

25-1234

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

George ANDOVER,
Plaintiff-Appellant

vs.

Beyond bAIsic,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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I. BACKGROUND

A. Questions Presented

1. Whether Andover's name, image, and likeness ("NIL") claim under NYCRL §§50-51 should be upheld on judgment as a matter of law ("JMOL").
2. Whether the AI-generated video of Abraham Lincoln should be permitted to be played before the jury.
3. Whether the Second or the Federal Circuit has jurisdiction over Andover's appeal.
4. Whether a new trial should be granted on the issue of obviousness due to the admission of the AI-generated memoranda.

B. Parties

Plaintiff-Appellant George Andover is a history and weightlifting influencer who derives substantial revenue streams from his well-regarded video podcast and partnerships with protein supplement and shaving-needs direct-to-consumer companies.

Defendant-Appellee Beyond bAIsic is an AI company that provides a platform for generating videos using AI. One advertised use-case is third parties seeking to create influencer-like content without the cost of partnering with influencers. Beyond bAIsic is the assignee of a recently-filed and issued, broad patent on mapping individuals' faces for use in AI-generated video.

C. Facts

Plaintiff-Appellant George Andover ("Andover") sees a video shared on social media that resembles himself¹ that was made using Defendant-Appellee Beyond bAIsic's artificial

¹ The parties do not dispute that the AI-generated speaker in the video could not have been generated without using at least some images of Andover. However, even after discovery, the parties were not able to ascertain what specific images of Andover were used to create the AI-generated speaker. Moreover, it is undisputed that the AI-generated speaker in the video is not visually identical to Andover, who has never worn his hair in the style used in the video, and that Andover has distinctive tattoos visible on his lower arms that the AI-generated speaker lacks.

intelligence (“AI”) technology. The video addresses similar content to Andover’s usual work, but the video contains several serious errors of historical fact. The video also includes a “testimonial” advertisement of a shaving-ware brand with which Andover has refused to partner in the past because the shaving-ware brand produces low-quality products. Andover never consented to having his likeness used in any AI-generated content, but there are many publicly-available images and videos of Andover on the internet due to his own video-podcast, his social media feeds, and his appearances on other forms of media. While the video does not explicitly introduce Andover by name, some of Andover’s fans publicly expressed disappointment in him for making a video containing errors and hawking a sub-par brand. Fourteen months later, Andover lands a huge brand deal that allows him to afford legal counsel. Andover sues Beyond bAIsic in a diversity action alleging violation of name, image, and likeness (“NIL”) rights under NYS law.

When the lawsuit is filed, Andover uses Beyond bAIsic’s technology to create a video explaining the suit to Andover’s followers, in which he alters Beyond bAIsic’s original video, superimposing the head of an AI-generated speaker that very closely resembles Abraham Lincoln—the only U.S. president to be granted a patent—onto the body of the “Andover-like” character. Beyond bAIsic counterclaims, alleging patent infringement. Thanks to an early claim construction decision applying prosecution history estoppel/disclaimer, the parties agree that Andover’s liability for patent infringement turns on whether the video image he altered was an image of “himself.”² Since this determination will overlap with a fact finding in the NIL claim—*i.e.*, whether Beyond bAIsic’s video incorporates Andover’s likeness—the parties stipulate to

Andover shares his User Generated Content Usage rights with each company he contracts with.

² If the image is of Andover, it is undisputed that Andover did not practice the asserted claims, all of which have been construed to exclude alteration of one’s own image.

be bound by the “likeness” determination made in the NIL claim for purposes of the infringement claim but only after final judgment following appeal. In the meantime, Andover argues that Beyond bAIsic’s patent is rendered obvious by an academic article published a year before the undisputed priority date of Beyond bAIsic’s patent. Beyond bAIsic’s star witness is an expert, Prof. JiaJia Liu who explains why the person of ordinary skill in the art at the time of the invention would not have found the patent obvious. Prof. Liu relies heavily on Beyond bAIsic’s own internal memoranda surveying the state of the art after the allegedly-invalidating article, allowing her to show how the inventors struggled with implementing the invention even after reading the allegedly-invalidating article and craft a narrative that the article contributed little to the field. On the eve of trial, Andover’s attorneys discover that some (but not all) of those internal memoranda had been generated using a large language model (“LLM”) and contain serious errors in their description of the state of the art. However, Prof. Liu is ultimately permitted to testify on those memoranda at trial over Andover’s objection; the jury hears that AI may have been used to generate the memoranda, but the district court reasons that any other issues with the memoranda go to weight, not admissibility.

The following additional facts are undisputed: (1) there is diversity of citizenship between the parties and jurisdiction at the district court level is proper as to all claims, (2) the consolidation of the issues into a single trial is appropriate, and (3) venue is proper.

D. Procedural Background

Andover’s NIL claim and the patent counterclaim are heard at the same trial. Andover’s video of Abraham Lincoln explaining the NIL lawsuit is admitted as evidence over Beyond bAIsic’s objection—Beyond bAIsic argues that it is highly prejudicial to allow the jury to hear a one-sided explanation of the NIL lawsuit (from Abraham Lincoln, no less). Beyond bAIsic

filed a motion for JMOL with respect to Andover's NIL claim. The motion was denied.³ The jury sides with Andover on the NIL issue (and hence also with Andover on the patent infringement issue) but Beyond bAIsic on the patent obviousness issue. In post-trial briefing, Andover argues that the admission of the late-disclosed AI-generated memoranda at trial over Andover's objection tainted the jury's understanding of the prior art, and requests a new trial in which the AI-generated memoranda are excluded. The motion for a new trial is denied.

Accordingly, Andover appealed to the Second Circuit arguing that Beyond bAIsic's patent counterclaim was permissive, so the regional circuit has jurisdiction. Beyond bAIsic moves to transfer the case to the Federal Circuit.

E. Legal Standard

1. JMOL

A renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) is a challenge to the legal sufficiency of evidence supporting the jury's verdict and is reviewed de novo, applying the same standard that is required of the district court. *See* Fed. R. Civ. P. 50(a)(1); *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007). Judgement as a Matter of Law is warranted when a reasonable jury would not have a legally sufficient evidentiary basis to find for the non-moving party. Fed. R. Civ. P. 50(a).

Judgment as a matter of law should not be granted unless:

- (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or
- (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [it].

Williams v. Cnty. of Westchester, 171 F.3d 98, 101 (2d Cir. 1999). In determining whether a

³ The JMOL was also reraised after the verdict and again denied.

reasonable jury could have found for the nonmovant, “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). While all reasonable inferences must be drawn in favor of the non-moving party, a court may not allow a verdict to stand where the evidence is “overwhelmingly in favor of the movant that reasonable and fair-minded persons could not arrive at a verdict against it.” *Brady v. Wal-Mart Stores, Inc.*, 455 F. Supp. 2d 157, 165 (E.D.N.Y. 2006), *aff’d*, 531 F.3d 127 (2d Cir. 2008) (citing *Song v. Ives Labs.*, 957 F.2d 1041, 1046 (2d Cir. 1992)).

The non-moving party has a burden of presenting sufficient evidence that a reasonable jury could find in its favor. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). If the non-moving party fails to meet this burden, even after viewing all evidence and inferences in its favor, Judgment as a Matter of Law is not only proper, but necessary. *Id.* at 149.

2. Use of a Person’s Identity Under New York Civil Rights Law §§50-51

The use of a person’s identity in commercial advertising and trade is protected in New York under New York Civil Rights Law (“NYCRL”) §50 and §51. In *Roberson v. Rochester Folding Box Co.*, the defendant used the likeness of the plaintiff in advertisements for its milling business. The Appellate Court ultimately found that there was no current law regarding the right of publicity. This decision led to the enactment of NYCRL §50 and §51. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442.

NYCRL §50 provides a foundation for the prohibition of unauthorized commercial use of a person’s identity. The law states: “A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.”

NYCRL §51 provides a civil cause of action corresponding to NYCRL §50. “Any person

whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without . . . written consent . . . may maintain an equitable action . . . and may also sue and recover damages.”

3. Admissibility of Evidence

This Court reviews decisions to admit evidence for abuse of discretion. *United States v. Salameh*, 152 F.3d 88, 110 (2d Cir. 1998). In determining whether evidence should be admitted “a district court ‘may exclude relevant evidence if its probative value is substantially outweighed by a danger of,’ among other things, ‘unfair prejudice, confusing the issues, [or] misleading the jury.’” *United States v. Garnes*, 102 F.4th 628, 635 (2d Cir. 2024) (quoting Fed. R. Evid. 403). The decision as to whether the evidence may confuse the issues or mislead the jury turns on the particular facts of the case. *See Morgan Guar. Tr. Co. v. Texasgulf Aviation, Inc.*, 604 F. Supp. 699, 702 (S.D.N.Y. 1985). Additionally, “[a] court should consider the possible effectiveness of a jury instruction and the availability of other means of proof in making a Rule 403 determination.” *United States v. Dupree*, 706 F.3d 131, 138 (2d Cir. 2013) (citing Fed. R. Evid. 403).

As this Court has recognized, however, “[a] district court is obviously in the best position to do the balancing mandated by Rule 403” and this Court “will second-guess a district court ‘only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally.’” *United States v. Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (quoting *United States v. Valdez*, 16 F.3d 1324, 1332 (2d Cir. 1994)). Additionally, “even if the defendants can demonstrate trial error under [. . .] Rule 403, the proceeding ‘will not be disturbed, on post-trial motion in the district court or on appeal, unless any error of the court was truly harmful.’” *Katt v. City of New York*, 151 F. Supp. 2d 313, 354 (S.D.N.Y. 2001) (quoting *LNC Invs. Inc. v. First Fid. Bank*, 126 F. Supp. 2d 778, 787 (S.D.N.Y. 2001)). In a civil case, proving harm of an evidentiary error is the burden of the appellant. *Tesser v. Board of Educ. of City School Dist. of City of New York*, 370 F.3d 314,

319 (2d Cir. 2004).

An “out-of-court statement[] offered to prove the truth of the matter asserted” is considered hearsay. *Smith v. Arizona*, 602 U.S. 779, 785, 144 S. Ct. 1785, 1792 (2024). In federal court, hearsay evidence is inadmissible unless it “falls within an enumerated exception” found within the Federal Rules of Evidence. *United States v. Cummings*, 858 F.3d 763, 772 (2d Cir. 2017) (quoting *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013)). One such exception is the residual hearsay exception, which is a catch-all to be invoked “very rarely, and only in exceptional circumstances.” *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991) (quoting *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7 Cir. 1979)). Hearsay admitted under this exception “must fulfill five requirements: trustworthiness, materiality, probative importance, [and] the interests of justice and notice.” *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991).

Opinion testimony from a lay witness is limited by the Federal Rules of Evidence to that which is “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. The Second Circuit has clarified that “a lay opinion must be the product of reasoning processes familiar to the average person in everyday life.” *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). Furthermore, the restriction of Federal Rule of Evidence Rule 702(c) “prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 and the pre-trial disclosure requirements set forth in Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26.” *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005).

Erroneous evidentiary decisions made without a constitutional dimension are reviewed for

harmless error. *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2002). “[U]nder harmless error review, we ask whether we can conclude with fair assurance that the errors did not substantially influence the jury.” *United States v. Gupta*, 747 F.3d 111, 133 (2d Cir. 2014) (internal quotation marks omitted). In determining whether an evidentiary ruling is harmless the following factors are considered: “(1) whether the evidence bore on the most important issues in the case; (2) whether the evidence was simply cumulative or corroborative; (3) whether the evidence was used in summation; and (4) whether the appellee's case was particularly strong.” *Abascal v. Fleckenstein*, 820 F.3d 561, 567 (2d Cir. 2016).

4. Jurisdiction

Courts apply Federal Rule of Civil Procedure 13(a) to determine whether a particular counterclaim is compulsory. *In re Rearden LLC*, 841 F.3d 1327, 1332 (Fed. Cir. 2016). Rule 13(a) provides that parties must “state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim. . . arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Fed. R. Civ. P. 13(a)(1)(A). The Federal Circuit has exclusive appellate jurisdiction over patent claims “arising under” federal patent laws. *See* 28 U.S.C. § 1295(a)(1). Such counterclaims are “governed by Federal Circuit law, rather than by that of the regional circuits.” *See* 28 U.S.C. § 1295(a)(1); *Rearden*, 841 F.3d at 1331 (quoting *Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635, 644 n.2 (Fed. Cir. 2015)); *see also Teradata Corp. v. SAP SE*, No. 2022-1286, 2023 WL 4882885, at *7 (Fed. Cir. Aug. 1, 2023) (nonprecedential) (“We apply Federal Circuit law when determining whether we have jurisdiction under the relevant statute” (citing *Rearden*, 841 F.3d at 1331)).

To determine whether a patent counterclaim is compulsory, the Federal Circuit uses a three prong test to determine whether the claims arose out of the same “transaction or occurrence”: “(1) whether the legal and factual issues raised by the claim and counterclaim are largely the same; (2)

whether the same evidence substantially supports or refutes both the claim and the counterclaim; and (3) whether there is a logical relationship between the claim and the counterclaim.” *Teradata*, 2023 WL 4882885, at *8 (quoting *Rearden*, 841 F.3d at 1332); *see also Rearden*, 841 F.3d at 1332–33 (applying the test); *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1326–28 (Fed. Cir. 2008) (same). Across each prong, “the question is the extent of factual overlap between what the plaintiff must establish to prove its claim and what the defendant must establish to prove its counterclaim.” *Teradata*, 2023 WL 4882885, at *9 (quoting *Nasalok*, 522 F.3d at 1326); *see also Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1125 (Fed. Cir. 2003) (“[C]ompulsory counterclaims, while being limited to those that arise from the same transaction or occurrence, allow for adjudication of counterclaims that are not strictly of the ‘same kind or nature,’ but should be litigated together.” (citation omitted)).

5. New Trial

When considering a motion for a new trial, the Federal Circuit applies the law of the regional circuit where the appeal from the district court would normally lie. *See, e.g., Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635, 647 (Fed. Cir. 2015); *WMS Gaming, Inc. v. Int’l Game Tech.*, 184 F.3d 1339, 1361 (Fed. Cir. 1999). The district court may, on motion, grant a new trial on all or some of the issues after a jury trial for any reason for which a new trial has been granted in an action at law in a federal court. Fed. R. Civ. P. 59(a)(1)(A). However, such relief should not be granted unless the court is “convinced that the jury . . . reached a seriously erroneous result or that the verdict is a miscarriage of justice.” *Ali v. Kipp*, 891 F.3d 59, 64 (2d Cir. 2018).

This Court reviews a district court's denial of a Rule 59 Motion for a New Trial for abuse of discretion. *Suarez v. Big Apple Car, Inc.*, 806 F. App'x 19, 23 (2d Cir. 2020). This is a deferential standard, which reflects the district courts’ significant latitude “to exercise their inherent discretionary authority.” *Ali*, 891 F.3d at 64. When considering a Rule 59 motion, the

Court views evidence in the light most favorable to the nonmoving party and will only reverse a judgement if the district court “(1) based its decision on an error of law, (2) made a clearly erroneous factual finding, or (3) otherwise “rendered a decision that cannot be located within the range of permissible decisions.” *Id.* at 64. Accordingly, a motion for a new trial should be denied “unless [the Court] is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.” *Shin v. Party Well Rest. & Oriental Bakery, Inc.*, No. 24-1189, 2025 WL 783737, at *2 (2d Cir. Mar. 12, 2025) (citations omitted).

II. ARGUMENT BY PLAINTIFF-APPELLANT ANDOVER

A. Beyond bAIsic’s Renewed Motion for JMOL was Properly Denied Because Substantial Evidence Supports the Jury’s Finding on Andover’s NIL Claim

The jury found that Beyond bAIsic violated Andover’s statutory rights under N.Y. Civ. Rights Law §§50, 51. Following this verdict, Beyond bAIsic filed a JMOL motion asking that the court overturn the jury’s verdict and rule that as a matter of law Beyond bAIsic did not violate Andover’s statutory rights under N.Y. Civ. Rights Law §§50, 51. The court denied the motion. That finding was correct and should be affirmed.

Plaintiff brought suit under N.Y. Civil Rights Law §§50 and 51. “Section 51 . . . permits individuals whose name, portrait, picture, likeness or voice is used in violation of § 50 to maintain an equitable action against the user⁴ as well as to sue to recover damages.” *Bayside Cmty. Ambulance Corps., Inc. v. Glen Oaks Volunteer Ambulance Corps., Inc.*, No. 24-cv-2114-BMC, 2024 WL 4450850, at *5 (E.D.N.Y. Oct. 9, 2024). Under N.Y. Civ. Rights Law § 51, a plaintiff must demonstrate “(1) the use of his name, portrait, or likeness; (2) for ‘advertising purposes or for the purpose of trade;’ (3) without written permission.” *Candelaria v. Spurlock*, 2008 WL

⁴ The parties do not dispute that the AI-generated video was created using Beyond bAIsic’s technology. (*Supra*, at 1).

2640471, at *1 (E.D.N.Y. July 3, 2008); accord *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87 (2d Cir. 1989). The jury found a violation based on a showing of each of these elements, and the district court found that decision supported by substantial evidence in denying Beyond bAIsic’s JMOL motion. That decision was correct and should be affirmed.

First, it was reasonable for the jury to find that the AI-generated video used Andover’s “name, portrait, or likeness.” *Candelaria*, 2008 WL 2640471, at *1. Beyond bAIsic never disputed that the AI-generated speaker in the video was created using images of Andover. (*Supra*, at 1, n.1). Further, the New York Court of Appeals has held that an avatar or a “graphical representation[] of a person” can “constitute a ‘portrait’ within the meaning of [N.Y. Civil Rights Law §§ 50 and 51].” *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 117 (2018). As a result, the inquiry turns on whether the images in the generated video are recognizable as the plaintiff. *Id.*

Substantial evidence supports a finding that Andover is recognizable in the AI-generated video. Here, Andover fans who saw the video recognized the video as Andover and “publicly express[ed] disappointment in him [for] making a video . . . hawking a sub-par brand.” (*Supra*, at 1). Given that Andover fans recognized the AI-generated video as Andover, a reasonable jury could find that the AI-generated video was recognizable as Andover. See *Lohan*, 31 N.Y.3d 111, 120-22 (finding that “[w]hether an image or avatar is a ‘portrait’ because it presents a ‘recognizable likeness’ typically is a question for a trier of fact.”); see also *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (highlighting the importance of recognizability in the likeness inquiry).

Second, it was reasonable for the jury to find that the AI-generated video was created for the “purposes of advertising or trade.” N.Y. Civ. Rights Law § 51. “Advertising purposes has been defined as use in, or as part of, an advertisement or solicitation for patronage of a particular

product or service, and trade purposes involves use which would draw trade to the firm.” *Mason v. Jews for Jesus*, No. 06-cv-6433, 2006 WL 3230279, at *3 (S.D.N.Y. Nov. 8, 2006). Andover frequently contracts with companies for whom he advertises. Here, the AI-generated video is similar content to his previous work. However, the AI-generated video consists of an advertisement for a shaving-ware brand. This is a company that Andover has refused to partner with in the past. By creating and sharing an AI-generated video advertising a product that Andover has expressly refused to advertise for in the past, a reasonable jury could find that it was made or used as “an advertisement or solicitation for patronage of a particular product. . . .” *Mason*, 2006 WL 3230279, at *3.

There is an exception to N.Y. Civ. Rights Law § 51 liability if the publication reports on “newsworthy” content or a “matters of public interest” because these are not deemed to be for the purpose of advertising or trade. *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.*, 94 N.Y.2d 436, 441 (2000). While anyone would be hard-pressed to find a shaving brand advertisement newsworthy, the Court need not consider the newsworthiness, since this exception does not apply “if the [publication] is substantially fictionalized.” *Bloom v. A360 Media LLC*, 735 F. Supp. 3d 466, 475 (S.D.N.Y. 2024). Here, the AI-generated video is entirely fictionalized, and therefore the newsworthy exception cannot apply to Andover’s statutory claim.

Third, a reasonable jury could find that there was no written consent between Andover and Beyond bAIsic for the use of his name, image, or likeness. Here, no evidence was presented to suggest that Andover granted Beyond bAIsic the right to use his name, image, or likeness. Indeed, Beyond bAIsic did not argue that it had written consent from Andover. Beyond bAIsic did argue that Andover had signed User Generated Content Usage rights with the other companies with whom he has contracted. But that does not mean that Beyond bAIsic had such permission. Even

if a party provides “written consent in favor of one party [that] does not allow others to use an image for trade or advertising.” *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 252 (2d Cir. 2021); *see also ASA Music Prods. v. Thomsun Elecs.*, No. 96-cv-1872-BDP-MD, 1998 WL 988195, at *11 (S.D.N.Y. Sept. 29, 1998) (noting that “by selling or disposing of his or her rights in a work, an artist . . . is deprived of a cause of action *only against the entity to whom he or she sold the work* and any successors in interest.” (emphasis added)). Therefore, a reasonable jury could have found there was no written consent between Andover and Beyond bAIsic.

Accordingly, a reasonable jury could have found Beyond bAIsic violated Andover’s statutory rights under N.Y. Civ. Rights Law §§ 50 and 51 when Beyond bAIsic’s AI technology was used to create an advertisement with Andover’s likeness as the spokesperson without Andover’s written consent. This Court should affirm the lower court’s decision to deny Beyond bAIsic’s motion for a judgment as a matter of law.

B. Andover’s Video Evidence was Properly Admitted Because it is Critical to Assessing a Material Fact of the Patent Infringement Claim

The district court properly admitted the video of Andover explaining the NIL case to his followers, with an AI-generated version of Abraham Lincoln’s face superimposed on his own into evidence because the video is relevant to the issue of infringement. Beyond bAIsic does not dispute that the question of whether it infringes hinges on whether the video is an altered version of an image of Andover himself. The jury was asked to make a factual determination of whether the video is an altered image of Andover and could only make that determination after seeing the video firsthand. The video is the only evidence that the jury could use to make a determination on that fact, and thus, the video has far more than a mere “tendency” to make a material fact more or less likely. Fed. R. Evid. 401. The video is essential evidence of Beyond bAIsic’s patent infringement argument and thus the district court properly refused to exclude it.

Beyond bAIsic challenges the trial court's admission on grounds of hearsay, and improper opinion, and unfair prejudice.

1. The Video was Properly Admitted Because it Was Not Offered for the Truth of the Matter Asserted

The video is relevant to whether the video portrayed an altered image of Andover himself. Because the truth of the content presented in the video is immaterial to its relevance, it does not fall into the definition given in Fed. R. Evid. 801(c) and therefore is non-hearsay. The normal dangers that would arise if the video had been offered for the truth of the matter were not present here, and thus, there was no basis upon which to exclude the video. *United States v. Detrich*, 865 F.2d 17, 20-21 (2d Cir. 1988). For example, Beyond bAIsic was not denied the ability to cross-examine the speaker regarding the contents of a statement, nor was the jury denied the opportunity to observe the demeanor of the speaker, nor was the speaker permitted to provide testimony regarding facts without the gravity conferred by testimony under oath and in a court room. *Id.*

2. The Video Does Not Contain Improper Opinion

The video was not offered for the truth of any matter, so the jury should not have assessed the credibility of the content of the video nor used the content to make its determination on the NIL claim. The visual, auditory, and stylistic content of the video was offered only for the patent infringement claim and provided no opinion, proper or otherwise, on that claim or any other. *See United States v. Scully*, 877 F.3d 464, 474 (2d Cir. 2017) (holding that an out-of-court statement not offered for the truth of the matter asserted is not hearsay and any content of the statement should not be considered for admissibility purposes).

3. The Admission of the Video Created no Unfair Prejudice

The probative value of the video is extremely high and its potential unfair prejudice is low. Accordingly, Beyond bAIsic is incorrect to suggest that the trial court judge should have excluded

the video because it caused unfair prejudice that substantially outweighed its probative value. Fed. R. Evid. 403.

The video was the only evidence that the jury could (and indeed, was required to) use to make the material factual determination of whether the video in question is an altered version of an image of Andover. The inquiry of whether the video contains edited “images” of Andover goes beyond mere physical appearance. A person’s voice and persona, the way they carry themselves, their signature gestures, are just as relevant as a person’s appearance to whether their “image” has been used. *See Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *see also White v. Samsung Elects. America, Inc.*, 971 F.2d 1395 (9th Cir. 1992). To the extent that Beyond bAIsic argues that still images or short clips of the video are sufficient evidence for the jury to make its determination, those redacted version of the video would not allow the jury to assess the full “image” of Andover that was used to make the video.

In *U.S. v. Gilliam*, an out-of-court statement was admitted for the effect on the listener, a non-hearsay use because the truth of the matter asserted is irrelevant. 994 F.2d 97, 103-04 (2d Cir. 1993). The admission was challenged on grounds that the jury would take the evidence for the truth of the matter, even though that was not why it was admitted. *Id.* at 104. However, the trial court found that the potential unfair prejudice did not substantially outweigh its probative value as to the effect on the listener and that the whole statement was relevant, so it was not limited or excluded. *Id.* Because the Second Circuit “entrust[s] such decisions to the discretion of the trial court” and this application of the balancing test was not an abuse of discretion, and the appellant’s argument that unfair prejudice required redacting the testimony was rejected. *Id.* (citing *United States v. Torres*, 901 F.2d 205, 235 (2d Cir. 1990)).

Here, the same is true. The probative value of the video to a material fact of the patent

infringement claim is not outweighed by the potential prejudice to Beyond bAIsic. Additionally, the district court's decision not to permit redactions does not represent an abuse of discretion—it is merely the *exercise* of discretion. The district court judge was in the best position to evaluate the propriety of admitting the evidence and because the materiality is high and the potential prejudice is low, her decision to let it in cannot be considered an abuse of discretion.

4. Even if There was Error in Admitting the Video, Any Such Error is Harmless

Even if Beyond bAIsic can show that the judge abused her discretion in admitting the video evidence, they must also show that it is likely that the jury was swayed by the evidence into making a decision on improper grounds. Mere conjecture is not enough to show harm from the error. *Tesser*, 370 F.3d at 320. The elements that must be considered in assessing harmlessness are “(1) whether the evidence bore on the most important issues in the case; (2) whether the evidence was simply cumulative or corroborative; (3) whether the evidence was used in summation; and (4) whether the appellee’s case was particularly strong.” *Grant v. Lockett*, No. 19-469, 19-738, 19-1558, 2021 WL 5816245, at *4 (2d Cir. Dec. 8, 2021) (citing *Abascal v. Fleckenstein*, 820 F.3d 561, 567 (2d Cir. 2016)). The principal factors in assessing harm are the importance of the evidence and the “overall strength of the [appellees’] case.” *Id.* (citing *Cameron v. City of New York*, 598 F.3d 50, 56 (2d Cir. 2010) (internal citations omitted)).

While the content of the video bears on important issues in the NIL case, the evidence is cumulative; there is no information in the video that the jury did not hear as part of the NIL case anyway. Furthermore, the content of the video was not used in summation of Andover’s NIL argument, because it was not introduced to prove any element of that case. Instead, Andover’s NIL case relied on substantial properly admitted evidence that the jury rightly used to come to its conclusion that Andover’s right of publicity had been violated. Balancing the evidence, Beyond

bAIsic cannot show any likelihood that, in the event that this evidence was improperly admitted, it was a harmful error.

The judge did not abuse her discretion in admitting the video in its entirety and this Court should affirm.

C. The Second Circuit Has Jurisdiction Over the Appeal Because the Counterclaim Is Permissive

The District Court denied Andover's motion for a new trial, and Andover appealed to this Court. Beyond bAIsic filed a motion to transfer and contended that the Federal Circuit, not this Court, would have jurisdiction over the appeal because the counterclaim involved patent infringement claims. Beyond bAIsic's argument is erroneous. The Federal Circuit has exclusive jurisdiction over an appeal, *inter alia*, "in any civil action in which a party has asserted a *compulsory* counterclaim arising under, any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1) (emphasis added). However, both case law and the plain language of the relevant statutes illustrate that this Court, not the Federal Circuit, has jurisdiction over the appeal because the patent-infringement counterclaim is permissive, not compulsory. The counterclaim is permissive because it does not fulfill the requirements of a compulsory counterclaim outlined in Rule 13(a), which states that a compulsory counterclaim must "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a). The Federal Circuit has prescribed three tests to evaluate whether a counterclaim arises from the same transaction or occurrence. *See Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1325 (Fed. Cir. 2008). The three tests in *Nasalok* are "(1) whether the legal or factual issues raised by the claim and the counterclaim are largely the same, (2) whether substantially the same evidence supports or refutes both the claim and the counterclaim, and (3) whether there is a logical relationship between the claim and the counterclaim." *Id.* Other Circuit Courts,

including this Court, have endorsed the three tests outlined in *Nasalok*. See, e.g., *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 209 (2d Cir. 2004) (emphasizing that logical relationships need to exist between claims and counterclaims to establish compulsory counterclaims); see also, e.g., *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389 (3d Cir. 2002). Additionally, because the Federal Circuit has mandatory and exclusive jurisdiction if the patent infringement counterclaim is compulsory, the Court should “apply Federal Circuit law when determining whether [the Federal Circuit has] jurisdiction under the relevant statute.” *Teradata Corp. v. SAP SE*, No. 2022-1286, 2023 WL 4882885, at *22 (Fed. Cir. Aug. 1, 2023); see 28 U.S.C. § 1295(a).

Here, under the *Nasalok* tests, the counterclaim is not compulsory and only permissive and therefore, jurisdiction properly rests with this Court.

1. Beyond bAIsic’s Counterclaim Has No Legal or Factual Issues That Are the Same to Ones Raised by the Original Claim

The Court should deny Beyond bAIsic’s motion to transfer because the counterclaim shares no common legal or factual issues with Andover’s original claim. Under the first test outlined in *Nasalok*, a counterclaim arises from the same transaction or occurrence only if the two claims share “[largely the same] legal and factual issues.” *Id.* at 1325. When determining whether these issues are largely the same, the Federal Circuit instructs courts to assess the “extent of factual overlap between what the plaintiff must establish to prove its claim and what the defendant must establish to prove its counterclaim,” comparing the factual and legal bases to determine whether they are indeed “largely the same.” *Id.* at 1325-26.

In *Teradata*, the Federal Circuit found that plaintiff’s trade-secret claims and defendant’s patent-infringement counterclaims were legally and factually distinct. The court emphasized that the claims had different *prima facie* legal elements and required different factual proofs.

Notably, the *Teradata* court acknowledged that there were “some overlap[ping]” facts between the two claims but stated that “such same-field overlap does not make the issues ‘largely the same.’” *Id.* at *31 (citation omitted).

Similarly, in this case, Beyond bAIsic’s patent-infringement counterclaim does not share factual issues with Andover’s NIL Right-to-Publicity claim. The original claim focuses on Beyond bAIsic’s unauthorized commercial use of Andover’s image and likeness in Video 1, created using Beyond bAIsic’s patented technology depicting an AI-generated individual resembling Andover. The counterclaim concerns a heavily altered, materially different video, Video 2, purportedly made with Beyond bAIsic’s patented technology, including a different, Abraham Lincoln-look-alike, character with a body resembling that of Andover. Further, Video 1 was produced and published before Andover filed the original claim, while Video 2 was produced after Beyond bAIsic filed the complaint. Therefore, Video 1 and Video 2 are different from each other in both content and timeframe in which they were produced, resulting in separate factual foundations and transactions.

Furthermore, the original claim and the counterclaim do not share any legal bases. Andover’s original claim seeks injunctive relief and monetary damages under New York State’s Right of Publicity laws. To prevail under New York Civil Rights Law §§ 50-51, a plaintiff generally must show: (1) ownership or exclusive rights to the identity; (2) unauthorized commercial use by the defendant; (3) lack of plaintiff’s authorization; and (4) resulting economic harm. *See* N.Y. CIV. RIGHTS LAW §§ 50-51; *see also* J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 3.1, 4.14–46 (2025). Conversely, Beyond bAIsic’s patent-infringement claim requires establishing both ownership of a valid patent and infringement of that patent. *See* 35 U.S.C. § 271. Like *Teradata*, the claims here similarly involve separate legal

frameworks and requirements, each with distinct and “multiple limitations.” *Teradata*, 2023 WL 4882885, at *31. Thus, given the differing *prima facie* legal elements and separate factual scenarios involving two distinct videos, the counterclaim is permissive. Accordingly, jurisdiction properly falls within this Court.

2. Beyond bAIsic’s Counterclaim Is Not Supported or Refuted by Substantially the Same Evidence Applied to the Original Claim

The patent-infringement counterclaim and the original Right-to-Publicity claim are not supported or refuted by substantially the same evidence because these claims have different legal and factual bases. The Federal Circuit typically resolves this issue by examining whether the two claims share similar factual or legal bases, particularly assessing what evidence each party must present to prevail. *See, e.g., Teradata*, 2023 WL 4882885 at *31; *see also, Nasalok*, 522 F.3d at 1326; *In re Rearden LLC*, 841 F.3d 1327, 1332 (Fed. Cir. 2016).

In *Rearden*, the Federal Circuit found that the claims and counterclaims shared “substantially the same evidence [that] could refute both the claims of ownership and the counterclaims of infringement,” because they “involve the same patents.” *Id.* at 1332. In contrast, in *Teradata*, the Federal Circuit concluded that the original trade secret claim did not share substantially the same evidence with the patent-infringement counterclaim because the plaintiff’s trade secret claim “depend[ed] on the scope of the marking requirements and license provisions of [the agreement]...and the composition of [defendant’s products],” while the defendant’s counterclaim “turn[ed] on the scope of the patent claims ... and the composition of [plaintiff’s products].” *Teradata*, 2023 WL 4882885 at *29-31.

The present case is more akin to *Teradata* as opposed to *Rearden*. Andover’s original claim alleges the infringement of his Right-to-Publicity. Beyond bAIsic’s counterclaim, however, alleges that Andover has infringed Beyond bAIsic’s patent. These claims do not share

overlapping legal elements, as presented *supra*, or depend on common factual circumstances. Unlike the claims and counterclaims in *Rearden*, which involved identical patents and, inherently, overlapping evidence, the claims here lack any comparable commonality, either factually or legally. Andover's original Right-of-Publicity claim is supported primarily by evidence relating to Video 1 and his own likeness. Conversely, Beyond bAIsic's patent-infringement counterclaim requires evidence centered on Video 2 and the alleged use of Beyond bAIsic's patented methods.

Any argument that by including the likeness of Andover in the evidence for both the NIL claim and the patent counterclaim, they would share the same evidence to support or refute the claims, fails under the reasoning articulated by the Federal Circuit. While the parties have stipulated that Beyond bAIsic's patent infringement counterclaim would include evidence from whether Andover's likeness appeared in Video 1, this stipulation does not create sufficient factual or legal overlap, nor does it create material evidentiary overlap to mandate a compulsory counterclaim. The court has emphasized that even if "there is undisputedly some overlap in evidence," "such same-field overlap does not . . . make the evidence supporting or refuting the particular claims and counterclaims 'substantially the same.'" *Teradata*, 2023 WL 4882885, at *31 (citation omitted). In *Teradata*, the court conceded that the claim and counterclaim share some evidence as "understanding the different accused products and the asserted trade secrets and asserted patent claims will call for explanations of various database-structure-and-access technologies." *Id.* Nevertheless, the court held that the differing elements underlying each claim meant that the necessary evidence for each claim was ultimately distinct. *See id.* Here, similar to *Teradata*, Andover's Right-to-Publicity claim and Beyond bAIsic's patent infringement claim also require the District Court to examine technologies related to both Video 1 and Video 2.

However, this overlap “does not make the issues ‘largely the same’ or ‘make the evidence supporting or refuting the particular claims and counterclaims ‘substantially the same,’ because the two claims arise from different legal and factual bases. *Id* (citation omitted). Therefore, even if both claims reference include Andover’s likeness as part of their evidence, based on the Federal Circuit’s holding in *Teradata*, they are not supported or refuted by substantially the same evidence.

3. Beyond bAIsic’s Counterclaim Has No Logical Relationship to the Original Claim

The counterclaim and the original claim share no logical relationship or connection because they “[do] not involve shared direct subject matter . . .” *Id.* at *34. When determining whether a logical relationship exists between a claim and a counterclaim, the Federal Circuit has analyzed “the extent of factual overlap between what the plaintiff must establish to prove its claim and what the defendant must establish to prove its counterclaim.” *Nasalok*, 522 F.3d at 1326. For the analysis, the Federal Circuit considers whether the case involves “shared direct subject matter” between the claim and counterclaim, viewing this test “[to] be of a piece with ... the first two tests, reflecting the significant assert-or-lose consequence of a ‘compulsory’ characterization ...” *Teradata*, 2023 WL 4882885 at *32 (citation omitted). Additionally, similar to the “substantially-same-evidence” test above, this test is “to a large extent circumstance-specific.” *Id.* Thus, the Federal Circuit, along with other courts applying this standard, analyze specific factual issues to determine if the claim and counterclaim share direct subject matter.

In *Teradata*, the Federal Circuit found that there was no logical relationship between the original trade secret claims and the patent counterclaims. Specifically, the court based this decision on the fact that not only did the counterclaim concern different subject matter than the

claim, but the counterclaim also “[did] not assert invalidity of [the plaintiff]’s asserted trade-secret right.” *Id.* at *38. The claims concerned different subject matter because “different parties’ different products are the direct subjects of [plaintiff]’s claims, on one hand, and [defendant]’s counterclaims, on the other.” *Id.* at *32. Additionally, the court determined that generalized considerations, such as “who invented the technology first,” were insufficiently specific to establish a logical relationship between the claims. *Id.* at *39. Ultimately, absent substantive arguments demonstrating shared direct subject matter or mutual impact, the Federal Circuit concluded that no logical relationship existed between the claims and counterclaims. *See id.* at *41.

Similarly in this case, Andover’s Right-to-Publicity claim and Beyond bAIsic’s patent-infringement counterclaim share no logical connections. First, this Court should recognize that the state-law-based Right-to-Publicity claim and the federal-law based patent-infringement counterclaim are grounded in different factual and legal foundations and are supported and refuted by different evidence. Moreover, the present circumstances most closely resemble *Teradata*, where claims involving different products and different transactions were found to be logically unrelated. Here, similarly, the original claim concerns Video 1, and the counterclaim concerns Video 2. These two videos were created at different times, through different transactions, addressing different subjects and contexts. It is clear that these claims lack direct shared subject matter. Second, neither the claim nor counterclaim is asserting anything that could invalidate the other. Andover’s Right-of-Publicity infringement claim does not vitiate or invalidate Beyond bAIsic’s patents, and more importantly, Beyond bAIsic’s patent-infringement counterclaim neither negates nor preempts Andover’s original claim because the claims involve largely separate evidence and entirely distinct legal standards, and any outcome related to the

patent-infringement counterclaim does not dictate a particular outcome related to the original claim. (Although the parties have stipulated that a positive result for Andover in the Right-of-Publicity claim will require a negative result for Beyond bAIsic's patent infringement counterclaim, that causality flows only one way: Andover's original Right-of-Publicity claim is not in any way affected by the outcome of the Beyond bAIsic's permissive patent counterclaim.) Therefore, there is no logical connection between the claim and counterclaim in the present appeal.

Because the original claim and counterclaim do not share any legal or factual issues, any substantially the same evidence, or any logical connections, they do not meet the "transition or occurrence" standard outlined in *Nasalok* related to whether the counterclaim is compulsory. Therefore, Beyond bAIsic's patent-infringement counterclaim is permissive, not compulsory, meaning jurisdiction over this appeal properly resides with the Second Circuit, and not the Federal Circuit. Accordingly, Beyond bAIsic's motion to transfer should be denied.

D. The District Court Erred in Denying Andover's Motion for A New Trial

The District Court denied Andover's motion for a new trial, and Andover appealed to this Court. Andover hereby respectfully moves this Court to grant a new trial. The District Court abused its discretion in admitting the testimony of Professor Liu, an expert witness, who heavily relied on memoranda generated by artificial intelligence ("AI") that undisputedly contained "serious errors," over Appellant's objection in violation of the standards for admissibility of expert testimony under Federal Rules of Evidence ("FRE") 702 and 403. FED R. EVID. 702 and 403.

FRE 702 grants expert witnesses "testimonial latitude" that is unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). Experts may provide opinions, even if those opinions are not grounded in firsthand

knowledge or direct observation. *Id.* In *Daubert*, the Supreme Court held that FRE 702 imposes a special obligation upon a trial judge to “ensure that any and all scientific testimony . . . is not only relevant, but reliable.” *Id.* at 589. To evaluate the relevancy and reliability of an expert’s testimony, a trial judge should consider the following factors: (1) whether an expert’s technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *See* FED R. EVID. 702; *see also Daubert*, 509 U.S. at 592-594. The gatekeeping function of the trial judge is particularly significant in jury trials, where the audience receiving the evidence consists of lay members of the public who may be misled by such evidence. FRE 403 exists to counterbalance this danger. It states that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED R. EVID. 403.

The District Court erred in denying a new trial and admitting Professor Liu’s flawed testimony. As an initial matter, Beyond bAIsic’s internal AI-generated memoranda fails the basic standards of admissibility under FRE 403, because they are unfairly prejudicial, confuse the issues, mislead the jury, and do not meet any hearsay exception. More importantly, Professor Liu, an expert witness for Beyond bAIsic, relied heavily on the materially inaccurate AI-generated memoranda for her trial testimony in this case. There is no evidence that Professor Liu recognized these “serious errors” in those memoranda prior to trial, alerted the District Court to them before testifying at trial, or distinguished those errors at trial for the benefit of the jury. Each of those

acts or omissions damages Professor Liu's credibility and trustworthiness under FRE 702, justifying a new trial.

1. Beyond bAIsic's AI-generated Internal Memoranda Are Not Admissible Evidence Under FRE 403 And Do Not Meet Any Hearsay Exception

FRE 403 states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED R. EVID. 403 (emphasis added). The rule makes it clear that it is for the judge to determine whether the danger of unfair prejudice substantially outweighs the probative value of the relevant evidence. *Id.* "Unfair prejudice," within the framework of FRE 403, denotes undue tendency to suggest decision on an improper basis. FED R. EVID. 403 Advisory Committee's Note to 1972 proposed rules. There is no reasonable dispute that the AI-generated memoranda on which Professor Liu heavily relied fail the basic admissibility standards of FRE 403. Those memoranda contain "serious errors" that likely misled the jury, and there is no indication that Professor Liu even attempted to distinguish or explain these errors to the jury at trial. More fundamentally, those memoranda constitute out-of-court statements by a non-human entity, which clearly do not qualify for hearsay exclusion under FRE 801(d) or any hearsay exception under FRE 803. Indeed, Beyond bAIsic concedes the point, having narrowly reframed the issue on appeal not as whether the AI-generated memoranda independently constitute admissible evidence, but whether Professor Liu's testimony based upon those memoranda satisfies the lower admissibility standards of FRE 702. As discussed in the following section, it does not.

An additional consideration regarding the admissibility of the AI-generated memoranda warrants attention. Generative AI-generated evidence significantly influences how factfinders think, particularly when the trier of fact is a lay juror. Rebecca A. Delfino, *Deepfakes on Trial: A*

Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery, 74 HASTINGS L.J. 293 (2023). The inability for lay jurors to disregard misinformation provided by unreliable AI clearly justifies the need for a new trial. By parroting the words of unreliable AI, Professor Liu compounded the risk that the AI-generated memoranda would confuse, prejudice, and mislead the jury by improperly placing the gloss of her expert credentials upon otherwise inadmissible evidence. *See, e.g., Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 428 (S.D.N.Y. 2009) (collecting Second Circuit cases establishing that an expert cannot satisfy Daubert simply by parroting the words of another without conducting independent analysis).

2. Professor Liu’s Trial Testimony Relying on the AI-generated Internal Memoranda Is Not Admissible Under FRE 702

In *Daubert*, the Supreme Court held that FRE 702 imposes a special obligation upon a trial judge to “ensure that any and all scientific testimony . . . is not only relevant, but reliable.” *Id.* at 589. To determine relevancy and reliability a trial judge should consider: (1) whether an expert’s technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *See* FED R. EVID. 702; *see also Daubert*, 509 U.S. at 592-594.

While the rules implicitly task juries with resolving factual disputes and assessing the credibility of the evidence presented, nevertheless, the trial judge assumes the role of “gatekeeper,” tasked with determining whether the jury should be permitted to consider the evidence proffered by the litigants. The importance of admissibility over the weight of evidence was addressed in the FRE 702 revision effective December 1, 2023, which noted that “rulings

that have held that the critical questions of the sufficiency of an expert’s basis ... are questions of weight and not admissibility. . .are incorrect [in their] application of Rule 702.” FED R. EVID. 702 Advisory Committee’s Note to 2023 Amendment. The District Court similarly erred in permitting Professor Liu, an expert witness who relied extensively on factually incorrect AI-generated memoranda provided by Beyond bAIsic, to testify before the jury regarding the prevailing state of the art and the pertinent issue of obviousness.

i. Reliance on AI-generated Documents Has Not Achieved General Acceptance Within the Scientific Community

The standard for admitting evidence based on a novel scientific theory or principle is grounded in whether that theory or principle has achieved general acceptance within the relevant scientific community. FED R. EVID. 702 Advisory Committee’s Note to 2000 Amendment (referencing the factors laide out in *Daubert*, 509 U.S. 579). To assess scientific consensus, the court considers expert testimony on general acceptance, relevant publications, practical application within the relevant community, secondary legal sources, and legal precedents from other jurisdictions. *Supra* Advisory Committee’s Note.

There is no reasonable dispute that the use of generative AI to create memoranda regarding what constitutes “prior art” in a legal context has failed to achieve general acceptance within the relevant scientific community. Andover is unaware of any documented case where AI has been used to establish what constitutes “prior art” in litigation. When AI *is* mentioned in a legal context, it is almost invariably to call attention to its failings. *See, e.g., Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 466 (S.D.N.Y. 2023) (sanctioning attorney for including fake, AI-generated legal citations in a filing); *Park v. Kim*, 91 F.4th 610, 614-16 (2d Cir. 2023) (referring attorney for potential discipline for including fake, AI-generated legal citations in a filing); *Kohls v. Ellison*, No. 24-3754, 2025 U.S. Dist. LEXIS 4928 (D. Minn. Jan. 10, 2025) at *10 (“The Court thus adds its voice

to a growing chorus of courts around the country declaring the same message: verify AI-generated content in legal submissions!”).

ii. Professor Liu’s Testimony is Not a Reliable Application of the Principles and Methods to the Facts of the Case

FRE 702 states that a witness, once qualified as an expert, may only testify “if the testimony is based upon sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” *Daubert*, 509 U.S. at 593. The facts in this case show that Professor Liu failed to meet the required standard. The above-cited *Kohls* decision is directly relevant to this situation. In that case, as with Professor Liu, Professor Jeff Hancock, a purported expert on AI ironically relied upon the generative AI ChatGPT-4o to author his expert declaration in opposing Kohls’ motion for preliminary injunction. *Kohls*, 2025 U.S. Dist. LEXIS 4928 at *9. There, Professor Hancock “failed to discern that GPT-4o generated fake citations to academic articles.” *Id.* Similarly, Professor Liu here either failed to discern that the AI-generated memoranda on which she “heavily” relied contained serious errors—or worse, knew of those serious errors but failed to disclose them to the district court in advance of her trial testimony. In *Kohls*, the Minnesota district court concluded that Professor Hancock’s “citation to fake, AI-generated sources in his declaration ... shatter[ed] his credibility with the Court” and summarily excluded his testimony under FRE 702. *Id.* at *13. The *Kohls* court continued: “the Court should be able to trust the indicia of truthfulness” that declarations made under penalty of perjury carry, “but that trust was broken.” *Id.* The judge in *Kohls* emphasized the necessity for severe consequences for citing fake, AI-generated information, whether the parties did so innocently or not. *Id.* at *14. Notably, the *Kohls* court excluded Professor Hancock’s opinions as unreliable under FRE 702 in a preliminary injunction proceeding, where the risk of juror confusion and prejudice was absent.

Here, by contrast, the presence of those jury-related issues further compounds the district court's abuse of discretion in allowing Professor Liu's testimony based upon unreliable AI-generated evidence.

iii. Professor Liu's Testimony Will Not Help the Jury Understand the Obviousness Inquiry

FRE 702 was recently amended to strengthen the requirement that the trial judge fulfill their gatekeeping role under FRE 104(a) to ensure that evidence regarding scientific, technical, and specialized matters not be admitted for consideration by a jury unless the proponent of the evidence has met its initial burden of showing that the basic standards of FRE 702 have been met. FED R. EVID. 702 Advisory Committee's Note to 2023 Amendment.

In this case, the District Court erred in the exact manner the Committee Notes on the 2023 Amendment cautions against. The District Court should not have allowed testimony based upon factually erroneous AI-generated evidence. The District Court bore a gatekeeping responsibility to ensure Professor Liu's testimony was grounded in evidence that met the scientific standards relevant to the technology at issue. Unfortunately, the court failed to uphold that responsibility. As a result, the jury was not aided in understanding the technically complex issues related to patent obviousness; rather, it was misled by the flawed testimony of an expert who heavily relied on information that contained serious material errors. Hence, Andover should be granted a new trial on the issue of obviousness.

III. ARGUMENT BY DEFENDANT-APPELLEE BEYOND BAISIC

A. The District Court Erred in Denying Beyond bAIsic's Motion for Judgement as a Matter of Law

The district court erred in denying Beyond bAIsic's motion for a Judgement as a Matter of Law and Beyond bAIsic's renewed motion for a Judgement as a Matter of Law as no reasonable jury would have found for Andover from the evidence presented.

1. Beyond bAIsic's Video is Not For Advertising Purposes or Purposes of Trade

The unauthorized use of a plaintiff's "name, portrait, picture or voice" within New York "for advertising purposes or the purposes of trade" may give rise to a cause of civil cause of action under NYCRL §50-51. As discussed further below, Beyond bAIsic's Video was not used for its own "advertising purposes" or its "purposes of trade."

The term "advertising purposes" as used in NYCRL §§50-51 has been interpreted by the New York Court of Appeals to mean solicitation for patronage of a particular product or service. The Court of Appeals of New York has long held that "[a] name, portrait or picture is used 'for advertising purposes' if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service." *Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 751, 587 N.E.2d 275, 278 (1991) (quoting *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 279, 284, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959); *Pagan v. N.Y. Herald Tribune*, 32 A.D.2d 341, 301 N.Y.S.2d 120 (App. Div. 1st Dep't), *aff'd without opinion*, 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727 (1970)). However, this New York statute is not an absolute bar, and instead allows for exceptions for matters of public concerns or newsworthy images. *Foster v. Svenson*, 128 A.D.3d 150, 159, 7 N.Y.S.3d 96, 102 (App. Div. 1st Dep't 2015).

There is no relationship between Beyond bAIsic's creation of its AI-generated speaker and the product being advertised by the video to amount to a use that is for Beyond bAIsic's "advertising purposes." Beyond bAIsic is in the business of AI software with the intent of making creator-like content for its customers. Beyond bAIsic's customers are companies that would like to advertise and market its products but do not want to pay high fees of content creators. The video in question features an AI generated video of an AI generated speaker advertising shaving products

for a shaving company. This differentiates Beyond bAIsic from *Beverley*, *Foster* and *Lahiri*, as with all three, the plaintiffs were featured in advertisements that marketed the defendant's businesses. *See id.*; *Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 751, 587 N.E.2d 275, 278 (1991); *Lahiri v. Daily Mirror*, 162 Misc. 776, 780, 295 N.Y.S. 382, 386 (Sup. Ct. 1937). Beyond bAIsic is not in the shaving industry and its consumer base is not people in the market for shaving products. Therefore, Beyond bAIsic's AI platform generating the video should not be considered for "advertisement purposes" under NYCRL §51, as it does not promote any commercial offering of Beyond bAIsic.

Similarly, Beyond bAIsic's creation of its AI-generated speaker is also not a use for Beyond bAIsic's "purposes of trade" under NYCRL §51. The term "purpose of trade" as used in the statute has been interpreted to refer to "nonconsensual commercial appropriations of the name, portrait or picture of a living person." *Lemerond v. Twentieth Century Fox Film Corp.*, No. 07-CV-4635 (LAP), 2008 WL 918579, at *2 (S.D.N.Y. Mar. 31, 2008). Whether an activity falls within the scope of "purposes of trade" under NYCRL §51 has been factually determined by courts in New York on a case by case basis. The courts in New York have repeatedly held that the mere use of a plaintiff's name or likeness in a voluminous body of work is not sufficient to establish liability under NYCRL §51.⁵ Beyond bAIsic's creation of its AI-generated speaker utilized data

⁵ The following cases, recovery was denied: "The use of plaintiff's name and picture in a motion picture of current events (*Humiston v. Universal Film Mfg. Co.*, 189 App.Div. 467, 178 N.Y.S. 752); the use of a name once in a novel of almost 400 pages (*Damron v. Doubleday, Doran & Co., Inc.*, 133 Misc. 302, 231 N.Y.S. 444, affirmed *Damron v. Doubleday, Doran Book Shops, Inc.*, 226 App.Div. 796, 234 N.Y.S. 773; *Swacker v. Wright*, 154 Misc. 822, 277 N.Y.S. 296); the portrayal of plaintiff's factory on which his firm name clearly appeared, in a motion picture dealing with the white slave traffic (*Merle v. Sociological Research Film Corporation*, 166 App.Div. 376, 152 N.Y.S. 829); the use of the name and picture of an alleged strike breaker together with the names and likenesses of eight others on the frontispiece, and the mention of his name four times in 314 pages of a book dealing with strike breaking (*People on Complaint of Stern v. Robert R. McBride & Co.*, 159 Misc. 5, 288 N.Y.S. 501); and the attributing of the authorship of an absurd adventure story purporting to be true, to a well-recognized and reputable writer (*D'Altomonte v.*

from numerous other sources distinct from Andover, as evidenced by the AI-generated speaker embodying features (e.g., hair style and lack of tattoos) that Andover lacks.

Furthermore, as discussed above, Beyond bAIsic is in the business of AI software with the intent of making creator-like content for its customers, and does not sell shaving products to consumers. *cf. Robinson v. Snapple Beverage Corp.*, No. 99-CV-344 (LMM), 2000 WL 781079, at *3-4 (S.D.N.Y. June 19, 2000) (Snapple was an express and paying beneficiary of the vignette and had a degree of input into the content of the vignette. Thus, the court found Snapple used the vignette as advertisement of its products). The video generated by Beyond bAIsic were not for advertising or trade on Beyond bAIsic's behalf. This case is distinguishable from *Robinson* because video generated by Beyond bAIsic differs from the vignette in *Robinson* with respect to whose product is being advertised. In *Robinson*, Snapple used its vignette to promote its own products. *See id.* at *4. Here, Beyond bAIsic is not promoting its own product, the product being promoted is for a shaving company. A user prompted the AI platform to generate a content creator-like video for a shaving company. Once prompted, the AI platform used the thousands of images it was trained on to generate an AI generated content creator-like video for advertising shaving products, not Beyond bAIsic's AI platform.

For at least the reasons discussed above, no reasonable jury could have viewed Beyond bAIsic's use of the Andover images as "advertising purposes." or "purpose of trade" under NYCRL §51.

Additionally, it has been found that incidental use of a person's likeness is not sufficient to

New York Herald Co., 208 N.Y. 596, 102 N.E. 1101, modifying 154 App.Div. 453, 139 N.Y.S. 200)." *Id.*

establish liability. *Candelaria v. Spurlock*, No. 08-CV-1830 (BMC)(RER), 2008 WL 2640471, at *2 (E.D.N.Y. July 3, 2008). A plaintiff must demonstrate a “direct and substantial connection between the appearance of the plaintiff’s name and likeness and the main purpose and subject of the work.” *See id.* (quoting *Preston v. Martin Bregman Prods., Inc.*, 765 F. Supp. 116, 120 (S.D.N.Y. 1991)). Isolated, fleeting, and incidental uses of a person’s likeness, even unauthorized use, are also insufficient to establish a Defendant’s liability. *See id.* (citing *D’Andrea v. Rafla-Demetrious*, 972 F. Supp. 154, 157 (E.D.N.Y. 1997) (citing *Univ. of Notre Dame du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 454, 256 N.Y.S.2d 301, 304 (1st Dep’t), *aff’d*, 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 (1965))). Here, Beyond bAIsic’s software created a video of an AI-generated speaker, which does not actually exist, through use of countless other images that are not of Andover. Even if an image of Andover’s likeness had been used, which the parties have not been able to ascertain, any such use of Andover’s likeness would have been as part of a large data set that resulted in the generation of the AI-generated speaker, and is therefore, not sufficient for Beyond bAIsic to be liable.

The motion for Judgement as a Matter of Law or the renewed Judgement as a Matter of Law should have been granted as viewing this information in favor of the non-moving party.

2. Beyond bAIsic’s Video Does Not Use Andover’s Portrait or Picture Without Consent

For a NYCRL §§50-51 violation, the likeness of a plaintiff must have been used without consent of the plaintiff. Beyond bAIsic’s AI software is trained on images and videos of real content creators to then create transformative use when prompted by users. This transformative use is the AI software merging the characteristics of thousands of real people collected from hundreds of thousands of images and videos together to create life-like content. *Compare with Bartz v. Anthropic PBC*, No. C 24-05417 WHA, 2025 WL 1741691, at *15 (N.D. Cal. June 23,

2025). (“What matters [] is not so much ‘the amount and substantiality of the portion used’ *in making a copy*, but rather the amount and substantiality of *what is thereby made accessible* to a public [in the purported secondary use] for which it may serve as a competing substitute [for the primary use].” *Google*, 804 F.3d at 222. Here, once again, there is no allegation of any traceable connection between the Claude service's outputs and Authors’ works. The copying used to train the LLMs underlying Claude was thus especially reasonable.”). Although some images used to create may have been Andover’s images, which the parties have not yet ascertained, it also used the images of thousands of other creators. The use of images that are not of Andover resulted in the differences in hair style and the lack of tattoos in the video at issue. *See id.* at *16 (“For one thing, all agree Anthropic needed billions of words to train any given LLM. If using only books, Anthropic would have needed millions of books per model.”).

The AI generated speaker shown in the video at issue does have a resemblance to Andover, but even if the AI-generated speaker was created using Andover’s images or videos, the resulting AI-generated speaker was generated from a LLM that transformed Andover’s likeness to something different, a fictional speaker, and use of the AI-generated fictional speaker that would not be a violation of NYCRL §§50-51. *See id.* at *7 (“Regardless, the “purpose and character” of using works to train LLMs was transformative — spectacularly so.”).

B. The District Court Abused Its Discretion by Allowing the AI-generated Video of Lincoln to be Played Before the Jury

The District Court’s decision to allow the AI-generated video of Lincoln to be played before the jury over the objection of Beyond bAIsic was an abuse of its discretion because its prejudicial effect outweighed its probative value. Additionally, playing the AI-generated video before the jury was erroneous because it was inadmissible hearsay which does not fall within an enumerated exception and it was an improper assertion of opinion evidence. Furthermore, playing

the video substantially influenced the jury and was therefore not a harmless error.

1. The District Court Misapplied Federal Rule of Evidence 403

Under the particular facts of this case, playing the AI-generated video of Lincoln misled the jury despite there being other means of proof which could have mitigated this effect. Playing video evidence before a jury is understood to risk misleading a jury by distracting from the issues in the case at hand. *See United States v. Monsalvatge*, 850 F.3d 483, 495 (2d Cir. 2017). Here, the significant alteration of the figure purporting Andover's theory of the case to very closely resemble Abraham Lincoln had this effect. *See Leo v. Long Island R.R.*, 307 F.R.D. 314 (S.D.N.Y. 2015) (declining admission of edited videotape evidence submitted without support). Specifically, by generating a video of Abraham Lincoln, a notably honest historical figure and attorney, the jury was misled into believing that the audiovisual content of the video was indeed accurate. Furthermore, the probative value of the video was minimal compared to this prejudicial effect because it is essentially duplicative of assertions made in Andover's case-in-chief. *United States v. Stewart*, 590 F.3d 93, 133 (2d Cir. 2009) (affirming the trial court's decision to exclude evidence which was "essentially duplicative"). The District Court also failed to adequately consider other means of proof in making their Rule 403 determination by playing the video rather than showing still images. *See United States v. Felder*, 993 F.3d 57, 74 (2d Cir. 2021) (concluding that the district court acted within its discretion to rely upon still images from a surveillance video). Accordingly, the District Court abused its discretion by playing the AI-generated video of Lincoln to the jury.

2. The Video Played to the Jury is Inadmissible Hearsay

Andover's video of Lincoln explaining the lawsuit is inadmissible hearsay and the residual hearsay exception does not apply because the video lacks trustworthiness. The video played to the jury, which was made by Andover for his audience, asserts Andover's position in the name, image,

and likeness claim at suit. While the appearance of the speaker closely resembling Abraham Lincoln in the video was AI-generated, the content of its assertions are Andover's. Thus Andover's video is hearsay because it presents Andover's out-of-court statement asserting his position in the case.

Hearsay is inadmissible unless it “falls within an enumerated exception” found within the Federal Rules of Evidence. *United States v. Cummings*, 858 F.3d 763, 772 (2d Cir. 2017) (quoting *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013)). Federal Rule of Evidence Rule 807 describes the residual exception which may allow hearsay evidence to be admitted where “(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” Fed. R. Evid. 807. In assessing trustworthiness of hearsay evidence under the residual exception, the Second Circuit has looked to the totality of the circumstances under which it was made — including whether a motivation to lie existed during the time of recording the statement. *See United States v. Bryce*, 208 F.3d 346, 351 (2d Cir. 1999). Factors analyzed in determining trustworthiness included the nature of the recording and its timing. *See United States v. Bryce*, 208 F.3d 346, 351 (2d Cir. 1999). Here, because the video was created by Andover for his followers shortly after filing suit, and asserted his position in the matter, the content of Andover's video lacks trustworthiness. Accordingly, the District Court erred by allowing inadmissible hearsay which lacked trustworthiness into evidence.

3. The Video Played to the Jury is Impermissible Opinion

The assertion in Andover's video is conclusory and impermissibly gives the appearance of expertise. George Andover is an influencer who operates a video podcast regarding weightlifting and history, but has not gained expertise in rendering legal opinions. Lay witnesses are permitted

under Rule 701 of the Federal Rules of Evidence to provide opinion testimony, but their opinion must be reliable and “not usurp the jury’s role as fact-finder.” *United States v. Kaplan*, 490 F.3d 110, 118 (2d Cir. 2007). Andover’s assertions in the Lincoln video played before the jury were conclusory given that they were directed to his explanation of the lawsuit and lacked objective bases given his bias and personal feelings on its content. Where an opinion offered lacks objective bases and is conclusory in nature the Second Circuit has reasoned that it “fails completely to meet the requirements of Rule 701.” *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992). Furthermore, under Rule 701 of the Federal Rules of Evidence, parties should not conflate lay and expert opinion to confer an aura of expertise. *United States v. Haynes*, 729 F.3d 178, 195 (2d Cir. 2013) (finding that admitting testimony under Rule 701 was erroneous despite the Officer’s statement indicating a lack of formal expertise). By leveraging the appearance of a highly regarded historical figure and attorney alongside his conclusory legal assertions, Andover’s video created an aura of expertise by conflating lay and expert opinion. Therefore, the District Court erred by allowing impermissible opinion into evidence.

4. Allowing the AI-generated Video of Lincoln to be Played Before the Jury Substantially Influenced Its Decision on the NIL Claim

Playing the AI-generated video of Lincoln before the jury substantially influenced its decision and was therefore not harmless error. In reviewing an erroneous evidentiary decisions for harmless error the court should assess “(1) whether the evidence bore on the most important issues in the case; (2) whether the evidence was simply cumulative or corroborative; (3) whether the evidence was used in summation; and (4) whether the appellee’s case was particularly strong.” *Abascal v. Fleckenstein*, 820 F.3d 561, 567 (2d Cir. 2016). Here, the thrust of the assertion put forth in Andover’s video bore directly on the name, image, and likeness determination in this case and consequently on the patent infringement matter. *See Abascal v. Fleckenstein*, 820 F.3d 561,

567 (2d Cir. 2016) (vacating and remanding an evidentiary decision where it “bore on the most important factual issue in the case....”). Accordingly, allowing the assertions of Andover’s AI-generated video of Lincoln to be played for the jury substantially influenced their decisions. Therefore, the District Court’s erroneous admission of Andover’s video was not harmless in its effect.

C. Beyond bAIsic’s Counterclaim is Compulsory

1. It Meets Each Element of the Three-Prong Test

Beyond bAIsic asserted a patent infringement counterclaim against Andover, who now appeals to the Second Circuit. Beyond bAIsic moves to transfer the appeal to the Federal Circuit because the Federal Circuit has exclusive jurisdiction over the appeal of Beyond bAIsic’s compulsory counterclaim. 28 U.S.C. § 1295(a)(1). It is undisputed that this counterclaim “arises under” federal patent law. Accordingly, the parties’ only disputed issue is whether Beyond bAIsic’s counterclaim is compulsory.

Beyond bAIsic’s counterclaim is compulsory because the legal and factual issues raised by the claim and counterclaim are the same—namely, whether the images at issue bear a likeness to Andover. The same evidence was used to prove and/or refute both parties’ claims, including evidence that Andover’s likeness was used in the relevant images. Lastly, the logical relationship between Beyond bAIsic’s alleged use of Andover’s likeness and Andover’s unlicensed use of Beyond bAIsic’s technology is clear.

i. Andover’s Claim and Beyond bAIsic’s Counterclaim Rely on the Same Legal and Factual Issues

Under the first prong of the transaction or occurrence test, the Court must determine whether the legal and factual issues raised by the claim and counterclaim are the same. *Nasalok*, 522 F.3d at 1325. The issue raised in Andover’s original claim was whether Beyond bAIsic

violated his publicity rights by using his name, image, or likeness (NIL) without consent. Succeeding on a publicity claim requires a plaintiff to show “(1) use of plaintiff’s name, portrait, picture or voice (2) for advertising purposes or for the purposes of trade (3) without consent and (4) within the state of New York.” *Jackson v. Odenat*, 9 F. Supp. 3d 342, 353 (S.D.N.Y. 2014) (citation omitted). Beyond bAIsic brought a counterclaim for patent infringement, which requires “construing the patent and determining whether infringement occurred.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996).

The claim and counterclaim both turn on whether Beyond bAIsic’s original video contained Andover’s image or likeness. For Andover to prevail on his claim, he must establish, *inter alia*, that the images in Beyond bAIsic’s advertisement bore sufficient likeness to Andover to be considered an image of “himself.” *See Jackson*, 9 F. Supp. 3d at 353. To prevail on its patent infringement counterclaim, Beyond bAIsic must show that the images *do not* bear likeness to Andover.⁶ In fact, the parties agreed to be bound by the likeness determination made under the NIL claim for the purposes of the infringement claim. This crucial determination bound the legal and factual issues to turn on one finding. Furthermore, the parties consented to consolidating both issues into one trial—an agreement the parties would not have proposed had the claims not presented overlapping legal and factual issues.

Because both the NIL claim and the patent infringement counterclaim turn on the central factual finding of whether Beyond bAIsic’s video used Andover’s likeness, the first prong of the test is satisfied. *See Rearden*, 841 F. 3d at 1332–33 (concluding that patent infringement counterclaims were compulsory where plaintiff’s state law claims and counterclaimants’ cases

⁶ A previous claim construction decision construed the patent claims to exclude alterations of one’s own image.

depend on how the single factual issue of ownership is resolved); *cf. Teradata*, 2023 WL 4882885, at *10–11 (rejecting compulsory treatment where claims depended on product characteristics and the terms of a licensing contract).

ii. Resolution of the Claims Rely on the Same Evidence

The second prong of the test requires the Court to determine whether the same evidence substantially supports or refutes the original claim and the accompanying counterclaim. *Nasalok*, 522 F.3d at 1325. As noted above, both claims here turn on a finding from the original claim: whether Beyond bAIsic’s initial video used Andover’s likeness. The parties agreed to be bound by this determination because it was critical to both claims. Although the infringement claim resulted from Andover’s alterations to Beyond bAIsic’s original video, the evidence nevertheless turns on the likeness determination, which required the jury to evaluate Beyond bAIsic’s video. *See Jackson*, 9 F Supp. 3d at 353 (using images as evidence to establish likeness). The jury relied on said video evidence to determine likeness, which ultimately decided both Andover’s NIL claim and Beyond bAIsic’s patent infringement counterclaim. Because the same evidence supported a finding that was dispositive of both the original claim and the accompanying counterclaim, the second prong is satisfied. *See Rearden*, 841 F.3d at 1332-33 (finding that counterclaims arise from the same transaction or occurrence as plaintiff’s claims where they “share substantial evidentiary overlap”).

iii. Logical Relationship Exists Between the Claims

Under the third prong of the transaction or occurrence test, the Court must determine whether a logical relationship exists between the claim and counterclaim. *Nasalok*, 522 F.3d at 1325. As previously discussed, the claim and counterclaim are based on the same underlying legal issue and rely on the same underlying evidence. As such, both claims share a close, logical relation: the alleged unlawful use of an individual’s likeness by way of AI technology and the

alleged unlicensed use of that patented technology. Because there is an overlap between the evidence and the facts that both parties “*must* establish to prove” their respective arguments, both the claim and counterclaim share a logical relationship. *Teradata*, 2023 WL 4882885, at *9 (citation omitted); *see Rearden*, 841 F.3d at 1332.

2. Principles of Judicial Economy Further Support Compulsory Treatment of the Counterclaim

The Federal Circuit also recognizes that principles of judicial economy may be considered in the determination of whether a counterclaim is compulsory. *See, e.g., Vermont*, 803 F.3d at 644 (applying Second Circuit law and considering “judicial economy” as relevant to the “logical relationship” test). Here, the parties, by stipulation, agreed to try their claims together. This stipulation was appropriate—and conserved the resources of the parties and the judicial system—because the District Court relied on the same facts and evidence to decide liability on both claims. Conversely, trying the issues separately would risk courts arriving at conflicting conclusions about factual findings central to both claims. Because the “considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit,” the patent infringement counterclaim should be treated as compulsory and under the exclusive appellate jurisdiction of the Federal Circuit. *Vermont*, 803 F.3d at 644 (quoting *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 209 (2d Cir. 2004)); *see also Nasalok*, 522 F.3d at 1328 (applying both Rule 13(a) and preclusion analyses to avoid an outcome “where the effect . . . [would be to] collaterally attack the judgment of the first action”); Restatement (Second) of Judgments § 24(2) (describing the groupings which comprise a transaction or series of transactions as those that “determined pragmatically, giving weight to such considerations as . . . whether they form a convenient trial unit”); Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1410 (3d ed. updated May 2025) (characterizing Rule 13(a) as designed to sweep “any counterclaim that from an economy or

efficiency perspective could be profitably tried with the main claim”).

For all of the foregoing reasons, Beyond bAIsic’s counterclaim should be deemed compulsory, bringing it under the Federal Circuit’s exclusive jurisdiction. Beyond bAIsic’s respectfully requests that the Court find this claim compulsory and transfer the case to the Federal Circuit.

D. The District Court Properly Exercised Its Discretion Under FRCP 59 in Denying a New Trial Based on the Admission of Expert Testimony

The district court did not commit “manifest error” in admitting Professor Liu’s expert testimony; indeed, it did not err at all. The district court’s evidentiary rulings under Rules 702, 703, and 403 fell well within its broad discretion. Further, any alleged error was harmless. Accordingly, the district court’s denial of a new trial was not only appropriate, it was fully consistent with the governing legal standard.

1. The District Court Properly Concluded That Flaws in the Memoranda Went to Weight, Not Admissibility, and Admission of Expert Testimony Did Not Warrant a New Trial

The district court properly exercised its discretion in concluding that any alleged deficiencies in the AI-generated memoranda went to the weight of Prof. Liu’s testimony, not its admissibility under Rule 702. Courts have long distinguished between admissibility—a legal threshold governed by Rule 702—and weight, which is a matter for the jury. *See Culley v. Edwards Mfg. Co. of Alberta Lea*, No. 20-CV-7346 (NSR), 2024 WL 5145565, at *5 (S.D.N.Y. Dec. 17, 2024) (holding that objections that target the credibility of an expert’s sources, rather than the reliability of the methodology itself, do not warrant exclusion). The Second Circuit has recognized that “our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.” *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

Courts in this Circuit routinely admit expert testimony based on internal or imperfect data,

recognizing that such concerns go to evidentiary weight. *See GeigTech E. Bay LLC v. Lutron Elecs. Co.*, 2023 WL 6614486, at *6 (S.D.N.Y. Sep. 20, 2023) (accuracy of internal data is a jury question). Unless flaws in the data are so severe that they undermine the reliability of the methodology or suggest bad faith, they do not justify exclusion. *See Lee Valley Tools, Ltd. v. Indus. Blade Co.*, 288 F.R.D. 254, 267 (W.D.N.Y. 2013); *Car Freshner Corp. v. Am. Covers, LLC*, 2021 WL 4502281, at *9 (N.D.N.Y. Sep. 30, 2021).

Prof. Liu’s opinion was methodologically sound and independently supported by unchallenged memoranda and corroborating materials. The AI-generated memoranda played a limited, contextual role, offering contemporaneous insight into the inventors’ development process, but were not the foundation of her conclusion that the invention was non-obvious. While some memoranda contained inaccuracies, others were accurate and aligned with the broader evidentiary record. Further, Andover’s attempt to elevate these documents from illustrative context to central evidence mischaracterizes their role. Prof. Liu’s analysis remained firmly grounded in the broader evidentiary record, and the jury was fully capable of weighing any discrepancies. The district court’s decision to admit her testimony and defer to the jury’s role as the ultimate arbiter of credibility and evidentiary weight was well within its discretion.

The Second Circuit has repeatedly emphasized, courts “should rarely disturb a jury’s evaluation of a witness’ credibility.” *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012) (reversing grant of new trial where district court improperly second-guessed jury’s credibility findings); *see also ING Glob. v. United Parcel Serv. Oasis Supply Corp.*, 757 F.3d 92, 99 (2d Cir. 2014). A party’s disagreement with the jury’s credibility determinations does not render the verdict erroneous or unjust. *Lundstedt v. JP Morgan Chase Bank, N.A.*, 853 F. App’x 704, 709 (2d Cir. 2021). Therefore, the district court did not abuse its discretion in concluding

that this was not one of the “rare occasion[s] on which the jury’s verdict should be disturbed,” and properly denied the motion for a new trial. *Ortiz v. Stambach*, 2025 WL 2345678, at *3 (2d Cir. 2025) (affirming denial of new trial where jury resolved credibility disputes and verdict was supported by the record).

**2. Absent Serious Methodological Defects,
Admission Under Rule 702 Does Not Warrant a New Trial**

Even assuming Andover challenges the reliability of Prof. Liu’s methodology, such an argument would still fall short. Under Rule 702 and *Daubert*, expert testimony is excluded only for “serious flaws in reasoning or methodology.” *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 173 (S.D.N.Y. 2009). Andover identifies no such “serious flaws.”

Prof. Liu provided a reasoned analysis of how a person of ordinary skill in the art would interpret the invention’s complexity in light of the prior art. While she referenced internal memoranda, some AI-generated, her opinion did not rely solely on them. Instead, they supported her broader conclusion that the inventors continued to face technical challenges even after reviewing the allegedly invalidating article. The presence of some errors in the memoranda does not undermine her methodology, especially where others were accurate. Her testimony reflected a coherent, expert-informed view of the invention’s development and fell well within the bounds of admissible expert opinion. *See Pacific Life Ins. Co. v. Bank of N.Y. Mellon*, No. 17-CV-1388, 2021 WL 673479, at *17 (S.D.N.Y. Feb. 22, 2021). The district court’s decision reflects both the letter and spirit of *Daubert* and its progeny, and therefore, a new trial was not warranted because of the admission of this expert evidence.

**3. The Expert Testimony’s Reliance on the
Memoranda Was Proper Under Rule 703, And,
Therefore, Its Admission Does Not Warrant A New Trial**

Independently of Rule 702, Prof. Liu’s reliance on the internal memoranda is also

supported by Rule 703, which allows experts to base opinions on inadmissible materials if they are “of a type reasonably relied upon by experts in the particular field.” *See* Fed. R. Evid. 703; *Castaldi v. Land Rover N. Am., Inc.*, 363 F. App'x 761, 762 (2d Cir. 2009); *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993). This reflects the practical reality that experts routinely consult with a wide range of materials, including hearsay, internal documents, and technical literature, when forming their opinions. Here, Prof. Liu used internal memoranda to assess the state of the art and technical challenges. Such reliance is common in patent litigation, especially in obviousness analyses, and aligns with professional norms. *See* Mark J. Feldstein et al., *Experts in Patent Cases*, FINNEGAN (May 2018). (discussing the reasonable reliance standard for experts in patent litigation and emphasizing the expert’s obligation to disclose facts or data relied upon during cross-examination as the appropriate safeguard against unfairness).

Rule 703 also permits disclosure of such materials to the jury if their probative value substantially outweighs any prejudicial effect. Fed. R. Evid. 703. The district court, exercising its broad discretion, reasonably allowed the jury to hear testimony about the memoranda. As the Supreme Court noted in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), trial courts have “considerable leeway” in evaluating expert testimony. Andover was afforded the opportunity to rigorously cross-examine Professor Liu regarding the accuracy, reliability, and relevance of the memoranda she referenced in forming her expert opinion. This cross-examination served as a vital procedural safeguard, enabling the jury to assess the credibility of both the expert and the underlying materials. Through this process, Andover could challenge any assumptions, highlight potential inconsistencies, and probe the extent to which the memoranda influenced Professor Liu’s conclusions.

Andover’s claim that the memoranda “tainted” the jury overstates their impact. They were

neither inflammatory nor misleading, but rather internal summaries used to contextualize technical challenges. As such, they lacked the capacity to mislead the jury or divert it from the actual claims, particularly when it was only a subset of memoranda that actually contained errors. *See Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 68 F. Supp. 3d 499, 505 (S.D.N.Y. 2014), *aff'd*, 873 F.3d 85 (2d Cir. 2017) (“Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the factfinder into rendering its verdict on a ground different from proof specific to the claims brought.”). Cross-examination, not exclusion, is the proper tool for challenging expert accuracy, and the district court’s evidentiary ruling did not justify a new trial.

4. The District Court Did Not Abuse Its Discretion in Declining to Exclude Expert Testimony Under Rule 403, And, Therefore, Its Admission Does Not Warrant a New Trial

“All evidence is prejudicial to one side or the other. To warrant exclusion under Rule 403, the prejudice must be unfair.” *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980). The court’s decision that the probative value of Professor Liu’s testimony regarding obviousness was not “substantially outweighed” by any potential prejudice was neither irrational nor arbitrary. Fed. R. Evid. 403 (“The court *may* exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice.”) (emphasis added). A new trial was not warranted in light of the proper admission of this critical expert testimony.

The probative value of expert testimony is at its peak where, as here, the issue at the center of the case is the one that the expert is testifying on; therefore, any minimal prejudice caused by the admission of the testimony pales in comparison to its great probative value. Since the issue of obviousness is viewed from the lens of a person having ordinary skill in the art, the probative value of expert testimony is extremely high. *See* 35 U.S.C. § 103 (A claimed invention is not patentable “if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious . . . to a person having ordinary skill in the art.”

(emphasis added)).

Notably, courts have held that where expert testimony is crucial to a fact issue in a patent validity case, like the claim at issue here, the probative value of expert testimony is so high that “it would be erroneous . . . to deprive either party of a ‘live trial’ at which the trial court could observe the witnesses’ demeanor in evaluating their testimony.” *Vt. Structural Slate Co. v. Tatko Bros. Slate Co.*, 233 F.2d 9, 10 (2d Cir. 1956); *see also HVLPO2 v. Oxygen Frog, LLC*, 949 F.3d 685, 688 (Fed. Cir. 2020) (highlighting that qualified expert testimony is “precisely [the] testimony which would pertain to an obviousness invalidity challenge in a patent trial” and “testimony [] directed to the central legal and technical question at trial: whether [the patent claims] were invalid for obviousness . . . is [] in the clear purview of experts.”).

Here, the art at issue is facial mapping and generative artificial intelligence. As this type of technology is relatively new and difficult for a lay person to fully understand, the testimony of an expert was crucial to the factfinder in rendering its judgment. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-MD-2542 (VSB), 2025 WL 354671, at *8 (S.D.N.Y. Jan. 30, 2025) (where expert opinion testimony “goes beyond what a lay juror would be able to comprehend from evidence in the record” it is valuable).

In contrast, any potential prejudice was minimal, fully mitigated by the adversarial process, and therefore not unfair. Andover had full access to the memoranda during discovery and raised no timely or substantive objections to their content or authenticity. Andover had the opportunity to move *in limine* to exclude the memoranda, to depose a Rule 30(b)(6) witness to clarify authorship, or to request a limiting instruction. Had Andover taken basic investigative steps, such as reviewing the metadata of the documents, he could have been able to determine whether AI tools had been used in their creation. These opportunities undercut any claim of unfair surprise or

prejudice.

Moreover, the jury was explicitly informed that some memoranda were AI-generated. Andover had ample opportunity to cross-examine Prof. Liu on the accuracy of the memoranda and could have introduced its own rebuttal expert testimony. As this Court has recognized, credibility disputes are for the jury to resolve, not grounds for exclusion. *Walker v. Raja*, No. 23-7688, 2024 WL 4611333, at *2 (2d Cir. Oct. 29, 2024) (affirming denial of new trial where challenged evidence was relevant and not unduly prejudicial under Rule 403). The district court acted well within its discretion by properly balancing the probative and prejudicial values of the evidence and therefore, a new trial was not warranted.

Even assuming the district court erred in admitting Professor Liu's testimony, any such error was harmless. Under Federal Rule of Civil Procedure 61, courts disregard errors that do not affect substantial rights. Fed. R. Civ. P. 61. An error affects a substantial right only if it likely influenced the outcome. See *Lore*, 670 F.3d at 150 (2d Cir. 2012); *Tesser v. Bd. of Educ.*, 370 F.3d 314, 319 (2d Cir. 2004) (holding that evidentiary error in a civil case is harmless unless the appellant demonstrates a likelihood that the error influenced the outcome). Andover has not shown that the admission of this evidence likely influenced the outcome. Accordingly, any alleged error did not affect Andover's substantial rights, and a new trial was not warranted.

Respectfully Submitted:

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