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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY BOLLEA'S
OPPOSITION TO MOTION TO EXCLUDE TESTIMONY OF SHANTI SHUNN

Plaintiff Terry Gene Bollea ("Bollea") professionally known as "Hulk Hogan" responds to the *Daubert* Motion to Exclude the Expert Testimony of Shanti Shunn as follows:

I. INTRODUCTION

Shanti Shunn is an internet and e-commerce expert with over 18+ years of experience in web-based businesses. Mr. Shunn reasonably applied his expert training, education, knowledge and experience to reliable methods in determining the following:

1. The one minute forty-one second sex video (the "Sex Video") originally posted by Gawker, which depicted Mr. Bollea fully naked and engaged in sexual intercourse, was copied and re-posted by other websites (mostly pornographic websites) which used programmed

code to capture the views of the video, which view counters are reasonably reliable and accurate under the circumstances; and

2. VividCeleb.com is the highest ranking membership-based website for celebrity pornographic videos and charges a minimum fee of $4.95 (for four days) to access such content.

Mr. Shunn's expertise in e-commerce qualifies him to testify as to both of these issues. The fact that he has no experience in the adult film industry is irrelevant to his qualifications. Even if it was, Gawker's own adult film expert supports Mr. Shunn's conclusions.

Mr. Shunn relied upon his extensive experience to conclude that the video view counters programmed into the coding of the websites that re-posted the Sex Video are reasonably accurate depictions of the number of people who viewed the Sex Video on those websites. Mr. Shunn also applied reliable methods within the e-commerce industry to verify that VividCeleb.com is the highest ranking membership-based website that provided access to celebrity sex tapes on the internet.

The fact that Mr. Shunn's testimony may damage Gawker on the merits by helping a jury quantify the damages caused by Gawker's decision to post the Sex Video for millions of people to see does not constitute prejudice to warrant exclusion of Mr. Shunn's opinions. Mr. Bollea is entitled to use an expert witness to help the jury understand and value the damages he suffered.

II. FACTUAL BACKGROUND OF SHANTI SHUNN'S TESTIMONY

Shanti Shunn has over 18 years of experience in internet and e-commerce technology. *Moving Papers*, Ex. 4 § 1. Mr. Shunn graduated from the Eberhardt School of Business at the University of the Pacific in 1998 with a Bachelor's Degree in Marketing and Business Administration. Ex. A (Shunn Tr. 10:8–19) He has extensive experience in all aspects of developing, creating and maintaining websites, including online marketing and e-commerce. Ex.

B (Shunn Resume). This includes an extensive background in "CPM Advertising" – Gawker's key method of revenue generation during the operative time period – and expertise, knowledge and experience in programming code used on websites for such purposes.

Mr. Shunn used his expertise to analyze data associated with Gawker's publication of the Sex Tape to arrive at two opinions in this case:

1. The video view counters used by websites that exhibited the Gawker produced and edited Sex Video, which reflect that 4,467,995 people viewed the Sex Video, were programmed to generate accurate counts of the number of views on the sites. *Moving Papers* Ex. 4 § 1.

2. The highest ranking membership-based site for celebrity pornographic videos, VividCeleb.com, charges the following rates to view such content: $4.95 for four days of access, $39.95 per month, or $95.40 per year. *Moving Papers* Ex. 2 § 1.

III. MR. SHUNN'S OPINIONS ARE ADMISSIBLE

Gawker's first argument to exclude Mr. Shunn's opinions mischaracterizes his testimony and Florida law. Mr. Shunn is not a "conduit" for hearsay, and his methodology is reliable.

Mr. Shunn used his expertise to review, decipher and evaluate the programming code used in the video view counters for the websites that displayed the Sex Video. *Moving Papers* Ex. 4 § 1. He then relied upon his expert knowledge and experience in the e-commerce industry to determine that, within a reasonable degree of certainty, the video view counters accurately recorded the number of view counts of the Sex Video. Importantly, Mr. Shunn testified that, based on his experience, the websites that he reviewed are incentivized by the market to keep their view counters as accurate as possible because they are accountable to advertisers on their website and would lose advertisers if their front-end view counter numbers were falsified. Ex. A

(Shunn Tr. 171:18–172:12). Mr. Shunn also verified how the sites tagged the viewers within their source code and reviewed the sites to confirm that they did not just drop standardized code across all videos on the websites (*i.e.,* verified different view counts for different videos). *Id.* (Shunn Tr. 175:15–176:3)

As stated in *Joiner v. General Electric Co.*, 78 F.3d 524, 529 (11th Cir. 1996), there is a "preference for admissibility" under *Daubert*. "In analyzing the admissibility of expert testimony, it is important for trial courts to keep in mind the separate functions of judge and jury…." *Id.* at 530. "This gatekeeping role is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion. It is not intended to turn judges into jurors or surrogate scientists. Thus, the gatekeeping responsibility of the trial courts is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions from the material in the field. Rather, it is to assure that an expert's opinions are based on relevant scientific methods, processes, and data, and not on mere speculation, and that they apply to the facts in issue." *Id.*

Gawker's argument that Mr. Shunn relied upon "hearsay" is contrary to Florida law. Experts are entitled to rely upon facts not admitted into evidence and which would not otherwise be admissible. § 90.704, Fla. Stat. This includes hearsay reasonably relied upon in the expert's field of expertise. *Dean Witter Reynolds, Inc. v. Cichon*, 692 So.2d 313, 315 (Fla. 5th DCA 1997).

The hearsay rule poses no obstacle to expert testimony premised on tests, records, data or opinions of another, where such information is of a type reasonably relied upon by experts in the field. *Barber v. State*, 576 So.2d 825, 832 (Fla. 1st DCA 1991). Expert testimony based on

presentation of data to the expert outside of court and other than by his own perception must be permitted. *Id.* What Mr. Shunn did in this case is akin to a medical expert reviewing x-rays. Mr. Shunn applied his expert knowledge to data to conclude that the view counts of the Sex Video were accurate.

Mr. Shunn's reliance on such data is not grounds to exclude his opinions. Rather, the "reasonableness of experts' reliance on this data may be questioned on cross-examination." *Id.* (citing *Bender v. State*, 472 so.2d 1370, 1371-2 (Fla. 3d DCA 1985).

Experts are permitted to testify regarding hearsay, as Gawker admits, so long as the testimony's probative value is not substantially outweighed by the likelihood of **unfair** prejudice. Fla. Stat. § 90.704. "In order for relevant, probative evidence to be deemed unfairly prejudicial, it must go beyond the inherent prejudice associated with any relevant evidence." *State v. Gad*, 27 So.3d 768, 770 (Fla. 2d DCA 2010). There is no such unfair prejudice here—the only "prejudice" to Gawker is that Gawker's actions resulted in significant numbers of people viewing the Sex Video on websites other than Gawker.com, and that Gawker gave something away that ordinarily requires a user to pay at least $4.95 (for four days of access).

This case does not present the situation discussed in *Doctors Co. v. State Department of Insurance*, 940 So.2d 466, 470 (Fla. 1st DCA 2006), cited by Gawker, where an expert simply parroted hearsay received from the lawyer who engaged him.[1] Mr. Shunn used his expertise to verify the accuracy of view counts of the Sex Video by analyzing data (programming code for video view counters) and the context of the websites involved and other background facts.

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[1] *Carratelli v. State*, 832 So.2d 850, 861-63 (Fla. 4th DCA 2002), cited by Gawker, actually supports Mr. Bollea's position and holds that the testimony of an accident reconstruction expert was **admissible** even though it relied in part on hearsay.

Gawker's arguments about the accuracy of Mr. Shunn's opinions and the data he relied upon goes to **weight**, not admissibility. *Joiner v. General Electric Co.*, 78 F.3d 524, 530 (11th Cir. 1996) ("correctness of the expert's conclusions" is left for the jury to decide; trial court may only exclude under *Daubert* when the methodology is flawed). Gawker had ample opportunity to conduct its own discovery to obtain the "back-end data" to attack Mr. Shunn's expert opinions. Having failed to do so, and having failed to retain its own expert in this field, Gawker cannot use *Daubert* as an excuse to exclude expert testimony it thinks is incorrect. Gawker is attacking Mr. Shunn's conclusion, not his methodology. Gawker must make its argument to the jury.[2] *Quinn v. State*, 549 So.2d 208, 209 (Fla. 2d DCA 1989)

Mr. Shunn's opinion confirming that the highest ranking membership-based celebrity sex tape website charges a minimum of $4.95 (for four days access) to view celebrity sex tape content also is proper. Mr. Shunn applied his expertise to reliable methods to reach this conclusion. Gawker argues that Mr. Shunn is not an expert in this area, but he clearly is an expert qualified to testify about the internet search he conducted, the methods he utilized and the results. Mr. Shunn did not need expertise in the "adult film industry" to arrive at his conclusion. Moreover, even Gawker's own celebrity sex tape expert, Kevin Blatt, testified that a three-day

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[2] Gawker analogizes Mr. Shunn's testimony to concluding the altitude of an airplane from seeing a photo of the altimeter. However, Mr. Shunn's testimony is actually akin to a description of how the altimeter is set up to record the altitude of the plane, what it measures, and what its internal machinery is and how it works. Gawker's argument, in contrast, is akin to arguing that even in the face of that information, the jury cannot even hear the testimony unless someone also ran a tape measure from the airplane to the ground.

Gawker seemingly cites *Fed Ex Ground Package System, Inc. v. Applications International Corp.*, 695 F. Supp. 2d 216, 224 (W.D.Pa. 2010), solely because it is a *Daubert* case that mentions the words "source code". However, the expert in *Fed Ex* gave what was essentially a legal opinion, and relied on what others had told him and did not even examine the source code. Mr. Shunn, in contrast, **did** examine the source code.

trial membership fee of $4.95 is a common trial membership amount in the adult industry, for access to celebrity content. Ex. C (Blatt Tr. 98:11–22, 103:7–105:16)

Gawker's argument that Mr. Bollea cannot use the $4.95 amount to establish a measure of damages, because it allegedly does not reflect a reasonable royalty or the amount that users would pay for a single celebrity's sex video, is an untimely and improper summary judgment argument guised as a motion in limine. Further, these arguments have nothing to do with the reliability and admissibility of Mr. Shunn's testimony. There is nothing inaccurate or unreliable about Mr. Shunn's opinions and methodology.

Gawker's effort to misuse *Daubert* as vehicle to try to obtain a summary judgment after the dispositive motion deadline is contrary to Florida law.

Moreover, Gawker's effort to limit the damages that Mr. Bollea can recover is contrary to the discretion afforded to juries in invasion of privacy cases. Juries have a great deal of discretion in determining the amount of harm done by a privacy invasion. *Fairfield v. American Photocopy Equipment Co.*, 291 P.2d 194, 200 (Cal. App. 1955) (holding trial court erred in privacy case by excluding plaintiff's own testimony as to how the invasion damaged him). *Fairfield* quotes with approval *Goodyear Tire & Rubber Co. v. Vandergriff*, 184 S.E. 452, 454 (Ga. App. 1936), a privacy case, which held: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." *Accord Myers v. U.S. Camera Publishing Corp.*, 167 N.Y.S.2d 771, 774 (N.Y. City Ct. 1957) (holding, in a case involving unauthorized publication of nude photographs: "The measure of damages should be left to the sound discretion of the trier of the facts.")

Fairfield was applied in *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979 (S.D.N.Y. 1981), a case in which a pornographic magazine used plaintiff's nude and sexually themed photographs without her consent in advertisements to promote the magazine. The court cited *Fairfield* with approval on the trier of fact's power to award damages on multiple theories, and upheld damages for invasion of privacy on three different theories as non-duplicative: emotional distress, failure to pay compensation for the use of her photos, and damage to her career. *Id.* at 983-84.

There are also a number cases holding that damages based on the number of viewers or readers **is appropriate** when a tortious act is transmitted by means of mass media. For instance, in *Keohane v. Wilkerson*, 859 P.2d 291 (Colo. App. 1993), a defamation action based on a statement that a judge was accepting bribes, the Court held that the number of people who read the libel was relevant to the amount of damages awarded: "That a defamatory statement is made to one person will not preclude recovery of actual damages; the number of people hearing the defamatory statement is relevant to the amount, not the fact, of damages." *Id.* at 302. A public disclosure of private facts claim is analogous to a defamation claim in this respect—the more people who read, view, hear, or see either, the greater the damage to the plaintiff. *Fairfield*, 291 P.2d 194, 198-99 (damages issues of invasion of privacy claim are analogous to libel damages).

Geragos v. Borer, B208827, 2010 WL 60639 (Cal. App. Jan. 11, 2010), discusses the importance of considering the number of people who heard or read the material in calculating damages. *Geragos* involved a surreptitious recording of conversations between Michael Jackson and his lawyers. The plaintiffs obtained a quick injunction—which led to only a few people viewing the video. The court later reversed a substantial damage award because so few people saw the material. In reaching its decision, the court contrasted *Sommer v. Gabor*, 48 Cal.

Rptr. 2d 235 (Cal. App. 1995), which upheld a $2 million damage award based on false statements in a periodical that the plaintiff was broke and destitute and had lost all the money she had made in show business. The circulation of the periodical in *Sommer* was 1.3 million, and this fact supported the damage award, according to *Geragos*: "The present case is distinguishable from *Sommer*. The defamatory statements in *Sommer* were published in periodicals that were distributed to millions of people. Here, by contrast, almost no one viewed the silent videotape of plaintiffs and Michael Jackson." *Geragos*, 2010 WL 60639 at *9.

Given the wide discretion a jury is afforded in fashioning a damage award in privacy cases to fully compensate a plaintiff for the damages he suffers, analogizing Gawker's misconduct to a conversion of personal property would also be appropriate. Under the damages principles of conversion law, Mr. Bollea is entitled to an award of damages based on the special value of what was taken from him, even if that measure is over and above the fair market value. Florida's damages law in conversion cases is set out in *Christopher Advertising Group, Inc. v. R & B Holding Co.*, 883 So.2d 867, 871 (Fla. 3d DCA 2004): "As a general proposition, the owner of property which has been converted is entitled to fair value at the time and place of the conversion, with interest. *See Restatement (Second) of Torts* § 927 (1979). How to calculate fair value depends on the circumstances of the case. *See id.* §§ 911, 927. '[V]alue includes market value and value to the owner. A person tortiously deprived of property is entitled to damages based upon its special value to him if that is greater than its market value.' *Id.* § 927 cmt. c." The *Christopher Advertising Group* opinion extensively discusses Florida law and the Restatement providing for an award based on subjective valuation and the authority of juries to make plaintiffs whole when items such as heirlooms, antiques, personal records, manuscripts, and other items with special value are converted. 883 So.2d at 871-72.

Gawker's invasion of Mr. Bollea's privacy is directly analogous to the conversion of an item of great personal value. The value of privacy does not necessarily depend on what the market will pay for it, and in fact it could be a perversion of the right to privacy to merely require a tortfeasor to pay the amount of money that it would have been required to pay to obtain a comparable license fee. To hold otherwise would reward Gawker for forcing Mr. Bollea—an an unwilling participant in a secretly recorded sex tape—to enter into a compulsory license of the most intimate details of his life. It therefore is appropriate to compensate Mr. Bollea for Gawker's invasion of privacy based on a damage model for the theft of something of extreme personal value; recompensing Mr. Bollea using the conversion model for damages, which allows the jury great latitude to determine the plaintiff's subjective personal value of what was taken. A minimum fee of $4.95 per view is entirely reasonable utilizing this method.

Intelsat Corp. v. Multivision TV LLC, 10-21982-CIV, 2010 WL 5437261 (S.D. Fla. Dec. 27, 2010), provides one example of the application of Florida's conversion damages rule to a comparable situation. In *Intelsat*, the defendant committed conversion by making 76 days worth of unauthorized transmissions on the plaintiff's satellite bandwidth. Under Florida law, the plaintiff was entitled to receive its full billing rate for those 76 days as damages for conversion regardless of whether it would have been able to sell the bandwidth to anyone else. *Id.* at *6. *Intelsat* supports a damages calculation based on the number of people who watched the sex video multiplied by the prevailing (and, according to Gawker's own expert, the most commonly charged) price to view a celebrity sex video.

IV. CONCLUSION

For the foregoing reasons, Gawker's motion to exclude Mr. Shunn's testimony should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 1st day of June, 2015 to the following:

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