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.
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PLAINTIFF TERRY BOLLEA'S
OPPOSITION TO MOTION TO EXCLUDE TESTIMONY OF LESLIE JOHN

I. INTRODUCTION

Terry Bollea, professionally known as Hulk Hogan, ("Mr. Bollea") intends to offer expert testimony from his designated expert, who is one of the nation's foremost experts on the valuation of privacy rights. Mr Bollea's expert—Professor Leslie John of Harvard Business School—will opine on the value of the loss of privacy suffered by Mr. Bollea when Gawker.com published a one minute and 41 second video of Mr. Bollea fully naked and engaged in consensual sexual intercourse in a private bedroom while being secretly recorded (the "Sex Video"). Specifically, Professor John will testify that the range of fair and reasonable compensation for a loss of privacy such as the one experienced by Mr. Bollea is between $7 million and $10 million. Her opinion is based on: (1) her extensive background and experience

in the field of behavioral economics, as that discipline is applied to an individual's valuation of his or her privacy; and (2) a survey Professor John conducted, asking a random sample of 200 Americans what amount they would demand as reasonable and fair compensation if footage of them having sexual relations were published online and watched by seven million people.

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (together, the "Gawker Defendants") seek to exclude Professor John's testimony under Fla. Stat. §90.702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The basis for their motion, however, is pure concoction without any supporting authority. The motion to exclude should be denied, for at least the following reasons:

First, Gawker Defendants' principal argument in support of exclusion is an attempt to analogize Professor John's expert opinions to impermissible "golden rule" arguments made by lawyers at trial. Gawker Defendants **do not cite a single case excluding the sort of expert survey testimony actually offered by Professor John**, on "golden rule" or any other grounds. Rather, Gawker Defendants' argument is a strained analogy entirely reliant on a non-analogous hypothetical. Essentially, the argument is: **If** Professor John were Mr. Bollea's lawyer, and **if** she were asking the jury in closing arguments, rather than survey respondents in a pre-trial survey, to put themselves in the place of Mr. Bollea, then she would be violating the "golden rule." The argument must fail because Professor John is not Mr. Bollea's lawyer, and she is not asking the jury to put themselves in the place of Mr. Bollea.

Second, Gawker Defendants' argument that Professor John's survey respondents represent a "mock jury" is equally without merit or support. Professor John asked her survey respondents about one discrete issue in the case—the valuation of privacy rights. She did not ask them to decide the various jury questions in this matter, such as whether the publication of the

Sex Video invaded Mr. Bollea's privacy, whether it was a matter of public concern, whether it increased the value of Gawker.com, or whether Gawker Defendants acted in good faith. In fact, the survey asked hypothetical questions about privacy invasions and did not even mention "Hulk Hogan", Gawker, the Clems, or any of the specific facts and/or parties to this case. Gawker Defendants cannot exclude expert testimony based on strained analogies to dissimilar legal principles, and which lack supporting authority.

Third, Gawker Defendants' remaining arguments, though lengthy, are entirely irrelevant at this stage of the proceedings. The arguments go to the **weight** of Professor John's testimony, and not its admissibility. The jury can evaluate: (1) whether the survey provides a plausible valuation of the emotional distress suffered by Mr. Bollea (it does); (2) to what extent Mr. Bollea's damages are attributable to the filming rather than the publication of the Sex Video (the **publication** of the video of him naked and having sexual intercourse is what allowed 7 million people to see it, which in turn is what caused Mr. Bollea the severe distress that he suffered, and continues to suffer); (3) whether survey respondents' conclusions were inflated by a desire to punish Gawker Defendants (which is impossible given the survey design, which does not even mention the parties to the case); and (4) whether the predicate determination as to the approximate number of people who watched the Sex Video was accurate (it was).

II. FACTUAL BACKGROUND OF PROFESSOR LESLIE JOHN'S TESTIMONY

Professor John is an Assistant Professor of Business Administration at Harvard Business School. Ex. A (Professor John's curriculum *vitae*). She has a Bachelor of Arts in Honors Psychology & Arts and Business Co-op from University of Waterloo in Ontario, Canada. She has a Masters of Science in Psychology & Behavioral Decision Research, and a Ph.D. in Behavioral Decision Research from Carnegie Mellon University. *Id.* Professor John's

dissertation for her Ph.D. was entitled "A Behavioral Economics Perspective on Privacy and Self-Disclosure: Three Essays." *Id.* She has published extensively in the field of privacy valuation, including co-authoring "What is Privacy Worth?," an article published in the *Journal of Legal Studies* in 2013. *Id.*

Professor John was retained to determine a range of reasonable or fair compensation for being observed naked and having sex on a video published and viewed online without consent. Ex. B (Professor John's Expert Report, Updated as of May 27, 2015). To make that determination, Professor John conducted a survey of 200 Americans with incomes exceeding $200,000 per year (and thus more likely to be similarly-situated to Mr. Bollea) to estimate the fair compensation for a loss of privacy **comparable to** the loss suffered by Mr. Bollea as a result of the acts of the Gawker Defendants (the publication of a recording of the survey respondent engaging in a private sexual encounter). *Id.* at 3–4. The survey asked about a hypothetical scenario and did not mention any of the parties or specific facts of this case. *Id.* Based on her survey results, Professor John concluded that the range of fair and reasonable compensation was between $7 million and $10 million. *Id.* at 3.

Professor John's study contained numerous controls and constraints to ensure that valuations were credible. Ex. B at 4 (participants were asked comprehension questions which they had to complete before finishing the survey; participants were asked to qualitatively measure the loss of privacy before being allowed to quantify it), 5 (participants were asked if they were comfortable valuing the loss of privacy at all before being allowed to quantify it; participants were asked to quantify within a range of numbers before being allowed to specify a number), 6 (participants were asked about a control scenario involving a less significant invasion of privacy not involving footage of sexual activity; half of the respondents were asked about a

control scenario where only one person, rather than millions, viewed the sex video), 7 (half of the participants were asked to imagine they were a famous sports figure, while the other half were not).[1]

III. PROFESSOR JOHN'S OPINIONS ARE ADMISSIBLE

A. Professor John's Testimony Does Not Violate the Rule Against "Golden Rule" Arguments

Gawker Defendants' central argument for excluding Professor John's testimony is that Professor John's privacy valuation survey violates the prohibition on "golden rule" arguments, which prohibits **lawyers** from asking **jurors** to put themselves in the position of the plaintiff in the determination of damages. The argument is a false analogy. Gawker Defendants cite **no cases** barring valuation surveys conducted by experts pursuant to their "golden rule" argument.

In Florida, the "golden rule" doctrine has been carefully limited by the courts to circumstances where a lawyer's summation expressly asks the jurors to put themselves in a party's position. Thus, in *Cummins Alabama, Inc. v. Albritten*, 548 So.2d 258, 263 (Fla. 1st DCA 1989), the court held that **the golden rule was not violated** when a lawyer in a negligence case asked the jurors to judge his client's actions based on what they would have done "as reasonable people" in the same circumstances. The court held this was **permissible**, and not a violation of the golden rule, because of the "as reasonable people" qualification. Professor John's survey, if it is analogous to closing arguments at all, is analogous to the one held permissible in *Albritten*. Professor John's survey attempts to determine what would be a reasonable valuation of the loss of privacy rights, such as occurred in this case.

[1] Exhibit C, attached hereto, is a copy of Professor John's complete deposition testimony. Cited excerpts are highlighted for the Court's convenience.

Similarly, in *Tieso v. Metropolitan Dade County*, 426 So.2d 1156, 1157 (Fla. 3d DCA 1983), the court **rejected an attempt to extend the "golden rule" doctrine beyond closing argument**, as Gawker Defendants attempt here. In that case, **counsel** had asked questions of **jurors** during *voir dire*, and the Court still found that the rule was not violated.

The case law cited by Gawker Defendants involves "golden rule" arguments made by lawyers in summation. Gawker Defendants have not identified any holding—or even dictum—that would extend the rule to prohibit surveys conducted by expert witnesses. The legal rule that Gawker Defendants asks this Court to apply simply does not exist.

B. Professor John's Testimony Is Not An Attempt To Place A Mock Jury's Verdict Before The Real Jury

Gawker Defendants' "mock jury" charge is similarly meritless:

First, this is once again an argument by analogy—there is nothing in Professor John's expert report that indicates her survey respondents were any sort of a mock jury. Indeed, they were not asked to opine on any of the issues in this case, other than the very narrow issue of the valuation of the privacy violation. Moreover, the respondents were not even told specifically about the parties to the case—they were merely asked about hypothetical invasion of privacy scenarios.

Second, *Hildwin v. State*, 951 So.2d 784 (Fla. 2006), cited by Gawker, which is the **only** reported case that excludes mock jury results, does not adopt a *per se* rule against the admissibility of such evidence. Rather, in *Hildwin*, a mock jury's conclusions were held inadmissible in a **post-conviction** proceeding (because there was no trier of fact) and where the mock jury purported to determine whether the governing legal standard was met in the case. *Id.* at 791. The Court specifically noted that mock jury results **had** been admitted in other situations. *Id.* (citing cases). Thus, *Hildwin* has no applicability here.

C. Gawker Defendants' Remaining Arguments Go To The Weight Of Professor John's Testimony, Not Its Admissibility

Gawker Defendants' remaining arguments are irrelevant at this stage of the proceedings. They read like a cross examination, not a proper *Daubert* analysis. Arguments as to the weight of Professor John's testimony, as opposed to their admissibility, are improper on a motion to exclude.

It is well-established that *Daubert* does not empower courts to exclude testimony based on concerns as to its weight. In *Mitchell v. United States*, 141 F.3d 8, (1st Cir. 1998), the court held that a party's claims that expert testimony is not credible, or that the research basis for testimony has been undercut, are not cognizable under *Daubert*: "The question whether the basis of the doctor's opinion is sound goes to the weight of the evidence, not its admissibility." *Id.* at 16–17. In *Adams v. Laboratory Corp. of America*, 760 F.3d 1322 (11th Cir. 2014), the court held that a risk that an expert study might be biased goes to weight—not admissibility under *Daubert*: "We have repeatedly stressed *Daubert's* teaching that the gatekeeping function under [Fed. R. Evid. 702] is not intended to supplant the adversary system or the role of the jury." *Id.* at 1334.

Gawker Defendants' specific arguments against Professor John's methodologies can be weighed and considered by the jury. The jury can evaluate whether the distress actually suffered by Mr. Bollea was comparable to what Professor John's survey respondents indicated, and whether the factual predicate of the survey that 7 million people watched the Sex Video has been adequately established in the factual record. None of these are grounds for excluding Professor John's opinion under *Daubert*.

IV. CONCLUSION

For the foregoing reasons, Gawker Defendants' motion to exclude Professor John'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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