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

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants") oppose the plaintiff's motion to exclude the expert testimony of the Publisher Defendants' rebuttal expert witness Peter Horan, and state as follows:

BACKGROUND

Plaintiff designated a consultant named Jeff Anderson as a purported "expert" in Internet valuation. Anderson claimed that the single publication at issue in this case – which contained no advertising – added between $4,995,000 and $15,445,000 to the enterprise value of the website www.gawker.com. Anderson based this claim solely on an alleged increase in traffic and without regard to Gawker Media's revenues, profits, growth or any other standard method of valuation. The Publisher Defendants have filed a *Daubert* motion to exclude Anderson's proposed testimony as irrelevant and unreliable.[1]

[1] For the reasons stated in the Publisher Defendants' *Daubert* Motion to Exclude the Expert Testimony of Jeff Anderson, "valuation" is not a valid measure of plaintiff's damages in this case. For that reason, among others, Anderson's testimony should be excluded. If the Publisher Defendants' motion is granted, and Anderson does not testify, Horan's testimony will not be required.

The Publisher Defendants also designated a rebuttal expert just in case: Peter Horan, an advertising and online publishing professional with decades of experience in running Internet-based companies, including some of the country's mostly widely-read websites. Horan reviewed Anderson's report, and found that there were four major problems with his conclusions:

> 1. The biographical information presented by Anderson suggests that his expertise is primarily in valuing intellectual property rather than ongoing media businesses.
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> 2. Anderson's approach to valuing www.gawker.com based on unique visitors is outdated and completely outside the realm of current industry valuation methods.
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> 3. Anderson's supporting data fails to validate his own assertions.
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> 4. Anderson's estimate of the increase in Gawker's enterprise value is off by 50-150x the real world impact of the video on Gawker's revenue or value (let alone the value to the www.gawker.com website, which is just one of *eight* websites run by Gawker Media).

Horan Rep. at 2 (Exhibit B to plaintiff's motion). Contrary to Anderson's astronomical estimate that that one set of brief video excerpts created approximately $5,000,000 to $15,000,000 of value for the single www.gawker.com website, Horan concluded that, at most, the actual *revenue* Gawker Media could be said to have received as a result of the publication at issue was about $11,000. *Id.* at 2. He disavowed Anderson's notion that a portion of a website's "enterprise value" could be attributable to a single post, since websites are valued as complete businesses, but explained that, even if one did conduct that analysis, the *"value"* to the company as a whole could not be more than $40,000.

Plaintiff disagrees with these conclusions, and thus attempts to argue that Horan – who has vast experience in valuing Internet media businesses – is somehow not qualified as an expert and has relied on flawed methodology. But as discussed below, Horan's opinions fully comply

with the requirements applicable to expert witnesses and accordingly, no basis exists to exclude his testimony. Plaintiff's motion should be denied.

APPLICABLE LEGAL STANDARD

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). 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:
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> (1) The testimony is based upon sufficient facts or data;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case.

Under this standard, expert testimony is admissible 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).

ARGUMENT

Plaintiff advances three arguments why Horan should not be permitted to testify. He asserts that (1) Horan's testimony regarding Anderson's qualifications is inadmissible under Florida law, (2) Horan's opinions relate to matters outside the scope of his expertise, and (3) Horan's opinions are "methodologically unsound and based on faulty premises." Horan's opinions about Anderson's qualifications are not themselves admissible, but were included as a predicate to explain why Anderson's opinions are substantively unreliable, a topic about which Horan is permitted to testify, which plaintiff concedes, as he must. *See, e.g.*, Pl. Mot. at 6 (conceding that Horan may properly challenge "the methodology used by Anderson"). Plaintiff's other two arguments are without merit and should be rejected out of hand.

A. Mr. Horan Is Eminently Qualified As an Expert.

In a two-paragraph argument, plaintiff asserts that Horan is not qualified to offer an opinion on how "to value a website or media company." Pl. Mot. at 6. Plaintiff repeatedly concedes that Horan is an "investor" in Internet media companies. *Id.* at 2; *see also id.* (conceding Horan has "expertise" in "investing in internet media companies"); *id.* at 7 (same); *id.* at 6 (conceding that Horan has "real world experience buying and selling internet companies"). Plaintiff nevertheless advances the remarkable contention that someone who has spent his career running, investing in, buying, and selling Internet media companies is not qualified to opine on what an Internet media company is worth. This makes no sense.[2]

[2] Indeed, when plaintiff goes on to criticize Horan's methodology, it too is based on the fact that Horan relies on valuation methodologies from his substantial experience in buying and selling Internet media companies. *See, e.g.*, Pl. Mot. at 7 (complaining that "Horan's approach is based on his experience as an investor/acquirer: 'what an investor might pay to own a piece of the company or what another company might pay to acquire the company.'").

Putting aside that Horan is rebutting Anderson's valuation of a single web posting (and not the www.gawker.com website as a whole or the entire Gawker Media company), plaintiff's argument is belied by Horan's significant experience with Internet publishing businesses, including specific experience in valuing such businesses. As he explained in his Report:

> I have spent my entire career running advertising and media businesses including Internet media businesses. I am currently an active investor, board member and consultant to web media companies from startups to public companies. In those capacities, I regularly look at revenue models and valuation methods for web media businesses. I meet weekly with investment bankers and discuss drivers of valuations of Internet media businesses. I have been in an executive or board role in web media businesses that have been sold in M&A transactions for $1.8 billion over the past ten years. The ability to understand the dynamics of valuation for Internet media businesses is central to my career.

Horan Rep. at 3.

Horan has "been an advertising and publishing professional since 1975," *id.*, and, among other things has served as:

- ∑ CEO of IAC Search and Media, which owns and operates such popular news and entertainment sites as Ask.com and CitySearch.com;
- ∑ CEO of About.com, a popular website which Horan and his team ultimately sold to The New York Times Company for $410 million;
- ∑ President and COO of Answers.com, a top media property in the United States.

See Exhibit 1, attached hereto (Horan's LinkedIn profile); *see generally* Horan Dep. (excerpts attached hereto as Exhibit 2) at 30:6 – 32:4; 37:11 – 38:4; 39:1-14; 40:2 – 42:5; 46:20 – 49:12; 61:7 – 62:22 (discussing experience); Horan Dep. Ex. 312 (U.S. website rankings from ComScore, including About.com and Answers.com in Top 25) (attached hereto as Exhibit 3). In addition, Horan has served as CEO of AllBusiness (a web resource for small to mid-sized businesses) and DevX (a leading website for software developers). Ex. 1; Horan Dep. at 40:7-

15. He also has served on the board of directors of the Interactive Advertising Bureau and the Online Publishers Association, organizations representing the most respected news and publishing brands in America, such as *The New York Times*, AOL, Condé Nast, and Bloomberg, among others. Ex. 1. Now, Horan serves on the board of directors of numerous Internet media companies and runs his own firm, which focuses on investing in and consulting with Internet media companies. Ex. 1; Horan Dep. at 37:11-22; 39:1-15.

In these roles, Horan has acquired and applied vast experience in valuing Internet media companies. *See, e.g.*, Horan Dep. at 40:6-23 (testifying about the various "online publishers" he has run, including "Computer World in the late '90s, [the] early days of the Internet," "About.com . . . which we ultimately sold to the *New York Times*" in the mid-2000s," and "Answers.com, which is another content site"); 63:20-22 ("I have talked quite a bit about, I'll say, corporate strategy of how to be successful and increase value"); 65:5-6 (describing his "profession" as being "an investor and adviser to Internet media and advertising companies"); 100:7-21, 101:25 – 102:17 (discussing the various "online news businesses" he has valued).

Plaintiff contends that Horan has "never personally prepared any written valuation or appraisal of any website or internet media company," Pl. Mot. at 6, and that he is therefore unqualified to render an expert opinion. But plaintiff has totally mischaracterized Horan's testimony. Horan stated only that he had not prepared any formal, written appraisals "***as a service for another business***," Horan Dep. at 74:16-19, such as one might do as an employee of an expert witness/consulting firm like Anderson's. He made clear, however, that he is deeply involved in valuing Internet business as an actual officer of and investor in such businesses and engages in such valuations routinely. *See, e.g.*, Horan Dep. at 74:20 – 75:5. ("I regularly have been involved in discussions about what is this business worth, how much can we get for it, what

price would I pay to invest in that business. So that's like an every-week conversation."); 69:11-15 ("I spent a lot of time in the middle of deals. I'm in the middle of one right now where one of my companies is out for a large financing, and we're talking to third-party investors on how it should be valued."); 69:16-19 ("I've got . . . direct personal knowledge [of] deal mechanics as well as I spend part of each week looking at . . . what transactions are happening in the market.").[3]

Florida law explicitly recognizes that this type of actual, real world experience easily qualifies someone as an expert witness. *See* Fla. Stat. § 90.702 (an expert may be qualified "by knowledge, skill, experience, training, or education"); *see also, e.g.*, *The Florida Bar v. Hollander*, 607 So. 2d 412, 414 (Fla. 1992) (witness with "extensive experience" in relevant field qualified to testify as expert); *Weese v. Pinellas County*, 668 So. 2d 221, 223 (Fla. 2d DCA 1996) ("A witness may testify as an expert if he is qualified to do so by reason of knowledge obtained in his occupation or business."); *Vega v. State Farm Mut. Auto.*, 45 So. 3d 43, 44 (Fla. 5th DCA 2010) (owner of business that included appraising and consigning automobiles qualified as an expert in automobile valuation where he learned appraisal methodology through experience (as opposed to formal training), provided valuation opinions on automobiles for the public, and kept himself aware of prices by use of internet websites).[4] Given the depth and

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[3] In contrast to Horan's day-to-day involvement in business deals involving the valuations of Internet publishing companies, plaintiff's proposed expert, Jeff Anderson, cannot recall "the specifics" of any valuation he may have performed "for a company that derives its revenue principally from advertising," and does not even know whether the handful of Internet company valuations he has performed were ever used to determine the price or value of a company in a deal or in litigation. Anderson Dep. at 60:4-12, 104:5-18 (excerpts attached hereto as Exhibit 4).

[4] Although these cases pre-date the *Daubert* amendment to the Florida Code (as does the case cited by Hogan on this point, *see* Pl. Mot. at 6, citing *Carrier v. Ramsey*, 714 So. 2d 657, 659 (Fla. 5th DCA 1998)), they remain instructive on the question of who may properly be qualified as an expert, provided that the expert also uses an established methodology and applies

breadth of Horan's experience in running, investing in, and valuing Internet media companies, he is eminently qualified to offer expert testimony in this case.

B. Horan's Opinions Are Admissible Under *Daubert*.

Plaintiff also argues that Horan's methodology fails the *Daubert* test because, according to plaintiff, Horan did not use what he describes as "one of the recognized methods for valuing a business in Florida." Pl. Mot. at 7. This argument misses the mark for at least two reasons.

First, as noted above, Horan is not "valuing a business." At no time did Horan value Gawker Media, LLC, or even its website www.gawker.com (not itself a legal entity). *See*, *e.g.*, Horan Dep. at 117:24 – 118:5 ("I did not make an enterprise valuation overall." Although "it's a little bit artificial . . . because you can't buy one article's worth of enterprise value, . . . I estimated the change in enterprise value based on running that article."); 119:2-23 ("I was not specifically asked to value the business as a whole, so I did not."); 122:3-5 ("I was asked to look at the impact that running that video had on Gawker as a business"); 130:7-15 (testifying that he never determined a value for www.gawker.com or Gawker Media because "that wasn't part of the scope"); 138:13-17 ("I was not asked to estimate the fair market value"); 153:16-20 ("specific mandate" was to "look at the revenue that was likely to have been derived from *this post*, and . . . the value that might have been created as a result of it") (emphasis added); 254:3-4 ("I didn't do an overall valuation of the business.").

Horan's opinion *responds* to Anderson's proposed testimony about the amount of value that ***a single web posting*** added to the overall value of the www.gawker.com website. Anderson Rep. at 3. Horan first opined that this is an artificial exercise since no one measures the increase in value to a website based on one post, and therefore this is not an established method.

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it reliably, which, as discussed below, Horan does. *See, e.g.*, 1 Fla. Prac., Evidence § 702.1 (2015 ed.).

Specifically, Horan opined that there is no established or reliable way to measure the impact on the overall "enterprise value" from a single web posting among tens of thousands of posts per year. As Horan explained, "trying to segregate the value attributable to one post, out of something like 100,000 posts a year, is an artificial exercise since no one would purchase just the Bollea video portion of the company." Horan Rep. at 9. Instead, Horan believes, the proper approach is to look at the direct revenue derived from that post. *See id.* at 9-19.

Horan further explained that if one *were* to engage in the artificial exercise of valuing a single web posting, Anderson's method for doing so is not an established method. Rather, the analysis should follow the valuation method currently used by buyers and investors – *i.e.*, one that determines a company's "value" by calculating an appropriate multiple of revenue. *Id.* at 3-4, 19-23.

Second, even if Horan had been valuing a whole business – as opposed to the increase in value from a single web posting – his methods are proper under Florida law. Plaintiff alleges (Pl. Mot. at 7) that, under *Fidelity Warranty Services v. Firstate Insurance Holdings, Inc.*, 74 So. 3d 506 (Fla. 4th DCA 2011), "Florida courts recognize three valuation methods for determining a business's value," the "income-based" approach, the "market-based" approach, and the "asset-based" approach. According to plaintiff, Horan purported to use an "income-based" approach, but failed to do so properly, because he "did not determine the predicated current and future revenue streams discounted to total present value." Pl. Mot. at 7-8. This argument mischaracterizes both the applicable law and Horan's testimony.

As a matter of law, *Fidelity Warranty* does not stand for the proposition that these are the *only* methods for determining business value, and is of little use because it did not address the valuation of an advertising-supported new media company. *Fidelity Warranty*, 74 So. 2d at 511-

512 (rejecting purported expert testimony about value of insurance company on grounds that it was too "speculative"). Indeed, the only requirements for expert testimony are that it must "reliably" apply "reliable principles and methods." *See* Fla. Stat. § 90.702. The other case cited by plaintiff, *Sun Insurance Marketing Network, Inc. v. AIG Life Insurance Co.*, applied Delaware law, and stands only for the proposition that the "value of a business depends upon the facts unique to that business." 254 F. Supp. 2d 1239, 1244-46 (M.D. Fla. 2003) (excluding expert testimony where expert was not properly qualified and where his opinions on value of insurance business were unduly speculative).[5] As Horan repeatedly explained, and as discussed below, the "facts" relevant to valuing a new media business are that business's revenue and growth, facts which formed the basis of Horan's analysis for the web posting at issue.

Specifically, Horan used a "revenue multiple" approach based on market comparables to assess the value a single web posting would have to the Gawker Media business. Horan Rep. at 19-23. Revenue multiples, along with "multiple[s] of EBITDA" (i.e., "Earnings Before Interest, Taxes, Depreciation and Amortization") are the "primary methods" for valuing Internet businesses. Horan Dep. at 83:22 – 84:17; Horan Rep. Ex. 1 (investor and analyst reports showing revenue multiples for Internet-based publishing companies, for purposes of evaluation by investors). The appropriate revenue multiple to apply to a particular Internet business "is in most cases driven by growth." Horan Dep. 98:6-23 (there is a "really strong correlation between enterprise value and growth rate for Internet businesses"); *id.* 116:16-22 (industry "risk factors"

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[5] Plaintiff's citation to *Sun Insurance* – and his claim that the "usual factors to consider" in valuing a business include "net worth," "historical" earning power, and the company's "position in the industry" (Pl. Mot. at 8) – is particularly remarkable given that his own expert's proposed valuation did not consider these factors. *See*, *e.g.*, Anderson Dep. 68:11-23 (Anderson did not consider Gawker's revenues, profits, growth rate, or other "financials"); Horan Rep. at 3-4 (explaining that revenue and growth, which were not considered by Anderson, are "the two primary measures that investors and acquirers use to value web media businesses").

are "baked into" the revenue multiples used as comps).[6] Therefore, Horan reviewed Gawker's revenue and year-over-year growth, and compared it to others in the industry to determine an appropriate revenue multiple. This is standard industry practice. *See* Horan Rep. Ex. 1; *see also* Horan Dep. at 257:16-19 (explaining that valuation was a "process" of asking "what are the comps, what are the metrics, what's reasonable in this marketplace, what deals have we actually seen get done, what do we think is reasonable").

Finally, plaintiff asserts that the revenue multiple method is not "reliable" because an article cited by Horan in his report calls it "simplistic" and "crude." Pl. Mot. at 9. *See* Horan Rep., Ex. 9 (article entitled "All Revenue is Not Created Equal: The Keys to the 10X Revenue Club"). Plaintiff neglects to mention, however, that despite this one author's opinions about the method, the author acknowledges that Horan's method is nevertheless *in fact* a standard method that investors use to value companies. *Id.* ("investors frequently use . . . revenue as their primary valuation tool"). As Horan explained at his deposition, the "article continues to go down and show a distribution of revenue multiples," and, despite having criticized the method, the author himself "then proceeds to use revenue multiples." Horan Dep. at 257:7-10.

In sum, if plaintiff's expert, Jeff Anderson, is permitted to testify about the effect that a single web posting has on the value of an entire website, then Horan should be permitted to

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[6] Plaintiff's suggestion that Horan's approach calculates an "asking price" rather than a "fair market value" makes no sense. Pl. Mot. at 8-9 (citing *Sun Insurance*). As Plaintiff's own authority makes plain, "a seller may ask any price he or she chooses, but fair market value is 'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'" *Sun Insurance*, 254 F. Supp. 2d at 1244. Here, Horan explained that he was applying methods to determine "what an *investor* might pay to own a piece of the company or what *another company* might pay to acquire the company." Horan Dep. 70:6-11 (emphases added). Thus, he is not opining about what his own "asking price" would be, but what he opines would be the market price based on a completed transaction, which plaintiff concedes is a proper valuation method.

testify (1) that such an exercise is wholly artificial and not one that any investor or buyer would undertake in the real world, and (2) that if a single web posting could be valued, the proper analysis is to apply a revenue multiple to the revenue derived from that post, given that revenue multiples are the predominant method by which new media companies are *actually* valued.

CONCLUSION

At bottom, plaintiff simply disagrees with Horan's conclusions, and this is not a proper basis for a motion to exclude. Thus, for the foregoing reasons, the Publisher Defendants respectfully request that plaintiff's Motion to Exclude the Opinions and Testimony of Peter Horan be denied.

Dated: June 1, 2015

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

-and-

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 1st day of June 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 1950
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ *Gregg D. Thomas*
Attorney