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.
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THE PUBLISHER DEFENDANTS' REPLY IN SUPPORT OF THEIR *DAUBERT* MOTION TO EXCLUDE THE EXPERT TESTIMONY OF JEFF ANDERSON

Hogan's opposition ("Opp.") to the Publisher Defendants' motion to exclude the expert testimony of Jeff Anderson ("Mot.") misses the mark entirely, as it fails to meaningfully address the many reasons that Anderson's testimony is inadmissible.

First, Hogan cannot overcome the threshold relevance problem with Anderson's proposed testimony: Florida law does not award damages based on the hypothetical increased "fair market value" of a company attributable to an allegedly tortious act. Mot. ¶¶ 16-17. Hogan does not address this point at all. It makes Anderson's expert opinion irrelevant.

Instead of addressing this fatal flaw, Hogan has created a smokescreen: He cites a series of cases to suggest – incorrectly – that he can seek disgorgement damages. Anderson, however, did not measure whether Gawker earned any profit from the Hogan post. (It did not.) He looked only at the fair market value of www.gawker.com.

In any event, Florida law is clear that Hogan cannot seek disgorgement for ***any*** of his causes of action. The cases cited by Hogan either do not address that issue or have no precedential value. First, the opposition cites a U.S. Supreme Court case that did not even address the issue of damages. *See* Opp. at 4 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433

U.S. 562, 576 (1977)). Next, it cites two Florida cases awarding unjust enrichment damages, but neither case involved the claims being asserted by Hogan. *See* Opp. at 4-5 (citing *BMC-Benchmark Mgmt. Co. v. Ceebraid Signal Corp.*, 292 Fed App'x 784 (11th Cir. 2008) and *Montage Grp., Ltd. v. Athle-Tech Computer Sys., Inc.*, 889 So. 2d 180 (Fla. 2d DCA 2004), both addressing ***causes of action*** for unjust enrichment). Finally, the opposition cites a slew of authorities to suggest that unjust enrichment damages are available in right of publicity cases, but ***none of those authorities are from Florida or apply Florida law***. *See* Opp. at 5 (citing the RESTATEMENT 3D OF UNFAIR COMPETITION and cases from New York, Minnesota, and Wisconsin).

Florida law simply does not permit awards of disgorgement damages for the claims asserted by Hogan – even his claim for commercial misappropriation of his right of publicity. *See* Mot. at ¶¶ 16-19 & n.5 (citing authorities); *see also Stockwire Research Grp., Inc. v. Lebed*, 577 F. Supp. 2d 1262, 1269 (S.D. Fla. 2008) ("in order to recover monetary damages for Defendants' misappropriation under Fla. Stat § 540.08, misappropriation under common law, or for the privacy violation of being placed in a false light, Plaintiffs *must conclusively demonstrate* the manner in which Plaintiff Adrian James *was personally damaged*") (emphasis added). Hogan's only response to those authorities is to protest that some of them are "70 year[s] old," or had an "alternative holding," or contain insufficient "reasoning." Opp. at 5-6 (addressing *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944), and *Jackson v. Grupo Industrial Hotelero, S.A.*, 2009 WL 8634834 (S.D. Fla. Apr. 29, 2009)). But, he does not, and cannot, dispute that that authority is still good law.

Second, Hogan has no response to the other threshold relevance problem with Anderson's analysis: Anderson's calculation is based on the number of unique times the page

hosting the commentary was viewed, ***not*** the number of times the Video Excerpts were viewed. Hogan is suing only on the Video Excerpts, not the commentary. Thus, Anderson's entire analysis is irrelevant. Even if Hogan were to prevail on his claims and Florida law permitted the damages he seeks (which it does not), the jury obviously could not award him the amount added to the value of www.gawker.com by a publication ***that does not give rise to his claim***. Yet, that is the number Anderson calculated. *See* Mot. at ¶¶ 19-21.

Third, Hogan still has not pointed to a single instance in which anyone outside of Anderson's consulting firm has used the method Anderson employed to value a website. And, more problematically, Hogan has not pointed to any time that anyone has used Anderson's methodology to value a single web posting. Indeed, Anderson himself knew of none. Mot. ¶ 27. Although Hogan asserts that Anderson's method is "the preferred means of valuing websites such as Gawker," the only support he provides for that proposition is a citation to Anderson's own report. Opp. at 2 (citing Anderson Report at 7-9).

Hogan's citation to "evidence" that the Publisher Defendants emphasize monthly unique visitors in their publicity, *see id.* at 3, is beside the point. It does not show (a) that the value of www.gawker.com can be estimated looking just at that statistic (and not actual financial data, such as revenue, profits, and growth), (b) that the value of the six websites Anderson used as comparables can *also* be meaningfully expressed solely as a function of monthly unique visitors, or (c) that the method Anderson used to value www.gawker.com as a whole can be applied to value a single web post. The only support for those three contentions comes solely from Anderson himself. Hogan simply cannot meet his burden of showing that Anderson's methodology has been peer-reviewed, is scientifically acceptable, or reliable. *See* Mot. ¶ 28 (citing cases).

Fourth, Hogan does not dispute that the statistic Anderson used as the first step in his analysis to value www.gawker.com (monthly "unique users" of the ***website***) is different than the statistic he used at the last step in his analysis to value the Video Excerpts (monthly "unique ***page*** views"). Instead, he attempts to minimize the significance of this sleight of hand by characterizing it as mere reliance "on suboptimal traffic statistics." Opp. at 8. That is a rather dramatic understatement. Unique ***page*** views is not a "suboptimal" version of the unique ***users*** statistic. It is a ***different statistic*** that measures something else entirely. *See* Mot at ¶¶ 31-33 & n.8 (explaining the distinction between "unique users" and "unique page views"). Anderson is conflating apples and oranges. His analysis is equivalent to a home appraiser who comes up with a ratio of dollars per ***square foot*** based on the value of several houses, and then estimates the value of another house by applying that formula to the house's ***cubic*** feet.[1] The fact that Anderson is applying his dubious analysis to a more complicated asset (a content-based website) and using less familiar statistics (unique visitors and unique page views) should not obscure what is really going on here.

Finally, Hogan's sweeping suggestion that this Court should defer to the jury all questions about the reliability of Anderson's opinion, *see* Opp. at 6-9, misconstrues the Court's gatekeeping function. Section 90.702 of the Florida Statutes expressly requires that expert testimony only make it to a jury ***after*** the Court has made a threshold determination that it is reliable. *See* Fla. Stat. § 90.702 (providing, *inter alia*, that expert opinion is admissible if, but

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[1] This analogy, although it suffices to illustrate the defects with the last (and most crucial) step in Anderson's analysis, is, in fact, much too generous to Anderson, since it presumes that the first step in his analysis, in which he came up with the valuation multiple, was itself reliable. A more complete analogy would be a property appraiser who used six different properties from different cities, zoned for multiple uses, to come up with a valuation formula based just on the square bathroom footage in those different properties, and then applied that ratio to the cubic feet of the bathrooms of the home he was appraising.

only if it is "the product of reliable principles and methods," and the "witness has applied the principles and methods reliably to the facts of the case"). While, admittedly, this "gatekeeper role . . . is not intended to supplant the adversary system or the role of the jury," it is nonetheless "[t]he judge's role is to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999). Indeed, the legislature's recent adoption of the *Daubert* standard was undertaken for the express purpose of "tighten[ing] the rules for admissibility of expert testimony in the courts of this state." *Perez v. Bell S. Telecomms., Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014). Hogan's invitation to this Court to abdicate its fundamental gatekeeper responsibility, and permit Hogan to put in front of the jury an expert opining on a damages theory that does not belong in the case, and who has employed an untested, unreliable, and unreliably applied methodology, should be resisted.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Publisher Defendants' opening motion, the Publisher Defendants respectfully request that this Court exclude the proposed testimony of Anderson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th 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:

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