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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 JEFF ANDERSON

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

In 2012, Gawker Media's eight websites published roughly 90,000 posts and generated a total of $25.6 million in revenue. That year, one of those eight websites – www.gawker.com – published a post that contained the video excerpts at issue in this case. Anderson claims that this single post – which contained no advertising – added between $4,995,000 and $15,445,000 to the fair market value of the single website www.gawker.com, standing alone. Anderson's remarkable opinion is inadmissible under Fla. Stat. § 90.702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for three reasons.

First, Anderson's proposed testimony is not relevant. Anderson admittedly is not planning to offer any opinion concerning a loss incurred by plaintiff. Nor is he opining about how much money the Publisher Defendants actually received from posting the video excerpts. Rather, Anderson's opinion focuses only on the supposed increase in www.gawker.com's fair market value to a hypothetical buyer or investor. That theoretical value is not recoverable as an

element of damage for any of plaintiff's claims. Moreover, Anderson did not even value the video excerpts – he valued the post containing the commentary about the video – a post that does not form the basis for plaintiff's claims, as plaintiff himself emphasized in opposition to the Publisher Defendants' Motion for Summary Judgment, at 3 (plaintiff "is **no longer pursuing a claim based on Daulerio's commentary**") (emphasis in original).

Second, Anderson's proposed testimony is not based on a reliable methodology. His opinion is based on two fundamentally flawed assumptions: (1) the fair market value of a website can be determined solely based on the average number of unique users of that site each month, without regard to such obviously relevant factors as the site's revenue, profits, cash flow, and growth; and (2) it is possible to estimate the portion of a website's fair market value attributable to a single post based solely on how many times that post was viewed. Anderson conceded in his deposition that he was not aware of *any market transaction* in which a website's valuation was determined by his methodology. More importantly, he admittedly cannot point to *any instance* in which his methodology was used to assess the value of a single web post.

Third, Anderson did not apply his methodology reliably to the facts. In calculating the percentage of increase in the value of www.gawker.com attributable to the video, Anderson conflated two different statistics: ***monthly unique users*** of the www.gawker.com website as a whole and ***unique page views*** of the single page where the commentary was posted. That error makes his opinion completely unreliable.

BACKGROUND

1. Gawker Media publishes eight websites. In 2012 and 2013, those eight websites published roughly 90,000 posts per year, with approximately 11,000 of those posts each year appearing on www.gawker.com. *See* Ex. 1 (site post counts). In 2012, the eight websites

generated a combined total revenue of $25.6 million, and in 2013, those eight sites generated $33.1 million in revenue. *See* Ex. 2 (Gawker 18323_C).

2. This lawsuit relates to a single posting on one of Gawker Media's eight websites. On October 4, 2012, the Publisher Defendants posted on www.gawker.com a commentary about a sex tape featuring plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan" ("Hogan"). The commentary was accompanied by short, heavily edited excerpts from the tape (the "Video Excerpts"). The Video Excerpts remained on the website until April 25, 2013, when they were removed pursuant to this Court's temporary injunction order, and have not been restored since. Ex. 3 (Gawker's Resp. to Pl.'s Interrog. No. 5). Between October 4, 2012 and June 30, 2013, the webpage where the commentary appeared received 5,357,572 unique page views. Ex. 4 (Gawker 01148). In contrast, portions of the Video Excerpts were viewed 2,505,826 times. Ex. 5 (Gawker 01185).

3. The page where the commentary was posted and where visitors could access the Video Excerpts did not contain any advertising. Ex. 3 (Gawker's Resp. to Pl.'s Interrog. No. 4). Thus, neither the commentary nor the Video Excerpts contributed any direct revenue to Gawker Media. *Id.*; *see also* Ex. 6 at 107:09-20 (S. Kidder Dep.) (no direct revenue to Gawker Media from the commentary or the video).

4. In an effort to justify his $100 million in claimed damages, plaintiff has retained three damages experts, including Anderson, who was asked to measure "the increase in value" to the www.gawker.com website attributable to the Video Excerpts.[1] *See* Ex. 7 at 3 (Anderson

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[1] Anderson is the Director of Valuation and Analytics at Consor, a consulting firm that spends 50% of its time performing expert witness services. Ex. 7 at 3 (Anderson Report); Ex. 8 at 22:22 – 23:16, 24:16-25 (J. Anderson Dep.). Anderson has worked at Consor since graduating from business school four years ago and has held his current position there for two years. *Id.* at 20:14-18, 24:23 – 25:02.

Report). Anderson intends to opine at trial that "[t]he increase in value of Gawker.com as a result of Gawker posting the Video on the website is between $4,995,000 and $15,445,000." *Id.* at 4 (Anderson Report).

5. Anderson arrived at these numbers in two steps: First, he estimated the supposed increase in value of www.gawker.com over the period that the Video Excerpts were posted. Then, he estimated the percentage of that increased value purportedly attributable to the Video Excerpts.

6. In the first step, Anderson employed what he calls the "market multiples" approach, a variation on the "Market Approach" to valuation. *Id.* at 7-8. According to Anderson, this approach involves comparing the asset being valued (here, www.gawker.com) to other "similar assets" that have recently been valued using some "common denominator." *Id.* at 8-9. To value the single www.gawker.com website, Anderson chose as "similar assets" six entire companies.[2]

7. Anderson then compared those companies to the www.gawker.com website based on a single common denominator: a website traffic statistic called "***monthly unique users***." Ex. 7 at 11 (Anderson Report). As Anderson explained in his report, a "monthly unique user is a single user that visits ***a website*** one or more times in a one month period." *Id.* at 10 (emphasis

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[2] The six companies that Anderson deemed comparable were Grandparents.com (a website devoted to senior citizen's issues), Yelp.com (a website providing reviews of restaurants and other retail businesses), BleacherReport.com (a sports website), Buzzfeed.com (an entertainment, politics, and news website), HuffingtonPost.com (a website covering politics, sports, business, and entertainment), and Ozy.com (a current events website). Ex. 7 at 11-13 (Anderson Report); Ex. 8 at 145:17 – 146:06, 217:03 – 258:01 (J. Anderson Dep.). Anderson selected these companies as comparables because they have content-based websites that generate revenue from advertising, Ex. 7 at 11-12 (Anderson Report); Ex. 8 at 194:04-25 (J. Anderson Dep.); *see also id.* at 53:01-10, 198:19 – 199:05, but he did not consider whether those websites are comparable to www.gawker.com in terms of content, revenue, revenue per ad, user demographics, profits, growth, or any other such factor. *See, e.g.*, *id.* at 206:25 – 216:16, 237:13-23; 241:04-17; 255:07 – 258:01.

added). According to this statistic, a person who views a number of different stories on a website over the course of a month is counted as one ***monthly unique user***. In contrast, each page that person views during the month counts as a ***unique page view***. Ex. 9 (definitions from Google Analytics, the traffic tracking service used by Gawker). Thus, a person who reads ten stories in a month counts as one ***monthly unique user***, but generates ten ***unique page views***, one for each story read.

8. Anderson determined the value of the six website companies by looking at published reports about those companies' values. Ex. 7 at 11-14 (Anderson Report). He then divided those valuations by the companies' average ***monthly unique users*** to generate a value per monthly unique user – a so-called "market multiple" that Anderson could use to value www.gawker.com based on its monthly unique users. *See id.* at 11-14 (explaining his calculations and methodology); *id.* at Ex. 3 (Anderson Report) (providing calculations); Ex. 8 at 146:12 – 149:02 (J. Anderson Dep.). (For example, one of the companies, Grandparents.com, had a valuation of approximately $31.3 million and 754,832 monthly unique users, yielding a value per monthly unique user of $41.44, representing its "market multiple." *See* Ex. 7 at Ex. 3 (Anderson Report).

9. Next, Anderson multiplied the market multiples by the supposed increase in ***monthly unique users*** to www.gawker.com during the period that the Video Excerpts were posted. *See id.*at 14 (Anderson Report); *id.* at Exs. 4 & 5 (Anderson Report). After performing this calculation, Anderson estimated that the website's value increased by somewhere between $17.5 million and $54.1 million. *See id.* Importantly, in reaching those estimates, Anderson did not consider Gawker Media's, or www.gawker.com's, revenue, profits, cash flow, or growth –

all widely recognized factors in valuing a company. *See, e.g.*, Ex. 8 at 97:01-13 (J. Anderson Dep.) ("[R]evenue and profits don't come into play in this valuation.").[3]

10. In the second step of his analysis, Anderson sought to determine the percentage of the supposed increase in www.gawker.com's value that was attributable to the Video Excerpts. *See* Ex. 7 at 14 (Anderson Report). To do this, he considered the ***unique page views*** of the page where the commentary was posted. *Id.* (As explained above, that statistic measures the number of unique visitors to a ***specific webpage***. *See supra* ¶ 7.)

11. Anderson divided the total ***unique page views*** for the page where the commentary appeared (5,357,572) by the approximately seven months the Video Excerpts were on the website (precisely, he used 6.71 months). *See* Ex. 7 at 14 (Anderson Report). He then divided the resulting number of average ***unique page views*** per month by the increase in the average ***monthly unique users*** for www.gawker.com as a whole to infer that 28.53% of the increase in value was attributable to the posting of the Video Excerpts. *Id.* Importantly, he did so even though he had measured the supposed overall increase in value to the website over the seven month period based on ***monthly unique users*** and the supposed portion of that increase attributable to the Video Excerpts based on a completely different measure, ***unique page views***.

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[3] Anderson's opinion has nothing to do with any revenue or profits the Publisher Defendants actually realized. Ex. 8 at 138:18-20 (J. Anderson Dep.); *see also id.* at 160:24 – 161:8 ("these valuations do not have anything to do with revenue or profit"). Indeed, as he conceded at his deposition, his calculation does not reflect actual money in "Gawker's pocket." *Id.* at 160:19-23; *see also id.* at 174:17 – 175:15 (same). It merely signifies his estimate of the increased market value of the www.gawker.com website, a value that Gawker Media has never received and that no person has ever offered to pay. *See id.* at 161:17 – 162:24 (explaining that opinion reflected Anderson's view of the value that some hypothetical "arms-length buyer would pay for Gawker" as of the date the Video Excerpts were taken down); *id.* at 163:01-03 (conceding that he does not know of anyone who has actually "offered to buy gawker[.com] at these values").

12. Anderson then used that percentage to conclude that the Video Excerpts must be responsible for 28.53% of the supposed increase in the value of www.gawker.com during that period. Thus, according to Anderson, the value attributable to the Video Excerpts was between $4,995,00 and $15,445,000 (*i.e.*, 28.53% of $17.5 million and 28.53% of $54.1 million). *Id.*

13. These astronomical numbers were only conjured up through a statistical sleight of hand. As explained below, Anderson started with the wrong number (the number of times the post with the commentary was viewed, not the number of times the Video Excerpts were viewed), and then treated two very different statistics (monthly unique users of the website and unique views of a single page on the site) as the same. Moreover, as detailed in the following section, Anderson conceded that he knows of no situation in which a company's value was actually based on users. Nor does he know of any situation in which his methodology was used to determine the value of a single web posting. Anderson's novel approach is unreliable. His testimony should be excluded.

ARGUMENT

14. Section 90.702 of the Florida Statutes, as recently amended to incorporate the *Daubert* standard, 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.

The *Daubert* standard requires that 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) (citing *Daubert*, 509 U.S. at 597). In this case, Anderson's testimony is inadmissible on three distinct grounds: (a) it would not assist the trier of fact because it is not relevant to any issue in the case; (b) he did not employ any reliable methodology; and (c) he did not apply his methodology reliably to the facts.

I. <u>ANDERSON'S TESTIMONY IS NOT RELEVANT.</u>

15. It is axiomatic that "[a]s a threshold matter, the expert's opinion must be relevant, that is, the evidence must prove or tend to prove a fact in issue." *Sunbeam Television Corp. v. Mitzel*, 83 So. 3d 865, 876 (Fla. 3d DCA 2012). Anderson's opinion is not relevant for two reasons.

16. First, the supposed increase in fair market value to www.gawker.com is not recoverable as damage for any of plaintiff's claims. Hogan has brought claims for intrusion upon seclusion, publication of private facts, and commercial misappropriation of his right of publicity, which are all considered species of privacy claims under Florida law.[4] *See* Am. Compl. ¶¶ 59-93, 100-108. Florida law is clear that "an invasion of the right of privacy by a publication confers no right on the plaintiff to share in the proceeds of the publication on the theory of unjust enrichment." 19A Fla. Jur. 2d Defamation & Privacy § 232; *see also Cason v. Baskin*, 20 So. 2d 243, 254 (Fla. 1944) (same). The same limitation applies to Hogan's claims for intentional infliction of emotional distress and violation of the Florida Wiretap Act. *See* 32 Fla. Jur. 2d Interference § 19 (successful claim for the intentional infliction of emotional distress allows "recovery for mental pain and anguish"); Fla. Stat. § 934.10 (authorizing only awards of "[a]ctual damages" or "liquidated damages" capped at $1,000 for violation of the Wiretap Act).

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[4] *See Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) (identifying the categories of privacy claims recognized in Florida, which includes the claims of intrusion, publication of private facts, and misappropriation) (citing *Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 n.20 (Fla. 1996)).

17. This bar applies even for the one claim Hogan has brought that is focused on economic injuries – his right-of-publicity claim. Under Florida law, a right-of-publicity claim allows for the recovery of "damages for *any loss or injury* sustained by reason" of an unauthorized use of a name or likeness, "including an amount which would have been a reasonable royalty." Fla. Stat. § 540.08(2) (emphasis added); *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). Anderson, however, is not offering any opinion about a loss or injury suffered by Hogan, and he has conceded that he is not offering "an opinion on the market value of the Hulk Hogan sex tape," let alone the portion of any such value that would be paid to Hogan as a royalty. Ex. 8 at 138:24 – 139:02 (J. Anderson Dep.).[5]

18. Even if Anderson's opinion somehow related to a recoverable element of damage, his testimony still would not be relevant for a second reason: His analysis focused on the number of views of the webpage posting the commentary, not the number of times the Video Excerpts were viewed. In opposing the Publisher Defendants' summary judgment motion, Hogan emphasized the significance of this distinction, highlighting that "he is **no longer pursuing a claim based on [the] 'commentary'**" and "does not seek . . . any liability relating to the commentary." Opp. to Mot. for Summ. J. at 3 (emphasis in original). Hogan only "seeks to hold [the Publisher Defendants] accountable for [their] publication of the Sex Video itself." *Id.*

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[5] Courts applying Florida law have been clear that a plaintiff asserting a right of publicity claim cannot seek disgorgement of profits. *See, e.g.*, *Jackson v. Grupo Indus. Hotelero, S.A.*, 2009 WL 8634834, at *1 n.1 (S.D. Fla. Apr. 29, 2009) (explaining that a defendants' profits are not available as an award on a right of publicity claim). In any event, Anderson acknowledged that he is not offering an opinion about Gawker Media's profits, or the profits of www.gawker.com. *See* Ex. 8 at 138:18-20 (J. Anderson Dep.).

19. Despite the significant distinction plaintiff has drawn between the commentary and the Video Excerpts, all of Anderson's analysis is based on the number of unique page views for the webpage where the commentary was posted. *See Husky Indus., Inc. v. Black*, 434 So. 2d 988, 993 (Fla. 4th DCA 1983) (in order to be admissible, the expert's opinion must be based on facts or data that are themselves relevant to the case).

20. Throughout his report, Anderson explained that his analysis is based on "5,357,572 unique pageviews." Ex. 7 at 6 (Anderson Report); *see also id.* at 14 ("5,357,572 unique views"); *id.* at 15 (figure showing "5,357,572" "unique pageviews"); *id.* at 16 (figure showing "5,357,572" "unique pageviews"); *id.* at 19 (citing GAWKER 01148, which provides Google Analytics showing "5,357,572" "unique pageviews"); *id.* at Ex. 2 (showing "5,357,572" "unique pageviews"). That is, he looked at the number of views of the *page* containing the *commentary*. *See* Ex. 4 (GAWKER 01148) (data from Google Analytics showing traffic to the web page). He did not, however, look at the number of times that the Video Excerpts were actually played. The data reveal that the Video Excerpts were played a total of 2,505,826 times. Ex. 5 (Gawker 01185). In other words, although the webpage containing the commentary and Video Excerpts garnered 5.3 million unique page views, the Video Excerpts themselves garnered ***less than half*** that amount of views.

21. Anderson simply looked at the wrong number. Because Anderson considered the number of pageviews for the webpage, but not the number of views for the Video Excerpts – which is what forms the basis for Hogan's claim – he analyzed "the wrong problem" and thus cannot assist the jury. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 862 F. Supp. 2d 1322, 1332-33 (S.D. Fla. 2012) (excluding expert testimony).

22. For both of these reasons, Anderson's testimony should be excluded as irrelevant. *See, e.g.*, *Stano v. State*, 473 So. 2d 1282, 1285-86 (Fla. 1985) (excluding expert testimony regarding false confessions because it did not speak to any issue in the case).

II. ANDERSON'S TESTIMONY IS INADMISSIBLE BECAUSE HIS CALCULATIONS ARE NOT BASED ON A RELIABLE METHODOLOGY.

23. Even if Anderson's proposed testimony were relevant, it should be excluded because his opinion is not based on a reliable methodology. To be admissible, expert testimony must be "the product of reliable principles and methods." Fla. Stat. § 90.702(2). *Daubert* requires a court to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. In performing this analysis, "the court must undertake an independent analysis of each step in the logic leading to the expert's conclusions; if the analysis is deemed unreliable at any step the expert's entire opinion must be excluded." *Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 578 (N.D. Fla. 2009) (applying *Daubert*). As the United States Supreme Court has explained, "a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593.

24. Anderson's opinion is based on principles and methods that are *not* reliable. Indeed, at his deposition, Anderson made significant concessions about the reliability of his methodology.

25. First, Anderson admitted that, apart from the work he and others have done at Consor, he is not aware of any examples of websites being valued for commercial purposes based solely on monthly unique users, the single variable he considered in this case. Ex. 8 at

104:19 – 107:01, 144:09 – 145:13 (J. Anderson Dep.).[6] In fact, Anderson admitted that, if he were advising a potential buyer of www.gawker.com, he would recommend that the buyer look at the entire company's revenue and profits. *Id.* at 165:10 – 166:23. Yet, that key financial data played no role in his valuation analysis.

26. Second, even with respect to the work at his own firm, Anderson conceded that he does not know whether his valuation methodology has ever been used to award damages in litigation involving a website or establish the actual value for which a website sold. *Id.* at 104:05-18. Indeed, when asked if he knew whether a "Web site has actually sold for [the] amount" of his firm's valuation, Anderson candidly admitted "I don't know what happens after our valuation. We are typically not filled in on the results of any of our advice or reports." *Id.*

27. Third, and most significantly, Anderson could not identify a single instance in which anyone else has advocated using his methodology to value a single web posting, let alone actually employed that methodology:

> Q. [A]re you aware of any other instance in which the increase in value attributed to a single post followed the methodology you used in this case?
>
> A. I don't know. I don't know.
>
> Q. Sitting here today, you are not aware of any other circumstance in which this methodology has been used to value – or to assess the increase of value attributable to a single post. Right?

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[6] With respect to the six companies that Anderson used as comparables, he does not know how the valuations for the four privately-held companies were determined, did not review those companies' finances, and does not know whether the stock price for the two public companies depended on a specific web posting. *See* Ex. 8 at 217:13 – 219:10 (J. Anderson Dep.) (testifying that he did not look at any financials or revenue figures for Bleacher Report and has no idea whether valuation was "reached through assessing average monthly unique users"); *id.* at 223:04 – 224:20 (same for Buzzfeed); *id.* at 228:21-230:03 (same for Huffington post); *id.* at 233:17 – 235:02 (same for Ozy.com); *id.* at 251:11-21 (testifying that he does not know whether the stock price of Grandparents.com, a publicly traded company, is tied to any specific posting on that website); *id.* at 261:25 – 262:08 (same for Yelp.com).

A. I know that this approach is used to value a Web site.

Q. My question is about a single post. Are you aware of any other situation in which this methodology has been used to assess the value of a post?

A. I don't know.

Ex. 8 at 131:22 – 132:16 (J. Anderson Dep.).[7]

28. Consequently, Anderson's proposed testimony should be excluded as unreliable. *See, e.g.*, *Perez v. Bell S. Telecomms., Inc.*, 138 So. 3d 492, 498-99 (Fla. 3d DCA 2014) (excluding expert opinion that plaintiff's placental abruption was caused by workplace stress where expert could not point to a single instance in which that medical outcome was linked to workplace stress); *see also In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 487-88 (Bank. C.D. Cal. 2013) (disregarding expert's "valuation testimony because it is new, innovative, not peer-reviewed and untested"); *United Co. v. Keenan*, 2007 WL 4260930, at *17-18 (W.D. Va. Nov. 30, 2007) (excluding expert's valuation testimony where "there is nothing within the record, nor within a search of business valuations methods, that suggests that [the expert's] methodology is generally accepted and reliable").

29. While the "market approach" to valuation is not by itself unreliable or lacking in support, courts around the country have not hesitated to exclude expert testimony purportedly applying that approach where, as here, the expert has applied a variant that is without precedent.

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[7] The Publisher Defendants' rebuttal expert, Peter Horan, explained the unreliability of Anderson's methodology: "In my experience, I have not seen or heard of an established web media business being valued primarily on unique users in fifteen years. . . . [N]o one in the industry would value Gawker or any similar business based on unique users. Instead, investors and acquirers look at how well those users are monetized in the form of revenue and profits." Ex. 10 at 4 (Horan Report). Horan has served as the CEO of About.com and IAC Media and as President and COO of Ask.com, sits on the Board of Directors of several website companies, and is a founder and principal of Horan MediaTech Advisors, a consulting firm through which he advises and invests in web media companies. Ex. 11 (Horan bio); Ex. 12 at 37:11-22 (P. Horan Dep.).

See, e.g., *Metabyte, Inc. v. Canal+ Techs., S.A.*, 2005 WL 6032845, at *4-6 (N.D. Cal. June 17, 2005) (excluding expert valuation testimony involving variant of the "market approach" as "not sufficiently reliable" where, as here, expert did not use sufficiently similar companies as point of comparison and failed to incorporate underlying financials in his analysis); *In re Greater Se. Cmty. Hosp. Corp.*, 2008 WL 2037592, at *10 (Bank. D.D.C. May 12, 2008) (excluding expert valuation testimony employing the market approach where transactions selected as comparisons were not sufficiently similar and there did not exist enough data about those transactions to make analysis meaningful). This Court should do likewise here.

III. ANDERSON'S TESTIMONY IS INADMISSIBLE BECAUSE HE DID NOT APPLY HIS METHODOLOGY RELIABLY TO THE FACTS.

30. Even if Anderson's proposed testimony were relevant and based on reliable methodology, it should be excluded because he failed to apply his methodology reliably to the facts of the case. *See* Fla. Stat. § 90.702(3). As discussed above, in attempting to determine the value of www.gawker.com and the market multiples, Anderson used a statistic measuring ***monthly unique users*** of the website as a whole. *See supra* ¶ 7. But, in attempting to determine the value attributable to the post, he employed a different statistic measuring ***unique page views*** of that particular page. *See supra* ¶ 10.

31. Anderson's analysis conflates these two very different statistics. In his report, Anderson himself explained the difference: "If an individual user visited the same website ten times in one month they would still be counted as one ***monthly unique user***." Ex. 7 at 10 (Anderson Report) (emphasis added). But, for each page within the website that person viewed, that person would count as one ***unique page view*** for that particular page. Ex. 9 (definitions from Google Analytics); *see also* Ex. 8 at 287:01-04 (J. Anderson Dep.) (testifying that if a person "viewed the Hulk video and they viewed fifteen other posts on gawker.com, that's still

one unique user"); Ex. 10 at 6 (Horan Report) ("'Unique page views' refers to the number of people who viewed a specific web page."). Thus, for example, if a user viewed two pages within www.gawker.com, then viewed the page with the commentary and Video Excerpts, and then returned to the website several days later to view a fourth page, the user would count as a single ***monthly unique user*** of the www.gawker.com website, but would count as four ***unique page views*** (one for each page viewed).

32. Anderson acknowledged that despite the difference in these two statistics, he treated them interchangeably:

> Q. Your analysis assumes that unique page views for this particular post were unique visits to [the] Gawker [website] as a whole. . . . Right?
>
> A. No, it doesn't have to be a unique -- okay. So now I understand your question. No, it does not have to be that one unique viewer of the 5.4 million that saw the video is also one unique end user per [of the whole website].
>
> Q. But in your analysis, you assume those two things are the same. Right?
>
> A. We assume that one unique viewer of the video would be counted as a unique user that's presented in the . . . data [for the whole website].

Ex. 8 at 285:18 – 286:08 (J. Anderson Dep.).

33. The Publisher Defendants' rebuttal expert explained the problem with assuming that these two different statistics are the same: "By conflating these two measures, Mr. Anderson is comparing apples to oranges. He is suggesting that the 5 million people who viewed the webpage (the 'unique page views') were also necessarily counted as 'unique visitors' to Gawker. That is simply not the case. In reality, only a fraction of the people who viewed the webpage would have been counted among Gawker's 'unique viewers' for an entire month." Ex. 10 at 6 (Horan Report). If Anderson had wanted to look at the percentage of www.gawker.com's traffic attributable to the webpage at issue here, he should have compared the number of unique ***page***

views for the Hulk Hogan post to the total number of unique ***page views*** for all of the posts on www.gawker.com during the relevant period.[8] Instead, he compared the number of unique ***page views*** for the Hulk Hogan post to the number of unique ***users*** of www.gawker.com, which is a wholly different thing.

34. That error, on its own, drains Anderson's proposed testimony of any reliability. It should be excluded on this ground as well. *See, e.g.*, *Guinn v. Astrezeneca Pharm. LP*, 602 F.3d 1245, 1254 (11th Cir. 2010) (affirming exclusion of proposed testimony where expert did not apply an otherwise reliable method in a reliable fashion); *In re Basil St. Partners, LLC*, 2014 WL 3582710, at *2-3 (Bank. M.D. Fla. July 18, 2014) (excluding expert testimony where expert used the wrong data).

CONCLUSION

For each of the foregoing separate and independent reasons, the Publisher Defendants respectfully request that this Court exclude the proposed testimony of Anderson.

Respectfully submitted,

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[8] This information is easily ascertainable from the information provided by Google Analytics. For the period October 4, 2012 through June 30, 2012, the unique page views to the post constituted **less than 1%** of the total number of unique page views of the posts on www.gawker.com (not more than 28%, as Anderson suggests). Ex. 4 (Gawker 01148, calculating, in the "unique page views" column, that the 5.3 million unique views of the Hogan post represent 0.91% of the total number of unique views for all posts during the relevant period).

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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:

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