Dale M. Cendali
Claudia Ray
Brendan T. Kehoe
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: (212) 446-4800
Fax: (212) 446-4900

Michael F. Williams
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200

Attorneys for the Associated Press

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant/Counterclaim Plaintiff,

v.

SHEPARD FAIREY, et al.,

Counterclaim Defendants,

And

MANNIE GARCIA,

Defendant, Counterclaim Plaintiff &
Cross Claim Plaintiff/Defendant,

v.

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Counterclaim Defendants,

And

THE ASSOCIATED PRESS,

Cross Claim Plaintiff/Defendant.

Case No.: 09-CV-01123 (AKH)

ECF Case

THE ASSOCIATED PRESS'S OPPOSITION TO 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

Obey Clothing's Motion in Limine No. 1 is nothing more than a thinly-veiled attempt to avoid a well-settled principle of black-letter copyright law: a copyright owner is entitled to recover the "profits of the infringer," including indirect profits related to the infringement. Section 504(b) of the Copyright Act makes clear that an injured party is entitled to disgorgement of ***all*** profits—whether direct or indirect—in order to make the infringement "worthless" to the infringer so as to deter infringement and prevent a windfall. Obey Clothing's previous motion for summary judgment, which sought to prevent the AP from presenting evidence of its indirect profits to a jury, was meritless. As the Court recognized in denying that motion, determining the amount of indirect profits is a classic "fact-intensive issue." (Transcript of Oral Argument at 36 (Feb. 15, 2011).) Accordingly, it should be decided by a jury after consideration of Obey Clothing's internal documents and testimony, which demonstrate that Obey Clothing as a whole enjoyed a significant marketing boost as a result of its misuse of the Obama Image. Obey Clothing's effort to accomplish the same end through a motion *in limine* is equally without merit. Its request that the Court exclude evidence of its indirect profits as well as the testimony of the AP's damages expert, Kathleen Kedrowski, on this same topic should be denied in its entirety.

First, Obey Clothing seeks to broadly exclude all evidence and testimony concerning its indirect profits that relate to its unauthorized use of the Obama Image on merchandise (the "Obama Merchandise"). This is nothing but a bald attempt to keep millions of dollars in profits even if Obey Clothing is found liable for infringement. The AP bears—and has met—the minimal burden of showing a "reasonable relationship" between Obey Clothing's indirect revenues and the infringing activity to get this issue before a jury. See Thornton v. Jargon Co., 580 F. Supp. 2d 1261, 1280 (M.D. Fla. 2008) (quoting Davis v. Gap, 246 F. 3d 152, 160 (2d Cir. 2001)). In fact, there is substantial evidence—ranging from documents produced from Obey

Clothing's own files to testimony from its own witnesses—that Obey Clothing's revenues increased substantially as a consequence of its infringement of the Obama Photo copyright. As the head of Obey Clothing's marketing division explained, Obey Clothing sought to "capitalize" on "heightened brand awareness" for Obey Clothing. In the process—and in the midst of the country's deepest recession in decades—Obey Clothing's revenues skyrocketed year-over-year across its branded lines. Instead of dealing with this evidence, Obey Clothing repeatedly (and disingenuously) argues that the AP fails to apportion the profits attributable to Obey Clothing's infringement. But it is black-letter copyright law that the AP (i.e., plaintiff) only has to establish the "gross revenues" of Obey Clothing (defendant). It is Obey Clothing's burden as the defendant to establish apportionment (if any). Once the AP has satisfied its minimal hurdle, apportionment is an issue for the jury to decide.

Second, Obey Clothing seeks to exclude expert testimony from Ms. Kedrowski establishing the significant revenue that Obey has generated by its misconduct. Defendant's motion, however, is premised on fundamental misconceptions of the law, Ms. Kedrowski's analysis, and the AP's damages claim. Indeed, Ms. Kedrowski's indirect-profit opinion is based not only on her more than 24 years of deep experience with forensic accounting and financial analysis, but also on established compound-annual-growth-rate and trend-line analyses, hundreds of documents produced by the parties, thousands of pages of deposition testimony, and the parties' pleadings. Her testimony, moreover, is echoed by the work of other defense experts. Obey Clothing may not like her conclusions and may cross-examine Ms. Kedrowski concerning her opinions or present testimony to the contrary, but Ms. Kedrowski's testimony is admissible and Obey Clothing's motion should be denied.

II. THE AP IS ENTITLED TO PRESENT EVIDENCE TO A JURY OF OBEY CLOTHING'S INDIRECT PROFITS THAT REASONABLY RELATE TO ITS INFRINGING ACTIVITIES

Obey Clothing's argument that the AP may not recover indirect profits is meritless as a matter of law and mistaken as a matter of fact. Copyright law expressly allows copyright owners to recover indirect profits in order to avoid a windfall to infringers. See Andreas v. Volkswagen of Am., Inc., 336 F.3d 789, 795 (8th Cir. 2003) ("The infringer's profits are awarded to the copyright holder 'to prevent the infringer from unfairly benefiting from a wrongful act.'" (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. § 504, at 161)). Here, there is substantial evidence—including from Obey Clothing's own witnesses and documents—that Obey Clothing's overall business benefitted from its infringement of the Obama Photo: in short, increased publicity and heightened awareness of the "Obey" brand as a result of Obey Clothing's infringement led to increased sales of non-Obama merchandise. In light of this evidence, Obey Clothing's real disagreement with the AP does not appear to be about the ***availability*** of damages in the form of indirect revenue but about the ***amount*** of damages that the AP should recover in this case. That issue is for the jury to resolve, and Obey Clothing's motion should be denied.

A. The Copyright Act Plainly Permits The Copyright Holder To Disgorge The Infringer's Profits Reasonably Related To Infringement

Under the express terms of Section 504(b), a copyright owner is entitled to recover its actual damages as well as "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b); see also Semerdjian v. McDougal Littell, 641 F. Supp. 2d 233, 244 (S.D.N.Y. 2009). The purpose of "allowing suit for the infringer's lost profits is to make the infringement ***worthless*** to the infringer." Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 933 (7th Cir. 2003) (Posner, J.) (emphasis added). Put differently, profits are awarded to prevent infringers from receiving "'***any benefit*** derived from their infringement.'" Kleier Adver. Co. v. James Miller Chevrolet, Inc., 722 F. Supp. 1544, 1545 (N.D. Ill. 1989) (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. Section 504 at 161) (emphasis added); see also U.S. Payphone, Inc. v. Executives Unlimited of Durham, Inc., 781 F. Supp. 412, 413 (M.D.N.C. 1991) (recovery of profits "designed to ensure that infringers are not able to retain some benefit").

In determining the amount of indirect profits available for recovery, the AP bears only the initial burden of identifying Obey Clothing's gross revenues that are "reasonably related to the infringement." Semerdjian, 641 F. Supp. 2d at 344; see also Thornton v. J. Jargon Co., 580 F. Supp. 2d 1261, 1279 (M.D. Fla. 2008) (comparing Section 504(b) case law from various Circuits and noting that "the Second Circuit requires only 'a reasonable relationship' between the revenue and the *infringing activity* . . . .") (original emphasis)). This threshold is not difficult to satisfy, as the AP "must meet only a ***minimal*** burden of proof in order to trigger a rebuttable presumption that the defendant's revenues are entirely attributable to the infringement." See Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1173 (1st Cir. 1994) (emphasis added); see also Andreas, 336 F. 3d at 796. Once this showing has been made, the burden shifts to Obey Clothing "to establish that those revenues include deductible costs of production and profits attributable to factors other than the infringing use." Semerdjian, 641 F. Supp. 2d at 244. Moreover, "[a]ny doubt as to the computation of costs or profits is to be resolved in favor of the plaintiff." See, e.g., Andreas, 336 F. 3d at 795 (quoting Frank Music Corp. v. MGM Inc., 772 F.2d 505, 514 (9th Cir. 1985)).

B. Obey Clothing's Indirect Profits From Increased Sales Are Reasonably Related To Its Infringement of the Obama Image.

The evidence in this case is more than sufficient to show a reasonable relationship between Obey Clothing's copyright infringement and the increase in its gross revenue during the years it distributed and sold the Obama Merchandise. Obey Clothing's widespread mass-marketing of the Obama Merchandise helped put the "Obey" brand on the map and opened up new market segments for the company, in the process significantly increasing its sales. Obey Clothing cannot plausibly dispute this fact, as much of the AP's evidence comes from Obey Clothing's own principals and documents.

The opinion of the Court of Appeals for the Eighth Circuit in Andreas v. Volkswagen of America, Inc. is instructive here. 336 F.3d 789 (8th Cir. 2003). In that case, Audi infringed plaintiff Andreas's copyrighted poem by including text from the poem in a commercial for the Audi TT automobile. Id. at 791-92. After the jury awarded Andreas a portion of Audi's profits for the Audi TT during the infringement period, the district court granted Audi judgment as a matter of law because the "award was too speculative" since Andreas "failed to prove a causal connection between the infringement and Audi's profits." Id. at 795. The Court of Appeals reversed, holding that Andreas only bore the burden of proving "whether Audi profited from the infringing commercial at all." Id. at 796. It concluded that Audi did so in light of evidence that the "infringement was the centerpiece of [the] commercial;" that "Audi enthusiastically presented the commercial to its dealers;" that sales of the Audi TT exceeded projections; that the ad campaign received high ratings; and that Audi paid its advertising consultant a bonus based on the success of the campaign. Id. at 797-98.

Nor is this an isolated decision, as courts from across the country have repeatedly found similar evidence sufficient to meet a plaintiff's burden of showing a reasonable relationship between infringement and indirect revenue. See, e.g., Thornton, 580 F. Supp. 2d at 1280 (denying defendant's motion for summary judgment on indirect profits where plaintiff presented evidence of gross revenue for events at which defendant distributed infringing programs as "free souvenir[s]" for ticketholders); Akrie v. Avis Rent A Car Sys,, No. 04-5248 SBA, 2006 WL 2583609, *2 (N.D. Cal., Sept. 7, 2006) (allowing defendants' indirect-profits theory to go to trial where plaintiff presented evidence that ad campaign that infringed his song provided some increased revenue for defendant and that his song played an important role in the success of the ad campaign); William A. Graham Co. v. Haughey, 568 F.3d 425, 442-44 (3d Cir. 2009) cert. denied, 130 S. Ct. 503, 175 L. Ed. 2d 348 (U.S. 2009) (upholding district court's denial of defendant's post-trial motion for judgment as a matter of law on indirect profits where plaintiff showed that defendant used infringing sales proposals in making numerous insurance sales and urged its employees to use the infringing proposals in pitch meetings, and that infringing proposals were an important part of the sales process); Frank Music Corp., 772 F.2d at 516-18 (Copyright Act of 1909) (holding that a single passage in defendant resort's annual report stating that its gaming operations were "materially enhanced by the popularity of the hotel's entertainment" including the infringing musical revue provided sufficient evidence to support an award of indirect profit, if ascertainable, based on defendant's use of plaintiff's copyrighted music in six minutes in one of the revue's ten acts).

There is no good reason to depart from that precedent here. The Obama Image was hugely popular, and Obey Clothing's distribution and sale of Obama merchandise—and thus infringement of the AP's copyright—opened new markets to and increased revenues for both the Obey brand and Obey Clothing. As early as May 27, 2008, Justin McCormack, co-owner with Shepard and Amanda Fairey of Obey Giant LLC and the "Obey" brand and trademarks, said that "[w]ith the Obama campaign poster, [the Fairey companies] are getting hit upon from a ton of new companies." (Ex. 111[1], MCCORMACK 0000175-8.) Six months later, in January 2009, he noted that the Obama Image has "been good to our royalties!" (Ex. 123, MCCORMACK 0000409.) Significantly, as a part owner in Obey Giant LLC, Mr. McCormack's royalties all come from Obey Clothing's product sales. (See Ex. 12, O. Perches (Sept. 22, 2009) 75:20-76:16 (Obey Giant LLC's business manager testifying that the only thing that Obey Giant LLC does is license the Obey trademarks to Obey Clothing).)

Obey Clothing saw the same effect. In an October 1, 2008 e-mail, Romeo Trinidad, head of Obey Clothing's international sales and marketing, told one of the company's international representatives that "The OBAMA [t-shirt] was a big 'free' marketing thing for us." (Ex. 115, OTT018818-21.) More than a year after Obey Clothing started selling the Obama merchandise, and more than five months after this suit was filed, Mr. Trinidad outlined a speech he planned to give at an Obey Clothing marketing meeting, stating in part:

> ***Again, the OBAMA image was a huge one for us, on a philosophical and marketing level, it opened up multiple international tiers (much like middle america [sic]) where demand increases season after season . .*** . .

(Ex. 116, OTT26471-2 (emphasis added).)

Similarly, Mr. Van Berckelaer, Obey Clothing's 30(b)(6) witness on its revenues and expenses, admitted that Obama merchandise increased Obey Clothing's exposure. "[W]e did gain more market awareness after the Obama project," Van Berckelaer explained.[2] (Ex. 90, A.

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[1] All exhibit numbers are references to the exhibits to The Associated Press' summary judgment pleadings unless otherwise specified.

[2] In fact, the Obama merchandise was a key part of Obey Clothing's marketing strategy, which is to appeal directly to potential customers through so-called "guerilla-marketing" tactics that feature its products and Mr. Fairey's art. Mr. Juncal described Obey Clothing's guerilla marketing as "pasting up [art] inside [retail stores] or doing special projects with retailers," stating that "the youth understands that kind of marketing." (Ex. 79, D. Juncal Dep. (Mar. 23, 2010) 258:9-259:3).) In a May 30, 2008 e-mail to a retail account, Mr. Juncal further described this approach as "subversive marketing where the person does not feel that they are being marketed to," calling the marketing style part of Obey Clothing's "philosophy." (Ex. 107 (OTT 012188-012190.) Mr. Juncal admitted that the Obama (Continued…)

Van Berckelaer Dep. (Mar. 11, 2010) 257:21-22; *see* Ex. 91, A. Van Berckelaer Dep. (Aug. 26, 2010) 365:12-367:15).) Mr. Broders, who heads Obey Clothing's marketing division, also recognized the heightened brand awareness that resulted from sales of the Obama merchandise. In March 2009, Broders commented that the "***OBEY brand*** is right at the cusp of being over exposed at the moment. ***Much of this is attributed to the amazing success of the OBAMA image***… there is no doubt that the awareness this has brought to the brand is so positive in so many ways. OBEY is so on the radar right now." (Ex. 117, OTT 000163-4 (emphasis added).)

This increased brand awareness produced tangible benefits for Obey Clothing, whose growth spiked sharply while it was distributing and selling the Obama merchandise. See, e.g., Andreas, 336 F.3d at 797. In fact, Obey Clothing's gross revenue grew from approximately $17.9 million in 2007 to nearly $27 million in 2008—an increase of over 50%. (Ex. 118, OTT 028223-41.) During the same year, the company's net profit increased from $2.68 million to $5.16 million—an increase of over 92%. (Ex. 118, OTT 028223-41.) This was more than ***twice*** the growth rate for the company during the period from 2006 to 2007, the earliest years for which Obey Clothing produced financial data in this case. (Ex. 119, OTT 028204-22; Ex. 118, OTT 0028223-41.)

In 2009, despite the global economic downturn, Obey Clothing far outperformed its financial results from pre-2008 periods, with annual revenues of $24.4 million (a year-over-year increase of more than 36%) and nearly $4 million in profits.[3] (Ex. 22, OTT 028254-9.) By

merchandise it sold to Urban Outfitters was just such a marketing tactic. (Ex. 107, OTT 0012188-012190.) Thus, there should be no dispute that Obey Clothing used the Obama merchandise as a promotional tool to increase sales to its retail accounts and to market the "Obey" brand to consumers.

[3] Obey Clothing passed along these increased profits to its six owners. It distributed over $8 million in profit in 2008 and 2009— approximately $4 million in each year—compared to just over $2 million in distributions for 2006 and 2007 combined. (Exs. 22, 70-71.)

comparison, the annual revenues of one of Obey Clothing's direct competitors, Stussy, Inc., decreased by over 16.3% during the same period, dropping from $31.9 million to $26.7 million. (Ex. 124 (Capital IQ "Private Company Profile" for Stussy Inc.); Ex. 125 (Lexis Nexis "Private Company Insight" and related company data).)

In light of this evidence, it is unsurprising that both the AP's and Obey Clothing's expert witnesses concluded that Obey Clothing received quantifiable indirect revenue as a result of its infringement. The AP's damages expert, Ms. Kathleen Kedrowski, a managing director at Navigant Consulting with over two decades of experience in the field, applied both a (1) compound-annual-growth-rate and (2) trend-line analysis to non-Obama-related revenues earned by Obey Clothing. (Preliminary Expert Report of Kathleen M. Kedrowski dated Oct. 1, 2010 ("Kedrowski Rpt.") at 59-70.) She calculated Obey Clothing's compound annual growth rate to be 16.7% from the end of 2007 through 2009. Based on this analysis, Ms. Kedrowski concluded that Obey Clothing's revenue increased year-over-year by up to $13.6 million, excluding revenues associated with the Obama merchandise. See infra. Moreover, her trend-line analysis further reinforces her conclusion that there is a nexus between the infringement and Obey Clothing's increase in revenues. (Kedrowski Rpt. 69.)

Similarly, one of Obey Clothing's experts, Mark Hair, analyzed Obey Clothing's indirect revenues and profits from its use of the Obama Image. (Expert Report of Mark L. Hair dated November 2, 2010 ("Hair Rpt.") at 25-30.) He first calculated Obey Clothing's potential indirect revenue for 2008—$3,184,089—by subtracting Obey Clothing's projected annual revenue, $22.1 million, from its actual revenue, $25.284 million. According to Mr. Hair, the remaining $3,184,089 represents "the likely maximum Indirect Revenue, if any, [Obey Clothing] received as a result of the notoriety related to the Obama Image." (Hair Rpt. 27-28.) Mr. Hair then calculated that Obey Clothing's indirect profit related to the Obama Image and Merchandise was at most $638,078.[4] (Id.)

While the AP disputes Mr. Hair's conclusions and intends to prove that its damages are much higher,[5] the question is not whether AP is entitled to recover, but rather how much. This is a classic "battle of the experts" that is best resolved by a jury. See, e.g., E.E.O.C. v. Bloomberg L.P., No. 07 Civ. 8383, 2010 WL 3466370, at *7 (S.D.N.Y. Aug. 31, 2010) (noting that arguments to exclude experts "do not go towards admissibility but rather goes towards the weight that the jury should give the testimony").

C. Obey Clothing Fails To Demonstrate That The Existence And Amount of The AP's Indirect Profits Damages Should Not Be Decided By A Jury

Instead of dealing with this evidence, Obey Clothing attempts to argue that "the hard data does not support" the notion that "the popularity of the Obama Image caused [Obey Clothing] to sell more clothing and accessories." (Mem. Of Law in Support of Counterclaim Def. One 3 Two, Inc.'s Mot. In Limine No. 1 To Exclude All Evidence & Testimony Concerning Indirect Profits ("MIL #1") at 4 (Feb. 25, 2011).) First, Obey Clothing tries to compare "three different aspects" of its 2008 monthly performance—total revenue, basic tees, and denim pants—and

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4 John Jarosz, Fairey's damages expert, took a different approach to calculating indirect profits related to the Fairey entities' commercial exploitation of the Obama Image. He determined the "mid-point" between the Fairey entities' residual revenues for 2007 and those for 2009 and then subtracted that "mid-point" from the Fairey's entities residual revenues for 2009. (Rebuttal Expert Report of J. Jarosz dated November 2, 2010 ("Jarosz Rebuttal Rpt."), 65-68.) Mr. Jarosz then applied the companies' estimated profit rate on non-Obama merchandise for 2008 and 2009. (Id. at 67.) The fact that Mr. Jarosz took a third approach to calculating indirect profit further demonstrates that, given the highly factual nature of this inquiry, this issue is best left to a jury.

5 Despite Obey Clothing's substantial sales of Obama merchandise in 2009, Mr. Hair does not include any indirect revenue for 2009 in his calculation, because "the majority of Mr. Fairey's exposure stemmed from the Obama Presidential Campaign which culminated in the November 2008 elections." (Hair Rpt. 26.) That conclusion is dubious at best, given the fact that Mr. Fairey incorporated the Obama Image in his poster design for President Obama's inauguration in January 2009, and Obey Clothing sold a substantial amount of Obama Merchandise in 2009. (Ex. 63, OTT 028260-73; Ex. 64, OTT 000307-24; Ex. 65, OTT 000001.) This is not to say, however, that Mr. Hair's indirect-profit opinion should be excluded in its entirety; rather the AP will challenge the soundness of Mr. Hair's conclusion on cross examination at trial.

contends that, because basic tee sales "are higher in months when its sales of denim pants are lower," there must be no correlation between the Obama Image and these items. (MIL #1 at 3-4.) But this argument should be dismissed out-of-hand. As an initial matter, Obey Clothing offers no justification at all for isolating t-shirt or jean sales when it sought to "***capitalize on the heightened brand awareness***" for the ***entire*** Obey line. (Ex. 117, OTT 000163-4 (emphasis added).) The Obama Image did not just bolster sales of particular Obey Clothing merchandise, it increased sales across ***all of Obey Clothing's product lines***. Moreover, it is hardly surprising that the sales of denim pants—typically colder weather clothing—might not sell well in the spring (for retailers' summer lines) or that jean sales might not track seasonal t-shirt sales. This does not mean that year-over-year revenue increases for each of these product lines were not tied to the infringement.

In fact, the data demonstrates that Obey Clothing's revenue increased when it began selling products using the infringing Obama Image. And as discussed above, Obey Clothing fared far better than its direct competitor, Stussy, during the economic downturn—very likely because of its infringing use of the Obama Image. Indeed, Obey Clothing's revenue growth rate after March 2008 (when it first began to distribute Obey merchandise using the Obama image) exceeded the linear average of its revenue growth between January 2006 and February 2008. See Appendix A; see also Kedrowski Rep. 69 (performing trend analysis on Obey Clothing's revenue); Id. at 70 (performing compound-annual-growth-rate analysis).

Nor should the Court exclude evidence of Obey Clothing's indirect revenues and profits based on Obey Clothing's claim that such damages "cannot be actually ascertained" because "they consist of unmeasurable goodwill and increased prestige." (MIL #1 at 8, 12.) Despite defendant's suggestion to the contrary, courts in this Circuit have repeatedly found that "an increase in defendants' good will resulting from their infringement may be considered a 'profit' for which the plaintiff is entitled to damages under Section 504(b)." Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Ltd., 891 F. Supp. 935, 942 (S.D.N.Y. 1995); see also Bus. Trends Analysts, Inc. v. Freedonia Grp, Inc., 887 F.2d 399, 404 (2d Cir. 1989) (noting that enhanced good will and market recognition may be treated as indirect profits "so long as the amount of the award is based on a factual basis"); Computer Assocs. Int'l, Inc. v. Atlai, Inc., 775 F. Supp. 544, 570 (E.D.N.Y. 1991) (proper measure of value of infringer's enhanced good will is the difference between pre-infringement and post-infringement value). Here, the benefit to Obey Clothing is not just an increased audience and additional markets for its product; it is also increased year-over-year revenues caused by "heightened brand awareness" for Obey Clothing. These damages are readily calculable. Three experts have separately evaluated the amount of indirect revenues and profits attributable to the Obama Image, and Obey Clothing's own expert, Mr. Hair, has calculated these indirect revenues ($3,184,089) and profits ($638,078) down to the dollar.

Moreover, Obey Clothing repeatedly confuses the issue of reasonable causation, on which a copyright plaintiff has the burden of proof, with the issue of apportionment, on which a copyright defendant bears the burden. For example, Obey Clothing claims that "one of its largest accounts did not want the Obama merchandise at all because it was a very conservative account" and thus there must be no correlation with increased sales. (MIL #1 at 4.) And it similarly criticizes the AP for not analyzing "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." (MIL #1 at 10.) But courts from across the country have repeatedly rejected similar attempts to inject apportionment issues into the low causation hurdle that a copyright plaintiff must meet. In Andreas, for instance, the Eighth Circuit refused to require a copyright plaintiff to provide testimony that purchasing decisions were influenced by an Audi commercial that used a copyrighted poem, reasoning that "[o]nce a nexus was shown ... [and] Andreas establish[ed] Audi's gross revenue ... [,] Audi then bore the burden of establishing that its profit was attributable to factors other than the infringing words: the other two commercials[,] ... customer loyalty, brand recognition, etc." 336 F.3d at 797; accord William A. Graham Co., 568 F.3d at 443. Indeed, as defendant's own case explains, "a copyright plaintiff is bound to no more and no less than its statutory obligation to demonstrate a causal nexus between the infringement and the profits sought." Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 712 (9th Cir. 2004). Once the AP has made that causal showing, apportionment is a burden that defendant must bear and for the jury to decide.

Obey Clothing's reliance on Davis v. The Gap is similarly misplaced. (MIL #1 at 7.) The facts of Davis are so dissimilar to this case that it actually ***supports*** the AP's claim to an award of indirect profits. In Davis, plaintiff argued that he was entitled to part of the Gap clothing store's $1.668 billion in gross revenues for 4Q 1996 (a figure that included revenues from non-Gap entities) simply because one of seven models appearing in a Gap advertisement happened to be wearing a set of designer eyeglasses that the plaintiff had designed. 246 F. 3d 152, 156-57 (2d Cir. 2001). This is a far cry from the indirect-profit claim in this case, where Obey Clothing is profiting from merchandise sales that have the AP's copyrighted image as a central focus, and where sales of the infringing works have been a driver for Obey Clothing's increased commercial success. In addition, unlike the situation here, the only evidence that Davis offered in support of his claim was a financial statement setting forth the combined fourth-quarter financials of the Gap and other merchandisers. Id. He offered no evidence of any internal Gap documents or witness testimony supporting the existence of a link between the use of his sunglasses and the Gap's revenue. On that record, it is unsurprising that Judge Leval ruled that "it was incumbent on Davis to submit evidence at least limited to the gross revenues of the Gap label stores, and perhaps also limited to eyewear or accessories." Id. at 160.

In contrast, there is substantial evidence here of a specific—and certainly "reasonable"—connection between the Obey Clothing's sale of Obama Merchandise, increased awareness of the "Obey" brand generally, and increased sales for Obey Clothing across its entire product line. The AP has focused directly on the Obey Clothing's annualized revenue growth for 2008 and 2009, when the infringing activities had their primary impact. And the AP's indirect revenue calculation only includes monies from product lines related to the infringement—namely Obey Clothing's products bearing the "Obey" brand or logo as used and promoted by the Obama Image and Obama Merchandise. The AP has submitted more than enough evidence to shift the burden to Obey Clothing to present evidence of deductible expenses and those elements of profits attributable to factors other than the Obama Image and Merchandise. See Davis, 246 F.3d at 160. The rest is for the jury to decide.

III. MS. KEDROWSKI'S OPINIONS ARE RELEVANT AND WILL ASSIST THE TRIER OF FACT

Obey Clothing also contends that the Court should prevent Ms. Kedrowski from testifying concerning its indirect revenues from the infringement because her opinions are "[u]nreliable and [i]nadmissible." (MIL #1 at 15.) The Federal Rules of Evidence, however, "embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact." Kannankeril v. Terminix Int'l Inc., 128 F.3d 802, 806 (3d Cir. 1997). Under Federal Rule of Evidence 702, "[t]he admissibility standard is a liberal one, and [a] review of the case law after Daubert shows that the rejection of expert testimony is the *exception* rather than the rule." U.S. v. Frazier, 387 F.3d 1244, 1293-94 (11th Cir. 2004) (citations omitted) (emphasis in original). "The grounds for the expert's opinion merely have to be good, they do not have to be perfect." Graham v. Playtex Prods., Inc., 993 F.Supp. 127, 133 (N.D.N.Y. 1998). This is because a district court's gatekeeper role under Daubert "is not intended to serve as a replacement for the adversary system." Wright v. Stern, 450 F. Supp. 2d 335, 360 (S.D.N.Y. 2006) (citation omitted). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking [debatable] but admissible evidence." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596 (1993).

Here, Ms. Kedrowski's testimony concerning the reasonable relationship between Obey Clothing's infringement and its indirect revenues is more than sufficiently reliable to satisfy Daubert. It is based not only on her extensive knowledge and experience, but also on established compound-annual-growth-rate and trend-line analyses, hundreds of documents produced by the parties, interrogatory responses, and deposition testimony—rather than "subjective belief or unsupported speculation." Daubert, 509 U.S. at 590. Moreover, her testimony is corroborated by other defense experts.

A. Ms. Kedrowski is Qualified To Testify Concerning Her Indirect Profit Analyses

Ms. Kedrowski is a managing director at Navigant Consulting, Inc. with over 24 years of professional experience in accounting, finance, and economics. She serves as an adjunct instructor at the University of Chicago's Graham School of General Studies, where she teaches Financial Accounting. She also serves on the AICPA's National Forensic and Litigation Services Executive Committee, the professional group responsible for standard setting related to the performance of Forensic and Valuation Services for CPAs, and as an Editorial Advisor for the AICPA's Journal of Accountancy. In her day-to-day practice, Ms. Kedrowski performs a variety of economic, business, and financial analyses on behalf of clients in intellectual property, licensing, and other disputes. She also has testified as an expert in federal, state, and bankruptcy courts and before national and international arbitration tribunals scores of times concerning both damages and licensing issues—precisely the topics on which she intends to testify in this case. (Ex. A to Kedrowski Rpt. 1-15.) Numerous courts have relied on her expert analyses. See, e.g., Pentech Pharm., Inc. v. Par Pharm., Inc., 597 F. Supp. 2d 758, 788 (N.D. Ill. 2009); Am. Seating Co. v. USSC Group, Inc., 514 F.3d 1262, 1270 (Fed. Cir. 2008) (noting trial jury's reliance on Ms. Kedrowski's testimony).

Plaintiffs, however, criticize Ms. Kedrowski because "[s]he does not claim to have any expertise in consumer behavior or the apparel industry." (MIL #1 at 11.) But she does not render an opinion about either of these issues, and she certainly does not "opine on customer behavior, particularly as it relates to apparel purchases." (Id.) Instead, her testimony is confined in relevant part to the amount of "indirect revenue [that Obey Clothing received] from the unauthorized use of the Obama Photo as a source for the Infringing Works." (Kedrowski Rpt. 15.) And her work is based on two separate economic analyses of Obey Clothing's financial data as well as qualitative evidence from the discovery record concerning Obey Clothing's revenues. Her opinions are squarely within the area of her expertise.[6]

[6] Similarly, Obey Clothing's argument that Ms. Kedrowski's testimony should be limited here because her opinions were excluded in another litigation is a red herring. (MIL #1 at 20.) In that case, she was asked by the plaintiff to testify as to the portion of sales of a single record album that was attributable to the inclusion of one of the 18 separate tracks on that album, an issue that the court found would be better addressed by another of the plaintiff's experts who had more than 20 years experience in the music industry. Loussier v. Universal Music Grp., Inc., No. 02 Civ. 2477 (KMW), 2005 WL 5644422 (S.D.N.Y. June 28, 2005). Here, rather than being asked to opine on the drivers of sales of a single product, Ms. Kedrowski's work focuses on compound-annual growth-rate and trend-line analyses directed at the change in profits of an entire company, a task that falls well within the scope of her experience in the accounting and finance realm.

B. **<u>Ms. Kedrowski's Indirect-Profit Analyses Exceed The Requirements of Daubert</u>**

To calculate the extent to which the Obama Merchandise indirectly increased Obey Clothing's profits, Ms. Kedrowski first applied a compound-annual-growth-rate analysis to non-Obama-related revenues earned by Obey Clothing. (Kedrowski Rpt. 68-70).) Ms. Kedrowski examined the revenue growth that Obey Clothing experienced from the end of 2007 through 2009, deriving a compound annual growth rate ("CAGR") that reflected the smoothed, annualized growth of the company as a whole during this period. (Kedrowski Rpt. 68-70.) For Obey Clothing, which experienced a remarkable financial performance in 2008 and 2009, Ms. Kedrowski calculated a CAGR of 16.7% for this period. (Kedrowski Rpt. Ex. D-3.) Ms. Kedrowski then derived the annual residual revenue, or non-Obama-related revenue, for Obey Clothing for 2006 through 2009. To isolate Obey Clothing's annualized growth for 2008 and 2009, Ms. Kedrowski applied the CAGR of 16.7% to Obey Clothing's annual residual revenue for these two years.[7] Although Ms. Kedrowski inadvertently included residual revenues for 2006 and 2007 in addition to those for 2008 and 2009 in running her final calculations through her damages model, Ms. Kedrowski recognized this error at her deposition, and the AP would expect Obey Clothing to cross-examine her about it at trial. Moreover, even without including 2006 and 2007, Ms. Kedrowski still arrived at an indirect revenue figure of $8.213 million.[8] This analysis captures the year-over-year increase in Obey Clothing's revenues,

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[7] Obey Clothing also takes issue with Ms. Kedrowski's decision to use its total annual revenues for 2009 in her CAGR calculation, asserting that she should have used residual revenues. (MIL #1 at 17.) In fact, Ms. Kedrowski applied her CAGR to Obey Clothing's residual revenue for 2009 on the back-end of her calculation. And Obey Clothing's challenge is certainly not grounds for <u>Daubert</u> exclusion.

[8] The inclusion of 2006 and 2007 resulted in an indirect revenue figure of $13.621 million. (Kedrowski Rpt. 70.)

excluding Obama merchandise sales, which are reasonably related to its use of the Obama Image to promote the Obey brand.

Obey Clothing, however, contends that Ms. Kedrowski's "[m]ath [e]rror [d]emonstrates the [i]rrationality in [h]er [o]pinion" and that her testimony should thus be excluded. (MIL #1 at 17.) While the error may affect her credibility, it does not affect the admissibility of her testimony. See, e.g., Smith v. Pfizer Inc., 714 F. Supp. 2d 845, 851 (M.D. Tenn. 2010) (finding that "math mistakes, typographical errors, and arguably misleading citations" did not render opinion unreliable for purposes of Daubert).[9] In fact, Obey Clothing all but ignores that, even under an adjusted calculation that accounts for Obey Clothing's arguments, Ms. Kedrowski still determined that Obey Clothing's indirect revenue associated with the infringement was approximately $8.213 million—a calculation that was confirmed by Obey Clothing's own economic expert in his November 2, 2010 expert report. (Expert Report of Mark L. Hair dated November 2, 2010 ("Hair Rpt.") ¶ 48.) This error certainly does not relegate her testimony to the realm of "junk science" with which Daubert was primarily concerned. See Safrani v. Werner Co., No. 95 Civ. 1267 (LBS), 1997 WL 729110 at *1 (S.D.N.Y. Nov. 24, 1997) (Sand., J.); see also Lappe v. Am. Honda Motor Co., 857 F. Supp. 222, 228 (N.D.N.Y. 1994) aff'd sub nom. Lappe v. Honda Motor Co. Ltd. of Japan, 101 F.3d 682 (2d Cir. 1996) ("Daubert's narrow focus is on the admissibility of novel scientific evidence under Fed.R.Evid. 702").

Nor can Obey Clothing argue that the fact that Ms. Kedrowski attributed all of its year-over-year revenue "growth … to infringement" or that "she was still comfortable with the

[9] *See also* Baldwin v. Bader, 539 F. Supp. 2d 443, 446 (D. Me. 2008) (holding that an expert's "miscalculations go to the weight, not the admissibility, of his opinions") (citation omitted); Main St. Mortgage, Inc. v. Main St. Bancorp., Inc., 158 F. Supp. 2d 510, 516 (E.D. Pa. 2001) (noting that a potential mathematical error in expert report "will bear only the weight, rather than the sufficiency of the evidence.").

$13.6 million figure" must mean that her "analysis is so flawed that it must be excluded." (MIL #1 at 14-15.) If anything, Ms. Kedrowski's analysis is conservative. First, Ms. Kedrowski's compound-annual-growth-rate analysis did not account for the devastating economic conditions in 2008 and 2009. (K. Kedrowski Dep. (Day 2) 14:15-16:25; 114:21-116:10; 185:18-188:15.) Obey Clothing saw revenues increase more than 36% year-over-year from 2008 to 2009, while its direct competitor, Stussy, experienced a 16.3% year-over-year revenue decrease in this same period during this same period. See supra. And same store sales for three of Obey Clothing's four largest customers—Nordstrom, Urban Outfitters, and Zumiez—declined during this time. (K. Kedrowski Dep. (Day 2) 14:15-16:25.) In light of this dire economic context, it is reasonable to attribute Obey Clothing's revenue growth to the Obama Image: without it, Obey Clothing might have seen the same sort of precipitous revenue declines that its competitors and retailer customers experienced. Second, because Obey Clothing has not produced documents showing its 2010 financial results, Ms. Kedrowski was not able to account for indirect revenues from that year. Because there is no basis to think that the indirect benefits to Obey Clothing suddenly halted with the turning of a calendar page, but rather likely continued into 2010 and perhaps even beyond, Ms, Kedrowski's indirect revenue calculation might well be too low, even if 2006 and 2007 figures were included.

Similarly, the Court should lend no credence to Obey Clothing's argument that Ms. Kedrowski should have "remove[d] items unrelated to infringement from the analysis of indirect profits." (MIL #1 at 16.) The AP's minimal burden, again, is to come forward with the revenues reasonably related to the infringement. Obey Clothing, on the other hand, must "establish that those revenues include deductible costs of production and profits attributable to factors other than the infringing use." Semerdjian, 641 F. Supp. 2d at 244. Daubert does not require plaintiff to distinguish between the defendant's lawful and unlawful activity. Main St. Mortgage, Inc. v. Main St. Bancorp., Inc., 158 F. Supp. 2d 510, 515 (E.D. Pa. 2001). "Whether [a] decline in … profits is attributable to the [infringement] or some other factors is a factual issue, not an issue of reliability." Id. (citing In re TMI Litig., 193 F.3d 613, 663 (3d Cir. 1999)); see also Andreas, 336 F.3d at 797-98 ("The question of allocating an infringer's profits between the infringement and other factors, for which the defendant infringer carries the burden, is highly fact specific, and should have been left for the jury.") (internal quotations and citation omitted) That issue is for the jury to hear and decide.

Obey Clothing also claims that Ms. Kedrowski's "'CAGR' calculation is the only actual mathematical analysis" she "relied on to evaluate the indirect profits issue." (MIL #1 at 13.) This is wrong. Ms. Kedrowski also analyzed the "growth and trending" of Obey Clothing's total revenues. (Kedrowski Depo., Day One, at 232:17-233-4; Kedrowski Rpt. 69.) Obey Clothing does not—because it cannot—question the reliability of this trend-line analysis, which also demonstrates the relationship between Obey Clothing's sales and its infringement.

The Court should likewise ignore Obey Clothing's criticism that Ms. Kedrowski did not perform a regression analysis in evaluating the nexus between the infringement and the company's indirect revenues. (MIL #1 at 13.) As she explained in her report, Ms. Kedrowski lacked sufficient data to perform a reliable regression analysis. (Kedrowski Rpt. 68.) Furthermore, Obey Clothing's own experts, who presumably had access to as much data as they wished, also did not do a regression analysis, suggesting that had Ms. Kedrowski been able to conduct such an analysis, it actually would have supported her conclusion.

Finally, Obey Clothing should not be heard to argue that "Kedrowski did not cite any factual information showing that sales of non-infringing merchandise were related to infringement." (MIL #1 at 11.) In fact, in addition to the documents she discussed showing the indirect benefits to Mr. Fairey and his companies, she also discussed the financial statements from Obey Clothing, deposition testimony from Adam Van Berckelaer, Obey Clothing's CFO, internal e-mails from Obey Clothing personnel, and a host of press articles about the Obama Image that focused attention on the Obey brand. (Kedrowski Rpt. 59-68.) In reaching her conclusions, Ms. Kedrowski also considered hundreds of documents produced in discovery, thousands of pages of deposition testimony from 12 separate witnesses, and dozens of pleadings and motions. (Ex. B to Kedrowski Rpt.) In short, Ms. Kedrowski's expert opinions are based not only on her considerable experience and knowledge but also on voluminous record evidence that demonstrates the connection between Obey Clothing's infringement and an increase in its revenues.

CONCLUSION

For the foregoing reasons, the AP respectfully requests that the Court deny Obey Clothing's Motion *In Limine* No. 1 in its entirety.

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Respectfully submitted,

/s/ Dale M. Cendali

Dale M. Cendali
Claudia Ray
Brendan T. Kehoe
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: 212-446-4800
Fax: 212-446-4900
Dale.cendali@kirkland.com
Claudia.ray@kirkland.com
Brendan.kehoe@kirkland.com

Michael F. Williams
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200
Michael.williams@kirkland.com

Attorneys for Plaintiff/Counterclaim Defendant
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