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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 MOTION IN LIMINE NO. 1 TO EXCLUDE OBEY CLOTHING'S EXPERT GABRIELLE GOLDAPER UNDER RULE 702

The Associated Press (the "AP") respectfully moves to exclude the testimony of Gabrielle Goldaper, whom One 3 Two, Inc. ("Obey Clothing") has offered as an "apparel industry expert," under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence.

I. PRELIMINARY STATEMENT

Gabrielle Goldaper has no business offering expert testimony in this case. Though she claims to be an "apparel industry expert," Obey Clothing put Ms. Goldaper forward as an expert on two damages-related subjects: (1) whether the copyrighted elements of the Obama Photograph contributed to the value of the Obama Merchandise sold by Obey Clothing; and (2) whether the overhead costs of merchandising for allegedly philanthropic purposes are generally higher than the overhead costs of selling merchandise for profit. (See Exhibit **A**, Expert Report of Gabrielle Goldaper dated September 17, 2010 ("Goldaper Rpt.") ¶ 1.) However, it became clear at her deposition that Ms. Goldaper lacks even the basic qualifications for offering these opinions at trial, that Ms. Goldaper's opinions are not based upon any reliable principles or methods, and that Ms. Goldaper cannot offer any quantifiable facts or empirical data to support her opinions. Indeed, Ms. Goldaper even conceded at her deposition that her opinions were merely "impressionistic," "not scientific," and "by the gut." At bottom, Ms. Goldaper's opinions are precisely the sort of unreliable and speculative testimony that should be excluded from the jury under Daubert and Rule 702.

Regarding Ms. Goldaper's first opinion, she claims that the copyrighted elements of the Obama Photograph "did not contribute or add any quantifiable value" to the design of the Obama Merchandise sold by Obey Clothing. (Goldaper Rpt. ¶ 1(a).) But Ms. Goldaper acknowledged at her deposition that she has no relevant expertise in art appreciation, art history, photography,

or graphic design that might conceivably qualify her to testify about the comparative value of elements of the Obama Photograph. (Exhibit **B**, Deposition of Gabrielle Goldaper dated November 20, 2010 ("Goldaper Dep.") 201:10–202:21.) Ms. Goldaper also conceded that she did not conduct any market research, review any sales records, or undertake any methodological process to develop her opinions. (Id. at 227:7–229:15.) Rather, the entire basis for her opinion was her own subjective impressions about the t-shirt market, (id. 227:13–227:24), without any supporting empirical data or other work product, (*id.* at 247:14–247:23). In Ms. Goldaper's own words, her analysis was not methodological at all, but "by the gut." (Id. at 244:7–8.)

As for Ms. Goldaper's second opinion, she asserts that the "overhead costs attributable to creating specialized merchandise to be sold for philanthropic purposes, as the Obama Merchandise was intended to be, are generally greater than those attributable to merchandise that is sold for profit." (Goldaper Rpt. ¶ 1(b).) Again, Ms. Goldaper readily admitted that she lacks any relevant expertise in accounting (see Goldaper Dep. 357:15–357:18), and conceded that her opinion is based entirely upon "personal, anecdotal experience" (id. at 360:22–361:1). Indeed, Ms. Goldaper never even reviewed Obey Clothing's financials before offering her opinion about overhead costs. (Id. at 325:6–326:6). This omission both confirms that Ms. Goldaper's opinion has no relevance to the issues in this case and explains why Ms. Goldaper mistakenly believed that Obey Clothing—a commercial entity that earned more than $2.2 million in revenue from the Obama Merchandise—was actually a "philanthropic" enterprise.[1]

[1] The AP has also moved in limine to exclude any evidence or testimony of Obey Clothing's alleged "charitable" purpose in selling the Obama Merchandise. (See AP Motion in Limine No. 2.) First, there is no evidence other than Obey Clothing's owner's self-serving testimony that Obey Clothing had any such purpose. In fact, there is not one shred of documentary evidence that Obey Clothing ever donated any money from the sale of the Obama Merchandise to any organization. Second, it is beyond dispute that Obey Clothing is a for-profit enterprise and that the Obama Merchandise was sold for significant profit, which was then distributed to Obey Clothing's owners as (Continued…)

II. ARGUMENT

Ms. Goldaper's proffered opinions are not proper expert testimony under Rule 702 of the Federal Rules of Evidence. Under Rule 702, a qualified witness may offer opinion testimony only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Zaccaro v. Shah, --- F. Supp. 2d ----, 2010 WL 3959622, at *4 (S.D.N.Y. Sept. 29, 2010) (citing Nimely v. City of New York, 414 F.3d 381, 395-96 (2d Cir. 2005) (quotation omitted)). The Supreme Court has emphasized that the district court must act as "the gatekeeper" regarding the admissibility of expert testimony and is responsible for ensuring that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589. This requires, at minimum, "mak[ing] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). In addition, opinion testimony may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Nimely, 414 F.3d at 397.

cash payouts in 2008 and 2009. Third, any testimony on this topic would be highly prejudicial as Obey Clothing will attempt to portray itself as altruistic and charitable to the jury, when in fact it is not. Such testimony is unduly prejudicial and should be excluded. See Ty Inc. v. Softbelly's Inc., No. 00 C 5230, 2006 WL 5111124, at *13-14 (N.D. Ill. Apr. 7, 2006) (excluding evidence of charitable contributions under Rule 403 because the limited probative value was outweighed by the significant threat of prejudice to the moving party).

A. Ms. Goldaper's Opinion on Apportionment is Unqualified, Unreliable, and Untested, and Amounts to Little More than Conclusory Speculation.

Obey Clothing proffers Ms. Goldaper as an expert to meet its burden on apportionment. Apportionment is a theory of offset in a copyright case that considers what portion, if any, of the revenue from the infringement is not attributable to the plaintiff's work. See Gaste v. Kaiserman, 683 F. Supp. 63, 65 (S.D.N.Y. 1988) (apportioning 0% of the infringement to the infringer because he was a "relatively unknown artist"); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 508 F. Supp. 798, 801-02 (S.D.N.Y. 1981) (apportioning 25% to ex-Beatle George Harrison due to his significant fame and success as a recording artist). As with other damages deductions, the defendant has the burden of proof on apportionment. Gaste, 683 F. Supp. at 65.

1. Ms. Goldaper Is Not Qualified to Offer an Opinion on Apportionment

Ms. Goldaper's opinion on apportionment is that none of the value of the Obama Image comes from the "protectable" elements of the Obama Photo, which Ms. Goldaper assumes are limited to an exclusive list of nine elements. (Goldaper Rpt. ¶¶ 19.1-19.3.) As a threshold matter, however, Ms. Goldaper's assumption is simply wrong as a matter of controlling Second Circuit law, which holds that the protectable aspects of a photograph may extend to almost any element. See Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992). In particular, Ms. Goldaper fails to consider the creativity in the moment in time when the photograph was taken, which is a significant creative element in the Obama Photo. See Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916) (finding infringement where defendant copied the moment in time captured in plaintiff's photograph); Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 452-53 (S.D.N.Y. 2005). Ms. Goldaper's faulty assumptions alone undermine her entire analysis on apportionment, rendering her opinion unreliable and not helpful to the trier of fact. See Zaccaro,

2010 WL 3959622, at *6 (excluding proffered expert because the underlying assumptions were "not reasonable"); Consulnet Computing, Inc., 631 F. Supp. at 621-22 (same).[2]

Even leaving aside her erroneous assumptions, however, it is clear that Ms. Goldaper is not qualified to offer any opinion on apportionment. Ms. Goldaper admits that she has no expertise in copyright law (i.e., what elements constitute "protectable" copyright expression), no expertise in photography (i.e., what elements of the Obama Photo were creative), no expertise in art history or appreciation (i.e., what is the artistic value of the photograph or Mr. Fairey's work), and no expertise in graphic design (i.e., what design changes Mr. Fairey made to the photograph). (Goldaper Dep. 201:10-202:14; 205:8-206:23.) Instead, Ms. Goldaper relies on her years of experience in the garment industry, but that experience does not qualify Ms. Goldaper to testify in this case because she has no experience working for a t-shirt manufacturer and no experience working with companies that place graphic designs on t-shirts. (Id. 41:11-16, 57:5-12.) Tellingly, the only potentially-relevant experience that Ms. Goldaper could point to in her deposition was consulting work for a dress maker called Stop Staring. But, unlike Obey Clothing, Stop Staring does not make t-shirts and does not place graphic designs on clothing. (Id. 56:20-57:12.) Moreover, Ms. Goldaper was never asked by Stop Staring to "value the contribution" of designs on merchandise or apportion the value of any intellectual property. (Id. 52:24-53:4, 56:20-24.) Thus, Ms. Goldaper's industry experience in no way qualifies her to offer an apportionment opinion in this case because she has no expertise in the relevant markets

[2] From this erroneous assumption, Ms. Goldaper further opines that because Mr. Fairey made even slight changes to the "protected" elements in the Obama Photo, no value should be assigned to the photograph. (Goldaper Rpt. ¶ 25.) Indeed, Ms. Goldaper even expresses the opinion that if Mr. Fairey had incorporated all of the so-called "protectable" elements of the Obama Photo, then she would still not change her opinion at all. (Goldaper Rpt. ¶ 25; Goldaper Dep. 186:5-14.) But Ms. Goldaper does not point to a any evidence to support this opinion and did not conduct a single test in forming her conclusion. See Zaccaro, 2010 WL 3959622, at *5 ("[E]xpert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison ....") (citation omitted)).

— t-shirt designs or the use of graphic designs on clothing. Consulnet Computing, Inc. v. Moore, 631 F. Supp. 2d 614, 622 (E.D. Pa. 2008) (apportionment expert not adequately qualified).

2. Ms. Goldaper's "From the Gut" Analysis Is Unreliable, Untested, and Not Based on Any Empirical Evidence

Ms. Goldaper's testimony regarding apportionment is also unreliable. Under Daubert and its progeny, the touchstone of reliability is whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co., 526 U.S. at 152 (quoting Daubert, 509 U.S. at 593); Zaccaro, 2010 WL 3959622, at *5. Here, Ms. Goldaper's opinion is not based on standards or methodologies that even she admits are used in the apparel industry. (Goldaper Dep. 226:23-228:23.) For example, in forming her conclusions in this case, Ms. Goldaper did not ask even a single consumer about the Obama Merchandise, did not speak with any of the more-than-100 Obey Clothing retailers who sold the Obama Merchandise, did not conduct any review of sales records for the Obama Merchandise, conduct any trend analysis, conduct any market or consumer research, compile any consumer reactions to define preferences, or conduct any focus groups, even though she testified that these were all accepted practices in the industry. (Id.)

In fact, Ms. Goldaper did not conduct any quantifiable, objective analysis that could be considered reliable. See Zaccaro, 2010 WL 3959622, at *6 (testimony based on speculation rendered inadmissible); Consulnet Computing, Inc., 631 F. Supp. 2d at 622. Tellingly, Ms. Goldaper admits that she did not conduct a scientific or empirical analysis, (Goldaper Dep. 247:14-248:14), was not even aware of how to conduct such an analysis, (Goldaper Dep. 253:10-25), and instead simply relied on her subjective, "by the gut" opinion that consumers bought the Obama Merchandise on an "impulse," because it "had Obama's face on it," and that the purchase of Obama t-shirts had nothing to do with "what . . . photograph . . . was used." (Goldaper Dep.

169:14-23, 244:7-12, 251:4-25, 254:1-24.) But these conclusory statements regarding apportionment are not methodologically sufficient to satisfy Rule 702 because they are based on nothing more than Ms. Goldaper's own impressions rather than on reliable principles or evidence. Consulnet, 631 F. Supp. 2d at 622.

In fact, Ms. Goldaper repeatedly admitted in her deposition that her opinion was not scientific and not based on any proven, quantifiable standards:

- When asked how she was able to determine that 100% of consumers did not value the use of the Obama Photo, Ms. Goldaper responded, "You got me. I have no scientific evidence." (Goldaper Dep. 251:22-25.)
- In discussing her methodology, Ms. Goldaper described her approach regarding consumer preferences as "nonsophisticated [and] nontextbook." (Goldaper Dep. 243:4-14.)
- When asked whether she agreed that hers was "not a scientific analysis," she responded, "Exactly. That's what I just said. It's not scientific." (Goldaper Dep. 243:19-22.)
- In discussing whether her analysis was "impressionistic," she acknowledged that it's "more, you know, by the gut, yeah." (Goldaper Dep. 244:7-8.)
- When asked whether she had "quantifiable evidence" to support her opinion that the consumers who purchased Obama merchandise did not care about what photograph was used, she said: "It's the same thing. I just said I don't have any numerical; I don't have any empirical data; I don't have anything quantifiable except the fact that working with the consumer long enough, I know -- even if this wasn't an impulse, I know that the consumer at that point because they love what's on the T-shirt will buy it." (Goldaper Dep. 254:1-24.)

Ms. Goldaper's opinion regarding the "protectable" elements of expression in a photo is similarly undefined and conclusory. Although she states that the "protected elements" of the Obama Photo contribute zero percent to the value of the design of the Obama Merchandise, Ms. Goldaper cannot explain what the "protected elements" are, or whether changing the "protected elements" in the source photo that Mr. Fairey used would affect the value of the Obama Image. (Goldaper Dep. 262:12-266:22.) Ms. Goldaper also cannot articulate or quantify what elements

of the Obama Merchandise supposedly do contribute to its value. (Goldaper Dep. 169:10-171:5.) In addition, Ms. Goldaper refuses to offer an opinion as to whether or not the Obama Image would be more or less valuable if Mr. Fairey used a different photograph of Mr. Obama. (Goldaper Dep. 172:6-173:2, 190:15-193:9.) For example:

- When asked whether Mr. Fairey could have chosen better or worse images for his artwork, Ms. Goldaper testified, "No, I'm not going to make any reference to better or worse images." (Goldaper Dep. 172:6-11.)

- In response to a question regarding whether or not a different photograph "would have been more marketable," Ms. Goldaper responded, "I'm not going to offer an opinion on that." (Goldaper Dep. 172:12-17.)

- When pressed in her deposition about whether an unflattering image of Mr. Obama would have affected the value of the Obama Merchandise, Ms. Goldaper still refused to offer an opinion: "In light of the fact that I won't give an opinion on any other image other than [the Obama Photo], I would have to say that without any quantifiable history that I can use to support the fact that this particular image was successful, you know, then I won't give an opinion." (Goldaper Dep. 172:18-173:2.)

These admissions are telling in light of the evidence put forward on summary judgment that Mr. Fairey himself admitted to selecting the Obama Photo from among 200 images that he reviewed for its special and unique qualities. (See Docket # 153, AP 56.1 SUF ¶¶ 96-99.) Also she does not consider that Mr. Fairey himself used other images of Mr. Obama to make other works, which indisputably were not as successful as the Obama Image based on the AP's copyrighted photograph. As Ms. Goldaper's testimony makes clear, she has not even considered this evidence and makes no attempt to square her opinion with the salient facts of the case.

Given that Ms. Goldaper's methodology lacks any quantifiable support, is not based on anything more than her own conclusory, unsupported opinions, and fails to display even a modicum of rigor that would allow for any testing of her theory, her testimony regarding apportionment should be excluded. See Zaccaro, 2010 WL 3959622, at *6; Consulnet

Computing, Inc., 631 F. Supp. 2d at 622 (finding expert's apportionment analysis not adequately reliable because expert did not conduct any independent analysis).

B. Ms. Goldaper's Opinion On Obey Clothing's "Philanthropic" Purpose Should Also be Excluded as Unreliable and Because it Would Usurp the Jury's Role in Assessing Obey Clothing's Witnesses Credibility

As with apportionment, Obey Clothing bears the burden of proving deductible overhead expenses from the sale of the Obama Merchandise. See Design Res., Inc. v. John Wolf Decorative Fabrics, 229 U.S.P.Q. 418, 425 (S.D.N.Y. 1985) (rejecting overhead deductions where infringer failed to "establish any impact on its administrative expenses or general overhead resulting from its manufacture of the infringing goods"). To qualify as a deductible expense, Obey Clothing must demonstrate that any claimed overhead was reasonably related to the infringement. Sygma Photo News, Inc. v. High Soc'y Magazine, Inc., 778 F.2d 89, 93 (2d Cir. 1985) (denying offset for rent and other overhead as not reasonably related to the infringement).

Ms. Goldaper opines as a general matter that "creating specialized merchandise to be sold for philanthropic purposes," as well as the "sale of merchandise where profits are donated to charity," increases overhead costs. She utterly fails, however, to relate her opinion to the facts of the case, as she did not even consider Obey Clothing's actual expenses or claimed overhead in forming her opinions. Moreover, she simply assumed that Obey Clothing had a charitable purpose based solely on the uncorroborated testimony of Obey Clothing's owners. Tellingly, in her deposition, Ms. Goldaper admits that the sale of the Obama Merchandise was in fact a for-profit venture, regardless of what Obey Clothing's owners may have originally intended. (Goldaper Dep. 321:3-322:23.) Significantly, Ms. Goldaper does not — because she cannot — point to a single philanthropic or charitable donation that Obey Clothing made from the sale of

the Obama Merchandise. (Goldaper Dep. 322:24-324:17.) Nor did she even consider evidence of Obey Clothing's significant sales and profits in forming her opinion. (Goldaper Dep. 326:14-327:20.) Ms. Goldaper's utter failure to analyze the germane facts of the case, standing alone, renders her testimony inadmissible. See Zaccaro, 2010 WL 3959622, at *6; U.S. v. Westchester County, N.Y., No. 06 Civ. 2860 (DLC), 2009 WL 1110577, at *2, 5-6 (S.D.N.Y. Apr. 22, 2009) (expert testimony for the purpose of bolstering fact witness not admissible).

As for her methodology, Ms. Goldaper admits that she has no basis to conclude as a general principle that philanthropic merchandising requires higher overhead than other types of merchandising, other than Mr. Juncal's self-serving deposition testimony and Ms. Goldaper's own gut feeling as to his veracity. (Goldaper Dep. 312:15-313:1.) For example, although her report cites a textbook that she uses in her classroom, she could not identify any particular portion of the textbook that supported her methodology in this case. (Goldaper Dep. 75:22-76:11, 312:15-314:5.) She also concedes that her analysis includes "no empirical data relating to the fashion and apparel industry," and that she "referred to no market trends or industry standards relating to" her opinion. (Goldaper Dep. 329:15-21.) Ms. Goldaper even admits that her opinions regarding higher overhead costs are based on nothing more than the testimony of Obey Clothing's principals and her "own statements." (Goldaper Dep. 313:17-314:5.)

At bottom, Ms. Goldaper's analysis rests entirely on the deposition testimony of Obey Clothing's largest owner, Don Juncal, and she "testified that it's a general principle" for no other reason than that his testimony about increased costs "rang true" to her. (Goldaper Dep. 312:6-313:1.) But such an analysis is improper under Daubert and its progeny and must be excluded. The law in this Circuit is clear that where an expert does nothing more than opine on the credibility, or attempt to bolster the testimony of, a fact witness through the use of conclusory

opinion, the expert's testimony is inadmissible. Nimely, 414 F.3d at 397-98 (determining that expert testimony was for the improper purpose of assessing lay witness's credibility); Zaccaro, 2010 WL 3959622, at *6-7 (usurping the jury's role in deciding ultimate questions of law); Westchester County, N.Y., 2009 WL 1110577, at *2 (use of expert to bolster testimony of lay witness inadmissible).

Lastly, although Ms. Goldaper also opines that the sale of the Obama Merchandise purportedly displaced revenues on other, supposedly more commercial products, Ms. Goldaper stated that "[w]e don't know, and there is no way of determining it that I'm aware of, whether the sales from the Obama merchandise interfered in terms of the total sales for Obama [sic] as a company. In other words, we have no evidence that we could use to address that." (Goldaper 297:17-298:3.) She also testified repeatedly that, if there were any disruption to Obey Clothing's revenues, it cannot be quantified in dollars. (Goldaper Dep. 298:7-299:14.) Further, Ms. Goldaper agrees that the Obama Merchandise actually contributed to Obey Clothing's profitability during the years it was sold, but cannot say how much of the increased profitability was attributable to the Obama Merchandise. (Goldaper Dep. 350:17-25.) Thus, because she fails to identify any external sources supporting her methodology, it is clear that Ms. Goldaper's opinion regarding overhead deductions is wholly unreliable and not supported by the type of rigorous analysis required under Rule 702, Daubert, and its progeny. Nimely, 414 F.3d at 397-98; Zaccaro, 2010 WL 3959622, at *6-7; Westchester County, N.Y., 2009 WL 1110577, at *2. Therefore, because her testimony would only confuse and mislead the jury, it must be excluded.

III. CONCLUSION

For the reasons stated above, the AP respectfully requests that the Court exclude the testimony of Obey Clothing's proffered expert regarding apportionment and increased overhead expenses, Gabrielle Goldaper.

Date: February 25, 2011

Respectfully submitted,

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