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; 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'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF PETER HORAN

Plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan" ("Mr. Bollea" or "Plaintiff"), by counsel, replies to the Opposition to Plaintiff's Motion to Exclude the Opinions and Testimony of Peter Horan filed by Defendants Gawker Media, LLC, Nick Denton and A.J. Daulerio (collectively, the "Gawker Defendants"), and states:

Introduction

Gawker Defendants gloss over the substantive reasons warranting the exclusion of Peter Horan's ("Horan") testimony. Instead, they rely upon Horan's "real world experience" as subterfuge for the improper admission of Horan's unqualified and fatally flawed opinions. Horan's history as an executive and "investor" in internet businesses does not qualify him to render an expert opinion concerning the increase in value of Gawker.com attributable to the

Gawker Defendants' use of illegally recorded footage of Mr. Bollea naked and engaged in sexual intercourse to virally market their website. Moreover, the "authoritative" literature Horan attaches to his own report establishes that the methodology he employed—the revenue multiple method—is "remarkably dangerous" and the "crudest valuation tool of them all." Horan's professional background does not overcome his lack of expertise in valuing intellectual property, or his use of a completely unreliable methodology to attack Jeff Anderson's ("Anderson") sound expert opinions.

A. Gawker Defendants Concede That Horan's Testimony Attacking Anderson's Qualifications and the Validity of His Opinions Are Inadmissible Under Florida Law

Gawker Defendants attempt an end-run around Florida law by offering Horan's admittedly inadmissible testimony regarding Anderson under the guise of a "predicate" for Horan's opinions. While conceding that "Horan's opinions about Anderson's qualifications are not themselves admissible . . . ," Gawker Defendants contend that Horan's attack on Anderson is nevertheless appropriate as "a predicate to explain why Anderson's opinions are substantively unreliable." (Def. Resp. p. 4).

This is a distinction without a difference, which Florida law does not allow. An expert cannot criticize another expert, nor render opinions regarding the "validity of opinions expressed" by an opposing expert. *Network Publs., Inc. v. Bjorkman*, 756 So.2d 1028, 1030-31 (Fla. 5th DCA 2000) (*citing Mathis v. O'Reilly*, 400 So.2d 795, 796 (Fla. 1982) and *Carlton v. Bielling*, 146 So.2d 915, 916 (Fla. 1st DCA 1962)); *Caban v. State*, 9 So.3d 50, 54 (Fla. 5th DCA 2009). Horan's opinions attacking Anderson's abilities and qualifications should be excluded.

B. Horan Is Not Qualified to Render Opinions on the Value of a Website

While Horan's experience as an executive **may** qualify him to testify about operating an internet company, or his experience as an investor **may** qualify him to value one of the

companies with which he was personally involved, his experience does not qualify him as an expert in the field germane to Anderson's opinions: valuing intellectual property. Horan cannot testify as an expert in a field in which he admittedly has no expertise.

Anderson provided an opinion regarding the benefit, as measured by the increase in value of the Gawker.com website, that resulted from posting the video of Mr. Bollea naked and engaged in sexual intercourse. (Anderson Rpt. p. 3). Horan agreed that a website such as Gawker.com is an "asset." (Horan Tr. p. 83:19–21). Anderson certainly is qualified to render an expert opinion concerning the value of such intellectual property.[1] The Gawker Defendants agree that Horan's purpose is solely to rebut Anderson's opinions, but Horan acknowledges that he is not an expert in Anderson's field:

> Q: What is your field of expertise?
>
> A: Running and investing in Internet media companies and advertising companies.
>
> Q: Are you an expert in any other fields?
>
> A: No.

(Horan Tr. p. 30:5–9).

> Q: Do you consider Mr. Anderson to be qualified as an expert to value intellectual property?
>
> A: That's not an area of my expertise.

(Horan Tr. p. 73:7–11).

Horan's practical experience "running and investing in internet media companies and advertising companies" does not render him an expert in valuing websites, nor the benefit Gawker received by virally marketing its website using an illegally recorded "sex tape" of

[1] Anderson's field of expertise is in the valuation of intellectual property, intangible assets and celebrity endorsements. (Horan Depo. Tr. 83:19–21; Horan Report p. 3). Anderson's testimony confirms he has substantial experience in valuing all types of assets, including websites. (Anderson Tr. 30–33).

Mr. Bollea. Also, he admits that he is not an expert in Anderson's field. Accordingly, his opinions should be excluded.

The mere fact that a witness "boasts an impressive resume, having achieved remarkable success over the course of a lengthy course of a lengthy career" does not qualify him as an expert. *Pleasant Valley Biofuels, LLC v. Sanchez-Medina, Gonzalez, Quesada, Lage, Crespo, Gomez & Machado, LLP*, 2014 U.S. Dist. LEXIS 85025, *4 (S.D. Fla. June 23, 2014). Although "a witness may qualify as an expert relying solely or primarily on experience . . . [that] . . . does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express." *Id.* at *8 (citing *U.S. v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004)). "The witness must show how that experience leads to the conclusion reached, why the experience is a sufficient basis for the opinion, and how the experience is reliably applied to the facts." *Id.* When the witness's experience is insufficiently related to the subject of his opinions, it is an insufficient basis to qualify him as an expert. *Id.*

A witness's involvement in "numerous" transactions does not qualify the witness as an expert on every aspect of those transactions. *Id.* at *11–12. The witness's actual role must be examined to verify that his experience bears an adequate relationship to the specific subject about which he is offering opinions. *Id.* The experience necessary to qualify one as an "expert" must endow the witness with "a sufficient body of specialized knowledge to assist the trier-of-fact in understanding the evidence or issues in the case." *Id.*

Here, although Horan has operated and invested in internet-based businesses, he has no experience, and admittedly no expertise, in valuing intellectual property such as websites. In fact, he bases his "opinions" upon the specialized knowledge and skill of **others**: people who provided Horan with "investment banking reports, analysis of comparable deals," which Horan

then used to make personal decisions on whether to sell or not sell companies. (Horan Tr. p. 75:6–76:16). In fact, Horan used these very same reports from investment bankers, which he admits he did not prepare himself, as the basis for his opinions in this case. (Horan Tr. pp. 140:9–146:18).

Ultimately, Horan merely is parroting information and data that other people gathered, compiled and provided to him when he decided whether to buy or sell companies he was personally involved with (not Gawker or its website, Gawker.com). Horan's complete reliance upon the specialized skill and knowledge of others is not an "expertise."

Considering his experience, Horan **may** be qualified to testify about operating an internet-based business, including subjects such as viral marketing of websites. He may even be permitted in certain cases to testify—as a lay witness—about the value of the companies he has owned or operated. *Air Turbine Tech. v. Atlas Copco AB,* 2004 U.S. Dist. LEXIS 28037, *9–10 (S.D. Fla. Apr. 20, 2004) (business owner or officer testifying as to the value of a business is proper subject of lay testimony because it is based on particularized knowledge by virtue of his or her position in the business, not experience, training or specialized knowledge within the realm of an expert); *Reliance Ins. Co. v. Pro-Tech Condit. & Heating,* 866 So.2d 700, 701 (Fla. 5th DCA 2003) (an owner of property can testify as to his opinion of the value of the property).

Horan, however, is **not** qualified to testify about the value of Gawker Media, LLC or Gawker.com. He has no personal or professional experience, or specialized knowledge, in the field of valuing websites or intellectual property. Although he has been involved in several "investments" in internet businesses, he did not personally prepare any business valuations involved in those transactions.

Regurgitating the work of other people and performing simplistic math is not the equivalent of performing the detailed analysis necessary for an "expert" to value a business or asset under Florida law. Horan's experience deciding on a price at which to buy or sell a company is completely irrelevant to the task at hand. "An asking price is not the same as fair market value."[2] *Sun Ins. Mktg. Network, Inc. v. AIG Life Ins. Co.*, 254 F.Supp.2d 1239, 1244 (M.D. Fla. Mar. 27, 2003). This is why appraisals, such as the one performed by Anderson, tend to be factually intensive involving competing valuation methodologies.[3] *Id.*

Horan lacks the educational background, training and experience to conduct the factually intensive analysis utilizing competing methodologies that Florida law requires. In fact, all Horan really did in this case was math: he took a revenue multiple that other sources told him was appropriate, and multiplied it by Gawker Media, LLC's revenue.

Anderson's valuation of the benefit Gawker Defendants received, based on the increased value of Gawker.com, by posting the video of Mr. Bollea, clearly is a matter outside Horan's expertise. Horan's testimony is inadmissible, even though he may be qualified through experience to testify about other matters. *Cordoves v. Miami-Dade County*, 2015 U.S. Dist. LEXIS 63067, *9–10 (S.D. Fla. Mar. 2, 2015).

C. Gawker Defendants Fail to Legitimize Horan's Unreliable Methodology

Horan's lack of qualifications to perform a proper valuation of intellectual property explains why his valuation methodology is unreliable and factually unsupported. It also explains

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[2] Further illustrating this point is Horan's testimony that he cannot determine fair market value until a deal actually closes. (Horan Tr. 137:10–21).

[3] Contrary to Gawker Defendants' argument, Anderson evaluated each of the established approaches to valuing intellectual property (income, asset, market), and explained why the income and asset-based approaches were not appropriate in this case. *See Sun Ins. Mktg. Network, Inc.*, 254 F.Supp.2d 1239, 1245 (noting that expert report should discuss the three approaches and how they relate to the business at issue).

why Gawker Defendants have such difficulty explaining what Horan was actually hired to do.

First, Gawker Defendants assert that Horan "is not valuing a business (Gawker Media, LLC) or even, its website." (Def. Resp. p. 8). This glaring admission reinforces the conclusion that Horan is not actually rebutting Anderson's opinions.

Next, Gawker Defendants argue (based on Horan's opinions) that it is impossible to measure the increase in value to a website based on one post. Horan opines that "there is no established or reliable way to measure the impact on the overall 'enterprise value' from a single web posting . . . ." (Def. Resp. p. 9). Horan's logic—again based on his "asking price" approach—is that "no one would purchase just the Bollea video portion of the company." (*Id.*) This "opinion" not only mischaracterizes Anderson's approach, but also amounts to an improper legal opinion about what types of damages Mr. Bollea can recover.

Finally, after Horan testified it is impossible to value the benefit of posting the video of Mr. Bollea naked and engaged in sexual intercourse, and also that he did not value Gawker or its website, Horan proceeds to engage in this very same "impossible" task of valuing the web posting by determining the "company's value by calculating an appropriate multiple of revenue." (Def. Resp. p. 9).

Putting aside these irreconcilable inconsistencies in Horan's opinions, Gawker Defendants still concede that, when he valued the company, Horan failed to properly apply one of the recognized methods for valuing a business in Florida (income, market, or asset). *Fid. Warranty Servs. v. Firstate Ins. Holdings, Inc.*, 74 So.3d 506, n.5 (Fla. 4th DCA 2011) (citing *Sys. Components Corp. v. Fla. Dep't of Transp.,* 14 So.3d 967, 979–80 (Fla. 2009)). Instead, Horan used his revenue-multiple approach to determine the "equity" (*i.e.*, "asking price") value of Gawker.com—an approach Horan characterized as an "income" approach, but does not

appropriately apply the income-based valuation method. (Horan Depo. Tr. 110:20–111:9, 114:1–3; Horan Report p. 23).

Although Horan testified that his approach is income-based, he admittedly did not determine the predicated current and future revenue streams discounted to a total present value. In fact, Horan did not take **any** future revenue sources into account. (Horan Depo. p. 87:16–20). He did not project any net revenue that was discounted or capitalized. (Horan Depo. p. 114:11–23). He did not engage in—nor is he qualified to perform—the detailed economic analysis necessary to conduct an income-based valuation of Gawker.com. Instead, Horan merely opined on what an investor would pay to buy Gawker.com. (Horan Depo. Tr. 70:3–11). This "approach" is irrelevant to determining fair market value. *Sun Ins. Marketing Network, Inc. v. AIG Life Ins. Co.,* 254 F.Supp.2d 1239, 1244 (M.D. Fla. 2003).

Gawker Defendants' assertion that, if Anderson is permitted to testify, Horan should be allowed to testify that valuing the benefit of posting the video of Mr. Bollea naked and engaged in sexual intercourse "is wholly artificial and not one that any investor or buyer would undertake in the real world" reveals Gawker Defendants' true intent in calling Horan to testify: they want their expert to tell the jury what damages they should **not** award. Not only is this an improper subject of "expert" testimony, it is contrary to controlling law. *Lee Cnty. v. Barnett Banks, Inc.*, 771 So.2d 34 (Fla. 2d DCA 1997); *Gurganus v. State*, 451 So.2d 817, 821 (Fla. 1984). Horan's opinion essentially is a back-door for Gawker Defendants to argue that Mr. Bollea cannot recover damages based on unjust enrichment. However, the U.S. Supreme Court has already shot down this contention. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1971) ("the rationale for protecting the right of publicity is the straight-forward one of preventing unjust enrichment by the theft of good will").

D. Horan's Remarkably Dangerous "Revenue Multiple" Method is Unreliable

Gawker Defendants have no answer for Mr. Bollea's argument that Horan's method fails to satisfy the reliability prong of *Daubert*. An admittedly "authoritative" source authored by an "expert" that Horan cites, and attaches to his own report, pronounces that Horan's revenue multiple method is a "simplistic," **"remarkably dangerous technique,"** and the **"crudest evaluation tool of them all."** *Id.* (emphasis added). Noting the revenue multiple method's significant room for error, this "authoritative source" concludes that a company's revenue alone "is a very poor guide" to determine what the company is worth. *Id.* at 2. This conclusion comes as no surprise, given the State of Florida law on the requirements necessary to perform a reliable income-based valuation. *Sun Ins. Mktg.*, 254 F.Supp.2d 1239.

Horan's revenue multiple method is highly unreliable and "remarkably dangerous." *Id.* It also is **not** one of Florida's recognized methods for valuing a business. Horan should not be permitted to employ his "remarkably dangerous" methodology to mislead the jury. *M.J. Stavola Farms, Inc. v. Department of Transp., State of Fla.,* 742 So.2d 391, 395 (Fla. 5th DCA 1999); *Rochelle v. State Road Dept.,* 196 So.2d 477, 479 (Fla. 2d DCA 1967) (expert testimony can be excluded when "method would require departing from all common sense and reason or would require adoption of an entirely new and totally unauthenticated formula in the field of appraising").[4]

E. CONCLUSION

Peter Horan is unqualified to render an opinion as to the value of Gawker.com and the benefit it received by virally marketing its website using the video of Mr. Bollea naked and

[4] "Because of the powerful and potentially misleading effect of expert evidence, judges must take care not to allow misleading and prejudicial opinions to influence the finder of fact." *R&R Int'l, Inc. v. Manzen, LLC*, 2010 U.S. Dist. LEXIS 94550, 46–47 (S.D. Fla. 2010) (citations and quotations omitted).

engaged in sexual intercourse. Moreover, Horan's opinions regarding Jeff Anderson's qualifications are improper. Horan's "crude," "remarkably dangerous" and unreliable revenue multiple method is unsupportable and misleading. Horan's opinions and testimony therefore should be excluded in their entirety.

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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 12th day of_June, 2015 to the following:

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