IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY BOLLEA'S
OPPOSITION TO MOTION TO EXCLUDE TESTIMONY OF JEFF ANDERSON

Plaintiff Terry Gene Bollea ("Mr. Bollea") professionally known as "Hulk Hogan," responds to the *Daubert* Motion to Exclude the Expert Testimony of Jeff Anderson as follows:

I. INTRODUCTION

Jeff Anderson ("Mr. Anderson"), is a highly qualified expert in valuing intellectual property who used a well-established method – market valuation based on traffic statistics – to quantify the benefit Gawker unjustly received from publishing footage of Mr. Bollea fully naked and engaged in sexual intercourse. His opinions are relevant and admissible under *Daubert*.

Gawker's contention that Mr. Bollea is not entitled to unjust enrichment is wrong. Florida law expressly provides for unjust enrichment remedies in an appropriate case such as this one.

Gawker's *Daubert* arguments are improper attacks concerning the weight of Mr. Anderson's opinions based on Gawker's belief that its own expert's methodology should control. These arguments do not support excluding Mr. Anderson's testimony under Florida law.

II. FACTUAL BACKGROUND OF JEFF ANDERSON'S TESTIMONY

A. Overview of Mr. Anderson's Qualifications and Methodology

Jeff Anderson is the Director of Valuation and Analytics at CONSOR, a consulting firm that specializes in valuing intellectual property and licensing rights. *Moving Papers* Ex. 7 at 3. Mr. Anderson holds a Bachelor's Degree in Economics and a Master's Degree in Finance. *Id.*

Mr. Anderson teaches on the subject of intellectual property valuation, and has contributed to a book on the topic. *Id.* He has valued intangible assets and intellectual properties on many occasions both in the business and litigation contexts. *Id.* at 3-4.

Mr. Anderson used the market approach to determine that publishing the Sex Video increased the value of Gawker's website by between $4.9 million and $15.5 million. *Id.* at 15. His approach is the preferred means of valuing websites such as Gawker, by using their number of monthly unique visitors as a benchmark for comparison with other websites with known valuations. *Id.* at 7-9. Mr. Anderson's methodology is supported by the facts of this case because Gawker based its entire business model on the "monthly unique visitor" metric.

At deposition, Mr. Anderson testified as to his extensive experience valuing various forms of intellectual property including websites, and including eight expert witness engagements. *Ex. A* (Anderson Tr. 29:9–34:21, 35:19–49:17). Mr. Anderson also detailed his extensive experience speaking and lecturing about the topic of valuation. *Id.* (Anderson Tr. 49:18–53:21, 56:6–57:10).

B. Mr. Anderson's Approach is Factually Supported Because Gawker Embraced Monthly Unique Visitors

The benchmark measure Mr. Anderson used – monthly unique visitors – is the very measure Gawker itself used as the key metric to measure its business' success. As Mr. Anderson recognized in his report, Gawker uses monthly unique user data, reported by Quantcast, in the analysis of operating performance. *Moving Papers* Ex. 7 at 10. Moreover, "[a]s an indication of the importance Gawker places on website traffic, monthly unique user data reported by Quantcast is currently used as the principal metric for determining employee bonuses." *Id.*

Nick Denton described monthly unique users as a more accurate representation of a website's ability to attract new users. He also recognized that it is the metric used by advertisers to determine where to spend money:

> The target is called "US monthly uniques." It represents a measure of each site's domestic audience. This is the figure that journalists cite when judging a site's competitive position. It's also the metric by which advertisers decide which sites they will shower with dollars. Finally, a site with plenty of genuine uniques is one that has good growth prospects. Each of those first-time visitors is a potential convert.

Ex. B (BOLLEA 005610-005638)

As Mr. Anderson notes, Denton's admissions make clear that traffic adds value through future monetization potential. Accordingly, based on the facts of this case, a monthly unique user multiple is an appropriate market multiple by which to value Gawker.com. *Moving Papers* Ex. 7 at 11.

Mr. Anderson reasonably explained why the market valuation approach, and not some other approach, is the best approach for valuing an Internet-related business; including its accounting for the substantial potential for growth associated with websites, and the unique characteristics of internet media business that render a revenue-based valuation approach

inferior. *Ex. A* (Anderson Tr. 69:15–72:18, 109:5–110:5). Mr. Anderson also explained the relationship between traffic to a website and its value, and why traffic is a superior benchmark for valuing websites. *Id.* (Anderson Tr. 100:18–102:14). Mr. Anderson also testified extensively regarding comparable websites he used in conducting his valuation of Gawker.com; and he provided reasonable justification for the selection of the comparable sites he used in forming his opinions. *Id.* (Anderson Tr. 241:23–262:8).

C. Mr. Anderson's Application of the Monthly Unique User Multiple Market Approach

Mr. Anderson used reliable data to then calculate the additional traffic brought to Gawker.com by publishing the Sex Video. *Moving Papers* Ex. 7 at 15. Then, he calculated the additional value the Sex Video brought to Gawker using the traffic data and the appropriate monthly unique user multiple benchmarks. *Id.*

III. MR. ANDERSON'S OPINIONS ARE ADMISSIBLE

A. Mr. Anderson's Opinions Are Relevant to Mr. Bollea's Recoverable Damages

Gawker incorrectly argues that Mr. Anderson's opinions are not "relevant" because Mr. Bollea cannot recover damages based on Gawker's unjust enrichment. Gawker's argument is rejected in numerous cases.

The US Supreme Court recognized in *Zacchini v. Scripps-Howard Broadcasting Co.*, that "[t]he rationale for protecting the right of publicity is the straight-forward one of preventing **unjust enrichment** by the theft of good will." 433 U.S. 562, 576 (1977) (emphasis added).

BMC-Benchmark Management Co. v. Ceebraid Signal Corp., 292 Fed. Appx. 784 (11th Cir. 2008), an unjust enrichment remedy was legally appropriate because the defendant obtained confidential information belonging to the plaintiff and profited from it. In *Montage Group, Ltd.*

v. Athle-Tech Computer Systems, Inc., 889 So.2d 180 (Fla. 2d DCA 2004), the Second DCA **affirmed Judge James Case's unjust enrichment award** (but reduced its amount) based on the breach of an agreement licensing film editing software.

In the context of privacy torts, unjust enrichment is a widely recognized remedy. For example, the Restatement 3d of Unfair Competition § 49 recognizes that "one who is liable for an appropriation of the commercial value of another's identity… is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater… " The comment further provides that this monetary relief can consist of "restitutionary relief measured by the **unjust gain to the defendant**," and that "an accounting of the defendant's profits from an unauthorized use of the plaintiff's identity is most often justified as a means of deterring infringement and **recapturing gains attributable to wrongful conduct**." (emphasis added)

The right of publicity "prevents unjust enrichment by providing a remedy against exploitation of the goodwill and reputation that a person develops in his name or likeness through the investment of time, effort and money." See *Comment, Restat. 3d Unfair Comp. § 46*; citing *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, 1198 (S.D.N.Y. 1983); *Uhlaender v. Henrickson*, 316 F.Supp. 1277 (D. Minn. 1970); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (1979).

Cason v. Baskin, 20 So.2d 243, 254 (Fla. 1944), a 70 year old case cited by Gawker, does not bar any unjust enrichment claim in a privacy case. Rather, it holds (as an alternative holding, because it also dismissed the complaint on public concern grounds) that a plaintiff was not entitled to a disgorgement of the profits of a book that contained biographical information about the plaintiff because plaintiff could not establish a causal relationship between that biographical

content and the defendants' profits. That is completely different from the Sex Video, because the entire reason Gawker obtained the millions of viewers that it did was because it had published footage of Mr. Bollea having sex.

Weinstein Design Group, Inc. v. Fielder, 884 So.2d 990, 1002 (Fla. 4th DCA 2004), cited by Gawker, approves a reasonable royalty rate as **one** measure of damage but nowhere rejects unjust enrichment as a potential alternative measure. Similarly, *Jackson v. Grupo Industrial Hotelero, S.A.*, 07-22046-CIV, 2009 WL 8634834 at *13 (S.D. Fla. Apr. 29, 2009) awards a disgorgement of profits on the plaintiff's Lanham Act claim but contains no reasoning as to why such an award would not be available on the right to publicity claim.

The remainder of Gawker's arguments are improper and unsupported challenges to the weight of Mr. Anderson's opinions and methodology under *Daubert*.[1] *Daubert* specifically permits reasonable damages methodologies to be heard by the jury. As stated in *Joiner v. General Electric Co.*, 78 F.3d 524, 529 (11th Cir. 1996), there is a "preference for admissibility" under *Daubert*. "In analyzing the admissibility of expert testimony, it is important for trial courts to keep in mind the separate functions of judge and jury…." *Id.* at 530. "This gatekeeping role is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion. It is not intended to turn judges into jurors or surrogate scientists. Thus, the gatekeeping responsibility of the trial courts is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions from the material in the field. Rather, it is to assure that an expert's opinions are based on relevant scientific methods, processes, and data, and not on mere speculation, and that they apply to the facts in issue." *Id.* Mr. Anderson's

[1] Gawker dresses its *Daubert* argument regarding the use of unique page views and unique visitors as a relevance argument. It is the same argument however characterized.

opinions are not mere speculation. They are based on a relevant and reliable valuation method firmly supported by the facts in this case.

For example, in *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001), the Eleventh Circuit held that the testimony of a damages expert regarding the amount of money that the plaintiffs would have made had the proceeds of a fraud been available to invest was admissible under *Daubert*. *Id.* at 663. The Court's *Daubert* analysis clearly applies to the case at bar:

> Defendants argue that Silberman was not qualified to offer an opinion regarding Plaintiffs' lost value damages. This argument is not convincing. The record demonstrates that Silberman has a Ph.D. in economics from Yale, extensive experience as a professional economist, and a substantial background in estimating damages. The subject matter of his testimony—calculating the economic losses suffered by the Plaintiffs as a result of Defendants' conduct—was sufficiently within his expertise. Defendants insist that Silberman has no real estate development experience and thus no basis to opine regarding how the pilfered funds would have been invested by the Plaintiffs. That objection, however, goes more to the foundation for Silberman's testimony than it does to his qualifications to calculate Plaintiffs' damages. As set forth above, we conclude that there was an adequate foundation for Silberman's core assumptions.

Id. at 665.

Gawker's contentions that Mr. Anderson's methodology used insufficiently similar comparables, did not use the market approach properly, and relied on traffic statistics which Gawker contends did not truly estimate the actual traffic to the site, are all attacks on the **weight** of his opinions. However, the "credibility of expert witnesses and the weight of their opinion testimony… are for the **jury** to determine." *Quinn v. State*, 549 So.2d 208, 210 (Fla. 2d DCA 1989) (emphasis added). The method Mr. Anderson that employed and the manner in which he employed it are sound and reliable.

Gawker's primary argument in support of excluding Mr. Anderson's opinion is based on its own expert's opinions. However, it is well established under *Daubert* that disagreement by

the parties' experts about methodology is not a basis for excluding testimony. "The mere fact that two experts disagree is not grounds for excluding one's testimony." *Feliciano-Hill v. Principi* 439 F.3d 18, 25 (1st Cir. 2006). "Ultimately, the court should satisfy itself as to the legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing expert opinions." *Joiner*, 78 F.3d 524, 533. Gawker can argue to the jury that Mr. Anderson's opinions are not persuasive and that his methodology is flawed. Gawker's arguments, however, are not a basis for excluding Mr. Anderson's testimony.[2]

Mr. Bollea does not have the burden of proving Mr. Anderson's testimony is scientifically correct – but that by a preponderance of the evidence it is reliable. *Allison v. McGhann Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999).

Gawker's charge that Mr. Anderson relies on suboptimal traffic statistics, using monthly unique visitors instead of unique page views, is not a ground for exclusion under *Daubert*. In *Micro Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003), the court held that the "reliability" prong of *Daubert* did not mean that the expert was required to prove all of the factual premises to his or her opinion before being allowed to testify. Rather, the **jury** is "entitled to hear expert testimony and decide whether to accept or reject it after considering

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[2] *Metabyte v. Canal Technologies, S.A.*, C-02-05509 RMW, 2005 WL 6032845 (N.D. Cal. Jun. 17, 2005), cited by Gawker, is entirely distinguishable. While *Metabyte* did exclude an expert's testimony based on the market approach, the expert used **a single** comparable which was not comparable at all, with the differences detailed in the Court's opinion. Further, the expert did not cite any published authorities supporting the valuation choices he made. In contrast, here, Mr. Anderson's report cites multiple sources **and** used **six** comparable companies in the market valuation analysis.

Gawker's citation to *In re Greater Southeast Community Hospital Corp.*, 02-02250, 2008 WL 2037592 at *10 (D.D.C. Bankr. May 12, 2008) is equally misplaced. There, the Bankruptcy Judge's opinion **does not even mention *Daubert***; rather, the judge, **acting as trier of fact**, finds an expert's market valuation testimony not credible. Obviously, *Greater Southeast Community Hospital* does not stand for the proposition that such testimony cannot reach the jury.

whether predicate facts on which expert relied were accurate". *Id. Micro Chemical* holds that an expert's estimate of reasonable royalty damages in a patent case was admissible even though the other party contested the facts upon which the expert's opinion was based.

Indeed, even if Gawker were correct that there are faulty premises or erroneous assumptions in Mr. Anderson's analysis (which Mr. Bollea denies), that would not render his opinion inadmissible under *Daubert*. *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 810 (7th Cir. 2012) (oversimplification and failure to consider significant factors are not grounds for exclusion under *Daubert*); *Avery Dennison Corp. v. Four Pillars Enterprise Co.*, 45 Fed. Appx. 479, 487 (6th Cir. 2002) (so long as the factual premises of an expert opinion involve factual disputes left to the jury to decide, they are not a basis for *Daubert* exclusion even if the trial court believes the premises are inaccurate; holding damages expert's testimony regarding reasonable royalty and defendant's profits in trade secret and unfair competition case was **properly admitted**).

Mr. Anderson's monthly unique user market valuation methodology is relevant and based on reliable valuation methods supported by the facts and evidence in this case. Accordingly, they should be admitted. Gawker can challenge the credibility and weight of Mr. Anderson's opinions to the jury.

IV. CONCLUSION

For the foregoing reasons, Gawker's motion to exclude Mr. Anderson's testimony should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 1st day of June, 2015 to the following:

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