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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

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'S MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF PETER HORAN

Plaintiff, Terry Gene Bollea, professionally known as "Hulk Hogan" ("Bollea" or "Plaintiff"), by counsel, files this Motion to Exclude the Opinions and Testimony of Defendant, Gawker Media, LLC's ("Gawker"), expert witness Peter Horan. Horan offers three opinions in this case: (1) that Plaintiff's expert, Jeff Anderson, who is the Director of Valuation & Analytics at CONSOR, an intellectual asset consulting firm, somehow is not qualified to offer an opinion as to the value Gawker.com received from posting the video at issue in this litigation; (2) a critique of Anderson's valuation methodology; and (3) Horan's own valuation of the benefit

Gawker.com received as a result of posting the video.[1] Each of Horan's opinions should be excluded for the following reasons:

First, in Florida, an expert witness is not allowed to offer an opinion as to the ability or qualifications of another expert. "[C]ase law reveals that an expert may properly explain his or her opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology **so long as the expert does not attack the opposing expert's ability, credibility, reputation, or competence**." *Network Publications, Inc. v. Bjorkman*, 756 So. 2d 1028, 1031 (Fla. 5th DCA 2000) (emphasis added). Horan's testimony as to Anderson's ability and competence should be excluded.

Second, Horan is an investor in companies. [Horan Depo. Tr. 65:3–6]. He is not a valuation expert, an accountant, or an appraiser. His expertise is in the area of "running and investing in internet media companies and advertising companies." [Horan Depo. Tr. 30:5–7]. He is not an expert in any other fields and has no expertise in valuing intellectual property. [Horan Depo. Tr. 30:8–9]. Thus, Horan simply is not qualified to offer any expert opinion as to **how** a website should be valued, and his testimony criticizing Anderson's methodology therefore should be excluded.

Third, the opinions and testimony of Horan regarding the increase in value to Gawker.com resulting from its posting of the video should be excluded because they fail all three prongs of Florida's *Daubert* test: (1) Horan is not qualified to render such opinions; (2) the methodology he used to reach his opinions is unreliable; and (3) his testimony will not assist the trier of fact. For the same reasons Horan is not qualified to offer an opinion as to Anderson's methodology, Horan is not qualified to offer his own opinion as to the value of the video of

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[1] Horan's Deposition Transcript is attached as **Exhibit A**, and his Report is attached as **Exhibit B**. Anderson's Deposition Transcript is attached as **Exhibit C**.

Gawker.com. Further, Florida law has specific requirements for valuing a business using the "income approach," which Horan claims he used to make his valuation, but Horan does not satisfy Florida's requirements. Horan also admitted at his deposition that the approach he used was criticized by one of the sources he relied on, and which he admits is authoritative, as being "crude," "simplistic," and a "remarkably dangerous technique." [Horan Report, Ex. 9].

For all of these reasons, Horan's testimony should be excluded.

I. LEGAL STANDARD

Florida courts have adopted and codified the standard for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), that was subsequently reaffirmed and refined by *General Electric Co. v. Joiner,* 522 U.S. 136 (1997) and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999). *See* Fla. Stat. §90.702; *Perez v. Bell South Telecomms., Inc.,* 138 So. 3d 492 (Fla. 3d DCA 2014). Section 90.702, Florida Statutes, now provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

"*Daubert* requires trial courts act as 'gatekeepers' to ensure that speculative, unreliable expert testimony does not reach the jury." *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010); *McClain v. Metabolife Intern., Inc.,* 401 F.3d 1233 (11th Cir. 2005). "The importance of *Daubert's* gatekeeping requirement cannot be overstated." *United States v.*

Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004). "Under *Daubert* and its progeny, [the court] conduct[s] a three-part inquiry to determine the admissibility of expert testimony, weighing whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Madura v. BAC Home Loans Servicing, LP,* 593 Fed. Appx. 834, 847 (11th Cir. 2014). The burden of establishing these factors rests on the proponent of the expert opinion. *Frazier,* 387 F.3d at 1260.

Section 90.702, Florida Statutes, requires expert testimony to be the product of reliable principles and methods. "[T]he reliability of the expert's methodology is a context-specific inquiry." *Tampa Bay Water v. HDR Eng'g, Inc.,* 731 F.3d 1171, 1184 (11th Cir. 2013). The Supreme Court has indicated four factors should be evaluated when considering the reliability of an expert's testimony:

> (1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the theory or technique used by the expert has been subjected to peer review and publication; (3) whether there is a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community.

United Fire & Cas. Co. v. Whirlpool Corp., 704 F.3d 1338, 1341 (11th Cir. 2013) (citing *Daubert v Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)). These "factors are not exhaustive and are intended to be applied in a 'flexible' manner." *Whirlpool Corp.,* 704 F.3d at 1341 (citing *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141 (1999). Moreover, not all of the factors will apply in every case. *Frazier,* 387 F.3d at 1262. Nonetheless, the requirement

that the trial judge evaluate the reliability of expert testimony before allowing its admission at trial remains constant. *Id.*

II. ARGUMENT

A. Horan's Testimony Regarding Anderson's Qualifications Is Inadmissible Under Florida Law

An expert cannot criticize another expert. *Network Publs., Inc. v. Bjorkman*, 756 So.2d 1028, 1030 (Fla. 5th DCA 2000) (*citing Mathis v. O'Reilly*, 400 So.2d 795, 796 (Fla. 1982). It is improper for a trial court to allow an expert to impeach the credibility of an opposing expert by testifying as to his opinion of the opposing expert's ability. *Id.* Opinions regarding the "validity of opinions expressed" by an opposing party's expert also are improper. *Id.* at 1031 (*citing Carlton v. Bielling*, 146 So.2d 915, 916 (Fla. 1st DCA 1962)); *Caban v. State*, 9 So.3d 50, 54 (Fla. 5th DCA 2009).

Horan renders improper opinions regarding Anderson's qualifications as an expert and the validity of his opinions. [Horan Depo. Tr. 72:15–25; 73:1–5]. Horan renders opinions regarding Anderson's qualifications and approach to valuing Gawker.com. For example, Horan offers testimony that Anderson, in his opinion, is not qualified to render an opinion as to Gawker.com's value, because Anderson's field of expertise is in the valuation of intellectual property, intangible assets and celebrity endorsements. [Horan Depo. Tr. 83:19–21; Horan Report p. 3]. The opinion is unsupportable on the facts. Horan admits that Gawker.com is an "asset," that Anderson has experience in valuing "assets," and Anderson's testimony confirms he has substantial experience in valuing all types of assets, including websites. [Horan Depo. Tr. 73:7–15, 83:19–21; Anderson Tr. 30–33]. More importantly, however, Horan's opinion as to Anderson's qualifications—regardless of whether they are supportable (they are not)—is

inadmissible under Florida law, as laid out by the numerous authorities cited above. Horan's opinions go beyond attacking the methodology used by Anderson, and attack his abilities and qualifications. Such opinions should be excluded.

B. Horan's Opinions Are On Matters Outside The Scope Of His Expertise

Before a witness may be permitted to submit expert opinion testimony, the trial court must be satisfied that the witness is adequately qualified to express an opinion on the subject about which he has been called to testify. *Carrier v. Ramsey*, 714 So.2d 657, 659 (Fla. 5th DCA 1998). If the purported expert witness does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible. *Id.* Whether the witness possesses adequate qualifications to submit expert opinion testimony is a question of fact to be decided by the trial court. *Id.*

Horan's expertise is in the area of "running and investing in internet media companies and advertising companies." [Horan Depo. Tr. 30:5–7]. He is not an expert in any other fields and has no expertise in valuing intellectual property. [Horan Depo. Tr. 30:8–9]. Horan has never personally prepared any written valuation or appraisal of any website or internet media company. [Horan Depo. Tr. 74:7–19]. Other than being involved in discussions about what a business is worth, Horan has never personally prepared a valuation or appraisal of an internet media business. [Horan Depo. Tr. 74:20–25, 75:1–5]. Horan's real world experience buying and selling internet companies does not qualify him to value a website or media company in which he has no personal involvement.

C. Horan's Opinions Are Excludable Under *Daubert* As Methodologically Unsound And Based on Faulty Premises

Horan's own opinions regarding the increase in value of Gawker.com should be excluded because his methodology is fatally flawed and based upon an insufficient factual predicate.

As set forth below, Horan fails to properly utilize one of the recognized methods for valuing a business in Florida (income, market, or asset). Horan used a revenue-multiple approach to determine the "equity" value of Gawker.com—an approach Horan characterized as an "income" approach. [Horan Depo. Tr. 114: 1–3; Horan Report p. 23]. Horan's approach is based on his experience as an investor/acquirer: "what an investor might pay to own a piece of the company or what another company might pay to acquire the company." [Horan Depo. p. 70: 3–11]. He bases his opinions on information and data from investment banks that analyzed companies other than Gawker—but Gawker did not provide Horan with information regarding Gawker's negotiations and discussions with Young America Capital about raising money through debt financing. [Horan Depo. Tr. 134–135].

Florida courts recognize three valuation methods for determining a business's value:

> First, the income-based approach values the business based on the predicated current and future revenue streams discounted to a total present value. [Second,] [a] market-based approach values the business based on a comparison to comparable businesses existing in the particular market adjusted for the individual characteristics and risks associated with the specific business. Third, an asset-based approach values the business based on its total assets minus its total liabilities and is typically used when the business is not profitable.

Fid. Warranty Servs. v. Firstate Ins. Holdings, Inc., 74 So.3d 506, n.5 (Fla. 4th DCA 2011) (citing *Sys. Components Corp. v. Fla. Dep't of Transp.,* 14 So.3d 967, 979–80 (Fla. 2009)). Although Horan tries to claim his approach is "income"-based, he admittedly did not determine the predicated current and future revenue streams discounted to a total present value. In fact,

Horan did not take **any** future revenue sources into account. [Horan Depo. p. 87:16–20]. He also did not project any net revenue that was discounted or capitalized. [Horan Depo. p. 114:11–23]. Horan did not engage in—nor is he qualified to perform—the detailed economic analysis necessary to properly conduct an income-based valuation of Gwaker.com. Horan merely opined on what **he** would pay to **buy** Gawker.com. This approach to valuing businesses is not recognized in Florida.

Moreover, the factual predicate supplied to Horan omits facts necessary to the formation of a valid opinion. "When the factual predicate is so lacking, the trial court may properly refuse to allow the testimony." *Huff v. State*, 495 So.2d 145, 148 (Fla. 1986). The value of a business depends upon facts unique to that business and therefore appraisals tend to be factually intensive, involving competing valuation methodologies. *Sun Ins. Marketing. Network, Inc. v. AIG Life Ins. Co.,* 254 F.Supp.2d 1239, 1244 (M.D. Fla. 2003). Usual factors to consider are: net worth; evidence of recent sales of similar businesses; whether the corporation is regularly traded on an exchange, is closely held or traded at arm's length in close proximity in time; historical and prospective earning power and dividend-paying capacity; good will; position in the industry; management; and the economic outlook of the industry. *Id.* at 1245.

Horan does not consider any of these factors. Rather, he chose to utilize a revenue multiple method because that is the method he deems appropriate when deciding how much to pay when acquiring an internet business. Horan's chosen method does not take into consideration all of the factors necessary under the income approach (*i.e.*, prospective earnings, historical earnings, corporate stability, and risk factors). Horan's approach here—basing a business's value on what Horan would pay to buy it—is just as inappropriate as the approach

held inadmissible in *Sun Insurance*—basing fair market value on "asking price." *Id.* at 1243–1244.

Further, Horan's method fails the reliability prong of *Daubert*. In his report, Horan cites to an article by Bill Gurley. [Horan Report Ex. 9]. Horan testified that Bill Gurley is an expert and that his article is "authoritative." [Horan Depo. p. 254:5–25]. This authoritative source states that the revenue multiple method, such as the one used by Horan, is "simplistic" and "crude." [Horan Report, Ex. 9, p.1]. It further states that Horan's method is a "remarkably dangerous technique," and is the "crudest evaluation tool of them all." *Id.* Noting how much room for error the revenue multiple method has, Mr. Gurley concludes that a company's revenue alone "is a very poor guide" to determine what the company is worth. *Id.* at 2.

Thus, as Horan's own authoritative sources reveal, Horan's revenue multiple method is highly unreliable and "remarkably dangerous." It also is not one of Florida's recognized methods for valuing a business. Accordingly, Horan's opinions are misleading because they employ an erroneous methodology, and therefore should be excluded on this ground as well. *M.J. Stavola Farms, Inc. v. Department of Transp., State of Fla.,* 742 So.2d 391, 395 (Fla. 5th DCA 1999); *Rochelle v. State Road Dept.,* 196 So.2d 477, 479 (Fla. 2d DCA 1967) (expert testimony can be excluded when "method would require departing from all common sense and reason or would require adoption of an entirely new and totally unauthenticated formula in the field of appraising").[2]

[2] "Because of the powerful and potentially misleading effect of expert evidence, judges must take care not to allow misleading and prejudicial opinions to influence the finder of fact." *R&R Int'l, Inc. v. Manzen, LLC,* 2010 U.S. Dist. LEXIS 94550, 46–47 (S.D. Fla. 2010) (citations and quotations omitted).

III. CONCLUSION

Horan is unqualified to render an opinion as to the value of Gawker and its increase due to the video. His opinions regarding Mr. Anderson's qualifications and opinions are improper. Horan's "crude," "remarkably dangerous" and unreliable revenue multiple method is unsupportable and misleading. Horan's opinions should be excluded.

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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 18th day of May, 2015 to the following:

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