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

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

Defendant LFP Publishing Group LLC, d/b/a *Hustler* Magazine ("LFP") respectfully submits this memorandum in support of its Motion *In Limine* to Exclude the Testimony of Dr. Usha Nair-Reichert.

I. Introduction

In its motion to exclude the testimony of Plaintiff's proffered expert, LFP showed that Dr. Nair-Reichert did not perform a reliable analysis of the facts and issues in this case, but instead offers opinions based largely on her subjective views; that her opinions include factors for which the law prohibits recovery; and that she lacks specialized knowledge or training in the fields she speculates about

in her report, and thus her academic experience, alone, is an insufficient basis to demonstrate her opinions about those fields are reliable.

In her response, Plaintiff does not materially dispute these facts. Indeed, she makes no effort to carry her burden to show the proposed testimony meets the admissibility requirements of Federal Rule of Evidence 702, but instead argues that burden should be shifted to LFP because it has not identified a more reliable method than that used by Dr. Nair-Reichert to measure Plaintiff's alleged damages in this case, and because Dr. Nair-Reichert based her opinions, in part, on information provided by LFP in discovery. Therefore, Plaintiff's argument goes, because LFP did not provide her expert with the type of information required to conduct a reliable valuation of the alleged damages in this case, or a reliable methodology for doing so, Rule 702 permits Plaintiff to present Dr. Nair-Reichert's opinions to the jury, regardless of whether those opinions are based on relevant experience, sufficient and reliable data, or sound methodology.

There is, of course, no support in the law for Plaintiff's position, which would have this Court turn Rule 702 -- and the nearly 17 years of federal jurisprudence affirming the district courts' gate-keeping obligation to prevent the jury from hearing unreliable expert testimony -- on its head. It remains Plaintiff's unmet burden to explain why Dr. Nair-Reichert's work in this case was sufficient

to support her highly speculative and subjective conclusions, or why her general experience in academic economics is sufficient to fill the gaps left by the research and analysis she failed to do. LFP respectfully submits that, Plaintiff having failed to carry her burden of proof to demonstrate that Dr. Nair-Reichert's proffered opinion testimony meets the admissibility requirements of Rule 702, it should be excluded.

II. Argument

A. Legal Standard: Plaintiff Bears The Burden Of Proof To Show Dr. Nair-Reichert's Testimony Is Admissible

Rather than explaining why Dr. Nair-Reichert's qualifications and efforts in this case are sufficient to render her opinions admissible, Plaintiff repeatedly argues that LFP failed to make its case why Dr. Nair-Reichert's testimony should be excluded;[1] that LFP failed to identify a more reliable methodology than that employed by Dr. Nair-Reichert;[2] that LFP failed to explain why specialized knowledge of the matters about which she speculates "is required for Dr. Nair-Reichert to be able to render an opinion" on those matters;[3] and that LFP failed to

[1] *E.g.*, Plaintiff's Response to Defendant's Motion in Limine to Exclude the Report and Opinion Testimony of Dr. Usha Nair-Reichert, Docket Index ("D.I.") 148 ("Pl. Resp.") at 6-13, 18-19 & 25.

[2] *E.g.*, Pl. Resp. at 9, 18 & 24-25.

[3] *E.g.*, Pl. Resp. at 9.

hire its own expert to rebut her opinion.[4] But these efforts to shift the burden of proof to LFP must fail: it remains Plaintiff's burden to affirmatively demonstrate that Dr. Nair-Reichert's methods are reliable, and her experiences relevant and sufficient. *Siharath v. Sandoz Pharmaceuticals Corp*., 131 F. Supp.2d 1347, 1351 (N.D. Ga. 2001) (party offering expert testimony must demonstrate its admissibility by a preponderance of the evidence) (Thrash, J.).

Moreover, Plaintiff's argument that the burden now shifts to LFP to rebut Plaintiff's calculation of damages, Pl. Resp. at 10-12, is wholly unsupported in law or fact. Specifically, Plaintiff cites *Dering v. Service Experts Alliance LLC*, 2007 WL 4299968 (N.D. Ga. 2007), for the proposition that the burden shifts to defendant to rebut plaintiff where defendant's actions hinder plaintiff's ability to calculate damages. But contrary to Plaintiff's claim that *Dering* is "very similar to the case at bar" (Pl. Resp. at 10), that case is easily distinguished. First, *Dering* involved a trademark infringement claim under the Lanham Act, which statute expressly provides that once the plaintiff proves the existence of damages, the burden shifts to the defendant to show that any award should be limited to the damages caused by the infringing activity. *Dering*, 2007 WL 4299968 at *8.

[4] *E.g.*, Pl. Resp. at 6, 9 & 22. Of course, whether LFP hired a rebuttal expert has no bearing on whether Plaintiff's expert employed a reliable methodology to arrive at her conclusions.

Georgia's common law right of publicity neither authorizes nor requires such burden-shifting.

Second, unlike LFP here, the defendants in *Dering* purposely withheld information sought by plaintiffs and claimed other requested records were destroyed. *Id.* at *7 & n.4. Citing defendants' "failure to keep records and their reluctance" to turn over relevant information to plaintiffs, the *Dering* court permitted plaintiff's expert's testimony even though his damages calculations were inexact. *Id*. at *8. This principle does not apply here: LFP gave Plaintiff everything she asked for.[5] Simply put, *Dering* does not abrogate Plaintiff's duty to show her expert meets the test of Rule 702.[6]

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[5] Indeed, as Exhibit A to Pl. Resp., D.I. 148-1 at 3, makes clear, Plaintiff asked LFP only for an accounting of its revenues from sales of "any media containing images of Ms. Benoit." As LFP told Plaintiff then, the images were contained only in the March 2008 issue of *Hustler* Magazine, for which sales and revenue data were produced by LFP. This data included *Hustler's* month-by-month revenues broken into streams such as "net newsstand sales," "advertising," "subscription," "trademark royalty," etc. (*See, e.g.*, Appendix of Evidence in Support of Defendant's Motion for Summary Judgment, D.I. 124-2, ("App. of Ev.") at TAB A-1 [Under Seal].) If Plaintiff's expert needed better or additional information to support her alleged damages calculations in this case, it was Plaintiff's duty and right to ask for it; but she never did. Moreover, Plaintiff also failed to direct even one deposition question to any LFP employee aimed at determining the portion of LFP's revenue attributable to the Benoit images. (*See, generally*, deposition transcripts of Donna Hahner, Larry Flynt, Mark Johnson and Bruce David.)

[6] Plaintiff also cites *Broan Mfg. Co., Inc. v. Associated Distributors, Inc*., 923 F.2d 1232 (6th Cir. 1991) as support for her claim that she is entitled to a lower burden

In short, Rule 702 does not support Plaintiff's effort to hold LFP responsible for her own failure to request or provide her expert with sufficient and reliable information. *See Siharath*, 131 F. Supp. 2d at 1351. Indeed, her attempt to shift that burden to LFP is an admission that Dr. Nair-Reichert did not base her opinion on reliable or sufficient information, which demands exclusion of her testimony.

B. Admissibility: The Flaws In Dr. Nair-Reichert's Methodology Go Directly To The Reliability Of Her Opinions, Not To Weight And Credibility

There is no dispute here about the methodology used and data relied upon by Dr. Nair-Reichert in formulating her opinions. The issue is, quite simply, are they both reliable? If either one is not, the opinions are inadmissible. Because Plaintiff cannot defend the reliability of either Dr. Nair-Reichert's methodology, or the data

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of proof of damages because LFP should bear the risk of any uncertainty created by its alleged "wrong." But Plaintiff's reliance on this case is also misplaced. *Broan* does not exempt expert testimony on damages calculations from the admissibility standards of Rule 702, but instead goes to the general relevance and admissibility of inexact evidence of damages in a Lanham Act case. Second, Plaintiff misconstrues the language she cites: her quote from *Broan* is actually a part of the court's explanation that, in the trademark infringement context, a plaintiff is held to a lower burden of proof in establishing an amount of damages, as compared to the burden that an expert faces when establishing the fact that damages are present in the first instance. *Broan*, 923 F.2d at 1235-36 (emphasis added). Thus, like *Dering*, *Broan* is inapposite here.

she relied on, Plaintiff instead argues, citing two Georgia Court of Appeals cases,[7] that any deficiencies in her method or data merely go to the weight and credibility of Dr. Nair-Reichert's testimony, not its admissibility. (Pl. Resp. at 4-6.) But here, in the federal courts, expert testimony is admissible only if its proponent shows both the methodology and the data underlying the testimony are reliable and relevant. *See U.S. v. Gilliard*, 133 F.3d 809, 815 (11th Cir. 1998); *City of Tuscaloosa v. Harcros Chemicals, Inc*., 158 F.3d 548, 565-66 (11th Cir. 1998); and *McClain v. Metabolife Intern., Inc*., 401 F.3d 1233, 1240 (11th Cir. 2005). Plaintiff has shown neither.

Moreover, the Georgia cases relied on by Plaintiff do not support admission of Dr. Nair-Reichert's testimony. Unlike LFP's challenge to Dr. Nair-Reichert's testimony, neither *Woodland* nor *Miller* involved a challenge to the sufficiency and reliability of the proposed experts' methods or data, but instead involved disputes about the otherwise qualified experts' interpretation of data. Notably, the *Woodland* court made clear that expert testimony may be submitted to the jury, and its credibility tested there, only "[p]rovided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the

[7] *See* Pl. Resp. at 5-6, citing *Woodland Partners Ltd. P'nership v. Dep't of Transportation*, 286 Ga. App. 546, 650 S.E.2d 277 (2007) *and Georgia Dep't of Transportation v. Miller*, 300 Ga. App. 857, 686 S.E.2d 455 (2009).

bounds of evidence . . . ." 286 Ga. App. at 548, 650 S.E.2d at 280 (emphasis added). Here, of course, Plaintiff does not even try to explain how Dr. Nair-Reichert is qualified to assist the jury on measuring "relative celebrity factor";[8] the reasonable production costs and profitability expectations with respect to a hypothetical "tribute DVD" produced by unknown persons, containing unknown content, and marketed through unknown channels; or how and why there is any rational connection between the size of a magazine cover headline and the revenues generated by the sale of that issue and future issues attributable to the headline.[9] Nor are Dr. Nair-Reichert's opinions based on facts "within the bounds of evidence," but instead are based upon layer upon layer of her personal

[8] Plaintiff attempts to retroactively defend Dr. Nair-Reichert's method for evaluating the relative celebrity factors of Nancy Benoit and Wendy Cortez by declaring, without reference to any authority whatsoever, that "Google searches of [] individuals qualify as one of the most effective and accurate means of determining relative popularity in today's society." (Pl. Resp. at 18). But Dr. Nair-Reichert testified that she did not perform any Google searches regarding Ms. Cortez, and that she did not gain any useful information from her Google searches regarding Ms. Benoit; and, accordingly, because she "didn't use" the results from any Google searches in her analysis, she did not record them or even mention them in her Report. (Deposition Transcript of Usha Nair-Reichert, Ph.D. ("Depo. T.") at 125-127, 129-130.)

[9] At least Dr. Nair-Reichert admitted she made up her "2% Cover Theory" based on her subjective belief that it is reasonable. (Depo. T. at 150.) In her response brief, however, Plaintiff improperly attempts to elevate the theory to another level, declaring without any basis whatsoever that the theory is a "well accepted economic methodology." (Pl. Resp. at 23.)

conjecture about those subjects. Thus, even if Plaintiff's Georgia case law were applicable here, it would support exclusion of Dr. Nair-Reichert's testimony.

Further, the fact that LFP has not proposed alternative methodologies for measuring damages in this case cannot satisfy Plaintiff's burden to show Dr. Nair-Reichert's application of her chosen methodology is sound; nor does it excuse Plaintiff's failure to learn what methods other experts have used. This is not the first right of publicity case ever litigated, and had Dr. Nair-Reichert done even a little homework (or been aided in the effort by Plaintiff) she could easily have learned how qualified and admitted experts have reliably conducted such analyses, even in cases involving the value of a professional wrestler's image. *E.g., Ventura v. Titan Sports, Inc*., 65 F.3d 725, 734 (8th Cir. 1995) (admitting expert valuation of unauthorized use of former pro wrestler Jesse Ventura's image based on survey of "thousands of licensing agreements" involving various sports and entertainment figures).

In *Ventura*, the court affirmed the admissibility of Jesse Ventura's proffered expert testimony that the value of the unjust enrichment to defendant Titan Sports due to its unauthorized use of Ventura's images in videotapes fell within a range of royalty percentages applicable to the net profits to defendant from sales of the videos. Finding the expert's methodology reliable, the court held:

> We believe that [Expert's] methodology in arriving at the royalty percentages was reliable. [Expert] based his opinion as to the reasonable royalty upon a survey of thousands of licensing agreements. It is common practice to prove the value of an article (*e.g.*, a videotape license) by introducing evidence of transactions involving other "substantially similar" articles (*i.e.*, other licenses). 2 John H. Wigmore, *Wigmore on Evidence* § 463, at 616-30 (James H. Chadbourn rev. 1979). [Expert] surveyed licensing agreements involving numerous sports and entertainment figures, App. at 487a (NFL), 489a (major league baseball), as well as various other types of characters. Although no individual arrangement examined by [Expert] was "on all fours" with the predicted Ventura-Titan license, in the aggregate, the licenses provided sufficient information to allow [Expert] to predict a royalty range for a wrestling license. We believe that this methodology is sufficiently reliable to support the admission of [Expert's] testimony.

Ventura, 65 F.3d at 734 (emphasis added).

The Eighth Circuit's holding in *Ventura* is particularly instructive here. First, while it generally supports the notion that a "comparable transaction" analysis is an appropriate method of valuation in cases like this one (which LFP does not dispute), it disposes of Plaintiff's argument that "[t]here are no commonly available and accepted methodologies" to measure damages in a right of publicity case, Pl. Resp. at 8, her key excuse for Dr. Nair-Reichert's ignorance of the applicable standards and methodologies in this case. Second, it illustrates just how deficient Dr. Nair-Reichert's efforts to reliably apply her methodology in this case were. Unlike the admitted expert in *Ventura*, Dr. Nair-Reichert made no effort to identify a sufficient sample of "comparable transactions" to measure the "Benoit

transaction" against. (Brief in Support of Defendant's Motion *In Limine*, D.I. 125-1 ("Def. Br."), at 9-10.)[10] Nor were Dr. Nair-Reichert's efforts to value Benoit's "celebrity factor," the sales attributable to the publication of her images, or the hypothetical "lost opportunity" to the Benoit Estate any more skillfully or reliably researched. *See* Def. Br. at 11-13, 22-23; *see also, City of Tuscaloosa*, 158 F.3d 548 at 562 (reliance on anecdotal evidence and improper extrapolation fatal to admissibility of expert testimony).

Finally, as discussed above, Plaintiff's suggestion that Dr. Nair-Reichert's reliance on a grossly deficient universe of data is permissible under Rule 702 because much of the data was produced by LFP is meritless.[11] Rule 702 contains

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[10] Indeed, as we noted in our initial brief, Dr. Nair-Reichert did not even actually review the only two transactions she says she did consider in her "comparable transactions" analysis. (Def. Br. at 10 & n.6.)

[11] Notably, in applying her methodology, Dr. Nair-Reichert failed to rely on one piece of data repeatedly provided by LFP: the correct on-sale date for the March 2008 issue of *Hustler*. (Depo. T. at 147-149.) Plaintiff's claim, Pl. Resp. at 14, that even LFP "cannot" provide a more specific on-sale date for the March 2008 issue than "early January" is neither true, nor does it forgive Dr. Nair-Reichert's ignorance of the matter. Throughout this litigation, LFP has repeatedly explained that the March 2008 issue went on sale in retail outlets on January 8, 2008. (*See, e.g.,* App. of Ev. at TAB B, Hahner D. at 40:14-20; TAB E, Flynt D. at 18:7-13; TAB A, Hahner Aff. at ¶ 4.) Plaintiff's contention that Dr. Nair-Reichert "knew as much about the release of the March 2008 issue as those who work directly for Defendant," Pl. Resp. at 14, is not true, and does not excuse the deficiencies in, and unreliability of, Dr. Nair-Reichert's testimony.

no such exception to the settled rule that, in addition to an expert's applied methodology, the data underlying the methods must also be reliable. *See McClain,* 401 F.3d at 1240 (excluding opinions on causation where expert did not "support his opinions with sufficient data or reliable principles").[12] LFP provided everything in discovery that Plaintiff requested, and even paid for Plaintiff's flight to Los Angeles for the depositions of LFP's corporate representatives. (*See* Minute Entry, D.I. 77.) Yet Plaintiff's counsel asked no specific questions about *Hustler*'s revenue streams at any of these depositions, or any questions that would explain what benefit, if any, LFP derived from publishing the Benoit images. There is no basis in law for Plaintiff's suggestion that LFP's failure to provide discovery that was never requested somehow abrogates her responsibility to ensure her expert's opinions are based on sufficient data.

[12] Plaintiff also tries, Pl. Resp. at 13-14, to rehabilitate Dr. Nair-Reichert's inclusion of *Hustler* Magazine revenue lines which could have no relation to the Benoit images, such as trademark royalties and subscriptions, in her damages calculation, but misses the mark. The point is not that Dr. Nair-Reichert accounted for these revenue lines by assuming all *Hustler* revenue must be in some way attributable to the Benoit images; the point is that Dr. Nair-Reichert admits she knows nothing about any of those revenue lines but she included them in her damages calculations anyway. In other words, the data she selected was inexcusably flawed.

C. Impermissible Damages: Dr. Nair-Reichert's "Lost Opportunity" Opinion Is Irrelevant

Even if Plaintiff could defend the reliability of Dr. Nair-Reichert's methodology for valuing the alleged "lost opportunity" damages, which she makes no effort to do, Dr. Nair-Reichert's opinion is not relevant. Indeed, it is predicated on her wholly untested and speculative assertion that Plaintiff's opportunity to sell a hypothetical "tribute DVD" is foreclosed because of the damage to Benoit's reputation caused by her association with *Hustler*. (Depo. T. at 168-170.) But neither "lost opportunity" nor reputational damages are permitted under Georgia law. *See, e.g., Cabaniss v. Hipsley*, 114 Ga. App. 367, 381, 151 S.E.2d 496, 506 (1966); *Pierson v. News Group Publ'ns, Inc*., 549 F. Supp. 635, 642 (S.D. Ga. 1982) ("Under this theory, recovery is gauged solely by the unjust enrichment of the defendant…") (emphasis added).

Plaintiff attempts to rescue Dr. Nair-Reichert's calculations concerning the "tribute DVD" by arguing that they represent "commercial damage to the business value of Nancy Benoit's identity", Pl. Resp. at 22, and not reputational damages. Dr. Nair-Reichert's own testimony proves otherwise. (*See* Depo. T. at 169-170: "Hustler published her nude photographs together with pornographic material . . . and, hence, being associated with her pictures appearing in the nude in Hustler has

substantially diminished the value of the tribute that could be produced by the estate and marketed.").[13]

Finally, even if the courts were not so consistently clear that the measure of recovery in a right of publicity case is unjust enrichment of the defendant, and not pecuniary loss to the plaintiff, the Restatement of Unfair Competition is also clear that plaintiffs cannot, in any case, recover under both theories. *See* Restatement (Third) of Unfair Competition § 49(1) & cmt. d. (1995) (rationale for limitation on damages is to prevent a plaintiff from receiving a windfall through double recovery).

Because here, recovery of damages other than unjust enrichment is precluded by settled Georgia law, Dr. Nair-Reichert's testimony pertaining to "lost opportunity" and reputational damages is irrelevant on its face and should be excluded.

[13] Plaintiff's reliance on *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998) is also misplaced. *Allison* does note that the right of publicity involves "commercial damage to the business value of human identity," but its holding also reveals that the court contemplates such "commercial damage" to be exemplified by unauthorized use of a celebrity's image in advertisements -- not by a celebrity's hypothetical lost opportunity to capitalize on his or her own fame. *Id*. In any event, *Allison* does not authorize Plaintiff's "back door" effort to introduce "lost opportunity" and reputational damages that are foreclosed by settled Georgia law. *E.g., Pierson*, 549 F. Supp. at 642.

III. Conclusion

For all of the foregoing reasons, and those set forth in our initial brief, D.I. 125-1, LFP respectfully requests that the Court order that the opinions and expert report of Plaintiff's expert Dr. Usha Nair-Reichert be excluded.

Respectfully submitted this 31st 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/ Darrell J. Solomon
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CERTIFICATE OF SERVICE

This is to certify that I have this day manually filed the within and foregoing REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF DR. USHA NAIR-REICHERT and will on this day serve same upon Plaintiff's attorneys of record via hand delivery.

This 31st day of August 2010.

/s/ Darrell J. Solomon
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