UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHANEL, INC.,

Plaintiff,

vs.

WGACA, LLC, WHAT COMES AROUND GOES AROUND LLC d/b/a WHAT GOES AROUND COMES AROUND, MHW PROPERTIES, INC., WGACA WEB, LLC, PINES VINTAGE, INC., VINTAGE DESIGNS LTD., and WCAGA LA, LLC,

Defendants.

Civil Action No. 18-cv-2253-LLS

DEFENDANTS WGACA'S MOTION TO EXCLUDE PLAINTIFF'S EXPERT DAVID FRANKLYN AND STRIKE HIS TESTIMONY

Defendants WGACA, LLC, WHAT COMES AROUND GOES AROUND LLC, d/b/a WHAT GOES AROUND COMES AROUND, MHW PROPERTIES, INC., WGACA WEB, LLC, PINES VINTAGE, INC., VINTAGE DESIGNS LTD., and WGACA LA, LLC (collectively "WGACA"), by their attorneys Lewis Brisbois Bisgaard & Smith LLP, hereby submit their Motion and this memorandum of law in support of their motion to exclude the testimony of Chanel's expert David Franklyn ("Franklyn") and his report ("Franklyn Report") and to strike his previous testimony herein.[1] This Court's gatekeeping function requires the exclusion of the surveys and the report of David Franklyn and his testimony.

[1] The Franklyn Surveys and Franklyn Report are found in Exhibit 1320.

I. THE EVIDENCE CLEARLY MANDATES EXCLUSION UNDER FRE 403 and 702

The Court, as the "gatekeeper", is already well versed in the requirements for exclusion under Federal Rules of Evidence 403 which was also set forth in WGACA's Motion in Limine # 3 (ECF No. 299). WGACA will not take up the Court's time with a tedious repetition of the underlying caselaw. Pursuant to Federal Rule of Evidence 702, the "trial judge" has a "special . . . gatekeeping obligation" to ensure that "all expert testimony" is relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Here, not only has the witness, Mr. Franklyn, testified based on inaccurate information provided to him by Chanel's counsel, but also he has taken it upon himself to try and lecture the jury as to legal issues which exceeds his role as an expert. Finally, the flaws in the methodology employed by him in his surveys are severe enough to outweigh any probative value and as such are sufficient, as an additional factor, to warrant exclusion. *Kargo Global Inc. v. Advance Magazine Publishers., Inc.*, 06 Civ 550, 2007 U.S. Dist. LEXIS 57320, *19 (S.D.N.Y. Aug. 6, 2007), *Trouble v. Wet Seal, Inc.*, 179 F. Supp. 2d 291, 307 (S.D.N.Y. 2001).

II. MR. FRANKLYN'S TESTIMONY AS TO LEGAL OPINIONS AND OPINIONS BASED UPON INACCURATE INFORMATION

A. Mr. Franklyn's Testimony as to Legal Opinions

The Court is already aware of Mr. Franklyn's penchant to try and testify as to legal issues. *See, for example*, Transcript 1/26/24, p. 1598, ll. 9-12 where he testified as to the alleged "rules regarding resellers" and Transcript 1/26/24, p. 1598, ll. 9-12 wherein the Court sustained the objection to that the same testimony as to supposed reseller "rules". Indeed, more recently the Court admonished Mr. Franklyn for his testimony claiming consumers set standards as "shockingly wrong". (Transcript 1/29.24, p. 1628, l. 25, p. 1629, ll. 1-5).

Based on fundamental principles of law, Mr. Franklyn's legal opinions must be excluded

because it improperly communicated false legal standards and legal conclusions. *Ideal World Mktg., Inc. v. Duracell, Inc.*, 15 F. Supp. 2d 239, 244 n.2 (E.D.N.Y. 1998), *aff'd*, 182 F. 3d 900 (2d Cir. 1999) (excluding trademark attorney's expert opinion on distinctiveness because it "impinges upon the Court's role" and "would be inadmissible at trial"). For example, in *LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A.*, 209 F. Supp. 3d 612, 635 (S.D.N.Y. 2016), *aff'd sub nom LVL XIII Brands, Inc. v. Louis Vuitton Malletier SA*, 720 F. App'x 24 (2d Cir 2017) the court held that a proposed expert could not opine on whether a particular product "constitutes a conventional trademark" such that it could be "inherently distinctive," because it was a "legal conclusion" that would "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it by undertaking to tell the jury what result to reach without providing any explanation or criteria by which the jury could render its own judgment." 209 F. Supp. 3d at 640 n. 30 (excluding expert) (internal quotation marks and alterations omitted); *see also Vantone Grp. Ltd. Liab. Co. v. Yangpu NGT Indus. Co.*, 2016 WL 4098564, at *4 (S.D.N.Y. July 28, 2016) (excluding declaration of expert which "purport[ed] to marshal the evidence and opine[d] as to the legal significance of the evidence under domestic trademark law" because it was "clearly a work of legal advocacy").

It is also well established that an expert may not usurp the Court's role by providing legal opinions. Expert testimony is not helpful to the fact-finder if it "usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 48 (S.D.N.Y. 2015) (striking portions of expert's report that "analyze the relevance of plaintiffs' evidence" and track the language of the applicable regulation). Courts therefore exclude expert testimony that

"provide[s] legal opinions, legal conclusions, or interpret[s] legal terms; those roles fall solely within the province of the court." *Id*. (alterations in original); *see also* 246 *Sears Rd. Realty Corp. v. Exxon Mobil Corp.*, No 09-CV-889 (NGG) (JMA), 2011 WL 13254283, at *6 (E.D.N.Y. Apr. 1, 2011) ("this circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion."). As made clear by his in-court testimony, that is precisely what Mr. Franklyn does: he opines on what the law is and whether the Defendant has complied with it. He testified both as a lawyer and as a survey expert and comingled his testimony. As a result, his testimony and report should be excluded.

B. Mr. Franklyn's Testimony Based Upon Inaccurate Information

Mr. Franklyn's testimony also includes portions where it is based solely upon inaccurate information provided by Chanel's counsel. It is axiomatic that while an expert "may incorporate assumptions into his or her opinion, but those assumptions must be ones that a reasonable juror could find correct based on admissible evidence. *Israel v. Spring Industries, Inc.*, 2006 WL 3196956, at *12 (E.D.N.Y. Nov. 3, 2006), *aff'd sub nom Israel v. Spring Indus., Inc.* 2007 WL 9724896 (E.D.N.Y. July 30, 2007). *See also*, *Supply & Building Co. v. Estee Lauder Int'l, Inc.*, 2001 WL 1602976, at *4 (S.D.N.Y. Dec. 14, 2001) wherein the court dismissed "[a]ssumptions based upon conclusory statements of the expert's client, rather than on the expert's independent evaluation" as unreasonable. Similarly, in *Rowe Entertainment, Inc. v. William Morris Agency, Inc*., 2003 WL 22124991, at *3 (S.D.N.Y. Sept. 15, 2003) the court excluded an expert's testimony that was compromised by his reliance, not on his own independent study and analysis, but on the plaintiff's inaccurate statements.

Here, Mr. Franklyn has admitted that he undertook no independent study as to the Von Maur photographs he used as the lynchpin for Survey 2. He never spoke with the actual photographer as to the possible signage at the display he also erroneously called a "pop-up". He

never asked for information as to what indicia the actual bags had in the form of dustcover, hang tags and even signage but relied on counsel's apparent statements without any verification as to whether such were even accurate and to whom counsel had spoken. (*See, e.g.*, Transcript 1/29/24, p. 1714, ll. 1-11). And indeed, Chanel has offered no evidence that these assumptions that Mr. Franklyn relied upon are accurate. We can certainly assume that because Chanel failed to do so, Chanel understands that what Mr. Franklyn was told is in fact not accurate.

III. THE FRANKLYN SURVEYS CONTAIN SIGNIFICANT ERRORS THAT RENDER THEM UNRELIABLE AND INADMISSIBLE

A. Survey 1

Mr. Franklyn addresses two surveys that he caused to be conducted in connection with the claims of Chanel. "Survey 1" purports to evaluate consumer "perceptions of the WGACA website". In fact, however, Mr. Franklyn did not do a survey of consumer reaction to "WGACA's website" but rather purports to offer a survey of respondents' reaction to 3 static images from WGACA's website from 2015. Mr. Franklyn readily admits that he did not replicate what a consumer would encounter when reviewing WGACA's website.

Survey 1's critical methodological flaws render it entirely unreliable. Initially, rather than try, to the extent possible, replicate the purchasing experience,[2] the stimuli submitted to the respondents were only three static screenshots from WGACA's website in 2015 (which at the time of the interviewing period of March 2021(Transcript 1/29/24, ll. 8-10) was about six years old).[3]

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[2] Edwards, G. Kip, 2012, "*The Daubert Revolution and Lanham Act Surveys*" pp. 329-362 in *Trademark and Deceptive Advertising Surveys: Law, Science and Design,* edited by Shari Seidman Diamond and Jerre B. Swan, pp. 346-348.

[3] A curious admission of Mr. Franklyn relates to the "decision" (be it by him or counsel) to use the 2015 product page from WGACA's website as to the red bag with an erroneous serial number as testified to by Paige Rubin. (Transcript 1/23/24, pp. 1115-1121) Mr. Franklyn's convoluted testimony appears to suggest he thought "confusion" is found if a respondent responded that Chanel was the "maker" of the bag when it, according to him, was a "counterfeit". (Transcript 1/26/2024, pp. 1590, ll. 12-25, p. 1591, ll. 1-2). It is the serial number that is the issue and there is no evidence that the bag that is shown, which is basically what respondents see, is non genuine.

Nonetheless, he admits that as to actual consumers going to the WGACA website, the consumer would have the ability to navigate through WGACA's website to see all of the different brands (Transcript 1/29/24, p. 1693, ll. 14-16). As the Court knows from the evidence presented at trial, a significant factual foundation for this case is that WGACA is a seller of a number of luxury brands with Chanel products constituting only a relatively small percentage of the offerings. Chanel has sought throughout this case to emphasize the Chanel offerings by WGACA by minimizing the other product offerings. While Chanel can, of course, advocate its position however it deems appropriate, that advocacy cannot extend to its alleged neutral survey expert creating a fictional buying and shopping environment with the apparent goal of arriving at results that support Chanel's theory of the case. The fiction of Mr. Franklyn's survey, and one that makes it intolerable to be presented as evidence, is the premise that consumers who visit WGACA's website would not be presented with a myriad of signals of who exactly WGACA is and that WGACA sells multiple brands. The respondents were not provided with any of those real world experiences.

Mr. Franklyn attempts to justify his failure to include more pages of the website by saying it was "voluminous" but not answering why more than three and more current screenshots were not offered (Transcript 1/29/24, p. 1694, ll. 1-3). He could not explain why he did not use cues that would educate the respondents that WGACA offers other brands.

Further ignoring the need to replicate the consumer's actual purchasing environment, Mr. Franklyn made no attempt to provide the respondents with images from the home page of the WGACA website because in his view, without any factual basis, "some" consumers would not go "directly" to the home page (Transcript 1/29/24, p. 1700, ll. 3-10) even though many of his

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The fact that Mr. Franklyn initially identified the bag as "counterfeit" further demonstrates his bias and lack of credibility.

questions for respondents would be directly affected by that such as under Table II, particularly those he seeks to highlight such as "the maker of the bag" at 23%. (Exhibit 1320D.002).

1. Use of an Improper Universe

Mr. Franklyn admits that his "universe" for the respondents were those who had either purchased or intended to purchase luxury brands products, which therefore includes purchaser of both used and new luxury items. As is clearly known, WGACA sells only pre-owned luxury brand products. The survey therefore must be directed at a universe of WGACA[4] which would exclude those who intend to purchase new luxury brand products. Mr. Franklyn's survey makes it impossible to determine past or prospective purchasers of pre-owned luxury products. Moreover, Mr. Franklyn's testimony that some consumers may purchase both at one time or another is without basis and ignores the fact that ONLY pre-owned items are sold by WGACA so the respondents must be ones who have purchased such in the past or may do so in the future.

2. Survey 1 Has No Control Group

Perhaps the most glaring omission form Survey 1 is Mr. Franklyn's decision to omit the inclusion of a control group. He claims that he basically could not come up with a control group and if he had used one of the more standard versions, the respondents would have had different answers than those he surveyed. (Transcript, 1/29/24, p. 1663, ll. 24-25, p. 1664, l. 1). Rather than an indication that the controls were inappropriate, his own admission and Survey 1's results show that such would do the job intended to reduce the likelihood of outside influences on the respondents' responses. This would be expected when you are able to filter out pre-existing biases

[4] Barber, William, 2012. "*The Universe" pp. 27-49* in "*Trademark and Deceptive Advertising Surveys: Law, Science and Design*, edited by Shari Seidman Diamond and Jerre B. Swan, pp. 36.

which is what a control group is designed to do. He further claims that he had internal "controls" such as making sure the respondents were paying attention, did not race through the survey, were "engaging". These are hardly "controls" per se, but rather "quality controls" standard in all surveys. Finally, he claims he looked at the responses to determine if the respondents responded to similar questions in similar ways. Had he actually done so, he presumably would have noted the vastly different responses from his respondents in Tables I and II. In Table I, (Ex. 1320D.001) in answering the question as to "Who is the Maker of this handbag", 93% indicated Chanel and 5% indicated WGACA. But in the very next question, answered by the respondents only seconds later, 23% said WGACA was the "maker of the handbag". (Ex 1320D.002). That is right, seconds apart the exact same group of respondents declared that WGACA was the maker of the bag with the irreconcilable results of 5% in one question and 23% in the next question. How can this be? Mr. Franklyn's efforts to justify NOT using a control for Survey 1 (to ward off guessing and survey "noise") was a study in expert double talk. Mr. Franklyn is in fact not a statistics experts or even a survey expert so it is not surprising that he would make such a fundamental mistake in survey methodology, nor is not surprising that he can't explain the results as anything other than indicative of guessing.

B. Survey 2

Survey 2 purports to measure the level of confusion as to source, as well as sponsorship, approval, or association with another company or companies.' Unlike the first Survey, Survey 2 does include a control group – which only further calls into question the methodology of Survey 1.

In Survey 2, the test respondents were asked to review a photograph of what was

described as a "pop-up" at a Von Maur department store[5] with Chanel branded products while the "test group" had an unaltered photograph with the Chanel interlinked "CC" removed.

1. Survey 2 Fails to Replicate As Close As Possible The Purchasing Experience.[6]

Here again, the images provided to the Respondents do not replicate the purchasing experience where consumers would be able to review the products, including any price tags, dust bags or signage which is not evident in the static images presented. The image of course reveals nothing of that and Mr. Franklyn never interviewed anyone who could inform him of the actual environment (like the photographer or anyone else who have had actual knowledge of the environment at Von Maur). He quite literally, accepted the image as is without any other information.[7] Indeed, he testified that he did not know if had spoken to the person who took the photograph. (*Id.* p. 1724, ll. 21-25, p. 1725, ll. 1) and yet he proceeded to advise the survey takers that it was a "pop up", without any definition or justification. All he could say was he "thought" counsel had spoken to whomever had taken the photograph and confirmed some information. (Transcript 1/29/24, p. 1714, ll. 23-25, p. 1715, ll. 1-9). This is on top of his testimony that he understands that WGACA places cards inside of the bags it sells that identify WGACA as well as dustcovers. (*Id.*, p. 1715, ll. 23-25, p. 1716, ll. 1-15). He then attempted to minimize these obvious sources of information (and his decision to withhold this information

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[5] Mr. Franklyn did not tell the respondents that the "pop up" was at a Von Maur. It is unclear why he did not, but certainly had he done so, respondents certainly would have responded in great volume "Von Maur" when asked who is responsible for putting on the display. Common experience would dictate that most shoppers understand that retail stores usually control their merchandise presentations.

[6] WGACA contests the characterization of the images as well. At the time Von Maur was a wholesale distributor of WGACA items so the display would be theirs not WGACA's. Mr. Franklyn acknowledges this is WGACA's position and admits he is unfamiliar with WGACA's relationship with its wholesale department stores and actually acknowledges that in "some" department stores there is signage, but he has no knowledge one way or the other as to what the display in his stimuli actually looked like in person and whether there was any signage or other indicia and further has no firsthand information as to WGACA displays in department stores. (Transcript 1/29/24, p. 1686, ll 14-22).

[7] Edwards, G. Kip 2012 "*The Daubert Revolution and Lanham Act Surveys*" in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design"* edited by Shari Seidman Diamond and Jerre B. Swan p 347.

from his respondents) by claiming that he wouldn't "dare" open a bag that was being offered for sale between $2,000 and $10,000 because he wouldn't expect to find anything inside (*Id.* p. 1717, ll. 8-14) which in and of itself is not credible. In any event, as with Survey 1, the use of two static photographs by an unknown photographer, apparently an employee of Chanel, falls far short of the requirement to replicate the marketplace.

2. Survey 2 Uses the Same, Overinclusive, Universe

As with Survey 1, Survey 2 uses an overinclusive universe, including as respondents individuals who would purchase new but not pre-owned items. Mr. Franklyn justifies this by asserting, as an acknowledged non expert in fashion, he does not think consumers fall "neatly" one category or another- (*Id.*, p. 1729, ll. 22-23). This conveniently ignores the differences in the goods as to price and availability online as opposed to only and limited boutiques or high end department stores and the price range while higher than most perhaps, is decidedly lower than a new Chanel item.

3. Survey 2's Reference to Pop Up Is Misleading

As noted in Section B, 1, above, the reference to the display in the Von Maur department store is incorrect and misleading and Mr. Franklyn acknowledged he has no information as to who put the display up or WGACA's relationship with its wholesale department stores.

IV. CONCLUSION

The Surveys the Franklyn Report and Mr. Franklyn's testimony are not helpful to the jury.[8] Mr. Franklyn is a lawyer and law professor who, like many trademark lawyers, understands the

[8] Although Mr. Franklyn sought to bolster his credentials on the re-direct of counsel on January 31, including references to his staff and "colleagues", it is undisputed that he admitted he has no experience in the fashion industry (Trial Transcript 1/29/24, p. 1705, ll. 23-25); that he is ignorant of the fact that his own client, Chanel, as has been repeatedly pointed out in this trial, **does not** sell handbags online, (*Id*. at p. 1706 ll. 12-16) and even affirmatively asserts that the fact he does not know about Chanel's own channels of trade has **no relevance** to his opinions despite the fact that it is one of the *Polaroid* factors to be considered. (*Id*. at p. 1707, ll. 3-6).[8] He admits that he has no formal training in survey methodology and is, essentially, a lawyer and law professor that he

contours of surveys. However, a lawyer who understands surveys is not the same as someone trained in statistics and survey science. Mr. Franklyn's surveys are also hopelessly flawed and should not be permitted to be paraded as actual evidence of confusion.

We readily appreciate that most of the time, expert testimony is not perfect and the imperfections go to the weight and not admissibility. But, the Court's gatekeeping function is particularly acute here as Mr. Franklyn's testimony is more than just imperfect or flawed. It is the work of someone who is not qualified and who designed a survey that is completely devoid of any helpful information for the jury. His testimony is dangerously misleading and Mr. Franklyn should be excluded from testifying further and his previous testimony stricken and the report excluded as inadmissible under Rule 403.

DATED: January 31, 2024

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admits has been "self-taught" as to surveys and methodology over a period of time (*Id.* at p. 1710, ll. 7-11) and has no certifications from any professional organization regarding survey methodology and no training in statistics. (*Id.* at p. 1710, ll. 12-17).