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, *et al.*,

Defendants.
_____/

PUBLISHER DEFENDANTS' *DAUBERT* MOTION TO EXCLUDE THE EXPERT TESTIMONY OF LESLIE JOHN

Defendants Gawker Media, LLC, Nick Denton and A.J. Daulerio (collectively, the "Publisher Defendants") hereby move to exclude the expert testimony of Leslie John.

Plaintiff retained John, a business school professor, to conduct a survey to support his argument for astronomical damages. In the survey, people making over $200,000 a year were asked to "imagine themselves in the same situation" as the plaintiff and then to report what they deemed to be "a fair amount of money to receive as compensation for the situation." According to John, the survey shows that the "range of money deemed as fair and reasonable compensation . . . is approximately $7,000,000 to $10,000,000."

John's proposed testimony should be excluded because it violates one of the fundamental tenets underlying our jury system: the bar against making a Golden Rule argument to the jury. The law has long prohibited attorneys from asking jurors to place themselves in the plaintiff's position and consider how much they would want to be compensated if they experienced the plaintiff's injury. But, that is precisely the theory that will be advanced if John is called to the stand. Indeed, the Golden Rule is the very premise of John's survey and the very subject of her proposed testimony.

That is not the only basic trial tenet that would be violated by John's testimony. Her survey is nothing more than an online mock jury exercise. Just as a party cannot place the results from a mock jury before an actual jury, plaintiff should be barred from introducing John's survey participants' views about what amount of money is "fair and reasonable compensation for a loss of privacy such as the one experienced by Terry Bollea." The jury is supposed to answer that question for itself, based on information presented by *both* parties, not defer to what is, in effect, a different group of jurors whose determinations were based only on the limited information plaintiff's expert chose to tell them.

Even if John's proposed testimony were not an affront to cardinal principles governing jury trials, it still would need to be stricken because it says nothing about *plaintiff's* harm. John conceded that she "did not deem" plaintiff's actual harm "to be relevant," but that is the *only* harm that is relevant to the calculation of plaintiff's damages. At trial, the jury will be asked to decide only whether and to what extent *plaintiff* suffered harm, not whether John's survey participants thought that *they* would be harmed if *they* faced a similar situation.

John's survey suffers from several other fatal flaws, rendering her testimony inadmissible:

- The survey asked people for a single dollar amount to compensate for the separate alleged privacy invasions of being secretly filmed and the subsequent posting of excerpts from the recording, despite the fact that any damages against the Publisher Defendants could be awarded only for their posting of the video;

- The survey's measurement of "fair compensation" is tainted by the strong possibility that participants factored in their desire for punishment; and

- The survey is built on the assumption that 7 million people watched the video, even though another of plaintiff's experts admitted that number could not be verified.

For each of these separate and independent reasons, John's testimony should be excluded.

BACKGROUND

1. Plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan" ("Hogan"), claims that he was secretly filmed by Bubba The Love Sponge Clem and his then-wife Heather Clem while Hogan and Mrs. Clem engaged in sexual relations. In this lawsuit, Hogan has asserted causes of action alleging that the Clems invaded his privacy when they "secretly videotaped" him. *E.g.*, Complaint and Demand for Jury Trial at ¶¶ 1, 18, 20, *Bollea v. Clem*, No. 12012477-CI-011 (filed Oct. 15, 2012); First Amended Complaint at ¶¶ 1, 38, *Bollea v. Clem*, No. 12012477-CI-011 (filed Dec. 28, 2012).

2. Separately, Hogan claims that the Publisher Defendants tortiously invaded his privacy by publishing short, heavily edited excerpts from that tape (the "Video Excerpts").

3. Although Hogan claims that he should be entitled to damages of at least $100 million, he long ago limited his emotional distress damages to "'garden variety' emotional distress." Ex. 1 (Hogan's Resp. to Gawker Interrogatory No. 19 (Aug. 21, 2013)). That limitation was memorialized in an Order by this Court, which recognized that Hogan "is limiting claims for emotional injuries to 'garden variety emotional distress damages.'" Ex. 2 at ¶ 4 (Feb. 26, 2014 Order).

4. To paper over his own admittedly limited damages, Hogan has retained John, an assistant professor at Harvard Business School, to opine on "a fair and reasonable compensation for a person in a situation similar as Terry Bollea." Ex. 3 at 4 (Report). To answer that question,

John "conducted a survey" of 200 people who were expressly limited to those with household incomes over $200,000. Ex. 4 at 14:10-12 (L. John Dep.); Ex. 3 at 4 (Report).

5. As John explained at her deposition, the "survey asked respondents to imagine themselves in the same situation as Terry Bollea." Ex. 4 at 22:9-12 (L. John Dep.). Specifically, survey "[p]articipants were asked to imagine that":

> You had sex with an acquaintance of yours in a private bedroom in a private home. Unbeknownst to both of you at the time, this sexual interaction was secretly filmed. You learned of this tape recently, when you discovered that a minute-and-a-half long portion of the sex tape – the tape of you having sex with your acquaintance in a bedroom in a private home – had been posted on the [i]nternet.

Ex. 3 at 4 (Report).

6. Participants then were asked to rate the extent to which "the situation" had violated their privacy. *Id.* at 4 (Report). Significantly, the survey did not distinguish between the violation from the secret filming or the posting of the tape. Indeed, the participants were not even told that that the person who posted the video was not the same person(s) who engaged in the secret filming. *See* Ex. 4 at 240:13-17 (L. John Dep.).

7. Ultimately, the survey asked respondents to provide a range and specific amount of "money that they thought would be fair and reasonable compensation for the sex-tape situation," based on the representation that 7 million people watched the tape online. Ex. 3 at 5, 6 (Report).[1] In asking that question, the survey did not ask people to apportion the compensation

[1] John divided the survey participants into eight conditions, varying the survey for each condition. *See, e.g.*, Ex. 3 at 10 (Report). For example, some of the participants "were asked to . . . assum[e] that they were a famous American sports figure." *Id.* at 7. In each of the eight conditions, participants were asked to rate the extent of the violation for the situation, as well as a range and amount of compensation, based on 7 million people viewing the tape. *See, e.g.*, *id.* at 4-5.

between the privacy violation for secretly filming the video and the separate alleged violation for posting the video. *See* Ex. 4 at 254:3 – 255:4 (L. John Dep.).

8. Based on the results of the survey, John concluded that "[t]he range of money deemed as fair and reasonable compensation for a loss of privacy such as the one experienced by Terry Bollea is approximately $7,000,000 to $10,000,000." Ex. 3 at 3 (Report).

9. As detailed below, plaintiff should not be permitted to parade John's survey and conclusions before jurors in an effort to get them to award as damages amounts that survey participants thought they should recover if they were hypothetically in his situation, rather than the limited damages he can actually prove.

ARGUMENT

10. In 2013, the Florida legislature amended Fla. Stat. § 90.702 to specifically adopt the standards for admissible expert testimony as provided in *Daubert v.Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 597 (1993), and its progeny. *See Giaimo v. Fla. Autosport, Inc.*, 154 So. 3d 385, 387-88 (Fla. 1st DCA 2014); *Perez v. Bell S. Telecomms., Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014). The objective of the *Daubert* inquiry is to ensure the reliability and relevancy of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). As amended, § 90.702 provides that:

> 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.

In addition, expert testimony is only admissible if it "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." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-92 (11th Cir. 2005). "The rule is well established that if an expert is called merely as a conduit to place inadmissible evidence before the jury, the trial court appropriately exercises its discretion by excluding such evidence." *Doctors Co. v. State, Dept. of Ins.*, 940 So. 2d 466, 470 (Fla.1st DCA 2006).

I. JOHN'S SURVEY IS A BACK-DOOR ATTEMPT TO MAKE AN IMPROPER GOLDEN RULE ARGUMENT.

11. It is well-established that "[a]n argument that jurors should put themselves in the plaintiff's place, commonly known as the golden rule argument, is impermissible and constitutes reversible error." *Klein v. Herring*, 347 So. 2d 681, 682 (Fla. 3d DCA 1977). The Golden Rule argument "is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence." *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258, 263 (Fla. 1st DCA 1989).

12. "The classic Golden Rule argument specifically requests the jurors to imagine themselves as the injured party, and to award damages as if they were the injured party." *SDG Dadeland Assocs., Inc. v. Anthony*, 979 So. 2d 997, 1003 (Fla. 3d DCA 2008) (citations omitted). But, as courts have observed, "[e]ven when an attorney does not explicitly ask the jurors how much money they would wish to receive in the plaintiff's position, comments may violate the Golden Rule if they implicitly suggest that the jury place itself in the plaintiff's position." *Id.*

13. Here, Hogan's attempt to introduce John's survey is an effort to dress a Golden Rule argument in different clothing. The survey explicitly asked respondents to "imagine that ***you are the person in the situation*** – i.e., imagine that ***you are the famous person*** who has been secretly filmed having sex with your acquaintance in their private home." Ex. 3 at 15 (Report)

(emphasis added). It then asked them to "rate the extent to which, if at all, ***your privacy*** has been violated" and to state the "amount of money that ***you*** would request, such that ***you*** feel adequately and fairly compensated." *Id.* at 15, 17 (emphasis added). As John herself explained at her deposition, the ultimate question she posed was: "For ***you***, what is a fair – ***assuming you're that person*** – what is a fair value?" Ex. 4 at 23:12-13 (L. John Dep.) (emphasis added).

14. This kind of testimony tears at the very fabric of our jury system. As Florida courts have long-recognized:

> It is hard to conceive of anything that would more quickly destroy the structure of rules and principles which have been accepted by the courts as the standards for measuring damages in actions of law, than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff.

Bullock v. Branch, 130 So. 2d 74, 76 (Fla. 1st DCA 1961), *disapproved of on other grounds by Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000).

15. If John's testimony were allowed, that is precisely the pitch that Hogan would be making to the jury: He would be suggesting the they put themselves in his shoes, as John asked participants to do in her survey, and implicitly telling them to use those views as the measure of his damages. The Golden Rule argument that Hogan seeks to make through John is flatly forbidden. *See, e.g.*, *Bocher v. Glass*, 874 So. 2d 701, 703 (Fla. 1st DCA 2004) (repudiating party's argument, even though it "did not explicitly ask the jurors how much they would want to receive," because "[t]he only conceivable purpose behind counsel's argument was to suggest that jurors imagine themselves in the place of [plaintiffs]"); *Coral Gables Hosp., Inc. v. Zabala*, 520 So. 2d 653, 653 (Fla. 3d DCA 1988) (argument "in effect" asked jurors to "place themselves in the plaintiffs' position and urged them to award an amount of money they would desire if they had been the victims"). Her testimony should be excluded.

II. JOHN'S SURVEY IS AN EFFORT TO PUT THE RESULTS OF A MOCK JURY BEFORE THE REAL JURY.

16. John's survey represents an improper attempt to place a mock jury's "verdict" before the real jury. Although John has packaged her survey as an academic exercise based on her prior scholarship, in reality, it is just a fancy pretrial focus group. In fact, that is essentially how John summarized her work: "the point is to describe the situation in a as reasonably similar as possible way [*sic*], to that that Terry Bollea faced, and then to ask people what is a fair compensation value." Ex. 4 at 22:23 – 23:2 (L. John Dep.). Of course, what John described is exactly what lawyers and jury consultants do whenever they present cases to mock juries – with the important difference that in a mock jury exercise some effort is made to present both sides' arguments and evidence, while John's presentation was entirely one-sided.

17. The Florida Supreme Court has held that the results of a mock jury are not admissible at trial. *Hildwin v. State*, 951 So. 2d 784, 792 (Fla. 2006). The court rejected this gambit because a mock jury's results have no probative value in a real jury's deliberations. *Id.*

18. In this case, the only reason for offering John's survey results is to provide validation for Hogan's multimillion dollar damages claim. At her deposition, John herself made this very point: "This validates the amount of money that Terry Bollea thinks is fair and reasonable compensation. . . . this survey serves as like a sanity check on whether those – those numbers actually are reasonable." Ex. 4 at 44:3-15 (L. John Dep.).

19. John's "sanity check" will not do anything to assist the jury in assessing the evidence and deciding for itself the damages question John asked her survey participants to decide. Her "mock jury" results should be excluded.[2]

---

[2] When asked at her deposition how her survey differed from a situation in which 100 people sitting in a room were presented with the same scenario and questions, John responded

III. JOHN'S SURVEY IS IRRELEVANT BECAUSE IT DOES NOT ADDRESS HOGAN'S ACTUAL EMOTIONAL DISTRESS.

20. Although Hogan would like for John to "validate" his claim that he is entitled to millions of dollars in damages, her survey did not address the central element of that claim: whether *Hogan* in fact was damaged.

21. Despite the law's instruction that damages for privacy claims can be awarded based only on the personal harm suffered by the plaintiff, John deemed ***Hogan's*** actual harm irrelevant to her assignment. Ex. 4 at 33:21-24 (L. John Dep.). She did not ask Hogan "what the invasion of privacy was worth to him." *Id.* at 32:2-4. Nor did her survey "describe the emotional distress that [he] suffered." *Id.* at 32:17-19. As John explained, the central question presented by her survey had a different focus:

> They're answering the question: For you, what is a fair – assuming you're that person – what is a fair value. It's not: What do you think Terry Bollea thinks. That was not the question.

Id. at 23:11-15. In fact, in valuing the impact of the Publisher Defendants' posting, John believed that the actual impact on Hogan was irrelevant:

> Q. And so in your survey, you did not present any facts about how Mr. Bollea himself was actually affected by the Gawker posting – right?
>
> A. I did not deem that to be relevant . . . .

Id. at 33:21-24.

22. The law holds otherwise. How Hogan was actually affected by the posting of the Video Excerpts is the sole damages question the jury must answer. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652H (1977) (in an invasion of privacy claim, plaintiff can seek to

---

that she "bet there are" differences, but struggled to identify any. Ex. 4 at 277:7 – 278:9 (L. John Dep.). Indeed, she could note only two differences: First, the "administration" is different, as the mock jury exercise is presented "verbally." *Id.* at 278:18-24. Second, "the lighting might be different," meaning that "there is environmental differences where the people are taking the survey." *Id.* 279:1 – 281:3. Substantively, John's survey and a mock jury exercise are identical.

"recover damages for the harm to ***his*** interest in privacy resulting from the invasion" and "***his*** mental distress") (emphasis added).

23. For his part, Hogan already has conceded that, however offended he might have been by the Publisher Defendants' actions, he suffered no more than "garden variety" emotional distress. *See supra* at ¶ 3. He should not be permitted to use John's survey results – conducted without telling participants that Hogan has limited his claims – to inflate a damages claim that he has dramatically limited.

24. John's survey does nothing to assist the jury in addressing the alleged damage Hogan personally suffered. If anything, the survey results will cause confusion and prejudice. *See* Ex. 4 at 59:15-23 (L. John Dep.) (John testifying that if a juror awards Hogan $50,000, her survey shows "there are better answers").

IV. JOHN'S ANALYSIS IS INHERENTLY FLAWED, UNRELIABLE, AND IRRELEVANT.

25. In addition to the bedrock legal bars to her testimony, John's survey should be excluded because it suffers from at least three fatal design flaws. Because an expert is required to employ a methodology that yields reliable and relevant results, each of these flaws requires that her testimony be excluded.

A. The Survey Results Are Unreliable And Irrelevant Because The Estimated "Fair Compensation" Includes Compensation For Both The Act Of Filming And The Act Of Posting The Film On The Internet.

26. John's conclusions will be of no assistance to the jury in assessing what, if any, damages to award against the Publisher Defendants. At trial, any damages against the Publisher Defendants must be based on their actions in posting the Video Excerpts, as they indisputably did not film the video. Yet, John's survey measured both alleged privacy violations together – the filming and the posting – with a single compensation amount.

27. John plans to testify that the "fair and reasonable compensation for a loss of privacy such as the one experienced by Terry Bollea is approximately $7,000,000 to $10,000,000." Ex. 3 at 3 (Report). The "loss of privacy" she probed in her survey included both the secret filming of the video and the posting of excerpts of the video on the Internet. Specifically, the survey described a situation in which a person is "secretly filmed" during a sexual interaction *and* later learned that the resulting "sex tape" "had been posted on the Internet." *Id.* at 4, 13; *see also supra* at ¶ 8. It then asked survey participants to "indicate the extent to which, if at all, ***the situation*** represented a violation of privacy." *Id.* at 4 (emphasis added). The survey next proceeded to instruct participants to imagine that a "representative from the website that put the sex video online . . . has come to write you a check to compensate you for ***the situation***." *Id.* at 15 (emphasis added). Survey participants were then asked to provide a range and specific amount of "money they thought would be fair and reasonable compensation for ***the sex-tape situation***." *Id.* at 5 (emphasis added).

28. John conceded that in asking those questions – questions that form the basis for her conclusions – the survey did not tell participants "that the person who posted the tape did not film it." Ex. 4 at 240:13-17 (L. John Dep.); *see also id.* at 241:16-19 (acknowledging that participants would not know that different people filmed the video and posted it).

29. In addition, the survey did not ask people to apportion the amount of "fair compensation" for the alleged privacy violation for filming the video and the violation for posting it. *See id.* at 254:3 – 255:4. Nor did it ask people to separately value those distinct claimed violations. *See id.* at 254:22 – 255:4; Ex. 3 at 11-20 (Report) (complete text of survey).

30. Instead, it asked them to value the alleged violations together and to come up with a single amount of "fair compensation" for the whole "situation." Thus, there is no way to know

how much compensation the survey participants would deem "fair" solely for the act of posting the video, which is all that Hogan can seek from the Publisher Defendants.

31. John acknowledged that she does not know which alleged violation survey participants valued – or whether they even addressed the posting at all. At her deposition, John herself was confused about which privacy violation respondents were being asked to evaluate:

> Q. At that point, what were the respondents supposed to be rating as a violation?
>
> A. They're supposed to be rating the situation of being secretly filmed having sex with your acquaintance in their private home.
>
> Q. So that didn't mention – that's not the valuation, the qualitative valuation of the violation of the posting the video – right? It's the filming.
>
> A. Secretly filmed.

Ex. 4 at 251:7-16 (L. John Dep.).[3]

32. Ultimately, John testified that participants' responses addressed "the situation" presented in her survey. *Id.* at 252:7 – 253:12 (testimony referring to "the situation" presented in the survey "start[ing] on page 12"). But, that "situation" expressly included both the "secret[] film[ing]" and the subsequent posting. *See* Ex. 3 at 12-13 (Report) (survey describing "situation" to include person being "secretly filmed" and then the video "be[ing] posted on the Internet"). As a result, John conceded that she does not know whether survey respondents were providing valuations for the secret filming, the subsequent posting, or both:

> Q. [H]ow do you know if people think that they're supposed to be getting compensated for the filming, or the posting, or both?

---

[3] Following John's response, plaintiff's counsel interposed an objection, prompting John to "revise my answer," but only to say that respondents were asked about "the situation described." Ex. 4 at 251:7 – 252:2 (L. John Dep.). John nevertheless admitted that she did not know whether the respondents were rating "the situation" or "the filming." *Id.* at 252:3-6 ("Q. How do you know the respondents were rating that situation as opposed to the situation you said first, which was the filming? A. I don't know. I can't get in their minds.").

A. I don't know about the inferences participants are making; what they may or may not have made.

Ex. 4 at 253:13-17 (L. John Dep.).

33. The bottom line is that, by John's own admission, the survey results do not say anything about the compensation that participants deemed "fair" for the posting of the video. That act is the only ground for plaintiff's damages claim against the Publisher Defendants. Consequently, the survey results provide no reliable information or assistance to the jury.

B. The Survey Is Unreliable Because It May Well Reflect Participants' Desire To Punish The Defendants.

34. John's survey suffers from a second fatal flaw: In asking people what they considered to be "fair compensation," it allowed them to consider their desire for punishment, thereby improperly blurring the lines between compensatory and punitive damages.

35. Florida law expressly distinguishes between compensatory and punitive damages. Damages designed to punish a defendant are only permitted in certain limited situations. *See Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1001 (Fla. 4th DCA 2004) ("punitive damages are reserved for particular types of behavior which go beyond mere intentional acts"); *Genesis Publ'ns, Inc. v. Goss*, 437 So. 2d 169, 170-71 (Fla. 3d DCA 1983) (reversing punitive damages award and explaining that a plaintiff "must show more than an intent to commit a tort or violate a statute to justify punitive damages"); *see also* 17 FLA. JUR 2D DAMAGES § 149 ("A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.").

36. For this reason, when there is a risk that the jury has confused those two types of damages, its verdict cannot stand. *See, e.g.*, *Erie Ins. Co. v. Bushy*, 394 So. 2d 228, 229 (Fla. 5th

DCA 1981) (vacating damages award where court "cannot tell in this case whether part of the damages award was 'punitive'").

37. Here, in making their compensation determinations, there is a substantial risk that survey respondents factored the desire to punish "the website that put the sex video online." Ex. 3 at 15 (Report). After all, the survey asked people to place *themselves* in the position where *they* were secretly filmed and *they* were the subject depicted in the video. *See supra* at ¶¶ 5-7; *cf. Bullock*, 130 So. 2d at 76 ("many a juror would feel that all the money in the world could not compensate him for such an injury to himself").

38. John's survey did not instruct respondents on what factors to consider in assessing what they deemed to be "fair" compensation. Ex. 4 at 257:15 – 258:10 (L. John Dep.). And, it did not tell respondents that they should *not* consider their desire to punish the person who posted the video. *Id.* at 258:11 – 259:3. Consequently, as John acknowledged, she is unsure if respondents considered punishment in deciding "what was fair," conceding "I don't know what was going on in their mind." *Id.* at 258:11-15.

39. In light of the strong possibility that John's survey participants considered punishment when deciding what would be "fair compensation," John's methodology is unreliable, and her conclusions should be excluded.

C. The Survey Results Are Based On The Unverifiable Assumption That 7 Million People Watched The Video Excerpts.

40. John's conclusion about the "the range of money deemed as fair and reasonable compensation" is based on her assumption that "7 million people had viewed the sex tape." Ex. 3 at 3 (Report); *accord id.* at 9 ("assuming that . . . 7 million people had seen it"). Indeed, in the survey, "participants were asked . . . what they believe to be the fair and reasonable

compensation value assuming that 7 million people had seen the video." Ex. 4 at 265:23 – 266:3 (L. John Dep.).

41. John explained that "the reason I chose 7 million is because that was based on someone who is an expert in seeing how many people have seen this thing." *Id.* 208:21-23. That assumption, however, has no basis in fact.

42. The "expert" mentioned by John is Shanti Shunn – the e-commerce consultant plaintiff retained to "determine the accuracy of the view counts" of the Video Excerpts on third-party websites. Ex. 5 at 2 (Shunn Report). As detailed in the Publisher Defendants' Motion to exclude Shunn's testimony, he expressly and repeatedly admitted that he could not determine the accuracy of those view counts. Specifically, Shunn conceded that he:

- Could ***not*** verify the number of times that the Video Excerpts were viewed;
- Could ***not*** validate that the number of "views" shown on various website screenshots actually reflected the number of times the Video Excerpts were watched; and
- Could ***not*** confirm whether the number of "views" presented by plaintiff is accurate or inflated.

See Publisher Defendants' *Daubert* Motion to Exclude the Expert Testimony of Shanti Shunn at ¶¶ 9-13.

43. In addition, Shunn admitted that he had no way of knowing how many of the "views" were "unique" – that is, he does not know whether the "views" reflect different people watching the Video Excerpts or the same person watching the video more than once. *See, e.g.*, Ex. 6 at 137:8-10 (S. Shunn Dep.) ("Q. Can you tell from this the number of unique views? A. No.").

44. Nor was there any way for Shunn to determine how many people actually watched the Video Excerpts. *See, e.g.*, *id.* at 137:23-25 (Shunn admitting that when looking at

the "views" numbers on a screenshot, he "can't tell if there's four people watching that video or one person watching that video").

45. In short, there is no reliable basis for John's assumption that 7 million people watched the video.

46. Shunn's admissions wholly undercut the validity of John's conclusion. Indeed, John herself conceded that she does not know if the survey results would change if her assumption were incorrect:

> Q. How about if all we know is that the video was played 7 million times. We don't know how many people saw it. . . . Would that change the valuation?
>
> A. I don't know because I didn't ask those questions.

Ex. 4 at 209:13-18 (L. John Dep.).

47. Because there is no factual support for this key assumption, John's conclusion about "fair compensation" is not reliable, has no relevance to the actual facts, and will not help the jury "understand the evidence or to determine a fact in issue." *Rink*, 400 F.3d at 1291-92. Her testimony therefore should be excluded on this basis as well.

CONCLUSION

Each of these six grounds provide separate and independent reasons for excluding John's testimony. Her proposed testimony runs roughshod over fundamental principles of our jury system, fails to address the single relevant damages issue (how Hogan was affected by the alleged privacy violation), and suffers from fatal design flaws making the results unreliable and irrelevant. For each of these reasons, plaintiff should not be permitted to call John as an expert witness at trial.

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*

Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Sarah Luppen, Esq.
sluppen@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

Gregg D. Thomas
Attorney