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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Glennon Marrero,

Plaintiff

v.

Michael Ray Nguyen-Stevenson; Universal Music Group, Inc.; Bravado International Group Merchandising Services Inc.; Tilly's, Inc.; Shiekh Shoes; and Doe Corporation,

Defendants.

Case No. 13-cv-09291-CBM-PJW

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE AND ARGUMENT OF DEFENDANTS' ASSERTED APPORTIONMENT OF GENERAL OVERHEAD EXPENSES AND COMPARATIVE SURFACE AREA

FILED UNDER SEAL

Hearing

Date: March 3, 2015
Time: 10:00 a.m.
Courtroom: 2
Trial Date: April 7, 2015
Judge: Consuelo B. Marshall

Action Filed: December 18, 2013

Last Kings Designs LLC, a California limited liability company,

Plaintiff,

v.

Glennon Marrero,

Defendant.

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I. INTRODUCTION

The Plaintiff in this case, Glennon Marrero, alleges infringement of his registered copyrights by Defendants Michael Ray Nguyen-Stevenson, Bravado International Group Merchandising Services Inc. ("Bravado"), Tilly's, Inc. ("Tilly's"), and Shiekh Shoes (collectively, "Defendants"; Bravado, Tilly's and Shiekh Shoes are collectively referred to as the "Retail Defendants"). If Defendants are found liable, Marrero is entitled to recover any profits of Defendants that are attributable to the infringement and are not taken into account in computing the actual damages. 17 U.S.C. § 504(b). Defendants' damages expert, Scott Hampton, seeks to apportion away substantial portions of Defendants' profits for various reasons, many of which are unsupported by law. Pursuant to Federal Rules of Civil Procedure 26(a) and 37(c), and Federal Rule of Evidence 702, Plaintiff seeks to exclude Defendants from offering evidence, opinions, or argument relating to two of these alleged deductions: (i) Tilly's and Shiekh Shoes' attempt to deduct all overhead expenses in total, and (ii) Retail Defendants' attempt to apportion away over 90% of their profits from the sale of infringing merchandise based on a flawed methodology that attempts to compare the surface area of the infringing images appearing on garments to the garments' total surface area, which for most cases largely includes nothing but blank material.

First, Mr. Hampton asserts that Tilly's should be able to deduct all of their overhead costs without identifying any particular cost, without attempting to determine which of those various costs were incurred as a result of Defendants' infringing activity, and ignoring that under applicable copyright damages case law, general fixed expenses are not deductible. Mr. Hampton further attempts to

reserve the right to opine as to Shiekh Shoes' overhead costs at trial, even though Shiekh Shoes has produced no evidence of any such expenses.[1]

Further, Mr. Hampton opines that, in addition to their actual costs of goods sold, Retail Defendants are entitled to deduct over 90% of the profits from the sale of infringing merchandise because, based on his calculations, the infringing images make up only 6.9% of the infringing goods' total surface area. This approach is unreliable and unsupported by law. Mr. Hampton's opinion assumes that Retail Defendants contributed almost all value to the goods, when in fact they contributed nothing. Moreover, Retail Defendants have **already deducted any value related to non-infringing portions through the cost of goods sold**.

An examination of a representative product shows the obvious flaws in Mr. Hampton's methodology:

[1] Other than arguing that Defendant Bravado should not be entitled to expense deductions by virtue of its willful infringement, or deductions for taxes generally as discussed below, Plaintiff does not challenge Mr. Hampton's apportionment as to Bravado's overhead expenses. Plaintiff does, however, dispute Bravado's surface area deductions as with the other Retail Defendants.

See, e.g., Declaration of Daniel Hipskind ("Hipskind Decl."), Ex. A.

Despite the fact that the Pharaoh Head Design (the infringing image) composes the entire front panel of the hat and appears again prominently on the side and on the sticker located on the bill of the hat, Mr. Hampton attributes only 11.4% of the profits from the hat depicted above to the copyrighted design, and the remaining 88.6% to the blank fabric. Hipskind Decl. Ex. B (Hampton Report) at Exhibit F.3, p. 3. He arrives at this number by dividing the hat between the front and back (even though the hat is curved), determining that the copyrighted image is displayed on 20% of the front half and 1% of the back half, and then averaging those portions of each "half." Mr. Hampton does not consider the image on the brim sticker at all. Mr. Hampton then uses this technique to extrapolate a misleading average across the entire product line, with each "half" of products being weighted equally irrespective of the product's design. As is apparent from the images above, other than the letters "LK" printed on the side, the Pharaoh Head Design is the product's focal point and only main design feature. Any methodology that attributes only 11.4% of the profits of this hat to the Pharaoh Head Design is deeply flawed.

II. ARGUMENT

In this case, Marrero has asserted copyright infringement claims relating to Defendants' sale of Last Kings merchandise bearing Marrero's copyrighted designs. Marrero seeks Defendants' profits attributable to the infringement of his copyrighted designs. Defendants' expert, Mr. Hampton, attempts to apportion away almost all of these profits by various flawed methodologies.

In order to deduct any money from Defendants' profits from the sale of infringing merchandise, a Defendant bears the burden to show that "it is ***clear*** that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a ***fair basis*** of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 402 (U.S. 1940) (emphasis added). Mr. Hampton has applied unsupportable methodologies in his attempts to deduct all overhead expenses of Retail Defendants, including all Selling, General, & Administrative expenses ("SG&A expenses") from Defendant Tilly's, and to claim that the vast majority of value in the products belongs to Retail Defendants because they purchased and then resold goods that contain blank, non-marketable portions in addition to the infringing image. Mr. Hampton's flawed analysis should be excluded.

A. Mr. Hampton's Attempt to Deduct All of Retail Defendants' Overhead Costs Regardless of Whether Those Costs Relate to Defendants' Infringement Is Contrary to Law and Should Be Excluded.

The Retail Defendants are each accused of willful infringement. *See* Dkt. No. 74-1 (First Amended Complaint (Order deeming First Amended Complaint filed at Dkt. No. 81)) at ¶¶ 29-35. "Generally, deductions of defendant's expenses are denied where the defendant's infringement is willful or deliberate." Ninth Circuit Model Jury Instructions, § 17.27 (*citing Kamar Int'l, Inc. v. Russ*

Berrie & Co., 752 F.2d 1326, 1331-32 (9th Cir. 1984)). Mr. Hampton has not offered any reason why this case should depart from that general rule. As a result, Mr. Hampton's arguments are premature.

Further, Mr. Hampton's arguments, even if properly before the Court at this stage, are fatally flawed and should be excluded. Federal Rule of Evidence 702 governs the admissibility of expert testimony and requires that such testimony (1) be based upon sufficient facts or data; (2) be the product of reliable principles and methods; and (3) apply those principles and methods reliably to the facts of the case. The Supreme Court has made clear that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" and that the reliability requirement applies equally to non-scientific expert testimony. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 589, 592-594 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999). Mr. Hampton's attempt to deduct all overhead expenses incurred by Tilly's is based on a non-specific methodology that fails to reliably determine which, if any, of those expenses should fairly be deducted and apportioned away.

1. Mr. Hampton Fails to Properly Tie Tilly's Expenses to the Infringing Products.

In his expert report, Mr. Hampton asserts that ***all*** proportional "selling, general and administrative expenses" ("SG&A") should be deducted from Defendant Tilly's profits generated from selling infringing goods. Hipskind Decl., Ex. B (Hampton Report) at ¶ 69. For Sheikh Shoes, Mr. Hampton did not argue for any apportionment of overhead expenses in his report or at deposition, but attempts to reserve the right to do so later. *Id*. at ¶ 80. There is no indication of what any of these asserted expenses were or which expenses were incurred as a result of selling infringing goods. As to Tilly's, Mr. Hampton's conclusion as to the amount of such expenses was calculated only "based on ratios derived from

[Tilly's] 10K," which provides a lump-sum amount for all yearly business expenses. *Id*. at ¶ 69. Notably, Tilly's SG&A expenses include general, corporate-wide expenses such as "payroll and support costs of corporate functions such as executive management, legal, accounting, information systems, human resources and other centralized services." Hipskind Decl. Ex. C.

Mr. Hampton's proportional method was specifically rejected by the Ninth Circuit long ago. "The real question, as [the 9th Circuit] sees it, is whether any of the overhead expenses were caused by the production or sale of the infringing goods, **not the proportionate amount of sales of the goods in relation to total sales**." *Kamar International, Inc. v. Russ Berrie & Co*., 752 F.2d 1326, 1332 (9th Cir. 1984) (emphasis added). As Judge Fernandez has explained:

> [G]eneral overhead, such as management, rent, telephones, designers, and the like are not to be deducted, since they are, by hypothesis, there whether the particular item is sold or not. Only if a particular 'overhead' item can be specifically related to the goods in question can it be deducted. This is true even if overhead increases losses or decreases gains for the enterprise as a whole.
>
> …
>
> If [the defendant] thought that actual costs of the particular goods were allocable to the JBJ material but were buried in overhead, or that there were specific overhead items that applied, [defendant] had the duty of pointing that out. It did not.

JBJ Fabrics, Inc. v. Mark Industries, Inc., 1987 U.S. Dist. LEXIS 13445, *15 (C.D. Cal. Nov. 4, 1987).

As in *JBJ*, Retail Defendants and Mr. Hampton make no attempt to point out any ***particular*** "costs that are directly attributable to the items in question." *Id*. In fact, Mr. Hampton does not identify any particular expenses at all. Instead, Mr. Hampton simply assumes that all overhead expenses related to the entirety of Tilly's business should apply in the same proportion to the sales of infringing

goods as they do to the total sales of Tilly's merchandise[2] without itemizing any of the expenses or even breaking such expenses into categories beyond "selling, general and administrative." *See See* Hipskind Decl., Ex. B at 23, n.69 ("I have not had the opportunity to further categorize Tilly's SG&A costs."). This type of general extrapolation is exactly what Judge Fernandez described as what might, on its face, give the "impression of one reasonable approach," but ultimately rejected given that it "does not appear to be the law. The rule is that one deducts from the gross sales price the costs that are **directly attributable to the items in question**." *JBJ Fabrics, Inc.*, 1987 U.S. Dist. LEXIS 13445, at *15 (emphasis added); *see also Kamar International, Inc.*, 752 F.2d 1326 at 1332. Mr. Hampton's attempt to deduct all of Tilly's SG&A expenses proportionally to total sales without any breakdown of the expenses whatsoever is contrary to Ninth Circuit law, and thus should be excluded.

Further, Mr. Hampton's failure to analyze or attribute any particular expenses to the infringing products in question fails because a "[d]efendant cannot deduct expenses which would occur whether the particular item is sold or not." *Spectravest, Inc. v. Fleet Street, Ltd.*, 1989 U.S. Dist. LEXIS 16594, 20 (N.D. Cal. Aug. 23, 1989); *JBJ Fabrics, Inc.*, 1987 U.S. Dist. LEXIS 13445 at *15. At his deposition, Mr. Hampton admitted that many, if not all, of these overhead expenses would exist regardless of any infringing sales. According to Mr. Hampton, "typically overhead costs, such as SG&A, are period costs. They're incurred regardless of the volume of sales. You have to have the company systems, the CEO, the human resource management, the finance department. All are required and necessary." Hipskind Decl., Ex. D (Hampton Depo. Tr.) at 53:9-

[2] That is, Mr. Hampton determines the percentage of Tilly's total revenue attributable to sales of the infringing merchandise then applies this percentage to Tilly's total SG&A expenses to arrive at the total SG&A (*i.e.*, overhead) expenses attributable to the infringing merchandise.

13. Yet, Mr. Hampton made no inquiry as to what portions of Tilly's overhead might compose necessary costs and what portions might, even arguably, be attributable to the sales accused of infringement here. Indeed, Mr. Hampton did not speak to anyone at Tilly's seeking a breakdown of costs, and for each Defendant bases his opinion on a single, generalized document—the only evidence in the record supporting any potential expense deductions. These documents make clear that most components of the asserted overhead costs could not be attributable to the sales of any particular goods. Mr. Hampton's opinion with respect to Tilly's relies entirely on Tilly's Form 10-K SEC filing, which states:

> "Our selling, general and administrative, or SG&A, expenses are composed of store selling expenses *and corporate-level general and administrative expenses.* Store selling expenses include store and regional support costs, including personnel, advertising and debit and credit card processing costs, e-commerce processing costs and store supplies costs. *General and administrative expenses include the payroll and support costs of corporate functions such as executive management, legal, accounting, information systems, human resources and other centralized services.* Store selling expenses generally vary proportionately with net sales and store growth. *In contrast, general and administrative expenses are generally not directly proportional to net sales and store growth, but will be expected to increase over time to support the needs of our growing company*.

Hipskind Decl., Ex. C (Tilly's 10-K) at 68 (emphasis added). As explained above, Tilly's general and administrative expenses (*i.e*., the "G" and "A" of SG&A), which are incurred regardless of any particular sales, are not deductible. *JBJ Fabrics, Inc.*, 1987 U.S. Dist. LEXIS 13445 at *15; *see also Kamar International v. Russ Berrie & Co*., 829 F.2d 783, 787 (9th Cir. 1987) (affirming the district court's decision not to consider deductions for general administrative costs); *Automobili Lamborghini, S.p.A. v. Sangiovese, LLC*, 2014 U.S. Dist. LEXIS 135282, *9 (D. Nev. Sept. 25, 2014) (excluding deductions for depreciation, automobile expenses, professional fees, and travel expenses).

Likewise, Tilly's "selling expenses," which are not separately identified anywhere in the record, should also be excluded because neither Mr. Hampton, nor Tilly's, has made any attempt to determine which such expenses could have actually contributed to the infringing sales. Mr. Hampton's general assertions of overhead expenses lack the necessary evidentiary support, are contrary to law, and should be excluded. *See Kamar International, Inc.*, 752 F.2d 1326 at 1332*; see also Gardner v. Cafepress Inc.*, 2014 U.S. Dist. LEXIS 168328, *17 (S.D. Cal. Dec. 4, 2014) (finding a defendant failed to meet its burden to establish deductions where the defendant "has neither broken down what types of expenses are being claimed nor shown whether such expenses are directly related to the allegedly infringing and which are overhead").

2. Mr. Hampton Should Not Be Permitted a Second Attempt at Curing His Defective Report at Trial.

Recognizing its deficiencies, Mr. Hampton declares in his report that "[a]t my deposition, and trial, I plan to testify as to each component cost included in Tilly's SG&A." *See* Hipskind Decl. Ex. B (Hampton Report) at 23, n.69.[3] Mr. Hampton's attempt to reserve his right to trial by surprise cannot save his defective report or render any planned, but undisclosed, testimony admissible. As is plain from Fed. R. Civ. P. 26(a)(2)(B), an expert's testimony is to be circumscribed by the contents of his report, which must include, among other things, "(i) a complete statement of all opinions the witness will express and the

[3] Mr. Hampton also admits that his report is not accurate and that it was written without an understanding of basic facts. For example, Mr. Hampton admits that his opinions on attribution were offered without even understanding who the parties are. *See* Ex. D (Hampton Depo. Tr.) at 20:15-21 ("I'm not sure that Paragraph 27 [purportedly describing Last Kings Designs, LLC] is even accurate" because Mr. Hampton "didn't pay attention to the specific entities."). A large portion of Mr. Hampton's report attempts to apportion profits away from Egypt Last Kings, LLC, an entity that is not a party to this case.

basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them." Mr. Hampton's attempt to reserve the right to testify to new, undisclosed opinions, based on new, undisclosed facts and documents, should be rejected.

Mr. Hampton has previously attempted to offer untimely opinions, and Courts have previously excluded those opinions. *See Zest IP Holdings, LLC v. Implant Direct Mfg.*, LLC, 2013 U.S. Dist. LEXIS 177752, 7-8 (S.D. Cal. Dec. 17, 2013) (excluding Mr. Hampton's report and opinions and *citing Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to supply evidence in a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless. . . . Exclusion of an expert witness report is an appropriate remedy for failing to fulfill the required disclosure requirements." *Id*. Mr. Hampton's lack of diligence prior to submitting his report and providing deposition testimony is not excusable. Moreover, Plaintiff will be substantially prejudiced if Mr. Hampton is permitted to testify to new opinions and evidence at trial and his prejudice cannot be cured by cross-examination given that Plaintiff would have no deposition testimony or evidence to work with in advance. Plaintiff should not have to interpret and cross-examine Mr. Hampton on the fly. *See, e.g., O2 Micro Int'l Ltd. V. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1368-69 (Fed. Cir. 2006) (affirming district court's exclusion of expert opinions concerning matters not disclosed in the opening expert reports). It is "[i]nappropriate for an expert to try to beef up his or her opinion with second thoughts after he or she has already been deposed in connection with the detailed report of his or her opinions." *See also Northlake Mktg & Supply, Inc. v. Glaverbel, S.A.*, No. 92 C 2732, 1996 U.S. Dist. LEXIS

19306, at *5-6, 11 (N.D. Ill. Dec. 17, 1996) (granting motion in limine to exclude expert from testifying on matters not set out in his initial report).

Further, even if Mr. Hampton could permissibly supplement his defective report, Mr. Hampton's attempt to reserve the right to trial by surprise should still be rejected because there is no admissible evidence that could form the basis for any new such allocation opinions. Discovery has long closed and the *only* evidence in the record supporting Tilly's expenses clusters them all together with no indication of how they could be further dissected or attributed to an infringing sale: as discussed above, Tilly's simply presents an overall number of all expenses via its Form 10-K.

Shiekh Shoes should be prohibited from offering evidence regarding any deduction for overhead costs, as Shiekh Shoes never produced any evidence of overhead expenses at all.[4] With nothing in the record on which Mr. Hampton might rely to formulate new, more specific opinions, his testimony is necessarily limited to its current inadmissible form.

3. Mr. Hampton's Deduction for Tax Expenses Is Improper.

As noted above, the Retail Defendants are accused of willfully infringing Plaintiff's copyright and, therefore, are not entitled to a deduction for tax expenses. *See, e.g., Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir. 2000) (Only "non-willful infringers" are entitled to deduct income taxes and management fees actually paid from profits under 17 U.S.C. § 504(b)).

Further, this Court has rejected deductions for tax revenues based on the same type of general application that Mr. Hampton asserts here, irrespective of a willfulness finding. *See JBJ Fabrics, Inc.*, 1987 U.S. Dist. LEXIS 13445 at *16

[4] *See* Hipskind Decl., Ex. B (Hampton Report) at 26, ¶ 80 ("As of the report date, Shiekh Shoes has not produced information on deductible costs. I plan to supplement my report with actual expenses before my deposition."). Shiekh Shoes never produced this information.

("[T]he Court does not see any justification for deducting a general income tax reserve figure from the calculations. That would seem to bear no necessary relationship to the sales in question."). Just as with as with its overhead expenses, Defendants have provided no evidence that its general tax burden on total profits should apply to profits specifically derived from the infringing goods. Mr. Hampton simply calculates the general percentage of taxes paid from all Tilly's profits and then applies that general rate to the profits from infringing sales. *See* Hipskind Decl. Ex. B (Hampton Report) Exhibit F.1, n.4 ("Rate calculated using Tilly's 2014 10K: [Total] Income tax exp ÷ [Total] Profit before tax = 39%. Rate then multiplied by Profit before tax: 39% x $1,943,685 = $757,846."). As with Mr. Hampton's improper generalization of Tilly's purported SG&A expenses, his attempts to deduct generally applicable tax rates from the specific profits at issue in the case should similarly be rejected.

Further, as in *JBJ*, Defendants have not shown that Plaintiff's recovery in this action "will not have its own income tax consequences, so that causing a reduction at this time could double the loss to the plaintiff, and otherwise be problematic, inappropriate, and even speculative." *JBJ Fabrics, Inc.*, 1987 U.S. Dist. LEXIS 13445 at *16; *see also Spectravest, Inc.*, 1989 U.S. Dist. LEXIS 16594 at *20 (refusing to deduct tax expenses absent evidence that Plaintiff will not bear the tax burden if awarded defendants' profits). Retail Defendants have presented no evidence on its actual harm relative to Plaintiff's and should therefore not be entitled to claim a tax deduction.

B. Mr. Hampton's Attempt to Apportion Profits Based on Surface Area of Infringing Products Is Unreliable and Unsupported by Law.

The infringing goods in this case are hats, T-Shirts, and other garments that bear either the copyrighted "Pharaoh Head Design" or the "Careless World"

copyrighted design. By definition, these products have portions that include the allegedly infringing designs, and other portions that are blank fabric, with no identifiable design elements other than the structure of the garments themselves. With no support other than his own observation, Mr. Hampton asserts that over 90% of Retail Defendants' profits from reselling these goods must be attributed to the blank portions, even though Retail Defendants have already deducted the costs of those materials and goods when deducting the costs of goods sold from gross revenue to arrive at net profits. Mr. Hampton's opinion rests on an unsupported and unreliable methodology, and should be excluded. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014) (internal quotations omitted) (affirming exclusion of an expert's testimony based on a superficial and subjective approach because "[i]t is not the correctness of the expert's conclusions that matters, but the soundness of his methodology."); *Williams v. UMG Recordings, Inc.*, 2006 U.S. App. LEXIS 12358, *5 (9th Cir. May 12, 2006) (rejecting expert testimony based on a "rule of thumb that is not widely adopted.")

1. Mr. Hampton's Attribution of Value to the Garments' Blank Areas Is Impermissible Double Counting.

Mr. Hampton's deductions for relative surface area should be excluded for the basic reason that Retail Defendants have already carved out any value attributable to the blank goods through deductions for cost of goods sold. *See* Hipskind Decl. Ex. B (Hampton Report) at Exhibit F.1 (noting deductions for Tilly's cost of goods sold); Exhibit G.1 (noting deductions for Shiekh Shoes' cost of goods sold); Exhibit H.1 (noting deductions for Bravado's cost of goods sold). Indeed, Mr. Hampton admitted at his deposition that all amounts paid by Retail Defendants with respect to the garments at issue are already included and deducted elsewhere. *See* Hipskind Decl. Ex. D at 67:25-68:5 ("Q. If we add up the cost of goods sold item and the printing and reproduction cost item from

Exhibit E1, would that include all the costs from a blank garment to the fully printed and tagged garment? A. I believe it would."). Yet Mr. Hampton, with no support in law or logic, asks the Court and the jury to deduct this value again by attributing over 90% of the profits from the sale of infringing merchandise to blank surface area. Retail Defendants are entitled to deduct these costs once, not twice, especially given that, as discussed further below, any attributable value in the styling of the blank garments is not Retail Defendants' doing.

2. Mr. Hampton's Surface Area Comparison Irrationally Apportions the Vast Majority of Value to Retail Defendants Where Retail Defendants Have Made No Valuable Contribution.

Even assuming that the non-infringing surface area of the goods at issue provides some value over and above that which Retail Defendants already paid for before reselling them, Mr. Hampton's surface area approach should be rejected because Retail Defendants have contributed none of that value. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940) (Defendants may be credited "only with such factors as they bought and paid for.") An apportionment analysis is based in fairness and aims to provide a defendant with an opportunity to show and deduct the value that they have contributed to profits from the sale of infringing products. As such, an expert's method must result in "a rational separation of the net profits **so that neither party may have what rightfully belongs to the other**." *Sheldon*, 309 U.S. at 404 (emphasis added); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 518 (9th Cir. Cal. 1985) ("mathematical exactness is not required. However, a reasonable and just apportionment of profits is required."). Incredibly, Mr. Hampton asserts that, although the Retail Defendants played no part in the design

or manufacture of the infringing goods,[5] the Retail Defendants should nonetheless get the benefit of deducting all value allegedly attributable to the portions of those goods that are not infringing, in addition to all business expenses. Such a methodology is inherently unfair and improper.

The plain fact is that none of the Retail Defendants made any contributions at all to the infringing goods. Mr. Hampton never identifies any such contributions and has only generally opined that "there are a lot of other things associated with each garment than just the copyrighted work." Hipskind Decl. Ex. D at 24:3-4. Mr. Hampton describes these "other things" as the work of whomever else designed the blank goods, including the selection of material, the color and the cut of the garments. None of these "contributions" were made by Retail Defendants, and each of these "contributions" is already accounted for when deducting the costs of goods sold. Retail Defendants' purchasing of complete goods and then reselling them cannot be rationally equated with the contributions of Jimmy Stewart's acting or Alfred Hitchcock's directing, as Mr. Hampton suggests. *See* Hipskind Decl. Ex. B (Hampton Report) at 20-21, ¶ 62 (comparing Defendants' purported contributions to the "outstanding performances of [the classic film *Rear Window*'s] stars – Grace Kelly and James Stewart – and the brilliant directing of Alfred Hitchcock.") The portions Mr. Hampton claim add intrinsic value to the product are not add-ons by Retail Defendants, *they are the product that were purchased and then resold*. *See* Hipskind Decl. Ex. D at 31:4-15. Because Retail Defendants have made no contribution to the allegedly value-laden portions of the products sold, the Retail Defendants are not entitled to an apportionment as if they had.

[5] Tilly's purchased completed garments from Egypt Last Kings, LLC.

3. Mr. Hampton's Pure Quantitative Surface Area Approach Is Impermissible.

Finally, even assuming that some value exists in the surface area of the goods not covered by the infringing images beyond the cost of the goods (which it does not), *and* that Retail Defendants have contributed some of that value (which they have not), Mr. Hampton's approach remains flawed as it is not supported by any reliable source, nor is it based on any evidence of reliability. To offer expert testimony pursuant to Fed. R. Evid. 702, Mr. Hampton bears the burden of first proving reliability by a preponderance of the evidence. *Nat'l Union Fire Ins. Co. v. Wells Fargo Bank, N.A.*, 2005 U.S. Dist. LEXIS 47175, 5 (C.D. Cal. Mar. 16, 2005) (*citing Daubert*, 509 U.S. at 592 n. 10). Yet, here, Mr. Hampton has admitted that his surface area methodology is based entirely on his own general experience and assumptions.[6] Nothing in any treatise or other reliable source supports Mr. Hampton's surface area methodology. When asked at his deposition, Mr. Hampton could not identify any such source, or even a time that he had acceptably used such a method in the past. Indeed, Defendants' other expert, Bruce Silverman, has pointed out the inherent flaws in Mr. Hampton's

[6] Mr. Hampton admits that his only basis for this methodology is the copyright treatise by Prof. Nimmer. *See* Hipskind Decl. Ex. D (Hampton Depo. Tr.) at 35:25-36:8 ("Q. What sources were you referring to as support for this apportionment based on the area of the accused works relative to the area of the garment? A. It'd be based on my experience over 28 years of doing intellectual property damages analyses. I refer to Nimmer, which is a treatise that is well recognized as authoritative in the copyright area, and then Nimmer quoted Abend versus MCA and I made reference to that in the report."). Yet, Mr. Hampton also admits that he does not know whether his surface area methodology, as opposed to apportionment generally, is supported by Prof. Nimmer or any other academic source. ("Q. Have you ever seen this approach positively treated in academia? A. Sure. I mean, Nimmer talks of apportionment. It's an established area. Q. But this specific approach of apportionment? A. Of apportioning the area of the accused work versus the area of the total garment? Q. Yes. A. In academia? *I'm not sure it's in Nimmer. I'd have to go back and look. I assume there have been other cases.*"). Mr. Hampton identified no such examples and Plaintiff is unaware of any positive examples.

proportional surface area approach. Mr. Silverman testified that the relative size of content on clothing is of no importance when analyzing value:

> Q. What about the difference in the surface area of the page? Does the amount of space that the message takes up dictate the importance of the message?
> A. No.
> Q. Not at all?
> A. Not really.
> ...
> Q. So the surface area of the image is irrelevant; is that right?
> A. That's correct.[7]

Hipskind Decl. Ex. F (Silverman Depo. Tr.) at 115:22-120:3. According to Defendants' own marketing expert, Mr. Silverman, the relative size of an image on clothing is not a proper way to attribute value. Yet, Mr. Hampton claims that the relative size of the infringing logo is paramount. Such conflicting views render Mr. Hampton's opinion unreliable and would only confuse a jury.

Even to the extent Mr. Hampton's methodology could be deemed potentially useful, he has failed to apply it in any reliable way. To properly determine a fair apportionment, weight must be given—and evidence must be introduced—to show the comparative *quality* of the components to be deducted. *See Frank Music Corp.*, 886 F.2d at 1548 ("If the district court relied exclusively on a quantitative comparison and failed to consider the relative quality or drawing power of the show's various component parts, it erred."). Here, Mr. Hampton makes no attempt to compare the substance of those elements to the infringing elements and instead merely applies a mathematical calculation of relative surface area, providing no indication of how or why the non-infringing portions are valuable at all. Mr. Hampton has provided no evidence that could show any value

[7] Counsel for Defendants repeatedly interrupted this line of questioning, demanded that a break be taken and coached the witness to "keep your answers brief" on the record. Then, after a 30 minute break, the witness immediately attempted to "clarify" his statements, declaring that "[i]t's not necessarily the size of the logo that matters or if the logo matters -- sometimes the logo barely matters" because buying a garment with a small or large image on it is simply a "fashion decision" by the consumer. Hipskind Decl. Ex. F at 121:8-10; 123:5-11.

of the blank space of the accused goods and his only explanation of that value is that the pattern, color, and fabric of the garments have some unidentified value.

That the design elements of a T-shirt or hat are substantially more valuable than the blank portions is not a close call. Nevertheless, "[i]n performing the apportionment, the benefit of the doubt must always be given to the plaintiff, not the defendant. . . . [W]hile the apportionment may take into account the role of uncopyrightable elements of a work in generating that work's profits . . . the apportionment should not place too high a value on the defendants' staging of the work, at the expense of undervaluing the plaintiffs' more substantive creative contributions." *Frank Music Corp.*, 886 F.2d at 1549. For example, according to Mr. Hampton, 93.14% of all infringing goods sold by Defendant Tilly's should be attributed to blank fabric, with only 6.86% being attributed to contributions by the infringing designs. *See* Ex. B (Hampton Report) at 24, ¶ 74.[8] On its face, this apportionment is ridiculous and an examination of the actual goods confirms that it is flawed, both in its assignment of percentages and in its extrapolation. *See* Ex. A, *supra* (showing a representative hat with the infringing Pharaoh Head image as its clear focal point, but Mr. Hampton asserts that the image constitutes only 11.4% of its surface area and, thus, only 11.4% of the value of the hat).

Mr. Hampton performed no comparative analysis at all other than to identify the total surface area of the products that do not include the copyrighted images. Such conclusions are inadmissible and improper. *See Frank Music Corp.*, 886 F.2d at 1548 (finding that the district court erred in ascribing value quantitatively without considering relative quality). Mr. Hampton spoke to no one, made no attempt to figure out whether the blank features of the products were in any way different than non-accused products, and did nothing to determine even what any of the actual design elements of the products *are*; yet he ascribes

[8] Mr. Hampton asserts similar infringing values of 7.36% as to Shiekh Shoes and 9.61% as to Bravado.

almost all of the products' value to them. Mr. Hampton's methodology is deeply flawed and unsupported by *any* evidence. Nothing in the record suggests that any consumer purchased the infringing merchandise for any reason other than the infringing designs. There is especially no evidence to suggest that any consumer purchased the products, for example the hat shown above, with the belief that nearly *90%* of the profit was derived from the hat's blank, generic portions. Mr. Hampton has failed to carry his burden of showing by a preponderance of the evidence that his theory has any support in law or science.

III. CONCLUSION

Defendants have failed to meet their burden to show a fair allocation of overhead expenses and Mr. Hampton's comparative surface area methodology is fatally flawed and would confuse a jury. Plaintiff respectfully requests that the Court grant his Motion and preclude Defendants from offering evidence, testimony, or argument relating to Mr. Hampton's overhead deductions or his comparative surface area analysis.

DATED: February 3, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2015, the foregoing document described as **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE AND ARGUMENT OF DEFENDANTS' ASSERTED APPORTIONMENT OF GENERAL OVERHEAD EXPENSES AND COMPARATIVE SURFACE AREA** was filed manually and served electronically via e-mail upon counsel of record in this case. Notice of the filing is being served upon all counsel of record automatically through Notice of Electronic Filing.

/s/ Daniel P. Hipskind