to look at some additional financial documents, ma'am. Let me show you what has been marked as Plaintiff's Exhibit 9, ask you if you can identify it.

A. Yes, I can.

1 Q. What is that, please, ma'am?

2 A. This is the Hustler operating statement in detail for the
3 year ending December 31st, 2008.

4 Q. And for the year 2008, what was the total revenue of
5 Hustler Magazine for that period, for that year 2008?

6 A. The total net newsstand sales revenue or the total at the
7 bottom?

8 Q. Total revenue, ma'am.

9 A. The total revenue was \$15,516,000 for that year.

10 Q. All right. Let me show you what has been marked --
11 Your Honor, I offer Plaintiff's Exhibit 9.

12 THE COURT: It's admitted without objection.

13 BY MR. DECKER:

14 Q. Show you Plaintiff's Exhibit 13, ask you if you can
15 identify it.

16 A. Yes. This is the operating statement for LFP Publishing
17 Group detail year ending December 31st, 2008.

18 Q. Now, Ms. Hahner, the document, Plaintiff's Exhibit 13, has
19 a good deal more entries in it than Plaintiff's Exhibit 9; is
20 that true?

21 A. Yes, correct.

22 Q. And do you know why?

23 A. Yes.

24 Q. Why is that?

25 A. This document represents the additional revenue from our

1 intercompany affiliates, other divisions within the company
2 that pay LFP Publishing Group for use of the Hustler trademark.
3 And then the difference between the Hustler operating statement
4 and this operating statement is other magazines.

5 Q. But it's all for LFP?

6 A. All for LFP Publishing Group, yes.

7 Q. Who is the Defendant in this case?

8 A. That's correct.

9 Q. All right. I'd like you to take a look at the -- there's
10 an entry at the bottom of the page of Plaintiff's Exhibit 13
11 that says management fee, \$592,000.

12 What exactly is that?

13 A. Oh. The umbrella of companies is managed by Flynt
14 Management Group which includes finance department, it includes
15 human resources and all the various other managers -- executive
16 management that oversees all entities owned by Mr. Flynt. And
17 that is a fee that LFP Publishing Group must pay to Flynt
18 Management Group for its services.

19 Q. So would it be fair to say that a Larry Flynt company is
20 paying another Larry Flynt company a management fee of \$592,000
21 a month?

22 A. Yes, that's correct, just like the affiliates trademark
23 royalty fee is other Larry Flynt companies paying LFP
24 Publishing Group. So it's almost like trading dollars.

25 Q. So that money is deducted on the P&L but which is really

1 money paid to another Larry Flynt company?

2 A. Correct. The management fee is paid to another Larry
3 Flynt company.

4 Q. And he owns the LFP 100 percent, and he owns that company
5 100 percent?

6 A. Correct.

7 Q. So he is taking money out of one pocket and putting it
8 into the other pocket?

9 A. Correct. For the management fee, yes.

10 Q. All right. Let me show you again a document that's marked
11 as Plaintiff's Exhibit 15 and ask you if you can identify it.

12 A. This is the LFP Publishing Group balance sheets 2006
13 through 2009 in U.S. dollars.

14 Q. And is that the document that you said that was obtained
15 for you from some other office within Hustler Magazine?

16 A. Yes. This was obtained from the chief financial officer
17 of Flynt Management Group.

18 Q. All right. Tell the jury what the net worth of the LFP
19 Publishing Group was in the year 2008, the year the Nancy
20 Benoit article was printed.

21 A. I have to apologize. There's total current assets.
22 There's intangible assets. Do you want me to read the total --

23 Q. The bottom line, ma'am, down there at the bottom, total
24 liabilities and equity.

25 A. For 2008, 196 -- 196,036,000.

1 Q. \$196,036,000?

2 A. Correct.

3 Q. And do you know what the net worth of the LFP company is
4 for the year 2010, the year that we do not have figures for?

5 A. No, I do not.

6 Q. Of course, 2011 is not over yet?

7 A. That's correct.

8 Q. But you don't know the net worth of your employer for the
9 year 2010?

10 A. No, I do not. All I can tell you is that my group, LFP
11 Publishing Group, our if you want to call it net worth has
12 dropped 50 percent since 2008.

13 Q. Let me ask you to look at what's been marked as
14 Plaintiff's Exhibit 11, ask you if you can identify it.

15 A. Yes, I can. This is the LFP Publishing Group operating
16 statement for the year ending December 31st, 2006.

17 Q. Now, there's an adjustment on this financial statement for
18 2006 that is the same as the one that we discussed earlier,
19 Plaintiff's Exhibit 13, which is the March 2008 -- I'm sorry --
20 the 2008 financial statement. And I'll draw your attention to
21 the bottom line in the last paragraph. It says adjusted net
22 income before LCF comp.

23 You see that line?

24 A. Yes, I do.

25 Q. And for the March of 2008, it was \$708,000. And then

1 there was the management fee that we have talked about of
2 \$592,000 for that month. But tell the jury what adjusted net
3 income before LCF comp means.

4 A. Excuse me. Could we back up one second?

5 When you read the number, did you say 780 or did you say
6 761?

7 Q. I said 780,000 for March of 2008.

8 A. Okay. One thing I have to explain first is that in our
9 accounting system we put the issue in the calendar month when
10 it actually went on sale. So for purposes of this trial, the
11 actual -- the January 2008 columns is what applies to the March
12 2008 issue because it went on sale in January 2008. So the
13 adjusted net income before LCF comp is 761.

14 Q. And the management -- the same management fee each and
15 every month for the year 2008 was \$592,000 that went to another
16 Larry Flynt company? We have already talked about that?

17 A. Yes, correct.

18 Q. So it's the same number across the board?

19 A. Correct.

20 Q. The revenue for the January of 2008 where you say the
21 Nancy Benoit edition was accounted for was 761,000, and for
22 March it was 780,000. Is that the distinction you are pointing
23 out?

24 A. Yes. I realize it's minor, but I did want to clarify.

25 Q. Okay. And my question is would you tell the jury what

1 adjusted net income before LCF comp, dollar sign, what does
2 that mean?

3 A. Well, now we are getting into a little bit of a financial
4 area that I'm not a hundred percent clear on. But if we look
5 at total revenue for all of the magazines and then we subtract
6 the direct costs which are the production, the printing, et
7 cetera -- the manufacturing, the editorial costs, the
8 subscription costs, then we come up with a what's called a
9 gross margin which is our revenue less our direct costs. So
10 there's a figure there.

11 Then we subtract our LFP Publishing Group overhead which
12 is the other departments within LFP Publishing Group, our
13 accounting department, our circulation department, on and on --
14 that payroll, the fringe, our office rent, et cetera. Then we
15 come up with a net operating margin. So there's a figure
16 there.

17 Q. Now, we are still not answering the question I asked,
18 ma'am.

19 A. Oh, I'm sorry. I'm trying to answer the best way I can
20 since I'm not a controller or an accountant. So we have
21 operating margin; then there's interest income, interest
22 expense. Those particular numbers I'm not sure where that
23 comes from. There's interest income. That's subtracted out.
24 And I'm sorry I can't explain what all that means.

25 Q. No. All I want to know is what do the words "adjusted net

1 income before LCF compensation," what does that mean?

2 A. Oh. I do know it does not mean Larry Flynt has, for lack
3 of a better phrase, written a check for that amount.

4 Q. I mean, his name is Larry Claxton Flynt.

5 A. Oh, absolutely. Correct.

6 Q. And it says adjusted net income before LCF compensation.
7 And so you are not -- you are saying that doesn't mean Larry
8 Claxton Flynt?

9 A. No, no. What I'm saying is he -- let me put it another
10 way. What I'm saying -- yes, you are correct. I can't explain
11 to you what adjusted net income before LCF compensation. It's
12 correct Larry Flynt owns the company. So then I would deduce
13 that, yes, that means that his company LFP Publishing Group --

14 Q. Pays him \$608,000 a month which is deducted from the
15 revenue of the company?

16 A. Wait --

17 Q. That's all I am asking.

18 A. Say that again.

19 Do we pay him?

20 Q. Yeah, that's my question.

21 A. No, we don't pay him that amount.

22 Are you saying 761,000, if we paid him that?

23 Q. For that year, it was \$761,000 a month. I'm just trying
24 to find out where it's going.

25 A. Oh, okay. I'm sorry.

1 I don't know all the corporate structures. I know that
2 the company does not write a check to Larry Flynt for \$761,000.
3 Q. Somebody is getting \$761,000 each and every month that is
4 deducted from the revenue of the company. Can you tell me
5 where it's going?

6 THE COURT: Mr. Decker, if you are going to raise
7 your voice, you got to go back behind the podium.

8 THE WITNESS: I cannot tell you -- this is a big
9 corporation. It's very complex. It's beyond my scope.

10 The \$761,000 -- money moves around between the
11 companies. I can't tell you how, why. That's our finance
12 department. That's part of FMG. But, yes, you are correct
13 that the adjusted net income for LFP Publishing Group was
14 \$761,000 for the month of January 2008 which included Hustler
15 Magazine -- not only Hustler Magazine, but it included Hustler
16 Magazine.

17 BY MR. DECKER:

18 Q. Which is then reduced by this payment to this LCF person,
19 and that's what I'm trying to find out.

20 MR. BAUER: And I'm going to object, Your Honor.
21 These are gross mischaracterizations what the document shows.
22 And if Mr. Decker wants to put this on the screen so the jury
23 can see it too, then my objection, I might withdraw it. But
24 the way he is characterizing the document is grossly
25 mischaracterizing it.

1 THE COURT: Overruled.

2 MR. BAUER: Nothing says anything about a payment to
3 any person on this document.

4 THE COURT: Overruled, Mr. Bauer.

5 THE WITNESS: I'm sorry. Would you ask me again,
6 please.

7 BY MR. DECKER:

8 Q. I'm not sure where we are, ma'am.

9 What I am trying to find out is what is this monthly
10 deduction that's described -- and that's all I am trying to get
11 you to do is describe it to me -- adjusted net income before
12 LCF comp, what does that mean?

13 A. Do you see -- I'm sorry I'm not -- I can't tell you. What
14 I'm trying to do is -- can we look at the document on screen?

15 Q. All I want you to do is tell me what that means if you
16 know. If you don't know, then that's the answer.

17 A. I know, but I can't describe it to you in the manner that
18 I should be able to since I'm not an accountant or in the
19 finance department.

20 Q. Well, if you know what that means, that's what I'm asking.

21 A. I know that number is --

22 Q. No, ma'am, I'm not asking about a number. I'm asking
23 about what that description means.

24 A. Adjusted net income before --

25 Q. Let me ask you this. Is that the money the magazine makes

1 before there is a payment in some amount of money and for the
2 year that we are talking about -- which document are you
3 looking at, ma'am?

4 A. Oh, I'm looking at 13.

5 Q. Okay.

6 A. And --

7 Q. With respect to 13, the company made an amount of money
8 that is shown on the line that is described as adjusted net
9 income before LCF comp. And then there is a deduction of
10 \$592,000, and then that results in net income of \$288,000. And
11 now what I'm asking you to tell the jury is what does that line
12 describe, adjusted net income before LCF comp. What is LCF
13 comp?

14 A. Well, I don't know.

15 Q. Okay. That's the answer. Thank you.

16 A. But may I add something to it?

17 Q. Sure.

18 A. Okay. I have worked at the company for 27 years. At one
19 time it was solely one company only publishing magazines. And
20 ever since I have worked at the company and was privy to
21 financial documents, I always saw that line, adjusted net
22 income before LCF compensation -- comp.

23 I personally took that to mean compensation thinking, Oh,
24 I guess this is what Mr. Flynt gets every month. But that's
25 not correct. I can't tell you why it's not because it gets

1 into corporate structure and it's -- I can't. I'm not
2 qualified to do that, and I don't even have the information.
3 Our finance department would have that information.

4 Q. So are you finished?

5 A. I'm sorry. Yes, I am. I'm trying to be helpful, but I
6 guess I'm not.

7 Q. Let me show you what's been marked as Plaintiff's Exhibit
8 14 and ask you if you can identify it.

9 A. This is the LFP Publishing Group operating statement for
10 the year ending December 31st, 2009.

11 Q. And it has the income and the expenses of the company?

12 A. Correct.

13 Q. For the year 2009?

14 A. Correct.

15 Q. And then it has the same line that we have been talking
16 about, adjusted net income before LCF comp. And for that year
17 for each and every month there was a \$608,000 deduction every
18 month from the revenue of the company --

19 A. Yes.

20 Q. -- which resulted in the net profit?

21 A. Yes.

22 Q. And, again, you don't know what LCF comp means?

23 A. I can't -- I cannot answer -- no. I'm sorry. My answer
24 is no.

25 MR. DECKER: Your Honor, at this time I would offer

1 Plaintiff's Exhibit 9.

2 THE COURT: It's admitted without objection.

3 MR. DECKER: Plaintiff's Exhibit 11.

4 THE COURT: Admitted without objection.

5 MR. DECKER: Plaintiff's Exhibit 13.

6 THE COURT: Admitted without objection.

7 MR. DECKER: Plaintiff's Exhibit 14.

8 THE COURT: Admitted without objection.

9 MR. DECKER: And Plaintiff's Exhibit 15.

10 THE COURT: Admitted without objection.

11 MR. DECKER: That's all I have, Your Honor.

12 THE COURT: You may step down, Ms. Hahner.

13 Wait a minute. Wait a minute. Are you through with
14 your evidence on punitive damages, Mr. Decker?

15 MR. DECKER: Yes, Your Honor, I am. We discussed the
16 Exhibit 23. I would offer that. I don't recall the Court's
17 ruling on my resubmission.

18 THE COURT: Same ruling as previously made, too
19 remote.

20 MR. DECKER: All right. I am finished, Your Honor.
21 I rest.

22 THE COURT: All right. Mr. Bauer, are you going to
23 have questions for Ms. Hahner?

24 MR. BAUER: I am, Your Honor.

25 THE COURT: All right. Ladies and Gentlemen, let's

1 take a quick ten-minute break. During the break, don't talk
2 about the case.

3 Court's in recess for ten minutes.

4 (A short recess was taken.)

5 THE COURT: Ms. Hahner, you can come back up.

6 We're ready for the jury.

7 (Jury entered the courtroom.)

8 THE COURT: All right, Mr. Bauer.

9 - - -

10 DONNA HAHNER,

11 having been previously sworn, was examined and testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MR. BAUER:

15 Q. Ms. Hahner, if you would take a look at your screen. I'm
16 showing you what's been marked and admitted by Plaintiff as
17 Plaintiff's Exhibit 13 and direct your attention and the jury's
18 attention to the line I'm pointing to which you will recall
19 Mr. Decker referencing as adjusted net income before LCF comp.

20 You see that?

21 A. Yes.

22 Q. Mr. Decker asked you a number of questions about what that
23 number reflects. Let me ask you if you understand that that
24 number \$761,000 on that line is simply the sum of 1,055,000
25 reflected on the operating margin line minus the items listed

1 below it.

2 MR. DECKER: Your Honor, he is leading the witness.

3 THE COURT: Overruled.

4 BY MR. BAUER:

5 Q. Ms. Hahner, do you understand that 761,000 is 1,055,000
6 minus 17,000, 226,000, plus 12,000, minus 63,000?

7 A. Yes.

8 Q. Okay. And so adjusted net income before LCF comp is
9 simply a reflection of the operating margin number minus the
10 interest expense and income number?

11 A. Correct.

12 Q. And then below that the net income or loss number which is
13 reflected as \$168,000 is simply the amounts designated for
14 management fee and taxes subtracted from the adjusted net
15 income before LCF comp; is that correct?

16 A. Yes.

17 Q. So we know that adjusted net income before -- we know that
18 LCF comp as it's referenced there consists of the management
19 fee and taxes?

20 A. Yes.

21 Q. And the management fee is the fee that you described
22 that's paid by LFP Publishing Group, LLC, which is the entity
23 that this operating statement reflects?

24 A. Yes.

25 Q. Is the payment made by that company, the company you work

1 for, to I think you said a management company?

2 A. Flynt Management Company.

3 Q. And what does Flynt Management Company do?

4 A. Flynt Management Company is the management company for all
5 of Larry Flynt's companies. That includes the human resources
6 department, the finance department. Those are the two that
7 come to mind. So it's the top executive branch of the company,
8 including Mr. Flynt.

9 Q. So the number that's reflected there as a management fee
10 for the year 2008 which is the year that Exhibit 13 relates to,
11 that management fee is for administrative services and
12 management services in the HR and finance sectors and Mr. Flynt
13 provided to LFP Publishing, LLC?

14 A. I'm sorry. That number is?

15 Q. The management company that you just described that gets
16 the management fee that you just described provides human
17 resources and financial services and management services to LFP
18 Publishing Group, LLC?

19 A. Yes.

20 Q. So these are administrative services to the company?

21 A. Yes.

22 Q. Okay. I just want to make sure that the jury understands
23 what these categories are.

24 Let me direct your attention now to actual January 2008.
25 What does actual January 2008 mean for purposes of the jury's

1 understanding what this document shows?

2 A. Those are the final numbers.

3 Q. But actual means the actual month of January 2008?

4 A. Oh, yes, yes. It also means for all the magazines that
5 went on sale in January 2008.

6 Q. Not just Hustler Magazine?

7 A. Correct.

8 Q. How many other titles does LFP Publishing Group, LLC,
9 publish?

10 A. At that time, 10, 15.

11 Q. How many does it publish now?

12 A. Five, seven.

13 Q. So the numbers between 10 and 15 publications, that's what
14 all the numbers -- when we are talking about the operating
15 statement for LFP Publishing Group, LLC, we are not just
16 talking about Hustler Magazine; we are talking about 10 to 15
17 publications, including Hustler?

18 A. Correct.

19 Q. And net newsstand sales in this category reflects just
20 what it says, right, sales of the magazine from the newsstand?

21 A. Correct. All the magazines.

22 Q. And would that include -- all of them, not just Hustler?

23 A. Yes.

24 Q. And that would include a customer who is perhaps
25 interested in a specific story and wants to go find a magazine

1 because of it?

2 MR. DECKER: Your Honor, he is leading the witness.
3 I object.

4 THE COURT: Overruled.

5 BY MR. BAUER:

6 Q. You can answer the question. Would this number, the
7 newsstand sales, would that reflect the customers who are
8 interested in purchasing a specific issue for a specific story?

9 A. Yes.

10 Q. Because subscribers get the magazine no matter what?

11 A. Correct.

12 Q. Without regard to what stories are in it?

13 A. Correct.

14 Q. The next category, advertising revenue, that's advertising
15 revenue for all the magazines published in 2008 by LFP
16 Publishing Group, LLC, not just Hustler?

17 A. Yes. For the month of January, yes.

18 Q. Next number, subscriptions, those are for all the
19 magazines you just described, not just Hustler?

20 A. Correct.

21 Q. Okay. And so on.

22 And direct sales, could you tell the jury what direct
23 sales means.

24 A. Yes. Those go -- there are wholesalers that then deliver
25 to individual retailers, and then there are what we call direct

1 sales. They are much smaller operations. And they might just
2 be in one particular region, one particular state. So we use
3 the term direct sales because they don't go through the big
4 wholesalers.

5 Q. And are direct sales driven by any particular content in
6 the magazines?

7 A. No, no. They just -- the same numbers are distributed to
8 them.

9 Q. Back-issue sales, I think, is probably self-explanatory?

10 A. Well, not really. Back-issue sales, we receive in our
11 warehouse what we call remainder copies. And those we hold for
12 six to eight months; and then after that time period then there
13 are some very small, independent companies that buy them and
14 repackage them. So, for example, the back-issues sales for
15 that particular month was \$29,000. But that represented issues
16 probably from 2006 or 2007, a combination of many different
17 titles.

18 Q. Okay. Thank you.

19 Can you tell the jury what affiliates' trademark royalties
20 are.

21 A. Within the company, Larry Flynt has an apparel group. He
22 has a casino. He has a video group, an internet group, a
23 broadcasting group. And those companies must pay LFP
24 Publishing Group a royalty for the use of the Hustler brand
25 name.

1 Q. And other brands owned by LFP Publishing Group?

2 A. That's the -- primarily the only one.

3 Q. Okay. And, obviously, that revenue would have nothing to
4 do with the content in any specific magazine?

5 A. No. It's just intercompany payments. Other companies
6 within the organization pay publishing.

7 Q. Thank you.

8 And those we have now just described and explained what
9 all the revenue lines mean?

10 A. Correct.

11 Q. Okay. And if we wanted to know what the specific revenue
12 lines were for Hustler Magazine in 2008, we could look at
13 Plaintiff's Exhibit 9 which you were shown?

14 A. Yes.

15 Q. And we can see the same categories, correct?

16 A. Correct.

17 Q. So for actual January 2008, what issue of the magazine
18 would that reflect primarily the sales of?

19 A. The March 2008 issue which went on sale that month.

20 Q. And, of course, advertising, subscription, direct sales,
21 back-issues sales, trademark royalty with respect to actual
22 revenues in January 2008 would not have anything to do with any
23 content in the March 2008 issue of Hustler Magazine; is that
24 correct?

25 A. Correct. The advertising, subscription, yes.

1 Q. Okay. And then the remaining categories below reflect the
2 costs?

3 A. Correct.

4 Q. Okay. For the March 2008 issue?

5 A. Correct.

6 Q. Ms. Hahner, let me show you a document marked LFP 0001. I
7 will represent to you and to you, Mr. Decker, that it's
8 attached to your Plaintiff's Exhibit 21 and ask you if you can
9 identify that document.

10 A. Yes. This is a sales analysis document from our national
11 distribution company.

12 Q. And what sales does it reflect?

13 A. Sales for Hustler Magazine.

14 Q. From what dates?

15 A. It covers the January 2007 issue through the September
16 2009 issue.

17 MR. BAUER: Thank you.

18 I'm going to mark this exhibit -- well, actually, I
19 would ask Ms. Sewell if she doesn't mind marking this exhibit
20 if you have a sticker.

21 THE CLERK: Your last number was 36.

22 MR. BAUER: We can do Defense 37. Thank you.

23 I am going to ask the Court if we can admit it at
24 this time.

25 THE COURT: It's admitted without objection.

1 MR. BAUER: May I publish it to the jury?

2 THE COURT: Yes, sir.

3 MR. BAUER: Thank you, Your Honor.

4 BY MR. BAUER:

5 Q. Ms. Hahner, can you tell from looking at this document --
6 let's see if I can make it so the jury can understand what the
7 lines are.

8 Can you tell us what these columns mean so the jury can
9 translate what they are seeing on the screen.

10 A. Yes. The far left column is the issue, and the numbers
11 mean the year and then the month.

12 Q. So the very top entry issue 070100, what does that mean?

13 A. January 2007 issue.

14 Q. So if we were interested in identifying from this document
15 sales of the March 2008 issue of Hustler Magazine, could we get
16 that information?

17 A. Yes.

18 Q. And what would be the entry on the left column under
19 issue? Would that be 080300?

20 A. Yes.

21 Q. Okay. Let me see if I can make this easy.

22 Have I correctly put this piece of paper under 080300 so
23 that just above the blocked-out portion of the exhibit we can
24 see --

25 A. I can't see --

1 Q. Yeah, hold on. I'm going to fix that.

2 Is that correct?

3 A. Yes.

4 Q. Okay. Starting with this first section on the left, it
5 has U.S. at the top?

6 A. Yes.

7 Q. What does this show us about the sales of the 2008 issue
8 of Hustler Magazine?

9 A. It shows what was the draw, the return and the actual sale
10 within the United States to -- from all the retailers that
11 received a copy from wholesalers.

12 Q. What were the total U.S. sales?

13 A. The U.S. sales were 66,767 copies.

14 Q. And then the column that says foreign on the other side on
15 the right side of the screen, that's for everything else
16 outside the United States and Canada; is that right?

17 A. Can you slide it over?

18 Q. I will, but I just want you to explain what the column
19 means first.

20 A. Yes, that's correct.

21 Q. And is there a reason that the Canadian sales are not
22 referenced on this LFP Publishing Group Hustler sales chart?

23 A. Yes. Because we don't publish the Canadian edition.
24 That's published by a licensee.

25 Q. Very good. Thank you.

1 All right. So if we slide the document all the way over,
2 are we now looking at total sales by LFP Publishing Group, LLC,
3 of the March 2008 issue of Hustler Magazine?

4 A. Yes.

5 Q. And what were those total sales?

6 A. The total sales is 110,445 copies.

7 Q. That's worldwide?

8 A. Yes.

9 Q. And what was the difference between the sales of the March
10 2008 issue and the February 2008 issue?

11 A. About between 10 and 11 thousand, 10,800, something like
12 that.

13 Q. And can you attribute those additional almost 11,000 sales
14 of the issue worldwide to any particular content in the
15 magazine?

16 A. Not really. It could be a variety of factors.

17 Q. And what typically drives sales?

18 A. Well, usually it's the cover model.

19 Q. Was there anything unique about -- other than the model
20 about the cover of the 2008 March issue of Hustler Magazine?

21 A. Well, something I thought was of interest to our readers,
22 especially on the newsstand, was when a 73-inch Mitsubishi
23 television which we put on the roof line which is just above
24 the logo and can be seen from all the newsstands no matter
25 where the magazine is placed; and it was in large yellow type

1 on a black background trying to draw attention.

2 MR. BAUER: Your Honor, my copy of Plaintiff's
3 Exhibit 2 which is the cover is black and white; but I have a
4 color copy here. I'd like to show that to the jury on screen
5 with your permission.

6 THE COURT: All right.

7 BY MR. BAUER:

8 Q. Ms. Hahner, can you identify on the screen what you were
9 just describing.

10 A. Yes.

11 Q. And what was that again?

12 A. It's what we call a roof line above the logo. And it
13 says: Win a 73-inch Mitsubishi High-Definition -- HDTV.

14 Q. And was that a one-time roof-line offer for Hustler?

15 A. Yes.

16 Q. It just happened to be the same month that the Benoit
17 feature was published?

18 A. Yes.

19 MR. BAUER: That's all I have, Your Honor.

20 THE COURT: Cross-examination, Mr. Decker?

21 - - -

22 CROSS-EXAMINATION

23 BY MR. DECKER:

24 Q. Ms. Hahner, since the break, have you been able to
25 ascertain what the reference to LCF compensation means?

1 A. No. If I could have, I would have called our corporate
2 office and asked someone in finance to describe it to me or
3 give me an answer that would satisfy you; but I did not have
4 the time. I did not do that.

5 Q. You couldn't call and ask them, Hey, what does this LCF
6 mean?

7 A. I could have. I didn't know if I could reach someone in
8 ten minutes. I thought about it.

9 Q. The document you have got for magazine sales that you just
10 described that was a Plaintiff's exhibit that you are now
11 talking about is just for Hustler Magazine, right?

12 A. Are you talking about the screen sales?

13 Q. The one that Mr. Bauer just showed you.

14 A. Yes. The one from our national distributor?

15 Q. Yes.

16 A. And at the top it says Hustler Magazine?

17 Q. Yes.

18 A. Yes. That's just for Hustler Magazine.

19 Q. By the way, is this the national distributor that handles
20 all of the sales of Hustler Magazine?

21 A. Yes, all of the U.S. edition that we -- all of the sales
22 that LFP Publishing Group publishes.

23 Q. And was this the person that you could have called after
24 you got my letter --

25 THE COURT: We're not going to get into that,

1 Mr. Decker. This is -- well, I will let you do it. I'm sorry.
2 I take that back. You can ask that question. Go ahead.

3 BY MR. DECKER:

4 Q. Is this the person that you could have called to say, Hey,
5 we better stop selling this magazine because it's got some
6 content in it, we may not be entitled to it? Is that the same
7 person?

8 A. Yes, that is the same person that I could have called for
9 the issue that went off sale February 4th, I think it was 2008.
10 I know before you claimed 39 days, but that was -- that had
11 nothing to do with us. So, yes, after we received your letter,
12 I could have called and I did not.

13 Q. Okay. These magazine sales for Hustler Magazine, however,
14 are just a part of the revenue of the LFP Publishing Group,
15 LLC, which is the Defendant in this case?

16 A. That's correct.

17 MR. DECKER: Okay. Excuse me.

18 Thank you. That's all I have, Judge.

19 THE COURT: Anything else, Mr. Bauer?

20 MR. BAUER: No, Your Honor. I just want to make sure
21 that Plaintiff's exhibit that we just marked makes its way into
22 the record.

23 THE COURT: Ms. Hahner, you may step down.

24 Any additional evidence, Mr. Decker?

25 MR. DECKER: No, Your Honor.

1 THE COURT: How much time you think you need for
2 argument?

3 MR. DECKER: Well, Judge, I'm not very good at
4 estimating time; but I am going to say 15 minutes.

5 THE COURT: You, Mr. Bauer?

6 MR. BAUER: Five or ten minutes.

7 THE COURT: Ladies and Gentlemen, I'm going to have
8 to meet with the lawyers and figure out what additional
9 instructions I give you. So I think what we are going to have
10 to do is adjourn for the day. We will have the closing
11 arguments from the attorneys on the amount of punitive damages
12 first thing in the morning. I will give you brief
13 instructions, then you will retire to deliberate.

14 So you are excused until 9:30 tomorrow morning.

15 (Jury exited the courtroom.)

16 THE COURT: I don't think either side submitted an
17 instruction on what I should say, if anything, to the jury at
18 this stage regarding the amount of damages.

19 Have you got anything you want me in particular to
20 say, Mr. Decker?

21 MR. DECKER: Judge, I thought that my original
22 submission had covered the issue of punitive damages and the
23 things the jury should consider. I could be wrong. I'll try
24 to locate it. But I was under the impression that it did
25 include a request that the things the jury can consider in

1 awarding punitive damages in this context. But if I did not, I
2 apologize and I'd like to submit something by nine o'clock
3 tomorrow morning.

4 THE COURT: All right. I've got your requests,
5 Mr. Decker.

6 What do you say, Mr. Bauer?

7 MR. BAUER: Your Honor, we would like -- if I could
8 direct the Court's attention to Attachment H2 which was the
9 pretrial order which was Defendant's trial brief, page 52 and
10 53 of the pretrial order, we would like to have the Court
11 include among its charges to the jury the last full paragraph
12 on page -- bottom of page 52 that starts with, "Any award of
13 punitive damages must be limited by the procedural and
14 substantive constitutional limitations on such awards," and
15 continue from there through the middle of page 53, the bulk of
16 which consists of language taken directly from the U.S. Supreme
17 Court decision State Farm Mutual Auto Insurance Company versus
18 Campbell, 538 U.S. 408.

19 THE COURT: Have you got a case that says that a jury
20 should be told to apply all those factors?

21 MR. BAUER: Your Honor, that's the Supreme Court's
22 direction on how all punitive damages awards must be
23 calculated.

24 THE COURT: Well, I know those are the factors to be
25 considered by the Court in deciding whether a punitive damages

1 award is appropriate. That's not what the pattern has. The
2 pattern jury charge says:

3 "You may assess punitive damages against the
4 Defendant as punishment and as a deterrent to others. When
5 assessing punitive damages, you must be mindful that punitive
6 damages are meant to punish the Defendant for the specific
7 conduct that harmed the Plaintiff in the case and for only that
8 conduct. For example, you cannot assess punitive damages for
9 the Defendant being a distasteful individual or business.

10 Punitive damages are meant to punish the Defendant
11 for this conduct only and not for conduct that occurred at
12 another time. Your only task is to punish the Defendant for
13 the actions it took in this particular case. If you find that
14 punitive damages should be assessed against the Defendant, you
15 may consider the financial resources of the Defendant in fixing
16 the amount of such damages."

17 That's what I would propose to give.

18 MR. DECKER: That's acceptable to the Plaintiff, Your
19 Honor.

20 THE COURT: Now, I'm reading from the 2005 edition of
21 the pattern jury charges. I may look at the latest edition
22 which might have some minor differences from that, but that's
23 what I would propose doing.

24 What do you say, Mr. Bauer?

25 MR. BAUER: I think that almost gets us to where we

1 need to be, Your Honor. I'm not sure that it adequately
2 instructs the jury on all the guideposts to award punitive
3 damages that the Supreme Court says ought to be followed. But
4 if the Court's not inclined to consider the language from the
5 U.S. Supreme Court's decision in State Farm Mutual, then we'll
6 accept the Court's instruction as you have just quoted them.

7 THE COURT: Well, unless I have a major change of
8 mind, that's what I'm going to do. And each side has 15
9 minutes for argument.

10 Court's in recess until 9:30 tomorrow morning.

11 (Proceedings adjourned at 4:54 p.m.)
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C E R T I F I C A T E

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UNITED STATES DISTRICT COURT:
NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 459 through 498, are a true and correct copy of the proceedings in the case aforesaid.

This the 5th day of July, 2011.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court