UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY AND OBEY GIANT ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim Plaintiff,

v.

SHEPARD FAIREY, OBEY GIANT ART, INC., OBEY GIANT LLC, STUDIO NUMBER ONE, INC., and ONE 3 TWO, INC. (d/b/a OBEY CLOTHING),

Counterclaim Defendants.

ECF

Case No. 09-01123 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S MOTION IN LIMINE NO. 1 TO EXCLUDE ALL EVIDENCE AND TESTIMONY CONCERNING INDIRECT PROFITS

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I. INTRODUCTION

By this Motion, Defendant One 3 Two, Inc. ("One 3 Two") asks the Court to exclude all evidence and argument[1] that Plaintiff the Associated Press (the "AP") might offer regarding the "indirect profits" it contends One 3 Two received as a result of sales of merchandise (the "Obama Merchandise") bearing the image of Barack Obama (the "Obama Image") that is the basis of the AP's copyright infringement claims. The AP has not satisfied its burden to show any causation between sales of the Obama Merchandise and sales of the thousands of other products One 3 Two made during the relevant period that admittedly do not infringe any right of the AP at all. The AP has offered opinion testimony from its accounting expert – Kathleen Kedrowski – on this issue. However her opinion is riddled with errors and baseless, if not false, assumptions. Among other mistakes, Kedrowski:

- Attributed 100% of the growth that One 3 Two experienced between 2007 and 2009 to infringement;
- Opined that One 3 Two should pay to the AP a portion of the profits One 3 Two generated in 2006 and 2007, years before the AP's copyright was allegedly infringed; and;
- Failed to limit her analysis in any way to isolate the alleged infringement.

Kedrowski has no experience or training that allows her to opine on this issue. She admitted significant errors in her (non)expert analysis, and that analysis therefore does not satisfy the standards under the Federal Rule of Evidence 702 and it must therefore be excluded.

[1] At this time, the Parties have not exchanged pretrial disclosures so One 3 Two cannot identify which trial exhibits are inadmissible. The basis for this Motion is the AP's use of such evidence and testimony in opposition to One 3 Two's Motion for Summary Judgment which sought the denial of the AP's claim for indirect profits as a matter of law. One 3 Two will amend and supplement this Motion, as appropriate, once it ascertains trial exhibits and evidence proposed by the AP.

Without that evidence, there is nothing the AP can point to that might satisfy its burden, and the Court should therefore preclude the AP from seeking any of One 3 Two's profits that did not result from the sale of an item bearing the Obama Image itself.

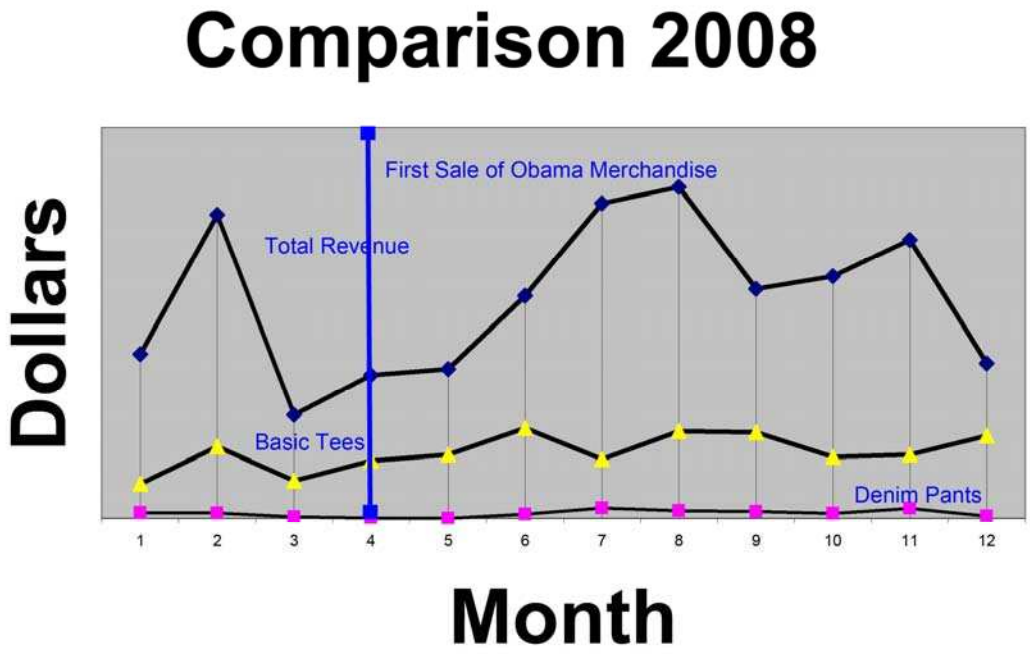
II. SUMMARY OF RELEVANT FACTS

One 3 Two is a clothing company that has existed since 1999 and that has generated revenues between $20 million and $30 million for each of the last five years. It sells a wide variety of apparel items ranging from t-shirts bearing graphics created by artist Shepard Fairey, who exclusively licenses his artwork to One 3 Two for use on apparel, to items with graphics designed by other artists, to blue jeans, jackets, hats, bags and jewelry that have no graphics at all.

The AP contends that, for some period between 2006 and 2010, One 3 Two sold $2.27 million of the Obama Merchandise. This amount represents less than five percent (5%) of One 3 Two's total revenues during the time the merchandise was available and, even by the AP's calculations, those sales yielded less than $1 million in profits to One 3 Two. The AP contends that this merchandise infringed the copyright in a photograph that was used as a visual reference for the Obama Image, which photograph is referenced as the "Garcia Photo."

As will be demonstrated below, according to the AP, One 3 Two's customers felt so positively about that merchandise that ***100 percent*** of the growth in revenues One 3 Two experienced between 2007 and 2009 on all of its product – both Obama Merchandise and all non-Obama merchandise – was a result of the fact that One 3 Two made the Obama Merchandise available. Based on this assumption, the AP seeks profits on an additional $8 million - $13.6 million (depending which of its expert's analyses the AP selects) in One 3 Two's revenues. That position is facially incredible. It was also expressly disavowed by Kedrowski during her deposition, even though it is the practical result of her calculation. It is also contrary to the facts.

The following graph[2], compares three different aspects of One 3 Two's financial performance on a monthly basis for the year 2008: Total Revenue, Basic Tees and Denim Pants.



This graph shows that there were substantial fluctuations in One 3 Two's sales throughout 2008. Moreover, it shows that the sales of One 3 Two's Basic Tees are higher in months when its sales of Denim Pants are lower, and that both fluctuate in ways that are totally independent of One 3 Two's total revenue.

Analyzing sales One 3 Two made to particular customers similarly undercuts the assumption of causation, because the 2008 Revenue Summary shows that One 3 Two's sales to Urban Outfitters (who originally requested that One 3 Two manufacture the Obama Merchandise) were substantially higher in January 2008—before the Obama Image was

[2] This graph was created based on information in One 3 Two's 2008 Revenue Summary, previously submitted to the Court by the AP in support of its Opposition to One 3 Two's Motion for Summary Judgment (Declaration of Brendan Kehoe, Ex. 81). Because that document contains One 3 Two's confidential and proprietary financial information, it is not attached to this publicly-filed document, and One 3 Two's proprietary information is not included in the graph as only the relative sales are relevant to the point, but the document will be made available to the Court upon request.

published and before any Obama Merchandise was created or sold—than in ***every other month in 2008*** except July and August (which are traditional high-revenue back-to-school months for retail clothiers). One 3 Two's President has also testified that one of its largest accounts did not want the Obama Merchandise at all because it was a very conservative account. While it may be natural to assume that the popularity of the Obama Image caused One 3 Two to sell more clothing and accessories, the hard data does not support that assumption at all, and it is equally natural to assume that some accounts and customers had a negative association with the Obama Merchandise.

In short, the evidence shows that One 3 Two's sales of t-shirts do not correlate to its sales of denim pants or any other item, including any items bearing the Obama Image. Nevertheless, the AP asserts that it is entitled to a portion of One 3 Two's profits earned on non-Obama merchandise because they allegedly are "indirect profits" caused by the alleged infringement.

III. THE AP'S EFFORT TO RECOVER ONE 3 TWO'S INDIRECT PROFITS

According to the AP, the Obama Merchandise served a promotional purpose for One 3 Two, creating good will for and enhancing the "Obey" brand under which One 3 Two markets its products. The AP therefore contends that it should not only be permitted to recover the profits One 3 Two generated from the sale of the Obama Merchandise itself, referenced as One 3 Two's "direct profits," but also a portion of the profits on the sales of the non-infringing merchandise One 3 Two made during the same period, known as One 3 Two's "indirect profits." However, to seek those damages, the AP must meet its threshold burden to offer evidence supporting two related, but distinct, premises:

1. **That there is a non-speculative basis to conclude that the indirect profits were caused by the alleged infringement; and,**

2. That the indirect profits attributable to infringement are reasonably ascertainable.

There is nothing in the record that might establish either proposition. Because the AP cannot satisfy its initial burden on either of these two issues, all evidence and argument relating to the indirect profits should be excluded.

IV. THE LAW DOES NOT PERMIT THE AP TO SEEK INDIRECT PROFITS FROM ONE 3 TWO

The Copyright Act permits a copyright holder to seek the defendant's profits attributable to infringement, but the copyright holder bears the burden of establishing that the profits it seeks "are attributable to the infringement." 17 U.S.C. § 504. The plaintiff is allowed to meet this burden by submitting evidence of the defendant's gross revenues, and the burden then shifts to the defendant to establish deductions for costs and apportionment. *Id.* However, "gross revenues" does not mean all of the money the defendant generated. The Second Circuit has held that "the term 'gross revenue' under the statute means gross revenue reasonably related to the infringement, not unrelated revenues." *Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001). When a plaintiff seeks indirect, as well as direct, profits, the causation is more attenuated, and the law therefore requires the plaintiff to submit evidence of causation to proceed.

A. Claims for Indirect Profits Must Be Supported with Non-Speculative Evidence of Causation

Although indirect profits may, in some circumstances, be recovered by a copyright plaintiff, "such claims are difficult to prove and are often unsuccessful." *Rainey v. Wayne State Univ.*, 26 F. Supp. 2d 963, 971 (E.D. Mich. 1998) (citing 1 *Nimmer on Copyright* § 14.03 [A] at 14-33 (1996)). As the Ninth Circuit has explained, trial courts should

> conduct a threshold inquiry into whether there is a legally sufficient causal link between the infringement and subsequent indirect profits. Such an approach dovetails with common sense—there must first be a demonstration that the infringing acts had an effect on profits before the parties can wrangle about apportionment.

Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 711 (9th Cir. 2004). While the statute permits a plaintiff to satisfy this burden by showing evidence of the defendant's gross profits, the Second Circuit interprets that language to require the plaintiff to put on evidence of profits that have at least some reasonable relationship to the infringement. *Davis*, 246 F.3d at 160.

A review of the relevant decisions suggests that indirect profits, if reasonably quantifiable, might be obtained when there is either (a) evidence linking the sales which profits the plaintiff seeks to recover to purchasers who were exposed to the infringing work or (b) where the plaintiff limits the profits sought to products actually promoted by the infringing work.

For example, the Ninth Circuit considered claims arising out of a production that included some material from the musical *Kismet*, and allowed recovery of indirect profits from hotels and casinos who used the infringing musical production to attract consumers, but not from films produced by the company unrelated to the musical production. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989). *Polar Bear* allowed the plaintiff to seek profits from (1) trade show booth sales where the infringing advertising materials were exhibited and (2) a particular advertising promotion that included the infringing work (as to which the defendant had separately quantified its sales), but not from retail sales of the particular watch advertised at the trade shows and in the advertising promotion because there was no evidence that retail purchasers even saw the infringing work at the trade show or in the

promotion. 384 F.3d at 715. *See also Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1280 (M.D. Fla. 2008); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 443 (3d Cir. 2009).

Alternatively, courts permit indirect profits where the plaintiff's evidence limits the profits sought to those products that are promoted in an infringing advertisement. *Andreas v. Volkswagen of Am., Inc.*, 336 F.2d 789 (8th Cir. 2003) (allowing evidence of profits from particular Audi model advertised in infringing work, but not other models); *cf. Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) (indirect profits not allowed because not related to infringing maps). Conversely, when the plaintiff fails to present evidence that might connect purchasers of the defendant's products with the infringing work, indirect profits are denied. *Business Trends Analysts, Inc. v. The Freedonia Group*, 887 F.2d 399, 407 (2d Cir. 1989).

The Second Circuit decision in *Davis* involved a plaintiff who filed suit against a large clothing retailer, The Gap, Inc., claiming copyright infringement as a result of certain advertisements in which models wore his nonfunctional eyeglasses. 246 F.3d at 156. The Second Circuit determined that the plaintiff had not satisfied his burden by putting forward evidence of the gross overall revenues of Gap stores (more than $1.68 billion), as "the term 'gross revenue' under the statute means gross revenue reasonably related to the infringement, not unrelated revenues." *Id.* at 160. The $1.68 billion figure contained revenues earned from clothing lines that had nothing to do with, and therefore could not be attributed to, plaintiff's eyewear product, such as "sales under other labels within the Gap, Inc.'s corporate family that were in no way promoted by the advertisement, not to mention sales under the 'Gap' label of jeans, khakis, shirts, underwear, cosmetics, children's clothing, and infantwear." *Id.* at 161. "When an infringer's profits are only remotely and speculatively attributable to the infringement, courts will deny recovery to the copyright owner." *Straus v. DVS Worldwide, Inc.*, 484 F. Supp. 2d 620, 645 (S.D. Tex. 2007).

B. A Plaintiff Seeking Indirect Profits Must Also Reasonably Quantify the Amount of Indirect Profits Attributable to Infringement

Even if the plaintiff can establish some evidence supporting causation, when a demand for indirect profits is based on a suggestion of enhanced "brand prestige" or notoriety that the plaintiff cannot reasonably quantify, they may not be recovered. As early as 1960, courts in this District have rejected as too speculative a plaintiff's effort to recover a portion of the revenues generated by an attorney's law practice and other sources even though the Court found that the attorney had plagiarized the plaintiff's book on eminent domain and marketed it as his own. *Orgel v. Clark Boardman Co. Ltd.*, 128 U.S.P.Q. 531 (S.D.N.Y. 1960).[3] Another court in this District reiterated this observation (in a decision affirmed by the Second Circuit) in 1980, explaining that damages from infringement cannot be actually ascertained where they consist of unmeasurable goodwill and increased prestige. *Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1155 (S.D.N.Y. 1980), *aff'd* 672 F.2d 1095 (2d Cir. 1982).

Judge Posner articulated the basis for this rule in 1983, when sitting as a trial judge in the Northern District of Illinois. Even when the court believes that "*some* benefit must have accrued to [the defendant] from the infringement," it "exceed[s] the bounds of permissible speculation to base a damage award on the hypothesis" when the court is unable to assign a dollar value to the benefit because the plaintiff failed to offer evidence establishing how much of the defendant's

[3] *Orgel* was a case arising under the 1909 Copyright Act, which permitted a court to award an amount of damages "as to the court shall appear to be just" within certain restrictions "in lieu of actual damages and profits." 17 U.S.C. § 101(b). The District Court judge in *Orgel* awarded "in lieu" damages in an amount greater than the proven actual damages and profits in part because the plaintiff could not sustain his burden of proof on indirect profits. 128 U.S.P.Q. at 531. No similar discretionary award is available under the Copyright Act of 1976 which applies here. *Compare* 17 U.S.C. § 504(b).

performance resulted from the infringement and other factors at work. *Deltak v. Advanced Sys., Inc.*, 574 F. Supp. 400, 411-12 (N.D. Ill. 1983), *vacated and remanded on other grounds*, 767 F.2d 357 (7th Cir. 1985).[4] Similarly, the Western District of New York granted summary judgment on a claim for indirect profits, finding that, even if there was a marginal benefit to a theme park that included an attraction based on a film, *Backdraft*, that infringed the plaintiff's screenplay, the percentage of such profits attributable to the infringement was too speculative and the relationship too attenuated to justify indirect profits. *Burns, M.D. v. Imagine Films Ent'mt, Inc.*, No. 92-CV-2438, 2001 WL 34059379 at *4-5 (W.D.N.Y. Aug. 23, 2001).

C. The AP's Evidence Establishes Neither Causation Nor the Amount of Indirect Profits

The AP's claim to One 3 Two's indirect profits is based on two facts: That the Obama Merchandise was popular and the AP's argument that One 3 Two's revenues and profits increased in the years in which the Obama Merchandise was sold. The AP's expert speculates, with no supporting documentary or testimonial evidence, that the notoriety of the Obama Image and Merchandise translated into a stronger overall performance by the company during a two-year period that began before the Obama Image was created and continued for more than a year after the election. This evidence is not sufficient to clear either of the hurdles the AP must overcome to pursue its claims.

[4] In *Business Trends Analysts, Inc. v. The Freedonia Group*, 887 F.2d 399 (2d Cir. 1989), discussed in detail below, the Second Circuit rejected the Seventh Circuit's analysis on quantifying actual damages using a "value of use" methodology. *Id.* at 405-06. It did not, however, address Judge Posner's analysis of indirect profits.

1. There Are No Facts in the Record Establishing that the Obama Merchandise Caused One 3 Two to Sell any Additional Items

One 3 Two has been in business for more than 10 years and has been steadily expanding its customer base and product lines. Many of the items sold have no graphics on them whatsoever, while others have graphics designed by artists other than Shepard Fairey, and the vast majority have nothing to do with politics or Barack Obama. One 3 Two does not have its own store fronts. While it makes some sales on its website, most of its sales are to retail outlets such as the department store Nordstrom or the chain Urban Outfitters. It is not the case that a consumer would see an Obama t-shirt in the window of a store operated by One 3 Two, that sold only One 3 Two merchandise or only merchandise under the brand name "Obey," and could be attracted into the One 3 Two store front by the Obama t-shirt but would buy more of One 3 Two's products at the same time. For the AP's theory to hold up, there would have to be evidence that One 3 Two's retailer customers decided to place more orders with One 3 Two because One 3 Two had made the Obama Merchandise available.

The AP has no evidence from any customer of One 3 Two that it placed more orders for non-Obama items with One 3 Two because One 3 Two had offered the Obama Merchandise, and makes no effort to limit its demand for indirect profits to such linked sales. Instead, the AP seeks profits from ***all of One 3 Two's product lines***, whether they were available at the same locations and from the same retailers who offered the Obama Merchandise, or not, and even without any analysis as to whether a consumer who purchased a t-shirt with the Obama Image was likely to have later purchased a skirt, or a pair of jeans, or a handbag from the same company.

The AP's only evidence regarding whether consumers purchased non-Obama Merchandise from One 3 Two as a result of the Obama Merchandise comes from its damages expert, Kedrowski. As a preliminary matter, Kedrowski has a B.S. in Business Administration

where she focused on accounting, is a licensed Certified Public Accountant, and teaches Financial Accounting.[5] She does not claim to have any expertise in consumer behavior or the apparel industry. There is no information suggesting that she has sufficient expertise to opine on customer behavior, particularly as it relates to apparel purchases. *See* Deposition of Kathleen M. Kedrowski, Day 2 at 160:3-162:17.[6] She could not, therefore, rely on her own experience or specialized knowledge to opine as to the reasons that customers made purchases from One 3 Two or that the Obama Merchandise generated indirect profits for One 3 Two, and her attempt to do so is nothing more than rank speculation. Fed. R. Evid. 702 (requiring an expert's opinion testimony be based on scientific, technical or specialized knowledge); *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993).

Second, Kedrowski did not cite any factual information showing that sales of non-infringing merchandise were related to infringement. When asked what support she had for her opinion that the Obama Image had buoyed One 3 Two's performance, Kedrowski cited nothing more than that the *Obama Image* itself has gained "fame and notoriety." Kedrowski Depo., Day 2 at 102:22-103:19. The mere fact that the *Obama Image* was well-known does not support, let alone establish, any causal link between that image and the purchase of non-Obama items from One 3 Two that had no obvious linkage to even a famous image.

Third, even the "facts" that Kedrowski recites in support of her conclusion that One 3 Two indirectly benefited from the sales of the Obama Merchandise fall far short of the standard the AP must meet. Most of these facts consist of the misconstrued deposition testimony of

[5] Preliminary Report of Kathleen M. Kedrowski dated October 1, 2010 ("Kedrowski Report"), ¶¶ 3, 6, a true and correct copy of which is attached to the Declaration of Robyn C. Crowther ("Crowther Decl.") filed concurrently herewith as Exhibit A.

[6] True and correct copies of the excerpts of the deposition transcript of Kedrowski are attached as Exhibit B to the Crowther Declaration.

Adam Van Berckelaer—an accountant who works for One 3 Two. Kedrowski relies on the following observations made by Van Berckelaer: That One 3 Two probably received more "notoriety" as a result of its Obama Merchandise, but that Van Berckelaer didn't believe there was any dollar figure that could be placed on that notoriety; and Van Berckelaer's "personal opinion" that the Obama Merchandise probably increased awareness of One 3 Two somewhat, which "may or may not" cause people to buy the company's products. Kedrowski Report, ¶ 88(E)(i)[7] These equivocal statements provide absolutely no evidence that a single sale of non-Obama merchandise by One 3 Two was caused by One 3 Two's sales of Obama Merchandise. No testimony ties One 3 Two's sales of non-Obama merchandise to the Obama Merchandise.

Finally, while Kedrowski cites a number of other factors supporting a link between the Obama Image and indirect profits, they all relate to additional media coverage of and benefits enjoyed by Shepard Fairey and his companies, not to One 3 Two. *Id.*, ¶ 88. These facts, like the others Kedrowski cites, at most support the hypothesis that One 3 Two reaped some intangible benefits from the Obama Merchandise. They provide no information as to whether that translated into sales of unrelated items. At the most they might provide evidence of enhanced prestige of the "Obey" brand that Fairey shares with One 3 Two which, under the many authorities cited above, is patently insufficient to establish a causal link sufficient to support a claim for indirect profits.

[7] Kedrowski also cites Van Berckelaer's testimony that the sales of the Obama Merchandise directly benefited One 3 Two's bottom line, but that is neither controversial nor relevant to the analysis of indirect profits.

2. Kedrowski's Mathematical Formula Purporting to Establish Causation Is Inadmissible under *Daubert*

Lacking any facts to support the conclusion that One 3 Two's indirect profits were caused by the alleged infringement, the AP resorts to what can only be characterized as accounting hocus pocus to manufacture evidence that it hopes will allow it to present its claim to the jury. When stripped of its "accounting-ese," Kedrowski's calculation is that 100% of the growth in revenues One 3 Two experienced between 2007 and 2009 is attributable to the Obama Merchandise. That contention is not supported by any evidence and does not even purport to establish a causal link between the alleged infringement and One 3 Two's growth.

(a) Kedrowski's Formula

Kedrowski based her approximation of the indirect profits that the AP can recover on her comparison of One 3 Two's actual annual revenues to what those revenues would have been if the performance had followed the Compound Annual Growth Rate or "CAGR" that Kedrowski selected. Kedrowski Report, ¶ 91, Ex. D-3. This "CAGR" calculation is the only actual mathematical analysis Kedrowski relied on to evaluate the indirect profits issue, even though she acknowledged that a different form of analysis, a regression analysis, would have been more accurate.[8] Kedrowski Depo., Day 1, at 257:19-25.

For purposes of the CAGR analysis, Kedrowski compared One 3 Two's gross revenues in 2007 to its gross revenues in 2009, and used a formula to establish what the growth rate (expressed as a percentage) would have been between 2007 and 2009 to achieve that result if the

[8] Kedrowski's Preliminary Report acknowledges the need to show a nexus between the "Infringing Works and the non-Infringing Works" and contemplates performing a regression analysis of Fairey's financial records in the future to establish that nexus, but never offered any opinion regarding such an analysis as to One 3 Two. Kedrowski Report, ¶ 90. At her deposition, Kedrowski acknowledged that she nonetheless did perform such an analysis, but "the result did not make sense." Kedrowski Depo., Day 2 at 143:18-146:8.

growth over those two years had occurred consistently, which percentage she found to be 16.7 percent per year. Kedrowski Depo., Day 1, at 241:19-243:19; Kedrowski Report at Exh. D-3. Significantly, this 16.7 percent has nothing to do with the Obama Merchandise, or infringement, or any accepted legal theory of damages; it is no more than the average growth rate of One 3 Two's revenues between 2007 and 2009. *Id*.

Then Kedrowski calculated the total "residual revenue" One 3 Two received, which is purportedly the revenues left once the direct revenues from the infringing products are deducted, by subtracting the amount of direct revenues from the Obama Merchandise sold in 2008 and 2009 from the total revenues earned between 2006 to 2009. According to Kedrowski, the total "residual revenue" that One 3 Two received between 2006 and 2009 was $81,415,037. Kedrowski Report at Exh. D-3.

Then Kedrowski multiplied the total residual revenue amount by the CAGR of 16.7 percent that she had previously calculated and opined that the resulting amount of $13,621,682 constituted One 3 Two's indirect revenues attributable to infringement. *Id*. That means that Kedrowski believed that all of One 3 Two's growth was attributable to infringement. But this analysis is so flawed that it must be excluded entirely. Most notably, Kedrowski's calculation includes revenues earned by One 3 Two between January 2006 to March 2008—***before One 3 Two ever sold any Obama Merchandise*** and before the Obama Image was even created.

Indeed, the AP now concedes that Kedrowski made a "math error" of more than $5 million, and apparently intends to seek only $8.213 million in indirect profits. *See* AP's Opposition to One 3 Two's Motion for Summary Judgment at 46. While the AP may be willing to forgo the damages that cannot be supported even by its expert's own methodology, it ignores the larger point, which is that this "math error" demonstrates that the AP has no basis for quantifying the indirect profits it seeks at all. Indeed, Kedrowski has failed to provide the Court

with a "reasonably accurate method" of determining what revenues, and resulting profits, were caused by the alleged infringement. *Burns*, 2001 WL 34059379 at *4. Kedrowski's "CAGR" reflects the average growth of One 3 Two between 2007 and 2009—not anything about the Obama Merchandise. Her original opinion was that 16.7 percent of the indirect revenues of One 3 Two could be attributed to the infringement. The position that the AP took in its Opposition—that Kedrowski intended to limit her analysis to 2008 and 2009 and thus the correct indirect revenue number is $8.213 million—is at odds with Kedrowski's testimony at her deposition, where she acknowledged her math error but testified that she was still comfortable with the $13.6 million figure. Kedrowski Depo., Day 2, at 112:2-113:12. What this means is that despite her flawed methodology, Kedrowski was equally comfortable expressing an opinion that One 3 Two's claimed infringement caused 16.7 percent of One 3 Two's sales of non-Obama merchandise or that it caused more than 27 percent of those sales.

(b) Kedrowski's Analysis Is Unreliable and Inadmissible

Expert testimony is admissible only if it "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597; *see also* Fed. R. Evid. 702. Pursuant to Rule 702, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue" and must be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) the expert must apply "the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. In *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the U.S. Supreme Court set forth the district court's "gatekeeping" obligation to ensure that "all forms of expert testimony, not just scientific testimony," survive scrutiny under Rule 702 before the testimony is presented to a fact-finder. If an expert relies on inadmissible evidence, it must be "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *See* Fed. R. Evid. 703.

This District has found that "[t]here must be 'a sufficiently rigorous analytical connection between [the expert's] methodology and the expert's conclusions ... and ... the scientific principles and methods [must] have been reliably applied by the expert to the facts of the case.'" *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 495 (S.D.N.Y. 2010) (citation omitted). Indeed, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Expert testimony should be excluded if it is "speculative" or "conjectural," or if it is based on assumptions "so unrealistic and contradictory as to suggest bad faith." *See Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (citation omitted). "The party seeking to rely on expert testimony bears the burden of establishing, by a preponderance of the evidence, that all requirements have been met." *Arista Records*, 715 F. Supp. 2d at 495.

(i) Kedrowski Admittedly Made No Effort to Establish or Quantify Causation

The AP offers Kedrowski's analysis to try to establish that the alleged infringement caused One 3 Two to obtain indirect profits. But Kedrowski herself testified that she did not do so, explaining that "the plaintiff's expert" was not required to remove items unrelated to infringement from the analysis of indirect profits. Kedrowski Depo., Day 1 at 39:17-40:25. Indeed, Kedrowski testified that a plaintiff is permitted to put forth "the entire gross revenue of the company, or the plaintiff may choose to put forth a direct subset of that." *Id.* at 32:2-33:4. Clearly, Kedrowski made no effort to determine what was caused by the infringement and what was not.

Second, Kedrowski made no effort to establish a base line for what growth One 3 Two would have experienced had the infringing works never been produced or sold. Kedrowski calculated her 16.7 percent CAGR figure by comparing the revenues earned in 2007 with those

in 2009—a year in which the AP contends One 3 Two sold infringing products. Kedrowski did not deduct the revenues One 3 Two received directly from the sale of Obama Merchandise in 2009 from her analysis, but instead used *total* revenues. Kedrowski Report, ¶ 92. This comparison failed to include any steps whatsoever to isolate the revenues generated by the Obama Merchandise—direct or indirect. Without doing so, it is impossible to opine as to what revenues or profits were caused by infringement. The practical effect is to attribute all of One 3 Two's growth from 2008 and 2009 to the Obama Merchandise—an assumption that even Kedrowski disclaims. Kedrowski Depo., Day 2 at 114:19-115:14.

(ii) Kedrowski's "Math Error" Demonstrates the Irrationality in Her Opinion

In its Opposition to One 3 Two's Motion for Summary Judgment, the AP disclaimed Kedrowski's calculation to the extent it includes revenues generated in 2006 and 2007, before any infringement had taken place. The AP's acknowledgement of Kedrowski's error does not, however, ameliorate the serious defects the error revealed in Kedrowski's analysis. When confronted with the obvious error at her deposition, Kedrowski admitted that it was inappropriate to include "residual revenues" from 2006 and 2007 in this analysis, because there was no infringement at all in 2006 and 2007. Kedrowski Depo., Day 2, at 112:2-113:12. Nevertheless, Kedrowski insisted that her original damage number of $13.6 million is in fact a reasonable estimate of One 3 Two's indirect profits in 2008 and 2009 based on "the other factors" by which she meant the vague statements of One 3 Two's accountant (which are likely not admissible or binding), One 3 Two's overall finances and *Fairey's* notoriety. None of these offers a principled basis to support Kedrowski's figure, nor appear to be based on any of Kedrowski's specialized knowledge. *See Daubert*, 509 U.S. at 589-90; Kedrowski Depo., Day 2, at 112:2-113:12.

Kedrowski's refusal to change her total dollar amount provides further evidence that she has made no effort to estimate reliably the indirect profits attributable to the purported infringement. Kedrowski opined that 16.7 percent of what she characterized as One 3 Two's revenues from non-infringing products was caused by infringement, and she multiplied that percentage by what she quantified as the residual revenues to reach her indirect profit number of $13.6 million. Kedrowski Report at Exh. D-3. However, given Kedrowski's admission that revenue from 2006 and 2007 should be excluded from her analysis, her indirect profits calculation could at most be based on residual revenues from 2008 and 2009, which total some $49 million. The $13.6 million represents more than 27 percent of $49 million. When Kedrowski insisted that $13.6 million remains a reasonable estimate of One 3 Two's indirect profits despite the computational error, she effectively abandoned her previous opinion that the percentage of non-infringing sales caused by the alleged infringement was 16.7 percent, and instead opined that 27 percent of the non-infringing sales were caused by infringement. This new opinion is not based on anything at all and may as well be plucked from thin air. That is not evidence that any sale of any non-Obama item was caused by the sale of the Obama Merchandise, and the AP therefore fails the first portion of the threshold analysis.

3. Kedrowski Offers No Reliable Method for Quantifying the Indirect Profits Attributable to Infringement

Even if the "brand prestige" evidence Kedrowski relied upon, and her observation that One 3 Two's profits were greater in 2008 and 2009 than they were in 2007 were sufficient to establish causation, they provide no basis whatsoever for quantifying the amount of indirect profits attributable to the infringement. That flaw independently defeats the AP's effort to seek indirect profits.

That Kedrowski is equally comfortable quantifying the indirect profits One 3 Two received as a result of the alleged infringement at *either* what she believes to be 16.7 percent of the residual revenues from 2006 to 2009, *or* 27 percent of the residual revenues from 2008 to 2009 shows that there is no logic or reason whatsoever to her analysis. Her testimony would be relevant and admissible only if it gave the trier-of-fact some reasonable quantification of the amount of non-infringing sales that were caused by the infringement. What Kedrowski *believes* to be the proper amount to pay her client sheds no light on that whatsoever, especially as her "expertise" is in accounting, not in consumer behavior, and she has no information other than financial performance to support the opinions she offers. Kedrowski's analysis does "not provide any basis to conclude how much" the Obama Merchandise contributed to One 3 Two's non-Obama sales, much less to separate the impact of the Obama Merchandise from the other reasons people bought One 3 Two's products in 2008 and 2009. *Straus*, 484 F. Supp. 2d at 487.

Additionally, when an expert performs this type of "about face," courts are reluctant to credit their testimony. In *Mackie*, the Ninth Circuit considered a declaration from an expert who initially conceded that there was no way to quantify the indirect profits caused by the infringement, but then attempted to quantify them by relying on the defendant's internal documents about the desired rate of return from the brochure with the infringing images in it. *Mackie v. Reiser*, 296 F.3d 909, 916 (9th Cir. 2002). The Ninth Circuit first noted that the contradictory testimony might not be sufficient in any event to create a triable issue of fact, but also described the expert's belated calculation as "rank speculation." *Id.* Judge Posner similarly took an expert to task in *Deltak*. Explaining that the expert did not rely on any expertise when he commented on the credibility of deposition testimony of witnesses (as did Kedrowski in her reports), and that the calculations the expert offered did not in any way attempt to account for factors other than infringement that might have affected the defendant's growth in revenues, the

expert was described as taking on the role of an advocate and was completely unbelievable. 574 F. Supp. at 405-07; *see also Estate of Vane v. The Fair Inc*, 849 F.2d 186, 188 (5th Cir. 1988) (expert's failure to control for factors other than infringement rendered testimony insufficient to establish attribution).

This is not the first time that Kedrowski's expert analysis has been challenged on the grounds that it exceeds her expertise and does not assist the trier-of-fact. In 2005, Judge Wood of this District excluded Kedrowski's proffered testimony on apportionment, finding that Kedrowski had "never provided expert testimony or consulting services on issues relating to the marketing and sales of a product," and further that her experience in the particular industry at issue was limited. *Loussier v. Universal Music Group, Inc.*, 2005 WL 5644422, at *3 (S.D.N.Y., 2005). Here, Kedrowski has similarly limited experience, and has offered an opinion that finds no basis on – and, indeed, is contrary to – the facts. For the same reason that Judge Wood excluded Kedrowski's testimony in *Loussier*, this Court should exclude it here.

V. CONCLUSION

The AP has not and cannot meet its threshold burden to show specific, non-speculative evidence that One 3 Two's alleged infringement caused One 3 Two to sell anything other than the Obama Merchandise, and no basis for quantifying those sales in any event. Having failed to meet this burden, the AP cannot pursue its claim for indirect profits, and all evidence and argument about One 3 Two's sales of non-Obama Merchandise is consequently irrelevant and prejudicial. Based on the foregoing, One 3 Two respectfully requests that the Court exclude all evidence and testimony concerning One 3 Two's indirect revenues and or profits.

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Respectfully Submitted,

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