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. 12012447-CI-011

HEATHER CLEM, *et al.*,

Defendants.
_____/

PUBLISHER DEFENDANTS' *DAUBERT* MOTION TO EXCLUDE THE EXPERT TESTIMONY OF SHANTI SHUNN

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants") hereby move to exclude the expert testimony of Shanti Shunn, one of plaintiff's three purported damages experts.

In an attempt to cobble together $100 million in alleged damages, plaintiff claims that he is entitled to the value of the "standard price to access and view" a complete celebrity sex tape on the Internet for each person who purportedly viewed the short video excerpts posted by the Publisher Defendants (hereinafter, the "Video Excerpts"). To advance this claim, plaintiff has retained Shanti Shunn, an e-commerce consultant who has no experience in the adult film industry, let alone with celebrity sex tapes. Nevertheless, plaintiff hopes to call Shunn to testify about both components of his damages claim.

First, Shunn plans to testify about the number of times that the Video Excerpts were viewed on third-party websites (*i.e.*, websites other than www.gawker.com). His testimony on this point is based solely on website screenshots provided to him by plaintiff purporting to show that the Video Excerpts were "viewed" a total of 4.46 million times. Second, Shunn plans to

testify about the membership fee charged by a "membership website specializing in celebrity sex videos, VividCeleb.com." According to Shunn, that fee is $4.95 for a four-day pass.

Both of Shunn's opinions should be excluded. The first represents an effort to introduce evidence through a purported expert that would not otherwise be admissible. Under well-established precedent, plaintiff is barred from using Shunn as a conduit to offer as "fact" hearsay evidence concerning the number of "views" appearing on webpage screenshots. Even if this end-run around the rules of evidence were permissible, Shunn's methodology is unreliable. As he repeatedly admitted at his deposition, all Shunn did was look at screenshots of other websites, but he took no steps to verify that the "views" displayed on those screenshots actually measure how many times the Video Excerpts were watched. Nor did he do anything to verify that the numbers on the screenshots accurately reflect the number of times the Video Excerpts were viewed.

Shunn's second opinion fares no better, as he has no experience in the area in which he is being asked to opine – the price needed to access a celebrity sex tape. Shunn freely admits that he has no knowledge of the adult film industry. In fact, prior to being engaged as an expert, he had never even searched for a celebrity sex tape, let alone assessed the price required to watch one. In addition, the membership fee charged by VividCeleb.com is irrelevant. If plaintiff prevails on his right-of-publicity claim, he is entitled to a reasonable royalty. But, Shunn's testimony made clear that the VividCeleb.com fee does not represent the royalty celebrities are paid. Indeed, the membership fee – which provides access to a *library* of *complete* celebrity sex tapes – has nothing to do with the value of the brief and heavily edited Video Excerpts at issue here were plaintiff to license them.

At bottom, Shunn's opinions are nothing more than a veneer designed to allow plaintiff to point to two numbers to concoct a rich "back-of-the-envelope" damages calculation. But, as Shunn himself, testified, connecting the number of times the Video Excerpts were viewed and the membership fee charged by VividCeleb.com would be "pure speculation."

BACKGROUND

1. On October 4, 2012, the Video Excerpts were posted on www.gawker.com. Subsequently, various people and companies copied the Video Excerpts and posted them on YouTube and other third-party websites that have no connection to the Publisher Defendants. There is no evidence that those other parties did so with the authorization of the Publisher Defendants.

2. In this case, plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan" ("Hogan"), claims as one of his damages theories, that he is entitled to the "reasonable value of a publicly released sex tape featuring Hulk Hogan." Plaintiff's Fourth Supplemental Response to Interr. No. 12 ¶ 1, attached as Ex. 1. Hogan contends that the Video Excerpts had a "viewership of approximately 2.5 million unique viewers . . . at Gawker.com, and approximately 4.46 million additional viewers at other websites" and claims that the "standard price to access and view a publicly released and authorized/licensed celebrity sex tape on the Internet is approximately $4.95 per unique view." *Id.*[1]

[1] Hogan "believes" that, because the Video Excerpts were "published without his knowledge or consent," "his damages exceed the standard price per unique view charged for authorized/licensed sex tapes" and that he is entitled to "a minimum of $15 per view," thereby tripling the speculative numbers mentioned in Shunn's reports. Ex. 2 (Membership Fee Report).

3. To make it appear that he has an evidentiary basis for this theory, plaintiff retained Shunn, a self-described e-commerce consultant who has worked on online sales and marketing for various consumer products companies. *See* Deposition of Shanti Shunn, Apr. 24, 2015, Ex. 3 at 10:22 – 11:15, 28:19 – 38:15 (S. Shunn Dep.). Most recently, Shunn was employed by Harry & David (a purveyor of food gift baskets) and Musician's Friend/Guitar Center (a purveyor of musical instruments and supplies). *Id.* at 35:2-20, 44:20 – 45:8. Shunn has never worked with or for an adult film company and has no particular knowledge of how companies in the sex tape industry generate revenue nor how celebrities who appear in sex tapes are paid. *Id.* at 182:22-24; 183:23 – 184:14; 214:24 – 215:2. Indeed, prior to being retained by plaintiff, Shunn had never done online searches for celebrity sex tapes or assessed what an appropriate membership fee would be for a pornography website. *Id.* at 182:22 – 183:22, 214:24 – 215:2.

4. Plaintiff retained Shunn for two purposes: (1) to "compile and determine the accuracy of the view counts" of the Video Excerpts on third-party websites, and (2) to "render an opinion regarding the subscription fee for websites providing licensed access to celebrity sex video content." Shunn, Expert Report, Apr. 4, 2015, Ex 4 at 2 (View Count Report); Shunn, Expert Report, Mar. 5, 2015, Ex 2 at 2 (Membership Fee Report).

ARGUMENT

5. 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. 579 (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). "Thus, the *Daubert* test applies not only to 'new or novel' scientific

evidence, but to **all** other expert opinion testimony." *Perez*, 138 So. 3d at 498 (citing *Kumho Tire Co. Ltd., v. Carmichael*, 526 U.S. 137 (1999)).

6. 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.

Under this standard, expert testimony is admissible only if "(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 as determined by the sort of inquiry mandated in *Daubert*; 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." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-92 (11th Cir. 2005).

7. Put another way, "[u]nder *Daubert*, 'the subject of an expert's testimony must be 'scientific knowledge'" and in "order to qualify as 'scientific knowledge,' an inference or assertion must be **derived by the scientific method** . . . the 'touchstone'" of which "is empirical testing – developing hypotheses and testing them through blind experiments to see if they can be verified." *Perez*, 138 So. 3d at 498 (citations omitted). "Subjective belief and unsupported speculation" do not meet the *Daubert* standard. *Id.* at 499.

8. In addition, Florida law provides that "[f]acts or data that are otherwise inadmissible may not be disclosed to the jury by [an expert] unless the court determines that their

probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fla. Stat. § 90.704. When an expert's opinion is based entirely on inadmissible evidence, that opinion is generally excluded under section 90.403 because its "probative value is outweighed by the danger of unfair prejudice." *Id.* at § 90.403.

I. SHUNN'S OPINION ON VIDEO VIEW COUNTS SHOULD BE EXCLUDED.

9. Shunn's testimony on the number of times the Video Excerpts were viewed on third-party websites should be excluded for two reasons. First, plaintiff seeks to use Shunn's testimony to offer otherwise inadmissible evidence. Second, as Shunn himself admitted at his deposition, he cannot actually verify that the number of "views" listed on the websites reflects the number of times the Video Excerpts were viewed, let alone that the numbers are accurate.

A. Shunn's Methodology For Assessing The Third-Part Websites' View Counts.

10. Plaintiff's counsel provided Shunn with screenshots of web pages that posted the Video Excerpts. *See* Ex. 4 at 6 (View Count Report) ("screen captures provided by HMA [Harder Mirell & Abrams]"); Ex. 3 at 103:1 – 105:20 (S. Shunn Dep.) (testifying about screenshots of YouTube pages provided by plaintiff's counsel); Ex. 5 (Dep. Ex. 330) (YouTube screenshots provided to Shunn); Ex. 3 at 120:22 – 121:11 (S. Shunn Dep.) (testifying about screenshots of other third-party webpages provided by plaintiff's counsel); Ex. 6 (Dep. Ex. 331) (screenshots of other third-party webpages provided to Shunn).

11. Shunn then prepared tables reflecting how many "views" were shown on those screenshots and aggregated those numbers to calculate the "total views." *See* Ex. 4 at 6-8 (View Count Report).

12. Shunn's report states that there were 99,149 total views of the Video Excerpts on YouTube. *See id.* at 6-7; Ex. 3 at 103:25 – 104:6 (S. Shunn Dep.). To "verify" this number, Shunn reviewed current YouTube view count methodology and various articles discussing

YouTube's video view counting technology. *See id.* at 104:12-23. Because the pages containing the Video Excerpts had been removed, Shunn did not – and could not – view any of the actual pages where the Video Excerpts were posted. *See id.* at 109:19 – 110:8. He also did not – and could not – review the back-end coding on those YouTube pages, and he did not contact anyone at YouTube. *See id.* 110:9-14.

13. Shunn's report states that other third-party webpages posting the Video Excerpts garnered over 4.3 million views. *See* Ex. 4 at 8 (View Count Report). To "verify" this number, Shunn reviewed publicly available source code for webpages displaying different videos. *See id.* at 7-8 (View Count Report); Ex. 3 at 129:20 – 130:4, 138:17 – 139:4, 144:4-16, 148:14 – 149:2, 152:5-18 (S. Shunn Dep.). As was the case with the YouTube pages, Shunn conceded that he did not – and could not – view the actual webpages where the Video Excerpts were posted, review the back-end coding on any of the third-party websites pages, or contact anyone at those websites. *See, e.g.*, *id.* at 163:4 – 168:12, 171:4 – 178:11. He also conceded that the publicly available coding does not provide critical information for verifying the accuracy of the view counts, including what the "views" measure, how "views" are counted, and whether the "view" numbers were inflated in any way. *See, e.g.*, *id.* at 134:19 – 138:8 (regarding third-party website); *id.* at 140:23 – 141:1, 142:12 – 143:23 (regarding another third-party website); *id.* at 146:2 – 148:13 (regarding a different third-party website); *id.* at 149:3-151:10 (regarding third-party website); *id.* at 152:19 – 155:15 (regarding another third-party website).

14. Shunn admitted throughout his deposition that his inability to access the back-end coding and analytics of YouTube and the other third-party websites prevented him from being able to accurately verify those sites' view counts. *See infra* at ¶¶ 22-26. As Shunn explained, from his experience with Harry & David and Musician's Friend/Guitar Center, he knows that a

person must have access to a website's back-end programming and analytics to verify video view counts. *See* Ex. 3 at 49:7 – 53:13, 55:17 – 57:20 (S. Shunn Dep.). That programming and those analytics, however, are only accessible to a company's employees and not people viewing the company's public websites, including Shunn. *See, e.g., id.* at 50:15 – 51:13, 53:9-13, 56:16-24.

B. Plaintiff Improperly Seeks To Call Shunn As An Expert Witness To Offer Evidence That Otherwise Would Be Inadmissible.

15. By Shunn's own admission, his conclusions about the total "view counts" are based entirely on the numbers printed on webpage screenshots. *See* Ex. 3 at 104:4-6 (S. Shunn Dep.) ("Based on the screenshots that were captured and provided to me, these are the numbers straight from those screenshots."); 112:5-9, 121:5-7 (testifying that his conclusion "about how many total views there were on all of those various web pages" was based on what was "displayed on the various screenshots" and that the table showing total views of the Video Excerpts "represents the count from the screenshots").

16. The numbers reflected on the screenshots are hearsay and cannot be admitted to establish the truth of the numbers of views. *See, e.g.*, Fla. Stat. § 90.802.

17. Hogan did not subpoena YouTube or any of the other third-party websites that posted the Video Excerpts and therefore has no witness to testify about the truth of the screenshots' out-of-court statements about the number of views or the meaning of the "views," or to verify the accuracy of the numbers shown on the screenshots. Instead, he plans to call Shunn as an "expert" – but, in reality, Shunn is merely the vessel through which Hogan hopes to introduce this otherwise inadmissible evidence.

18. The veneer of expert endorsement does not transform the numbers shown on the screenshot into anything other than what they are – inadmissible hearsay. Florida courts reject attempts to engage in such legal alchemy and bar parties from attempting to end-run the rules of

evidence by seeking to introduce inadmissible evidence simply by calling it an "expert opinion." Indeed, "[t]he 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); *accord Carratelli v. State*, 832 So. 2d 850, 861-63 (Fla. 4th DCA 2002) (noting that trial judge should avoid "situation where an expert was a conduit for inadmissible evidence" and suggesting expert could not "reasonably rely" exclusively on inadmissible facts or data).

19. Shunn's testimony about "view counts" should be excluded on this basis alone.

C. Shunn's Methodology Is Unreliable Because He Admittedly Cannot Verify The Webpages' View Counts.

20. To establish a "standard of evidentiary reliability," proposed expert testimony "must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590. In determining whether expert testimony is admissible, a court must consider whether the expert's technique "can be (and has been) tested" and "whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* at 593.

21. In this case, Shunn's testimony is wholly unreliable. In fact, he has repeatedly admitted that he cannot verify the accuracy of the numbers of "views" listed on the various website screenshots or what those "views" actually measure. As Shunn explained over-and-over again at his deposition, he did not have access to any of the websites' back-end coding or analytics and, without that information, he could not verify any of the "view counts" or what they measure. This renders his "methodology" facially unreliable.

22. For example, with respect to one of the YouTube screenshots, Shunn testified as follows:

> Q. [D]id you do anything to verify that the 18,463 number on the screenshot is accurate with respect to the number of views of this video on this page?

A. No. This was – the video was a raw – or it was a raw screen capture. I assume it was unadulterated.

Q. But there was nothing you could independently do to verify that that number was correct?

A. No. I had to depend that it was an actual just screenshot that had not been manipulated.

* * * * *

Q. Do you know whether that view count, the 18,463 number, was impacted by artificial inflation?

A. I do not.

Q. Do you know whether YouTube froze the view count because of concerns with inflation?

A. No.

Q. Did you contact YouTube to find out?

A. No.

Q. And I take it from what you said earlier, you didn't look at any of the coding on this particular page, right?

A. No. . . .

Ex. 3 at 106:14 – 107:12 (S. Shunn Dep.).

23. Shunn's testimony concerning the other YouTube screenshots was the same:

Q. . . . . I take it you weren't able to visit any of those actual web pages, right?

A. No. This video had been pretty well scrubbed from the Internet at that point.

Q. You had just looked at the screenshots for those pages, right?

A. Yes.

Q. And you weren't able to do anything to independently verify that the numbers reflected on those screenshots accurately reflected the views through YouTube, right?

A. No, I was not able to physically and visually verify each of these exact instances, no.

Q. And you don't know whether any of the numbers shown on those screenshots were reflecting artificial inflation of views, right?

A. That -- no. I would have no way to tell that.

Q. You don't know whether any of those views were frozen by YouTube because of concerns with inflation, right?

A. No.

Q. And I take it you didn't contact YouTube about any of those views, did you?

A. No.

Q. And you weren't able to look at the coding on any of these pages, right?

A. Not on these exact pages, no.

See, e.g., *id.* at 109:11 – 110:14.

24. Shunn made the same devastating admissions with respect to the other third-party webpages:

Q. Do you know, with respect to any of these sites, how they counted views at the time?

A. No. As stated before, across all of these, without access directly to resources within this company or within any of these companies who are tied to either the analytic systems, the development systems, or the database, I wouldn't be able to tell you that.

Q. Do you know what the coding on any of these sites said at the time that these screenshots were taken?

A. No. Again, as I said, I was not able to visit any of these pages because this content had already been removed from the Internet.

* * * * *

Q. . . . . [F]or each of these pages . . . , do you know what was considered a view?

A. Nope. Just that the assumption of users is that a view would be a video view.

Q. But you don't know if it was page views, right?

A. No, I don't know if they're using page views as that statistic or no[t].

Q. And you don't know whether it was just one click [o]f the view button, right?

A. Yes. Again, I can't tell you whether the play button was the trigger for the play counts or that the play but[ton] plus a certain time of video run was counted, would trigger that play count.

* * * * *

Q. Do you know whether any of the numbers reflected on those pages were typed in by the person coding the site?

A. No, I could not tell you the exact coding ethic of these companies.

Q. Do you know whether any of the view numbers were artificially inflated?

A. No, not without – not without auditing their analytics, their programming, everything else.

Q. And you don't have access to any of that?

A. No.

Id. at 172:25 – 173:13, 174:1-15, 174:21 – 175:6; *see also id.* at 156:8 – 161:25, 163:4 – 168:12, 169:4 – 171:15 (making same admissions regarding specific webpages where the Video Excerpts were posted).

25. Shunn testified that the only additional step that he took to verify the number of "views" on the webpages containing the Video Excerpts was to look at the publicly available source code for other pages displaying different videos on those websites. *See, e.g.*, *id.* 175:15-20 ("Q. For each of these sites, did you do anything to audit the numbers that are reflected? A. I just verified how they tagged it within their source code to confirm whether or not they were tagging these things as views or that they were tied to this particular page.").

26. As Shunn conceded, however, this step suffered from the same methodological flaws. Specifically, he could not access the websites' back-end coding or analytics and thus could not verify critical pieces of information such as how "views" were counted or whether the "view count" numbers were accurate. For example, with respect to the publicly available source code displaying 9,485 "views" for a video posted on one of the websites that previously posted the Hogan Video Excerpts, Shunn testified as follows:

> Q. It doesn't show how views are counted, does it?
>
> A. No. But it shows how they actually labeled this as their views for both users and advertisers.
>
> Q. Okay. Where does the number for views come from? Like where did the number 9485 come from?
>
> A. It would come from their back-end analytics for this video.
>
> * * * * *
>
> Q. How do you know that [9,485 is] not page views?
>
> A. In this case, it could be page views, but does not – every other video had the exact same, and it says "viewed," as in the past tense, so contextually, it would relate to the actual video view.
>
> Q. But you don't know, right?
>
> A. Not without having access to their code and developers.
>
> * * * * *
>
> Q. But looking at this page, how would you know one way or another that whoever coded the page just didn't type in viewed, colon, 9485?
>
> A. I wouldn't be able to tell you that without speaking to a developer. Like I said, most of the stuff that feeds into these things are fed in from a back-end aspect of a website.
>
> Q. And you don't have access to those – that back-end part, right?
>
> A. No.
>
> * * * * *

Q. Do you know. . . if it was clicking play counted as a view?

A. No. Again, not without having access to their --

Q. Do you know whether the video had to play for a certain length for this site to count it as a view?

A. No, not having worked at CrazyShit.com

* * * * *

Q. But you also wouldn't know if it was counting the same IP address, going loading – you know, I'm going to the website 14 times, whether that counts as 14 views or one?

A. No. Again, I would not be able to confirm their methodology on this without some back-end access or access to an individual that actually coded that.

Id. at 134:19 – 135:1, 135:11-18, 135:25 – 136:9, 136:10-24, 136:25 – 137:13.[2]

27. All of these limitations render Shunn's entire methodology fatally flawed. Shunn's testimony is akin to someone concluding that an airplane flew a certain height above the ground simply because he saw a photo showing a number displayed on an altimeter. Without speaking to the pilot, seeing the plane's flight, or examining the altimeter itself to determine whether it was working properly and whether, for example, the device was set to measure altitudes based on the plane's height above the ground or its height relative to sea level, the photographed number is meaningless. There is no way to confirm how high the plane actually flew.

28. As Shunn himself admitted, the critical variables necessary to determining whether the numbers reflected on the screenshots are accurate – and what, if anything, those numbers even measure – remain a mystery. His conclusions therefore amount to nothing more

[2] In his testimony about the remaining websites' publicly available source code, Shunn acknowledged the same fatal constraints. *See supra* ¶ 13.

than guesses and assumptions. They are exactly the type of subjective and unsupported expert testimony that *Daubert* bars. *See, e.g.*, *FedEx Ground Package Sys., Inc. v. Applications Int'l Corp.*, 695 F. Supp. 2d 216, 224 (W.D. Pa. 2010) (excluding expert testimony because expert had not compared source codes for similarity and based his opinion on "assumed facts"); *Coffey v. Dowley Mfg., Inc.*, 187 F. Supp. 2d 958, 976 (M.D. Tenn. 2002) ("Like a house of cards, once those foundations are disproved, the whole analysis collapses."), *aff'd*, 89 F. App'x. 927 (6th Cir. 2003).

29. Indeed, Shunn's methodology reflects precisely the kind of methodologies that courts in Florida and around the country routinely strike as unreliable. *See, e.g.*, *Tyrrell v. State*, 975 So. 2d 615, 619-20 (Fla. 4th DCA 2008) (expert testimony regarding victim's blood alcohol level inadmissible where "[t]here was no evidence of any blood alcohol test, only the victim's testimony about the mixed drinks she consumed at various bars, without any evidence as to the amount of alcohol in any drink. There was thus insufficient data for the proposed opinion."); *Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1260 (Fla. 1st DCA 2003) (excluding expert testimony where proposed method "was vague and theoretical and failed to provide the bridge between economic theory and common economic damages"); *see also, e.g.*, *Ellipsis, Inc. v. The Color Works, Inc.*, 428 F. Supp. 2d 752, 761 (W.D. Tenn. 2006) (striking expert testimony when purported expert did not verify statistics presented on websites nor product sales and circulation figures provided by counsel); *U.S. E. E. O. C. v. Rockwell Int'l Corp.*, 60 F. Supp. 2d 791, 797 (N.D. Ill. 1999), *aff'd*, 243 F.3d 1012 (7th Cir. 2001) (striking expert testimony in part based on fact that expert relied on materials, reports, and summaries provided by counsel and failed to verify the information from reliable, independent sources).

30. The bottom line is that Shunn's proposed testimony on "view counts" is based on unreliable methodology and is being used to improperly offer evidence that is plainly inadmissible. His testimony should be excluded.

II. SHUNN'S OPINION ON ONE WEBSITE'S MEMBERSHIP FEE TO WATCH COMPLETE CELEBRITY SEX TAPES SHOULD BE EXCLUDED.

31. In his second report, Shunn sought to "determine the membership cost for online access to celebrity sex videos." Ex. 2 at 3 (Membership Fee Report) . To make that determination, Shunn performed searches on Google and determined that "VividCeleb.com . . . is an appropriate measure of membership fees for a website providing" access to licensed celebrity sex videos. *Id.* at 4; *see also* Ex. 3 at 182:4-19 (S. Shunn Dep.) (describing keyword search on Google); *id.* at 184:22-24 ("Essentially just searching for celebrity sex tape, celebrity sex video, membership-based celebrity sex video; those things."). According to Shunn, "[t]he lowest cost available to view videos on VividCeleb.com is $4.95 for a 4-day pass . . . ." Membership Fee Report at 4.[3] Shunn's proposed testimony on these points should be excluded for two reasons.

32. First, Shunn is not an expert in this area. He testified that: (1) he has never worked for an adult film company; (2) he has no knowledge about the sex tape industry or how it generates revenues; and (3) he had never previously done online searches for celebrity sex tapes or assessed what an appropriate membership fee would be for such a website. *See* Ex. 3 at 182:22-24, 183:23 – 184:14, 214:24 – 215:2 (S. Shunn Dep.). In light of the fact that Shunn has no experience, let alone expertise, in the subject matter on which he is seeking to opine, his

[3] Shunn came to these conclusions because of the narrowness of his assignment: He searched only for a pornography website that "had a membership fee associated to it." Ex. 3 at 180:13-14 (S. Shunn Dep.). VividCeleb.com was the only site he found. As Shunn explained at his deposition, "Vivid Celeb was the *only site* that specifically called out that they had a membership in their search engine listing." *Id.* at 208:3-5 (emphasis added).

testimony should be excluded. *See Florida Dept. of Transp. v. Armadillo Partners, Inc.*, 849 So. 2d 279, 291 (Fla. 2003) ("[R]ules adhered to by Florida courts ensure that purported experts are properly qualified, [including] that their testimony is limited to matters within the ambit of their expertise").

33. Second, the only damages of this type that Hogan would conceivably be entitled to are what *he* would be paid for appearing in a sex tape (or as is the case here, brief and heavily edited excerpts of a sex tape), not what a visitor to a website would pay that website to access a library of tapes. Shunn testified that has no knowledge about the amount of money celebrities are paid for appearing in sex tapes. *See* Ex. 3 at 216:11-14 (S. Shunn Dep.). Shunn's proposed testimony should therefore also be stricken because it does not address the issue before the court. *See, e.g.*, *Stano v. State*, 473 So. 2d 1282, 1285-86 (Fla. 1985) (expert testimony to the effect that certain persons falsely confess to crimes was inadmissible as not speaking to any issue in the case); *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 862 F. Supp. 2d 1322, 1332-33 (S.D. Fla. 2012) (because proffered expert analyzed "the wrong problem," his testimony could not assist the jury in determining the facts at issue in the case).

34. Shunn's findings concerning the membership fees charged by a single website, VividCeleb.com, will not aid the jury in assessing damages. The sole claim for which Hogan can pursue economic damages is his right of publicity claim. For that claim, Hogan can only recover his losses, including "an amount which would have been a reasonable royalty." Fla. Stat. § 540.08(2); *see also Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1001-03 (Fla. DCA 4th 2004) (plaintiff was entitled to damages for right of publicity claim based on the royalty value of his name and likeness). There is nothing to suggest that VividCeleb.com's membership fee reflects a reasonable royalty.

35. Shunn admittedly has "no idea" what VividCeleb.com pays celebrities who appear in sex tapes. Ex. 3 at 216:11-14 (S. Shunn Dep.).[4] But, his deposition testimony makes clear that VividCeleb.com does *not* pay celebrities the full membership fee as a royalty each time someone watches their sex tapes. As Shunn acknowledged, the membership fee provides "access to *all* the videos on VividCeleb," "you get access to *all* of the videos that they host," and "to access one or *many*, it still costs the same." *Id.* at 219:21-23, 220:17 – 221:1 (emphasis added). Plainly, if a person can pay $4.95 to watch *all* of the videos numerous times over a multi-day period, no celebrity is paid $4.95 each time his or her video is viewed.

36. VividCeleb.com's membership fee has no bearing on Hogan's alleged damages for a second reason: As Shunn explained, the membership fee is charged "to access the actual videos." *Id.* at 214:22-23. In this case, the Publisher Defendants did not post the full, actual Hulk Hogan sex tape; they posted only short excerpts. *See, e.g.*, *id.* at 225:18 – 226:7 (testifying that although he did not watch the Video Excerpts, Shunn understands the full tape was "supposed to be a half hour" and the excerpts were "two minutes . . . or something like that"). There is no evidence to suggest that the membership fee VividCeleb.com supposedly requires to watch a *library* of *complete* celebrity sex tapes has any connection to the amount that might be charged to watch *excerpts* of one sex tape.[5] Indeed, Shunn conceded that he would be

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[4] Shunn also acknowledged that he does not have any information about the revenue or profit generated by VividCeleb.com, does not how the inclusion of any particular video on that website impacts its membership fees, and had no knowledge about "price and demand in the pornography industry." *See id.* at 211:7-13, 212:5-8, 216:24 – 217:15, 218:2-19, 219:21 – 221:1, 221:16-20, 224:20-22.

[5] In fact, Shunn readily conceded that his research revealed that numerous websites offer pornography – including celebrity sex tapes – for free. *Id.* at 197:6-10 (noting that top search results included PornHub, where "people can watch pornography for free"); *id.* at 201:22-23 (noting that PornHub was the first result in his search).

speculating if he were to suggest that anyone would pay the full VividCeleb.com membership fee to watch the Video Excerpts at issue in this case:

> Q. Does the fact that people watch[ed] the Gawker video for free mean they would pay to watch that video?
>
> A. That would be speculation on my point.
>
> * * * * *
>
> Q. Do you have any factual basis to believe that 4.4 million people who watched the video, according to your first report, would pay the Vivid 4.95 membership fee?
>
> A. Again, it would be pure speculation.

Id. at 224:13-18, 225:10-16.

37. In the end, all Shunn can say is that VividCeleb.com's base membership rate appears to be $4.95 and that the website provides access to repeated viewings of a library of complete celebrity sex tapes. Shunn is not an expert in the adult film industry, celebrity sex tapes, or anything relating to the economics of those industries. And, the limited information to which he can testify does nothing to inform any part of Hogan's damages claim. The testimony is therefore improper and must be stricken.

CONCLUSION

For the foregoing reasons, the Publisher Defendants respectfully request that this Court exclude the testimony of Shunn.

Respectfully submitted,

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