IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC,
d/b/a *Hustler* Magazine, et al,,

Defendant.

CASE NO. 1:08-cv-00421-TWT

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE TESTIMONY OF GREGORY C. LISBY OR, IN THE ALTERNATIVE, TO DISQUALIFY EXPERT

NOW COMES Defendant LFP Publishing Group LLC, d/b/a *Hustler* Magazine ("LFP") and respectfully submits this memorandum of law in opposition to Plaintiff's motion to strike testimony of Gregory C. Lisby or, in the alternative, to disqualify expert.

I. Introduction

Professor Gregory C. Lisby, Ph.D., J.D., is a tenured professor of journalism in the Department of Communication at Georgia State University, and a lawyer. He was a professional journalist for many years and, among other qualifying experiences, he is the author of *Mass Communication Law in Georgia* and serves

on the editorial board of *Communication Law & Policy*, a peer reviewed academic journal. The intersection of news reporting and the law is and has been the focus of Dr. Lisby's professional and academic endeavors; thus he is uniquely qualified, and one would be challenged to find a more experienced expert, to provide testimony regarding the entertainment news industry's standards and content trends.

LFP proffers two opinions by Dr. Lisby, both based on his applicative professional experience and survey of relevant entertainment news content: (1) that, when they were published, the *Hustler* Magazine article and images of Nancy Benoit were consistent with the nature and content of news reporting pervasive in entertainment and celebrity news media outlets, and (2) that it was reasonable for the publishers of *Hustler* Magazine to believe that both the Benoit images and the article were, each independently and standing alone, "newsworthy" by any objective measure of the public's interest in such content or the prevailing journalistic standards. Plaintiff moves to strike Dr. Lisby's testimony based on her contentions that (1) Dr. Lisby's conclusions are "redundant" and lack "relevance" because the Eleventh Circuit has already conclusively decided the issue of "newsworthiness"; and (2) Dr. Lisby's research methods do not meet the *Daubert* reliability standards. Neither contention withstands the slightest scrutiny.

First, due process restraints prohibit the Eleventh Circuit's Rule 12(b)(6) opinion from operating as a final and conclusive determination of the merits of LFP's "newsworthiness" defense; and because LFP is entitled to present factual evidence in support of that defense, Dr. Lisby's testimony that the Benoit article and images published in *Hustler* Magazine were consistent with the contemporary entertainment/celebrity news industry standards is clearly relevant and material to the central issue in this case to be resolved by the Court or, if necessary, the jury.

Second, even if the Eleventh Circuit's Rule 12(b)(6) ruling were construed to have deprived LFP of its right to present its factual case in support of its "newsworthy" defense (which it could not properly have done), Dr. Lisby's opinion is clearly and directly relevant to the merits of Plaintiff's claim for punitive damages, which the Eleventh Circuit did not address.

Third, in stark contrast to Plaintiff's proffered expert testimony, the reliability of both Dr. Lisby's "technique," and the actual (as opposed to purely subjective and presumed) facts from which his conclusions are drawn, is evident from his Report. Unlike Plaintiff's expert, Dr. Lisby has years of professional and academic experience in the industry about which he testifies; and the authenticity and sufficiency of the data on which his opinions are based -- results from a survey of entertainment/celebrity news media content -- is not legitimately disputed.

Finally, Dr. Lisby's proffered testimony clearly meets the core test of admissibility under Rule 702: it will assist the trier of fact -- whether the Court on summary judgment or the jury at trial -- to fulfill its constitutional duty to evaluate LFP's publication of the Benoit images in context with the entertainment news industry's reporting standards which existed at the time of publication. Dr. Lisby's specialized professional and academic experience, coupled with his thorough research in this case, make him ideally suited for that task.

For the foregoing reasons, and those set forth in further detail below, LFP respectfully submits Plaintiff's motion should be denied.

II. Summary Of Dr. Lisby's Work And Opinions

Dr. Lisby holds undergraduate and advanced degrees in journalism and communications, and a Juris Doctor degree. (Report at 2.) Among other relevant experiences, he has authored and served on the editorial board of texts and journals concentrating on the legal standards applicable to the media, and has taught that subject in undergraduate and graduate programs for many years. (*Id*. and Tab A thereto.)

Dr. Lisby was asked by LFP to research and determine whether the images of Ms. Benoit published by *Hustler* Magazine were typical in nature and subject matter of the content of mainstream and popular entertainment/celebrity media

outlets at the time the March 2008 issue of *Hustler* Magazine was published. Dr. Lisby enlisted the assistance of three graduate research assistants and a junior member of the Georgia State University Department of Communications faculty to (1) identify popular entertainment/celebrity media outlets, and (2) review their content from 2003-2008 using library print archives, and archival magazine and website materials found on the Internet. (*Id*. at 12.)

The Report references the dozens of magazines, wire service, newspaper and on-line media outlets identified by Dr. Lisby's team and reviewed for content. (*Id*. at 13-18.) Dr. Lisby's researchers searched the identified celebrity/entertainment media outlets for content similar to the images of Ms. Benoit published by LFP, specifically, nude images of notable celebrities and public figures, using search terms and content tags relevant to such images. (*Id*. at 12-18.) Examples of the hundreds, if not thousands of relevant images and content reviewed by Dr. Lisby and his team are collected and attached to the Report at Tab B, indexed by source and date. (*Id*. and Tab B thereto.)

Dr. Lisby personally reviewed and analyzed the materials gathered by his research team. (*Id*. at 20.) From his review of the materials, Dr. Lisby determined that the article and images of Ms. Benoit published by LFP are consistent with the nature and content of entertainment/celebrity news that was not only popular but

pervasive in mainstream entertainment media outlets at the time they were published in the March 2008 issue of *Hustler* Magazine, and similar to media coverage that followed the death of another celebrity, Anna Nicole Smith, in 2008. (*Id*. at 22.) Viewed in context, and based on his substantial experience as a journalist and as a professor of journalism and law, Dr. Lisby concluded that, given her celebrity status and highly-publicized murder, images illustrating Ms. Benoit's life and career -- whether nude or otherwise -- are newsworthy to entertainment/celebrity media outlets, and previously "unpublished [i.e., exclusive] nude photographs . . . even more so in the aftermath and context of her tragic death." (*Id.* at 21-22.) Finally, Dr. Lisby also concluded that, given the typical and prevalent content of the entertainment/celebrity media at the time, any reasonable publisher, including LFP, would have believed that the images of Ms. Benoit were themselves "newsworthy" when they were published in early 2008. (*Id*. at 22-23.)

III. Plaintiff's Challenges To Dr. Lisby's Testimony

Plaintiff wisely does not challenge Dr. Lisby's qualifications to testify competently on the subject matter of news media industry standards. Instead, she argues that Dr. Lisby's opinions should be stricken or excluded because they conflict with the Eleventh Circuit's Rule 12(b)(6) opinion regarding "newsworthiness," and are thus "irrelevant" or "immaterial," (Plaintiff's Brief in

Support of Motion ("Pl. Br."), Docket Index ("D.I.") 119-1 at 10-13); and because Dr. Lisby's "technique" is unreliable because it "is not based upon any objective facts, data, or analysis," *id*. at 7-9. To prop up these arguments Plaintiff: (1) routinely mischaracterizes the substance and scope of Dr. Lisby's opinions; (2) misrepresents the factual record; and (3) ignores the applicable and controlling law.

A. Plaintiff's Mischaracterizations Of Dr. Lisby's Opinions

The foundation of Plaintiff's attacks on Dr. Lisby's testimony is her systematic mischaracterization of Dr. Lisby's actual conclusions. Contrary to Plaintiff's characterizations, Dr. Lisby has not opined that "every nude image on the internet is newsworthy" or that "because there are other nude photographs in the world, therefore, all such photographs are newsworthy." (Pl. Br. at 6 & 12.) He does not conclude that the Benoit article and images published by LFP are newsworthy "because some celebrity has posed nude on the cover of *Time Magazine*." (*Id*. at 8-9.) He does not suggest that the entertainment news media industry standard of newsworthiness is "anything goes," *id*. at 12, or that public interest in nudity, alone, "transform[s] all nude photographs into legal, newsworthy images." (*Id*. at 13.) Nor does Dr. Lisby argue, as Plaintiff contends, "that any nude, suggestive, or compromising picture of any celebrity, no matter how it is

obtained, is newsworthy and therefore may be published by any media outlet with impunity." (*Id*. at 17.) Indeed, an accurate description of Dr. Lisby's far narrower conclusions, *see supra* Section II, is nowhere to be found in Plaintiff's brief.

B. Plaintiff's Mischaracterizations Of The Factual Record

Plaintiff takes similar liberties with her references to the facts of record. For example, despite that Dr. Lisby's Report includes more than 150 pages of sourced and verified data, almost all of which was obtained from mainstream entertainment media outlets, Plaintiff nakedly contends that "[t]he basis provided by Dr. Lisby in his Report to support his conclusions consists entirely of non-verifiable sources," and that all such "data . . . were either published with permission or were taken from porn sites of unknown origin." (Pl. Br. at 7 & 9, emphasis added.)[1] There is no basis whatsoever for these assertions, in the record or otherwise.[2]

[1] *See also* Pl. Br. at 15, where Plaintiff again argues, with no basis in fact, that the data in Dr. Lisby's Report "are a collection of wide-ranging images that were either: (1) taken in the public arena; (2) taken in professional photo shoots; or (3) the subject was compensated for the use of the image."

[2] Notably, although she was entitled to do so, Plaintiff did not depose Dr. Lisby regarding his work and proffered opinions and made no effort to validate any of her assertions about the data he collected.

Plaintiff also repeatedly mischaracterizes disputed issues of fact or facts never proven as "conclusively established," *see* Pl. Br. at 9 & 15-16;[3] and she simply ignores undisputed facts where convenient to support inflammatory, if inaccurate, argument, *see* Pl. Br. at 14 ("Millions of issues of the March 2008 edition of *Hustler* Magazine . . . were sold worldwide.") (emphasis added).[4]

C. Plaintiff's Misstatements Of Law

Plaintiff's challenges to Dr. Lisby's testimony are also founded on multiple incorrect conclusions of law.

First, Plaintiff repeatedly misconstrues the Eleventh Circuit's Rule 12(b)(6) decision as "conclusively" deciding the merits of LFP's "newsworthy" defense; but LFP's constitutional due process rights do not permit Plaintiff's construction. (*See, e.g.*, Defendant's Brief in Support of Motion for Summary Judgment ("Def. MSJ Br."), D.I. 124-1 at 13-15 & n.2; *see also* Order, D.I. 76, at 4.)

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[3] *Compare* Pl. Br. at 9 ("[Ms. Benoit] did not give her consent for [the] images to ever be produced" and "she believed that [the] images were destroyed") *and* Pl. Br. at 15-16 (same) *with* LFP Facts ¶¶ 22, 24-25 (photographers were never requested by Ms. Benoit or anyone else to destroy the images).

[4] Documents produced by LFP to Plaintiff in discovery showed that only 110,445 issues of the March 2008 issue of *Hustler* Magazine were sold worldwide. (*See* Tab A hereto.)

Second, while Plaintiff frequently invokes the maxim that "newsworthiness" is a question of law, she ignores that the inquiry is, by constitutional imperative, a "fact-intensive" one, the purpose of which is to protect the press from "possible First Amendment interferences," and not to supplant the jury's role where the question is a close one. Def. MSJ Br. at 15-17 & n. 3&4; *see also Gilbert v. Medical Economics Co*., 665 F.2d 305, 309 n.1 (10th Cir. 1981) ("When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at (the summary judgment stage) of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. … Requiring defendants to undergo a trial in this case would unnecessarily chill the exercise of their first amendment right to publish newsworthy information.") (cits. omitted); *Virgil v. Time, Inc*., 527 F.2d 1122, 1130 & n.13 (9th Cir. 1975) (dispute about "newsworthiness" a jury question because "a determination founded on community mores must be largely resolved by a jury subject to close judicial scrutiny to ensure that the jury resolutions comport with First Amendment principles").[5]

[5] In any event, the Court is the decision-maker on summary judgment, and compelled to make the newsworthiness inquiry on a fully-developed, and contextual, factual record, which Dr. Lisby's testimony helps to complete.

Third, Plaintiff is incorrect, Pl. Br. at 4, that "[n]o amount of expert testimony is relevant to a determination of law." By its express terms, Rule 704 permits expert opinion testimony on "an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a); *see also Haney v. Mizell Memorial Hosp*., 744 F.2d 1467, 1473 (11th Cir. 1984) (adoption of Rule 704 "abolished the so-called 'ultimate issue rule' which proscribed opinion testimony that ostensibly invaded the province of the jury"); *Plantation Pipeline Co. v. Continental Gas. Co*., 2008 WL 4737163 at *7 (N.D. Ga. 2008) ("As a general matter, the Federal Rules of Evidence favor the use of expert testimony . . . Rule 704 states that 'testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.") (Hunt, Jr., J.).

Fourth, contrary to Plaintiff's assertions, Pl. Br. 6-7 & 9-10, Rule 702 and *Daubert* do not require that Dr. Lisby's "technique" be "peer reviewed" or "generally accepted in the scientific community" to be admissible.[6] Rule 702

[6] "[T]he objective of [the Court's gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (emphasis added).

accommodates a universe of expert opinions which are not "methodology-based", but properly "experience-based."[7] One such subject ripe for experience-based expert testimony is a particular industry's standards and customs, and whether a party's conduct is consistent with such standards. *See, e.g., U.S. v. Frazier*, 387 F.3d 1244, 1297-98 (11th Cir. 2004) ("experts on industry customs and practices . . . are often permitted to derive their conclusions [from experience-based observations]") (citing *Kumho Tire*); *see also Long v. Amada Mfg. America, Inc*., 2004 WL 5492705 at *14 (N.D. Ga. 2004) ("under Georgia law, '[e]xpert testimony as to the practices of an industry is admissible'") (cit. omitted) (Cooper, J.); *Primavera Familienstiftung v. Akin*, 130 F. Supp.2d 450, 529 (S.D.N.Y. 2001) ("proper for an expert to testify as to the customs and standards of an industry, and to opine as to how a party's conduct measured up against such standards"). Here, Dr. Lisby's conclusions regarding media standards for entertainment news reporting are "based on his extensive [and directly relevant] education, research,

[7] To this point, the Advisory Committee Note to the 2000 Amendments states: "Some types of expert testimony will not rely on anything like a scientific method . . . Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."

and experience," an entirely appropriate basis for admissibility under Rule 702. *American General Life Ins. Co. v. Schoenthal Family, LLC*, 248 F.R.D. 298, 313 (N.D. Ga. 2008) (admitting experience-based expert testimony regarding "industry practice in the life insurance field") (Duffy, J.).

Finally, Plaintiff's assertion, Pl. Br. at 7, that "hearsay" data relied upon by an expert "is inadmissible at trial and cannot form the basis for an expert report or opinion" is also wrong. Expert opinions are almost always based on facts or data made known to the expert outside of the presence of the fact-finder; thus, Rule 703 expressly provides that such "facts or data need not be admissible in evidence in order for the opinion or inference [drawn from such data] to be admitted." Fed. R. Evid. 703; *see also U.S. v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) ("Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion … even though his opinion is based in part or solely upon hearsay sources.").[8]

[8] As the Fifth Circuit explained in *Williams*, "[t]he rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness

IV. Argument

A. Dr. Lisby's "Technique" Clearly Meets The Reliability Requirements Of Rule 702

Plaintiff claims that "[i]n this case, Dr. Lisby's Report is simply a subjective, conclusory opinion that cannot be assessed for reliability" because it "is simply an 'assumption' and is not based upon any objective facts, data, or analysis." (Pl. Br. at 7-8.) Given the substantial data gathered and relied upon by Dr. Lisby in support of his opinions (all of which was attached to his Report), and given the stark difference in the level of objectivity of and research performed by Plaintiff's own proposed expert, this argument is misplaced.

Unlike Plaintiff's proffered expert, here, Dr. Lisby actually did the leg work required to gather the data from which his conclusions are drawn. (*See* LFP Brief in Support of Motion *In Limine* to Exclude The Report and Opinion Testimony of Dr. Nair-Reichert, D.I. 125-1 at 5-13 [under seal].) He identified the relevant media outlets operating in entertainment/celebrity news at the time the Benoit images were published by LFP; and he surveyed and gathered content from those outlets by commissioning print archive and internet searches. (Report at 13-18.)

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has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *Williams*, 447 F.2d at 1290.

His "technique" produced only "objective data": there is no dispute that the information about, and images of, celebrity activities collected through Dr. Lisby's research were actually published by reputable and well-known entertainment/celebrity news outlets between 2003 and early 2008, *id*. at Tab B; nor does Plaintiff suggest (nor could she) that Dr. Lisby's research was somehow incomplete, or that it insufficiently captured the representative, relevant content of the various entertainment/celebrity media outlets during that period of time.

Moreover, even though there is no fixed legal requirement that Dr. Lisby's "technique" be "tested [or] challenged in any objective sense," Pl. Br. at 9, for it to be admissible under Rule 702, Dr. Lisby's research is easily replicated: each and every image and article gathered is indexed by source, and virtually all of them also by date, and Plaintiff remains free to retrace Dr. Lisby's thoroughly documented steps, Report at 12-20, if she is inclined to do so.

Finally, there is no merit to Plaintiff's suggestion, Pl. Br. at 5, that Dr. Lisby's opinions are unreliable because he lacks "any specialized knowledge" to support his conclusions. Dr. Lisby's entire career is characterized by his news media experience; and he has supplemented his extensive professional and academic media expertise with a law degree, which he has used to study and teach about the legal standards applicable to the media, including the concept of

"newsworthiness". (Report at 2-3 & Tab A thereto.) Thus, the nexus between Dr. Lisby's particular expertise and experience and the conclusions he has drawn in this case about entertainment news standards could not be clearer; indeed, it is difficult to imagine a more qualified expert for the task than he.[9]

In short, Plaintiff's efforts to mischaracterize Dr. Lisby's "technique" and conclusions notwithstanding, his efforts clearly produced objectively verifiable data from which he is specially qualified to draw inferences and conclusions. Dr. Lisby's "technique" and his resulting opinions are thus clearly sufficiently reliable for purpose of admissibility under Rule 702. Accordingly, Plaintiff's motion should be denied.

B. Dr. Lisby's Proffered Testimony Will Assist The Trier Of Fact

Plaintiff also mistakenly argues, Pl. Br. at 4, that "[t]here is nothing in Dr. Lisby's Report that could assist a trier of fact to establish the newsworthiness of

[9] Notably, Plaintiff does not challenge and even concedes, Pl. Br. at 13, that Dr. Lisby's research proves there was substantial public interest in entertainment news stories describing celebrities' nude antics at the time of the *Hustler* Magazine publication at issue -- the very definition of the "newsworthiness" standard. *See, e.g., Waters v. Fleetwood*, 212 Ga. 161, 167, 91 S.E.2d 344, 348 (1956) (defining "newsworthy" as, *inter alia*, "a matter of public interest"). Instead, she argues, *id*., that the fact-finder must ignore this evidence because it conflicts with the Eleventh Circuit's Rule 12(b)(6) opinion which, as described above and as a matter of law, can have no such preclusive effect.

the images" because the Eleventh Circuit has already ruled on this issue.[10] The issue of "newsworthiness" is fact-dependent; and whether it this Court on summary judgment, or the jury at trial, Dr. Lisby's testimony will aid the fact-finder by providing the important factual context demanded by the Constitution to be considered when making that determination. *Connick v. Myers*, 461 U.S. 138, 147-148 & n.7, 103 S. Ct. 1684, 1690 & n.7 (1983) ("the content, form, and context of a given statement, as revealed by the whole record" must be examined to determine whether speech is constitutionally-protected) (emphasis added); *see also Toffoloni v. LFP Publishing Group, LLC, et al.*, 572 F.3d 1201, 1208 (11th Cir. 2009) *cert. denied*, 130 S. Ct. 1689 (2010) ("fact-intensive balancing test"). Further, as explained *supra* Section III.C, expert testimony on the industry standards which frame the determination of such an "ultimate issue" are not only permitted, but encouraged. Fed. R. Evid. 704(a); *Frazier*, 387 F.3d at 1297-98; Long, 2004 WL 5492705 at *14.

Moreover, Dr. Lisby's opinion that the *Hustler* Magazine publishers reasonably believed that the Benoit images were "newsworthy" and their publication constitutionally-protected could not be more directly relevant to

[10] Of course, as we have already briefed, Plaintiff misapprehends the preclusive effect of the Eleventh Circuit's Rule 12(b)(6) opinion. (*See supra* Section III.C *and* Def. MSJ Br. at 13-17.)

Plaintiff's punitive damages claim. The trier of fact is entitled to learn -- and LFP is entitled to present in its defense of that claim -- that the Benoit images were consistent with the type and nature of content routinely consumed by the public as "entertainment news" at the time they were published.

Finally, Plaintiff's argument that Dr. Lisby's opinions are "redundant" and therefore must be stricken under Rule 12(f) ignores settled law that a motion to strike is not the correct procedural mechanism to address admissibility of expert testimony. As this and other courts have made clear, a motion to strike under Fed.R.Civ.P. 12(f) is properly directed only at the pleadings, which do not include expert reports. *Burchfield v. CSX Transp., Inc*., 2009 WL 1405144, at *8 (N.D. Ga. 2009) ("A motion to strike is properly made with respect to pleadings. An affidavit is not a pleading. Therefore, a motion to strike is not appropriate.") (Thrash, J.); *see also U.S. ex rel. Pogue, v. Diabetes Treatment Centers of America, Inc*., 474 F. Supp.2d 75, 80 (D.D.C. 2007) ("Rule 26(a)(2) expert disclosure is neither testimony nor a pleading, and therefore could not properly be stricken under Rule 12(f)."); *Johnson v. Manitowoc Boom Trucks,* Inc., 406 F. Supp. 2d 852, 864 n.10 (M.D. Tenn. 2005) (motion *in limine* is proper avenue for objections to expert testimony: "Motions to strike relate only to 'pleadings,' a term which is narrowly defined by Rule 7(a) of the Federal Rules of Procedure. Statements and exhibits

relating to depositions and affidavits are not within the Rule's definition of pleadings."); *In re Commercial Money Center, Inc., Equipment Lease Litigation*, 2007 WL 1514282, at *3 (N.D. Ohio 2007) (motions to strike are inapplicable to expert reports). Simply put, Rule 12(f) has no bearing on the admissibility of Dr. Lisby's testimony.

In short, given the importance of context and industry standards to the determination of "newsworthiness," *see* Def. MSJ Br. at 10-11 & 15-16, and to the determination whether LFP reasonably believed it was acting lawfully when it published the Benoit images, Plaintiff cannot sincerely dispute that Dr. Lisby's unique and specialized experience and expertise will assist whichever trier of fact is charged with those tasks. LFP respectfully submits that Dr. Lisby's wealth of experience and expertise will be invaluable to the Court or, if necessary, the jury, in making those inquiries necessary to resolve the core issues in this case. Accordingly, Dr. Lisby's testimony is admissible under Rule 702, and Plaintiff's motion should be denied.

V. Conclusion

For all of the foregoing reasons, LFP respectfully requests that the Court deny Plaintiff's motion to strike the testimony of Gregory C. Lisby or, in the alternative, to disqualify him as an expert.

Respectfully submitted this 13th day of August 2010.

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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer
Georgia Bar No. 042537

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing DEFENDANT LFP PUBLISHING GROUP, LLC'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE TESTIMONY OF GREGORY C. LISBY OR, IN THE ALTERNATIVE, TO DISQUALIFY EXPERT via the CM/ECF system which will automatically send notification to Defendants' attorneys of record, who are participants in the CM/ECF system.

This 13th day of August 2010.

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