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**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. 4
 TO EXCLUDE THE OPINION OF
 WILLIAM M. LANDES**

I. INTRODUCTION

One 3 Two, Inc. d/b/a Obey Clothing (“Obey Clothing”) through its Motion *in Limine* No. 4 seeks to exclude the testimony of University of Chicago law and economics professor William Landes, an expert designated by the Associated Press (“AP”). In his expert report, Professor Landes concludes that the use of the Obama Photo by Shepard Fairey and Obey Clothing contributed a significant portion of the overall value of the Obama image made by Shepard Fairey, which Obey Clothing distributed on t-shirts and other merchandise. In reaching his conclusion, Professor Landes uses a regression analysis to demonstrate that auction prices were significantly higher for Mr. Fairey’s Obama image, which incorporated the AP’s copyrighted Obama Photo, than other images made by Mr. Fairey that were based on other photographs (including of President Obama). Professor Landes’s quantitative analysis thus directly rebuts Obey Clothing’s argument, put forward by both its fact witnesses and Obey Clothing’s purported garment-industry expert, Gabriele Goldaper, that the Obama Photo contributed nothing to the value to the resulting Obama Image.

Obey Clothing incorrectly argues that Professor Landes’s testimony should be excluded because it pertains solely to issues relating to Shepard Fairey and his companies, who are no longer in the case. Professor Landes is a renowned economist, with particular expertise in the economics underlying copyright exploitation, having written the seminal 2003 book with Judge Richard Posner, The Economic Structure of Intellectual Property Law. The AP designated Professor Landes to rebut expert testimony relating to both the fourth fair use factor, i.e., the economic harm to the market for the copyrighted work at issue, and to apportionment. He produced two reports: an original rebuttal report and a supplemental rebuttal report. While

many of the opinions in Professor Landes's original report are no longer in issue,¹ Professor Landes included in his original report and in his supplemental report opinions on much of the same apportionment evidence offered by Obey Clothing largely through its purported expert, Gabriele Goldaper. Indeed, Professor Landes's opinions are based on an analysis of the image created by Shepard Fairey (the "Obama Image"), which was copied from the AP's photograph of then-Senator Obama (the "Obama Photo") and printed on merchandise sold by Obey Clothing. His opinions do not, as Obey Clothing argues, pertain solely to Mr. Fairey's companies, but are thus equally applicable to Obey Clothing. Indeed, in his supplemental report, Professor Landes expressly applies his analysis to the success of not just Mr. Fairey, but of Obey Clothing as well.

Obey Clothing also wrongly contends that Professor Landes's apportionment analysis is unreliable and unfairly prejudicial because it relies on data pertinent to artwork rather than clothing. Professor Landes relies on publicly available third-party-auction record data and applied reliable and accepted statistical analysis. He did not rely on information provided by Mr. Fairey or any of his entities in his report. Any complaints Obey Clothing may have about the data on which Professor Landes relied simply go to the weight of his opinion, not its admissibility. Moreover, there can be no unfair surprise, because Obey Clothing received Professor Landes's reports long ago and attended his deposition. And, as a rebuttal witness, the proper scope of Professor Landes's testimony will depend on Obey Clothing's presentation of its apportionment evidence.

In short, the Court should deny Obey Clothing's motion *in limine* and, if necessary,

¹ The Court has dismissed Obey Clothing fair use defense and thus the portion of Mr. Landes's report discussing the fourth fair use factor, the economic harm to the AP from Obey Clothing's use of its copyrighted photograph, is no longer relevant.

reserve ruling on the admissibility of Professor Landes's testimony until after Obey Clothing presents its apportionment evidence.²

II. ARGUMENT

Obey Clothing argues that Professor Landes's testimony should be excluded in its entirety because Professor Landes was originally designated as a rebuttal expert to Shepard Fairey's expert, John Jarosz, rather than Obey Clothing's expert, Gabriele Goldaper. Obey Clothing therefore contends that Professor Landes's testimony should be excluded under Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 702 because it is inapplicable to Obey Clothing, whose business is different from that of Mr. Fairey and his companies.

Obey Clothing misses, or ignores, the essential opinion expressed by Professor Landes in his supplemental report, which is as applicable to Obey Clothing as it is to Mr. Fairey. To rebut Obey Clothing's evidence of apportionment, Professor Landes performed a regression analysis comparing other works made by Mr. Fairey of President Obama in the same style as the Obama Image, demonstrating that it was the use of the AP's copyrighted photograph, and not other factors relating to Mr. Fairey or Obey Clothing, that contributed most significantly to the value of the Obama Image. (OC Mot. Ex. B, Supplemental Expert Report of William M. Landes, Dec. 1, 2010 ("Supp. Landes Rpt."), ¶ 9-11; OC Mot. Ex. A, Expert Report of William M. Landes, Nov. 2, 2010 ("Landes Rpt."), ¶¶ 49-58.) In essence, Professor Landes was able to mathematically demonstrate the significant value of the Obama Photo in Mr. Fairey's and Obey

² Obey Clothing is also putting forward Marita Sturken, one of Mr. Fairey's experts on fair use. However, unlike Marita Sturken, who only opined on fair use for Mr. Fairey, Mr. Landes deals with both fair use (a subject which he will not testify to) and apportionment (which he will).

Clothing's works as compared to other source photos of President Obama that Mr. Fairey has used in other works in a similar style.

While Professor Landes will no longer testify regarding fair use, his opinions on apportionment are very much still an important part of this case. The AP should be permitted to present such opinions to rebut Obey Clothing's apportionment arguments, which it plans to make including through its purported expert, Gabriele Goldaper. And there is no prejudice to Obey Clothing because Professor Landes addresses much of the same evidence offered by Ms. Goldaper. For example, both discuss the effect of the Obama Campaign on valuation and whether another photograph of Obama would have been just as successful in contributing to Obama Image sales. (Compare AP MIL No. 1 Ex. A, Expert Report of Gabriele Goldaper, Sept. 17, 2010, ¶¶ 25, 25.6 with OC Mot. Ex. B, Supp. Landes Rpt. ¶ 10.)

Obey Clothing also contends, disingenuously, that Professor Landes's analysis relies on information that pertains only to Mr. Fairey's companies. In fact, Professor Landes's opinions have nothing to do with Mr. Fairey's companies and instead relate solely to the images Mr. Fairey creates, which Mr. Fairey indisputably licenses to Obey Clothing for use on clothing and other merchandise. Professor Landes's quantitative analysis rests on a set of data derived solely from publicly available *third-party* auctions of items containing the Obama Image, not from sales data from Mr. Fairey's companies. (OC Mot. Ex. A, Landes Rpt. ¶¶ 48-58; OC Mot. Ex. B, Supp. Landes Rpt. ¶ 9.) And as Professor Landes clearly states in his supplemental report, his analysis applies to the success of the *image*³ itself, not to Mr. Fairey's companies:

³ Mr. Landes in his report refers to the HOPE/PROGRESS Images, but these are collectively known as the "Obama Image" throughout this brief.

Since all the works in the latter comparison were based on Obama images and all were the product of Mr. Fairey's creative efforts, this result suggests that the AP's Obama Image, as the source for the *HOPE/PROGRESS Image*, contributed to the success of the *HOPE/PROGRESS Image*.

(OC Mot. Ex. B, Supp. Landes Rpt. ¶ 9 (emphasis added).) Although Professor Landes's reports were styled as a rebuttal to Mr. Jarosz, designated by Mr. Fairey, the defendants at that time were acting in a coordinated fashion, and Mr. Jarosz was the primary expert on apportionment. Obey Clothing well knew that Professor Landes's independent, image-based analysis applied equally to Obey Clothing; however, as Professor Landes explicitly discussed Obey Clothing in the apportionment section of his report:⁴

[T]he fame that Mr. Fairey *and Obey Clothing* achieved in connection with the products based on the *HOPE/PROGRESS Image* spurred interest in Mr. Fairey's *and Obey Clothing's* non-Obama works and led to engagements that might not have occurred in the but-for world.

(OC Mot. Ex. B, Supp. Landes Rpt. ¶ 11 (emphasis added).) Since his measure of value is based on publicly available third-party data involving the Obama Image, it translates to the use of that image on clothing just as it does to the use of that image in other works bearing the same image.

Obey Clothing also attempts to characterize Professor Landes's report as unreliable because Obey Clothing disagrees with the factors Professor Landes considered in reaching his opinions. Specifically, Obey Clothing contends that Professor Landes's analysis is unreliable as applied to Obey Clothing, which sells clothing bearing Mr. Fairey's designs, because Professor Landes's analysis rests on data related to artwork and posters and supposedly does not take into account factors Obey Clothing contends are relevant to a clothing consumer's purchasing decision. (OC

⁴ Although this statement appeared in Mr. Landes's supplemental report, Obey Clothing chose not to ask any questions on this statement during the deposition of Mr. Landes.

Mot. 4.) In fact, Professor Landes's opinion takes into account a number of factors considered by Obey Clothing's own expert, Ms. Goldaper. (OC Mot. Ex. B, Supp. Landes Rpt. ¶¶ 9-10; AP MIL No. 1 Ex.A, Expert Report of Gabriele Goldaper, Sept. 17, 2010, ¶¶ 25, 25.6.) But whether or not the factors Professor Landes considered are the most applicable and whether or not he should have considered any other specific factors are questions best saved for cross-examination, as they go to the weight of Professor Landes's opinion, not its admissibility. See, e.g., Campbell v. Met. Prop. & Cas. Ins. Co., 239 F.3d 179, 186 (2d Cir. 2001) (“[G]aps or inconsistencies in the reasoning leading to [an expert's] opinion . . . go to the weight of the evidence, not to its admissibility.”) As laid out in Daubert, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 596 (1993).

Finally, Professor Landes's testimony cannot unfairly surprise Obey Clothing. Obey Clothing received both of Professor Landes's reports and attended Professor Landes's deposition, and was thus well aware of Professor Landes's apportionment analysis and of its express applicability to Obey Clothing. Moreover, because Professor Landes is a *rebuttal* expert, his opinion can pertain only to evidence introduced by Obey Clothing. Obey Clothing thus knows Professor Landes's opinions, controls the scope of his testimony through its own introduction of evidence, and cannot credibly claim that his testimony threatens to surprise Obey Clothing in any unfair way.

III. CONCLUSION

In light of the foregoing, the Court should deny Obey Clothing's Motion *in Limine* No. 4 in its entirety. In the alternative, the Court should reserve ruling until after Obey Clothing presents its own evidence on the issue of apportionment, on which it bears the burden of proof, and thus should not rule on the motion *in limine*.

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Respectfully submitted,

/s/ Dale M. Cendali

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