UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE REPORT AND OPINION TESTIMONY OF DR. USHA NAIR-REICHERT

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit ("Plaintiff"), through counsel, and files this her Response to Defendant's Motion to Exclude the Report and Opinion Testimony of Dr. Usha Nair-Reichert with the Court as follows:

INTRODUCTION

Defendant alleges in its Motion to Exclude the Report and Opinion Testimony of Dr. Usha Nair-Reichert, and Brief in Support thereof (hereinafter Defendant's "Motion" and "Brief" respectively), that Dr. Nair-Reichert's expert report and deposition testimony does not meet the admissibility requirements for expert testimony established by Federal Rule of Evidence 702,[1] and further defined by the cases of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999).

Defendant claims that the data and methodology used by Dr. Nair-Reichert is unreliable, flawed, and based upon Dr. Nair-Reichert's subjective opinions. In her expert report, Dr. Nair-Reichert categorizes the damages in this case under three headings:

(1) the market rate that Defendant would have had to pay Plaintiff for the use of Nancy Benoit's image;

(2) the lost opportunity cost for future use of Nancy Benoit's image by Plaintiff; and

---

[1] Defendant incorrectly cites to Federal Rule of Civil Procedure 702 on page two of its Brief in Support.

(3) the amount of revenue and future revenue gained by Defendant due to its unauthorized and illegal publication of Nancy Benoit's image.

In addition to general objections to Dr. Nair-Reichert's methods and qualifications, which are addressed herein, Defendant specifically alleges that: the comparable transaction used by Dr. Nair-Reichert in her analysis is flawed; lost opportunity costs are not recoverable under Georgia law; and Dr. Nair-Reichert lacks the specialized knowledge in the fields of publishing, professional wrestling, and pornography to form an opinion as to the revenue gained by Defendant through the use of Nancy Benoit's image.

ARGUMENT AND CITATION TO AUTHORITY

A. Legal Standard.

As described in Defendant's Brief, expert testimony should be admitted if:

(1) the expert is competent and qualified to testify regarding the matters that he intends to address;

(2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and

(3) the expert, through scientific, technical or specialized expertise, provides testimony that assists the trier of fact to understand the evidence or determine a fact in issue.

Defendant's Brief, p. 14 (citing *Siharath v. Sandoz Pharmaceuticals Corp.*, 131 F. Supp.2d 1347, 1351 (N.D. Ga. 2001).

In this case, Dr. Nair-Reichert prepared a report and testified as to the value gained by Defendant from the publication of unauthorized, one-of-a-kind, nude images of Nancy Benoit. Dr. Nair-Reichert has an extensive background and expertise in the field of economics, and is certainly "competent and qualified" to testify about the economic impact that the publication of these images had on the profitability of Defendant and the opportunity costs taken from Plaintiff.

Dr. Nair Reichert utilized standard, basic, accepted economic principals in performing her analysis of the specialized damages evaluation for this case, such as: "scarcity," "uniqueness of the pictures," and "the monopsony buyer." *See* Deposition of Usha Nair-Reichert dated June 28, 2010, p. 20.

The defects alleged by the Defendant of Dr. Nair-Reichert's research background (i.e., her inexperience in the field of pornography and professional wrestling) go to the weight and credibility of her testimony, not to whether she is competent to prepare an economic report calculating the potential value of a scarce resource gained by Defendant through the unauthorized publication and dissemination of that resource.

"Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion … goes to the weight and credibility of the testimony, not its admissibility." *Woodland Partners Ltd. Partnership v. Department of Transp.*, 286 Ga. App. 546, 548, 650 S.E.2d 277 (2007).

In *Woodland*, a condemnation case, an expert witness for the Georgia Department of Transportation testified as to the value of the plaintiff's property. In doing so, the witness, a real estate appraiser specializing in commercial properties, opined that a mining permit encumbering the property significantly devalued the land, because of the difficulty of having the permit released by the Georgia Environmental Protection Division. The plaintiff claimed that the expert's statement was outside of the witness's expertise, because the witness did not know that such a permit devalued the property or that it would be difficult to have such a permit released. The plaintiff/condemnee, therefore, argued that the statement should not have been admitted.

In ruling that the witness's opinion was properly admitted, the court found that the witness's

> experience and study authorized the trial court to admit [the witness's] opinion of just and adequate compensation. And as [the witness]

> explained, his opinion of such was influenced by the mining permit he believed encumbered the property. Under these circumstances, Woodland's argument goes to the weight and credibility of [the witness'] testimony, rather than its admissibility. No abuse of discretion by the trial court has been shown.

Id at 548. *See also Georgia Dept. of Transp. v. Miller*, 300 Ga. App. 857, 686 S.E.2d 455 (2009).

> [I]f the expert's opinion was based upon inadequate knowledge, this does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. If it be developed that the opinion is based on inadequate knowledge, this goes to the credibility of the witness rather than to the admissibility of the evidence. … [T]he appropriate standard for assessing the admissibility of the opinion of [an] expert is not whether it is speculative or conjectural to some degree, but whether it is wholly so.

Miller supra, at 861-862 (internal citations omitted).

Defendants were free to hire their own expert during discovery to rebut the findings of Dr. Nair-Reichert, but refused to do so. Instead of going to the trouble and expense of hiring its own expert to challenge the findings of Dr. Nair-Reichert and present its own evaluation of damages, Defendant instead attempts to have Dr. Nair-Reichert's report and testimony excluded by the Court. Defendant's arguments, however, only go to the credibility of Dr. Nair-Reichert's report and testimony, and not to admissibility. As such, Dr. Nair-Reichert's report and testimony should not be excluded, but should be considered by this Court and the jury, if necessary.

B. Defendant's General Objections.

A. Reliability of Data.

Defendant states several times throughout its Brief that Dr. Nair-Reichert's report and testimony should be excluded based upon her failure to use objective and reliable data in forming her opinions. *See* Defendant's Brief pp. 2, 20, 24. Here, Dr. Nair-Reichert reviewed materials relevant to the inquiry about the appropriate amount of damages in this case; Dr. Nair-Reichert's conclusions are based directly from the documents produced by Defendant in its responses to discovery requests or from witnesses' sworn deposition testimony. *See* Nair-Reichert Deposition, p. 17.

Dr. Nair-Reichert used this data and applied her considerable expertise in the field of economics (*see* Curriculum Vitae of Usha Nair-Reichert, Ph.D. attached hereto as Exhibit A for the Court's convenience) to prepare a report to assist a potential trier of fact in determining the proper damages owed to the Plaintiff for the unauthorized publication of nude images of Nancy Benoit. Defendant cannot produce information through discovery, and then claim that the information is unreliable or incomplete when utilized by Plaintiff's expert. If Defendant answered truthfully, fully, and accurately to Plaintiff's discovery requests, then the foundation of Dr. Nair-Reichert's report is sound.

2. Methodology.

Despite Defendant's arguments to the contrary, the calculation of damages in a right of publicity case is not an exact science capable of absolute certainty. There are no commonly available and accepted methodologies to calculate with certainty the unjust enrichment of a defendant when an individual's likeness is used for commercial gain without that individual's permission, especially when used in a publication with pictures of other models.

In preparation for her report, Dr. Nair-Reichert researched to find a methodology that would apply to the exact factual circumstances in this case. Because of the uniqueness of the facts in this case, she was unable to find an example of an economic damages calculation based upon the unauthorized publication of nude photos of a murdered former wrestling star in a pornographic magazine. Because there was no direct analogous situation in the published literature, Dr. Nair-Reichert applied known principles of microeconomics to the facts of this case to perform her calculation.

A: when we initially took up the case, yes, we tried to look for other papers that would give us some insights into this particular case.

Q: And where did you look?

A: I looked through various databases, academic databases.

Q: And you were unable to find information which educated you about the methods used to value the right of publicity by experts in other cases, correct?

A: That we could use for this particular case, yes.

See Nair-Reichert Deposition, p. 79.

Though Defendant criticizes Dr. Nair-Reichert for allegedly failing to utilize a universally accepted methodology to perform a calculation of the value of damages sustained by Plaintiff for the unauthorized publication of nude photos of a murdered former wrestling star in a pornographic magazine, Defendant has failed to identify any such methodology in its Motion, Brief, or any other document. Defendant had the opportunity to hire an expert of its own to present such a methodology, but has failed to do so, because no such exact methodology exists. On the face of its Motion, Defendant totally failed to show how specialized knowledge of wresting and pornography is required for the expert to be able to render an opinion.

The only way to calculate damages to the degree of certainty demanded by Defendant in its Brief would be to require Plaintiff to interview every single purchaser of the March 2008 issue of *Hustler Magazine*.

To meet the Defendant's standard for an expert in this case, Plaintiff would be required to determine: the exact number of people who purchased the March 2008

issue of *Hustler Magazine* due solely to the nude pictures of Nancy Benoit; the exact number of those who purchased the March 2008 issue of *Hustler Magazine* only in part because of the nude images of Nancy Benoit (and if so, the percentage of their motivation); and the exact number of those who purchased issues of *Hustler Magazine* after the March 2008 issue, or continued their subscription for the magazine, due at least in part to the nude pictures of Nancy Benoit. These determinations are not possible or even feasible.

It is established Georgia law that, where the acts of the defendant make the calculation of damages difficult or impossible for plaintiff to ascertain, it is the defendant's burden to rebut plaintiff. *See* *Dering v. Service Experts Alliance LLC*, 2007 WL 4299968, 69 Fed. R. Serv. 3d 939 (N.D. Ga. 2007). In *Dering*, a case very similar to the case at bar, the court refused to exclude plaintiff's experts' testimony of unjust enrichment based on the defendant's allegations that the data used by plaintiff's expert, and supplied by defendant in discovery, was unreliable.

The court found that,

> [i]f Plaintiffs' expert has failed to make calculations with the highest precision, then the blame clearly lies with Defendants. Their failure to keep records and their reluctance to provide Plaintiffs with relevant information made a perfectly precise calculation of damages impossible. Defendants cannot now complain that this supposed deficiency renders [the expert's] calculations inadmissible.

Id. at 7. *See also* *Burger King Corp. v. Mason*, 710 F.2d 1480, 1493 (11th Cir. 1983). "[A] wrongdoer cannot escape liability simply because the harm he caused is difficult to value," *Broan Mfg. Co., Inc. v. Associated Distributors, Inc.*, 923 F.2d 1232, 1236 (6th Cir. 1991) "the plaintiff is held to a lower burden of proof in ascertaining the exact amount of damages because, '[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'" (citing *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265, 66 S. Ct. 574 (1946)).

In this case, there simply is no way to determine the exact reasons why an individual purchased the March 2008 edition of *Hustler Magazine*. Furthermore, Defendant repeatedly labels the data used by Plaintiff's expert to be unreliable, when that very data was produced by Defendant in discovery. Though Plaintiff's expert has prepared a complete and credible report on the estimated damages in this case, Plaintiff is not required by law to produce an exact amount of damages in this case. The Plaintiff is not required to read the minds of hundreds of thousands of purchasers of *Hustler Magazine*.

In discovery, Plaintiff requested that Defendant ascertain the total amount of money Defendant earned as the result of its illegal and unauthorized use of Nancy

Benoit's images. Rather than attributing an amount earned from use of Nancy Benoit's images, in its response, Defendant chose to refer Plaintiff to financial data evidencing Defendant's "worldwide sales" of the March 2008 edition, which contained Nancy Benoit's images. *See* Defendant's Responses to Plaintiff's First Interrogatories attached hereto as Exhibit A; *see also* Exhibit A to the Affidavit of Richard P. Decker filed contemporaneously herewith. Thus, the logical starting point of Dr. Nair-Reichert's analysis was to begin with Defendant's own data showing its gain from "worldwide sales" of Nancy Benoit's images.

> The rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, where proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted.

Gaskins v. Hand, 219 Ga. App. 823, 825, 466 S.E.2d 688 (1996) (citing *Johnston v. Lyon*, 173 Ga. App. 524, 327 S.E.2d 519 (1985).

Despite these maxims of law, Defendant faults Dr. Nair-Reichert for failing to consider "every piece of information in the universe" in preparing her report.

> Q: So, if I understand your testimony, you're not testifying that you had every piece of information in the universe that might have been available for you to review that could be relevant to your opinions, but based on the information that was made available to

you, you made your best effort to come up with a reasonable and reliable judgment about the economic damages?

A: Yes.

See Nair-Reichert Deposition, p. 24.

Defendant's artificially heightened standard is not required under either Rule 702, *Daubert*, or any other statutory or case law. Dr. Nair-Reichert used a reliable methodology based upon sound economic principals, of which she is an expert, to perform her calculations in this unique case. She utilized the very information obtained directly from Defendant about revenues received by Defendant as a foundation for her report. As such, her report and testimony should not be excluded.

3. Misstatements in Defendant's Brief.

In addition, Defendant makes several statements in its Brief that are simply incorrect and clearly have been manipulated when viewed in light of Dr. Nair-Reichert's report and full deposition testimony. For example, Defendant incorrectly states in its Brief that "Dr. Nair-Reichert made no effort to account for Hustler Magazine revenue lines that could not possibly be attributable to the publication of the Benoit Images, including trademark royalties …" *See* Defendant's Brief p. 8, fn. 3. In fact, Dr. Nair-Reichert specifically accounted for such trademark royalties in her

calculations. *See* Nair-Reichert Deposition, pp. 161-162. Defendant cannot claim that Dr. Nair-Reichert did not consider such revenue streams at all in her analysis.

In addition, Defendant is also incorrect when it states that Dr. Nair-Reichert was ignorant "regarding magazine publishing schedules." *See* Defendant's Brief p. 9, fn. 4. In fact, Dr. Nair-Reichert knew as much about the release of the March 2008 issue as those who work directly for Defendant. (*See* Deposition of Larry Flynt dated April 13, 2010, pp. 16 and 17). Dr. Nair-Reichert knew that the March 2008 issue of *Hustler Magazine* was actually released for sale in January of 2008.

> Q: Do you know when Hustler publishes the March issue of Hustler magazine every year?
>
> A: They send it out to the market in January, but they were not clear in their deposition when exactly it hit the market in different places.

See Nair-Reichert Deposition p. 147.

In fact, Defendant cannot provide a more accurate statement in its Brief of the date when the March 2008 issue of *Hustler Magazine* went on sale, claiming that it was "early January," which encompasses a potential two-week period. *See* Defendant's Brief p. 9, fn. 4. Accordingly, Dr. Nair-Reichert is as knowledgeable as

anyone else, including the Defendant, as to the sale date of the March 2008 issue of *Hustler Magazine*.[2]

Defendant also incorrectly states that Dr. Nair-Reichert "performed no independent research or inquiry whatsoever," (Defendant's Brief, p. 19) in preparation for her report. Dr. Nair-Reichert's deposition testimony clearly proves, however, that this statement is false, as Plaintiff's expert performed numerous hours of independent research, including research on methodologies used in similar cases, if any. *See* Nair-Reichert Deposition, pp. 79, 123-127. As explained above, this research did not reveal a substantially similar case. Because these searches did not factor into the conclusions reached in her report, Dr. Nair-Reichert did not include them in her report. To say that Plaintiff's expert performed no independent research or inquiry is incorrect.

C. Comparable Transactions.

One of the most accepted, trusted, and prevalent methodologies available for determining the value of a hypothetical transaction, in this case, the payment of Nancy Benoit or her estate for use of her image, is through the use of similar or comparable

---

[2] It is unclear if in fact such knowledge has any relevance in this case at all, which Defendant has not shown.

transactions. Because *Hustler Magazine* is a notorious and somewhat unique magazine, a comparable transaction must have taken place within the same magazine and within a recent time period. In addition, the model in a similar transaction would have to be someone of some fame or notoriety who had not previously had nude pictures published.

> A: The best way to determine what the value would be for this transaction would have been to allow the marketplace to determine the price. The fact that Hustler published these images without the approval of the estate foreclosed the opportunity for the estate to let the market determine the price. So Hustler in a sense became a monopsony buyer, a sole buyer in a private transaction, and then it was a monopsony seller of that image published for the very first time. So the best method of determining the price then was not available. And so in determining a comparable transaction the comparability was on the basis of somebody who had some degree of celebrity factor or newsworthiness or news -- or who was in the news.

See Nair-Reichert Deposition, pp. 88-89.

In analyzing these factors, Dr. Nair-Reichert, reviewed that the case of Wendy Cortez, a prostitute who gained sudden notoriety for her association with Louisiana United States Senator David Vitter. This case was determined to be the most similar transaction that could be found in recent years. Dr. Nair- Reichert identified several important similarities between the circumstances involving Ms. Cortez's situation and the hypothetical situation involving the images of Nancy Benoit, including the

uniqueness of the pictures and the sudden fame or notoriety experienced by both women. *See* Nair-Reichert Deposition, pp. 93-97, 110-116.

Dr. Nair-Reichert explained in detail why the comparison to Ms. Cortez's situation was more analogous to this case than other transactions, such as the one involving Carmen Elektra discussed in Defendant's Brief (Defendant's Brief p. 10, fn. 6 and p. 11, fn. 7).

> A: I want to go back and explain our analysis in terms of why we did not include Carmen Electra. One of the major reasons was that Carmen Electra's pictures were already published and available. Wendy Cortez came to the limelight because of her relationship with Senator Vitter. And so this was a unique set of nude -- in that sense was the first onset of nude photographs or more unique set of nude photographs. And so since these unique nude photographs of Ms. Benoit were one of a kind we thought that that was a more comparable transaction than the transaction for Ms. Electra.

See Nair-Reichert Deposition, pp. 106-107.

Defendant also takes issue with Dr. Nair-Reichert's evaluation and determination of the relative popularity of Ms. Cortez and Nancy Benoit. *See* Defendant's Brief pp. 9-12. Dr. Nair-Reichert performed Google searches on both parties to determine relative popularity, as well as reviewed the deposition testimony of Defendant's employees who testified as to Nancy Benoit's popularity among its readers. *See* Deposition of Mark Johnson dated April 13, 2010, pp. 10-11. Based

upon this information, Dr. Nair-Reichert determined that Nancy Benoit was 4 to 5 times more popular than Ms. Cortez, and thus, her images would be 4 to 5 times more valuable.

> A: Mark Johnson's testimony says that millions of Hustler readers would be interested. Donna Hahner says that after she got the letter to desist that they did not include her pictures in the Best of Hustler. So there are many indications that Ms. Benoit is a popular figure.
> ....
> The large number of Google hits was an indication that she -- news about her is extremely widespread on the internet. And that to me is a measure of the interest that the public has in this particular case.

See Nair-Reichert Deposition, pp. 46-47.

Evaluating the popularity of one figure over another is not an exact science capable of objective methodologies; Google searches of such individuals qualify as one of the most effective and accurate means of determining relative popularity in today's society. Though Defendant criticizes Dr. Nair-Reichert's methodology, Defendant has yet to produce a more accepted methodology that could have been used by Plaintiff's expert to determine popularity. Defendant had the opportunity to employ an expert of its own to rebut Dr. Nair-Reichert's findings related to comparable transactions and the relative popularity of Nancy Benoit, but has failed to do so. As such, Defendant cannot collaterally attack the weight and credibility of

Dr. Nair-Reichert's report by seeking to exclude it altogether. *See Woodland Partners Ltd. Partnership v. Department of Transp.*, 286 Ga. App. 546, 548, 650 S.E.2d 277 (2007).

Finally, Defendant criticizes Dr. Nair-Reichert's lack of knowledge regarding Nancy Benoit's wrestling contracts, tax returns, net worth, and other financial information. Defendant's Brief, p. 11, fn. 8. This information is wholly irrelevant to Nancy Benoit's relative popularity to Ms. Cortez, and is irrelevant to the calculation of value gained by Defendant by illegally publishing her image. Net worth of an individual does not translate to popularity. As such, Defendant has not shown sufficient cause as to why Dr. Nair-Reichert's report and testimony should be excluded.

D. No Recovery for Lost Opportunity.

Defendant also claims in its Motion and Brief that Dr. Nair-Reichert improperly includes in her damages calculation the lost opportunity costs sustained by Plaintiff, should Plaintiff choose to capitalize on Nancy Benoit's life and career. Dr. Nair-Reichert uses as an example of such an opportunity that was lost to Plaintiff through the actions of Defendant: a tribute DVD detailing the life and career of Nancy Benoit.

Because "the right of publicity is a 'proprietary' right, 'the measure of damages is the value of the use of the appropriated publicity.'" *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1206 (11th Cir. 2009) quoting *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 296 S.E.2d 697, at 703 (1982). The "use of the appropriated publicity" is not clearly defined, as Defendant would have the Court believe.

The unjust enrichment of the Defendant is an accepted component of the damages in a right of publicity case; however the Defendant claims that the measure of damages in a right of publicity case is *strictly limited* to the gain realized by the defendant. The relevant case law holds that the appropriate measure of damages is not limited as the Defendant asserts.

> One commentator has summarized the difference between the right of publicity and the commercial-appropriation prong of the right of privacy this way:
>
> The appropriation type of invasion of privacy, like all privacy rights, centers on damage to human dignity. Damages are usually measured by "mental distress"-some bruising of the human psyche. On the other hand, **the right of publicity relates to commercial damage to the business value of human identity.** Put simplistically, while infringement of **the right of publicity looks to an injury to the pocketbook**, [an invasion of appropriation privacy looks to an injury to the psyche.]

Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1446-1447 (11th Cir. 1998) (emphasis added) (citations omitted).

Dr. Nair-Reichert does not include in her report or testimony any calculation for bruising or injury to the psyche of Plaintiff, although Maureen Toffoloni was no doubt injured when images of her deceased daughter appeared in *Hustler Magazine*. *See* Nair-Reichert Deposition, p. 59. Instead, the damages calculated by Dr. Nair-Reichert deal exclusively with:

(a) the amount Nancy Benoit or her Estate would have been paid for the photographs had Defendant paid for such images as the law requires;

(b) the economic loss sustained by Nancy Benoit or her Estate in the loss of the Estate to control the selective commercial use of Nancy's image; and

(c) the total amount gained by Defendant through the use of the images in question.

Defendant also claims that, because Plaintiff has stated in deposition testimony that she had no intention of exploiting her daughter's image, the idea of damages from a tribute DVD sale, or any future use of Nancy Benoit's image, is not compensable. *See* Defendant's Brief p. 23.

Whether Plaintiff Maureen Toffoloni would choose to produce and distribute a tribute DVD honoring Nancy Benoit's life, whether for her own profit or for the benefit of charitable causes, is irrelevant, as the *choice* has already been made for Plaintiff by Defendant's actions. Plaintiff is unable to produce any such tribute due to the "commercial damage to the business value" of Nancy Benoit's identity. *Allison v. Vintage Sports Plaques*, 136 F.3d at 1447. Again, Defendant could have chosen to hire its own expert to rebut the opinion of Dr. Nair-Reichert in this regard, but failed to do so.

Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966), cited by Defendant to hold that recovery is limited only to the unjust enrichment of the defendant, leaves the door open for recovery of damages to plaintiff's commercial interest, as contemplated by *Allison*, *supra*. "Recovery … is measured by the unjust enrichment of the defendant and not by the injury to plaintiff's feelings or reputation (and we assume, **but do not decide**, to plaintiff's own commercial interests)." *Cabaniss* at 381 (emphasis added).

Dr. Nair-Reichert's report does not include injury to the feelings or reputation of Plaintiff in its calculation, though certainly such injury has occurred. Instead, the report is an evaluation of the "commercial damage to the business value of human

identity," as well as the gain realized by Defendant through the publication of the images. *Id*. at 1447. As such, her report should properly be admitted.

E. Revenue Gained by Defendant.

Finally, Defendant claims that Plaintiff's expert lacked a verifiable methodology in calculating the revenues gained by Defendant through the unauthorized publication of Nancy Benoit's image, and that Dr. Nair-Reichert's lack of experience in magazine publishing, professional wrestling, and pornography make her unqualified to render such an opinion.

As stated above, and as amply demonstrated in her curriculum vitae, Dr. Nair-Reichert's extensive background is in the field of economics. Dr. Nair-Reichert's report is an economic report. Regardless of the industry, the theories of supply, demand, scarcity, monopoly and monopsony, remain the same. In determining the potential revenue gained by Defendant through the unauthorized publication of the images of Nancy Benoit, Dr. Nair-Reichert utilized the financial information provided by the Defendant and well accepted economic methodology: the association between the content on the cover of the magazine and the profitability of that content. Dr. Nair-Reichert rightly concludes that the more profitable specific content is to the magazine, the greater the space that will be made available to it on the cover.

> Q: And how did you derive on the 2 percent of net revenues or 2 percent of Hustler's net operating contribution as an appropriate measure of the value that the publication of the Benoit images had to Hustler?
>
> A: We looked at the cover pages and we looked at the size of the blurbs in relation to the entire size of the cover page and we came up with somewhere in the range of 2.9 to 3.9 percent. And so we decided to take the conservative approach and go with 2 percent.

See Nair-Reichert Deposition, p. 139.

Dr. Nair-Reichert's estimate of 2% was conservative, as the Canadian version of the March 2008 issue devoted 6% of its cover to the images of Nancy Benoit. *See* Nair-Reichert Deposition, p. 141.

As discussed above, the nature of Defendant's business and violation of the right of publicity creates difficulty in determining with precise accuracy the value gained by Defendant from its misconduct. As such, it is Defendant's burden to rebut Plaintiff's expert's calculation of damages, either through cross-examination or the use of its own expert witness. Defendant could have gone to the trouble and expense of hiring its own expert to illustrate what Defendant claims is the proper methodology for such calculation; however, Defendant refused to do so. Defendant now seeks to attack issues that relate to the weight and credibility of Plaintiff's expert's testimony, and not the admissibility. *See* *Woodland*. Because Plaintiff's expert used a reliable

and quantifiable method for calculating revenues gained by Defendant through its publication of the Nancy Benoit images, Dr. Nair-Reichert's report and testimony should not be excluded.

CONCLUSION

Though Defendant criticizes the data and methodology used by Dr. Nair-Reichert in her report, Defendant has not, and cannot, identify a more reliable methodology for use in this very unique and difficult case. Because the issues presented by Defendant in its Motion and Brief relate to the weight and credibility of Dr. Nair-Reichert's testimony, and not its admissibility, Plaintiff's expert's report and testimony should not be excluded, but should be allowed to stand to assist the trier of fact in this case.

Respectfully submitted August 16, 2010.

/s/ Richard P. Decker

RICHARD P. DECKER
State Bar of Georgia #215600
F. EDWIN HALLMAN, JR.
State Bar of Georgia #319800

For HALLMAN & WINGATE, LLC
Attorneys for Plaintiff

166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060
(404) 588-2530

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that on August 16, 2010, I have electronically filed the foregoing Response to Defendant's Motion *in Limine* to Exclude The Report and Opinion Testimony of Dr. Usha Nair-Reichert with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
S. Derek Bauer, Esq.

Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
Lipsitz, Green, Scime, Cambria, LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202

/s/ Richard P. Decker
RICHARD P. DECKER
State Bar of Georgia #215600

For HALLMAN & WINGATE, LLC
Attorneys for Plaintiff

166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060
(404) 588-2530